IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
HARRISONBURG DIVISION

JAMES D. GARLAND, et al.,	)	CIVIL ACTION NO. 5:01CV00027
	)	
Plaintiff,	)	
	)	
v.	)	MEMORANDUM OPINION
	)	
TRAVCO INSURANCE CO., et al.,	)	
	)	
Defendant.	)	JUDGE JAMES H. MICHAEL, JR.

Before the court is the defendants' Motion to Dismiss filed April 18, 2001. This matter was referred to United States Magistrate Judge B. Waugh Crigler for proposed findings of fact, conclusions of law, and a recommended disposition. *See* 28 U.S.C. § 636(b)(1)(B). The Magistrate Judge returned his Report and Recommendation on June 18, 2001 in which he recommended that the court grant the defendants' motion to dismiss. The plaintiffs filed timely objections to the Magistrate Judge's recommendations. The defendants filed no objections. This court has reviewed *de novo* those portions of the Report and Recommendation as to which objections were made. See 28 U.S.C. § 636(b)(1)(West 1993 & Supp. 2000); Fed. R. Civ. P. 72(b). Having thoroughly considered the entire case and all relevant law, the court shall grant the defendants' motion to dismiss.

I.

In deciding a motion to dismiss under Rule 12(b)(6), the court must determine "whether the complaint, under the facts alleged and under any facts that could be proved in support of the complaint, is legally sufficient." *Eastern Shore Markets, Inc. v. J.D. Assocs. Ltd. Partnership*, 213 F.3d 175, 180 (4th Cir. 2000). The court must "assume the truth of all facts alleged in the

complaint and the existence of any fact that can be proved, consistent with the complaint's allegations . . . [but] need not accept the legal conclusions drawn from the facts. . . . [or] accept as true unwarranted inferences, unreasonable conclusions, or arguments." *Id.* (citations omitted). The following facts are taken from the plaintiffs' Motion for Judgment (hereinafter, "complaint"), and are assumed to be true.

The plaintiffs, James Garland ("Garland") and Linda R. Lorber ("Lorber"), were issued an insurance policy on their rental house in Boyce, Virginia by the defendants, Travco Insurance Company, Travelers Property Casualty Corporation, The Travelers Insurance Company, and Travelers Indemnity Company. On March 7, 1999, the rental house was completely destroyed by fire. That same day, the plaintiffs contacted the defendants' claims office and were informed that Jeff Stewart ("Stewart") would be their claims representative.

On March 9, 1999, Stewart communicated to Garland that he planned to take photographs of the house and obtain an oral statement from the plaintiffs. However, despite numerous requests by Garland, Stewart failed to follow-up on the plaintiffs' claim. No action was taken by the defendants until April 14, 1999, when Gerald W. Ferrell ("Ferrell"), an employee of Travelers's Investigative Services Unit, conducted a ninety minute interview of Garland. Then, on April 29, 1999, Ferrell requested that the plaintiffs fax to him an executed "Authorization to Obtain Information." The plaintiffs complied with this request.

By letter dated June 25, 1999, Stewart notified the plaintiffs that the investigation into their claim was complete, and that the defendants were offering $38,095 to settle the claim for the damages to the rental house and $11,650 to settle the claim for demolition and disposal of the house. This offer was rejected by the plaintiffs, who then engaged Jenkins Restorations, Inc.

("Jenkins") to prepare an outside estimate of the replacement cost of the house. The Jenkins estimate was $251, 448.83.

In October 1999, attorneys for Travelers Insurance Company requested that the plaintiffs submit to an examination under oath and produce certain documents related to the home and its contents. The defendants also requested a copy of a preliminary estimate of repair prepared for the plaintiffs by Hodgson Construction Company ("Hodgson"), to which request the plaintiffs complied. While an examination of Garland was performed on December 3, 1999, the defendants declined to conduct an examination of Lorber, despite the fact that she made herself available for such an examination.

In February 2000, the plaintiffs accepted reimbursement from Travelers Insurance Company for demolition, disposal and site protection in the amount of $11,409.17. On February 18, 2000, Hodgson provided the plaintiffs with a revised estimate of replacement costs in the amount of $249,191.48, and a copy of that estimate was provided to the defendants. However, in a letter dated March 27, 2000, a Property Claim Representative for the defendants, Michael H. Bealey ("Bealey"), estimated the plaintiffs' loss to be $127,769.51.

On July 6, 2000, Garland submitted to a second examination under oath. The next day, the defendants requested records of all checking accounts owned or controlled by the plaintiffs from October 1, 1999 to February 29, 2000. The plaintiffs complied with this request.

Since June 7, 2000, the defendants have not contacted the plaintiffs regarding the status of their claim. Correspondence from the plaintiffs' counsel to the defendants' counsel has gone unanswered, a certified copy of the insurance policy has not been produced, and the defendants have not paid the amount demanded by the plaintiffs. The plaintiffs instituted suit against the

defendants for breach of contract and intentional infliction of emotional distress in the Circuit Court of Clark County on March 12, 2001, and on March 30, 2001 the case was removed to this court.

The defendants filed an amended motion to dismiss on April 18, 2001 seeking the dismissal of the plaintiffs' intentional infliction of emotional distress claim and attendant request for punitive damages. The Magistrate Judge issued his Report and Recommendation on June 18, 2001, to which the plaintiffs have objected. The plaintiffs argue that the defendants' conduct with regard to the plaintiffs' insurance claim was "outrageous and intolerable" and that the complaint states a sufficient claim for intentional infliction of emotional distress.

II.

To make out a case for the intentional infliction of emotional distress under Virginia law, the plaintiff must show (1) reckless or intentional conduct with the purpose of inflicting emotional distress or where the actor knew or should have known that emotional distress would result; (2) conduct that was outrageous to the extent it offends generally accepted standards of decency and morality; (3) a causal connection between conduct and distress; and (4) emotional distress which was severe. *See Womack v. Eldridge*, 210 S.E. 2d 145, 148 (Va. 1974).

The plaintiffs must demonstrate that the challenged conduct "has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Russo v. White*, 400 S.E.2d 160, 162 (Va. 1991) (quoting the Restatement (Second) of Torts § 46d (1965)). It is the court which must determine in the first instance "whether the facts alleged will support a finding of both outrageousness and severe emotional distress." *Id.* (internal citations omitted). Virginia

courts have declared the tort of intentional infliction of emotional distress unfavored in law and have established a very high threshold for plaintiffs to meet. *See Ruth v. Fletcher*, 377 S.E.2d 412, 416 (Va. 1989).

The plaintiffs in the current action assert that the conduct of the defendants alleged in the complaint "involved much more than bad manners." (Opp'n to Mot. to Dismiss at 6.) Specifically, the plaintiffs state that the defendants "actively misrepresent[ed] which insurance company insured the house, contended that the plaintiffs had committed fraud, harassed the plaintiffs, made unreasonable document demands, and refused to give plaintiffs a copy of the insurance policy in a meaningfully timely fashion." *Id*. While the court finds such conduct inappropriate and unprofessional, it cannot find that the defendants' employment practices could be categorized as "atrocious." As the Virginia Supreme Court noted in *Russo*,

> it is insufficient for a defendant to have acted with an intent that is tortious or even criminal. Even if a defendant has intended to inflict emotional distress, or his conduct can be characterized by malice, or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort, the requirement of the second prong has not been satisfied.

400 S.E.2d at 162 (internal citations and quotations omitted). The defendants' conduct in the current case, while potentially sanctionable, is not actionable for intentional infliction of emotional distress under Virginia law.

III.

In addition to their claim for contract damages, the plaintiffs request punitive damages in the amount of $350,000. As the Magistrate Judge noted in his Report and Recommendation, the plaintiffs' claim for punitive damages is dependant on their claim for intentional infliction of emotional distress. Because the court finds the latter claim unsustainable, the plaintiffs' claim for

punitive damages must also be dismissed.

IV.

In accordance with the foregoing, the Report and Recommendation shall be accepted and the defendants' motion to dismiss shall be granted. An appropriate order shall this day enter.

ENTERED: _____
Senior United States District Judge

_____
Date

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JAMES D. GARLAND, et al.,	)	CIVIL ACTION NO. 5:01CV00027
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Plaintiff,	)	
	)	
v.	)	ORDER
	)	
TRAVCO INSURANCE CO., et al.,	)	
	)	
Defendant.	)	JUDGE JAMES H. MICHAEL, JR.

For the reasons stated in the accompanying Memorandum Opinion, it is accordingly this day

ADJUDGED, ORDERED and DECREED

as follows:

(1) The June 18, 2001 Report and Recommendation of the Magistrate Judge shall be, and it hereby is, ACCEPTED.

(2) The defendants' April 18, 2001 Motion to Dismiss shall be, and it hereby is, GRANTED.

(3) The plaintiffs' intentional infliction of emotional distress claim shall be, and it hereby is, DISMISSED with prejudice.

(4) The plaintiffs' claim for punitive damages shall be, and it hereby is, DISMISSED with prejudice.

The Clerk of the Court hereby is directed to send a certified copy of this Order and the accompanying Memorandum Opinion to Magistrate Judge Crigler and all counsel of record.

ENTERED: _____
Senior United States District Judge

_____
Date