

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

TOLL NAVAL ASSOCIATES,
Plaintiff,

v.

LEXINGTON INSURANCE COMPANY,
et al.,
Defendants.

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CIVIL ACTION

NO. 03-6537

Memorandum and Order

YOHN, J.

August ____, 2005

Pending before the court are plaintiff's motion for partial summary judgment as to liability on its breach of contract claim and defendants' motion for summary judgment as to all claims in plaintiff's complaint. After consideration of the motions, the responses, and the replies, both motions will be denied as to the breach of contract claim, but defendants' motion for summary judgment as to plaintiff's bad faith claim will be granted.

I. Factual Background¹ and Procedural History

This case arises out of a dispute between an insured and its insurers over the scope of coverage afforded under two commercial property insurance policies. Plaintiff Toll Naval Associates ("Toll Naval") is a general partnership organized and existing under the laws of Pennsylvania. It is a related and affiliated entity of Toll Brothers, Inc. ("Toll Brothers"), a

¹The account contained in this section is comprised of both undisputed facts and Toll Naval's factual allegations. *See Skoczylas v. Atlantic Credit & Fin., Inc.*, No. CIV. A. 00-5412, 2002 WL 55298, at *2 (E.D. Pa. Jan. 15, 2002) ("When considering a motion for summary judgment, a court must view all facts and inferences in a light most favorable to the nonmoving party.") (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)); *see also Brown v. Muhlenburg Township*, 269 F.3d 205, 208 (3d Cir. 2001) (citing *Beers-Capitol v. Whetzel*, 256 F.3d 120, 130 n.6 (3d Cir. 2001)).

Pennsylvania corporation in the business of real estate development. Consistent with Toll Brothers' standard business practice, which is to create one or more new business entities for each new project it undertakes, Toll Naval was formed for the sole purpose of owning and developing the site of the United States Naval Home, a property located at 2420 Grays Ferry Road in Philadelphia which housed the first United States Naval Academy.

Defendants Lexington Insurance Company ("Lexington") and Commercial Underwriters Insurance Company ("Commercial Underwriters") (now known as Allied World Assurance Company) have sold insurance policies to Toll Brothers since at least 1993 and were aware of Toll Brothers' practice of holding its inventory of properties through a collection of distinct legal entities, each corresponding to a specific development project. Defendants sold Toll Naval two insurance policies,² containing virtually identical provisions and using nearly identical forms, covering the time period between July 1, 2002 and July 1, 2003. The policies were to cover:

The interest of the Insured in all real and personal property (including improvements and betterment) and their contents owned, used, or intended for use by the Insured (including those sample homes sold and leased to the insured), or hereafter constructed, erected, installed, or acquired including while in the course of construction, erection, installation, and assembly.

The policies provide an overall limit of \$15 million in coverage for any one occurrence, but they also contain a limitation on coverage of \$1 million per occurrence for "newly acquired locations or unnamed locations; 120 days reporting required."³ Nowhere in the policies is the

²Defendant Lexington Insurance Company was to provide \$11 million of the \$15 million limit on coverage, while defendant Commercial Underwriters Insurance Company (now Allied World Assurance Company) was to provide the other \$4 million. Answer at ¶¶ 10, 11.

³The parties disagree over whether the 120-day reporting requirement applies to both newly acquired and unnamed locations or to newly acquired locations only. *See* Doc. #43 at 27-

phrase “unnamed locations” defined. In the policy issued by Commercial Underwriters, the description of the property covered is “as per schedule on file with the company.” Nowhere in the policy is that phrase defined. In the policy issued by Lexington, the description of the property covered is “as per manuscript form attached.” Nowhere in the policy is “manuscript form” defined. It is undisputed that Toll Naval is a “named insured” under the policies, but there is no clearly delineated list of insured properties in the policies. All that is included is a Toll Brothers marketing submission naming the related and affiliated entities (including Toll Naval) that hold Toll Brothers’ properties, and containing eight pages of locations entitled “Sample/Model Homes – Leased,” “Sample/Model Homes – Owned,” “Real and Personal Property,” and “Country Clubs.”

The claim at issue in this case was filed following a fire on February 3, 2003 which severely damaged Biddle Hall, a registered historic building on the site of the Naval Home. As soon as plaintiff learned of the fire, it submitted a claim to defendants, seeking coverage under the policies for the entirety of the loss. Defendants conducted an investigation and, by letter dated July 28, 2003, denied any coverage for the fire damage. They cited multiple reasons for the denial of coverage: (1) Toll did not include the Naval Home on the schedule of properties in the Toll Brothers marketing submission for purposes of the fifteen million dollar limit, and the Naval home was not covered as an “unnamed location” for purposes of the one million dollar sublimit provision, because Toll had failed to satisfy the 120 day reporting requirement in the provision; (2) Toll had not yet provided the insurers with proof of loss, and any such proof would be subject to policy exclusions pertaining to coverage for damages caused by wear and tear and by the

28; Doc. #53-1 at 7. The implications of this disagreement are discussed *infra*.

presence on the property of asbestos and other contaminants;⁴ (3) provisions of the Standard Fire Policy excluded coverage for losses resulting from dangerous conditions within the knowledge and control of the insured (*e.g.*, the presence of vandals and trespassers on the property as evidenced by graffiti).⁵

Plaintiff filed suit in this court on December 3, 2003, alleging breach of contract, breach of the duty of good faith and fair dealing, and bad faith conduct by defendants in violation of 42 Pa.C.S. § 8371. Defendants filed a motion for partial summary judgment on July 16, 2004, seeking an order limiting their liability in connection with the fire at the Naval Home to the policies' one million dollar sublimit for losses occurring at "unnamed locations." Defendants' motion was denied by memorandum and order of this court dated February 3, 2005, on the ground that the policies, which lacked a clear and definitive list of insured "named locations," were ambiguous as to whether the Naval Home was, in fact, an "unnamed location" for purposes of the million dollar sublimit provision.

Plaintiff and defendants filed the instant motions for summary judgment on April 22, 2005, followed by responses and replies. The parties again, somewhat inexplicably, seek summary judgment on plaintiff's breach of contract claim, specifically, on the issue of whether

⁴It is undisputed that Toll had not begun to develop the Naval Home property at the time Biddle Hall was damaged by fire. *See* Doc. #43, Defendants' Statement of Facts at ¶ 28; Doc. #53-1, Plaintiff's Statement of Facts at ¶ 28. It is also undisputed that the buildings on the property were vacant at the time of the fire and that they had fallen into disrepair. *See* Doc. #43, Defendants' Statement of Facts at ¶ 29; Doc. #53-1, Plaintiff's Statement of Facts at ¶ 29-30.

⁵It is undisputed that the City of Philadelphia Department of Licenses and Inspections had cited Toll prior to the fire for violations arising from its failure to maintain the Naval Home. *See* Doc. #43, Defendants' Statement of Facts at ¶ 29; Doc. #53-1, Plaintiff's Statement of Facts at ¶ 29-30.

defendants are liable under the policies for the loss at the Naval Home. Defendants also seek judgment as a matter of law on plaintiff's statutory bad faith claim.

II. Discussion

Either party to a lawsuit may file a motion for summary judgment, and it will be granted only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party bears the initial burden of showing that there is no genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the moving party has met its initial burden, the nonmoving party must present "specific facts showing that there is a genuine issue for trial." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 n.10 (1986). "Facts that could alter the outcome are 'material,' and disputes are 'genuine' if evidence exists from which a rational person could conclude that the position of the person with the burden of proof on the disputed issue is correct." *Ideal Dairy Farms, Inc. v. John Lebart, Ltd.* 90 F.3d 737, 743 (3d Cir. 1996) (citation omitted). The non-movant must present concrete evidence supporting each essential element of its claim. *Celotex*, 477 U.S. at 322-23.

When a court evaluates a motion for summary judgment, "[t]he evidence of the non-movant is to be believed." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). Furthermore, "[a]ll justifiable inferences are to be drawn in [the non-movant's] favor." *Id.* "Summary judgment may not be granted . . . if there is a disagreement over what inferences can be reasonably drawn from the facts even if the facts are undisputed." *Ideal Dairy Farms*, 90 F.3d at 744 (citation omitted). However, "an inference based upon a speculation or conjecture does

not create a material factual dispute sufficient to defeat entry of summary judgment.” *Robertson v. Allied Signal, Inc.*, 914 F.2d 360, 382 n.12 (3d Cir. 1990). The non-movant must show more than “[t]he mere existence of a scintilla of evidence” for elements on which he bears the burden of production. *Anderson*, 477 U.S. at 252. Thus, “[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no ‘genuine issue for trial.’” *Matsushita*, 475 U.S. at 587 (citations omitted).

A. Breach of Contract

Although defendants assert at the beginning of their motion that they do not attempt “simply to re-argue the prior motion,” they go on to do just that in the section of their brief arguing for summary judgment on the breach of contract issue. In its memorandum and order of February 3, 2005, this court held that the portions of the policies pertaining to the limits of liability governing plaintiff’s claim are ambiguous on their face, and that summary judgment is therefore inappropriate on the question of whether the million dollar sublimit for “unnamed locations” applies to the Naval Home loss. *See Toll Naval Assoc. v. Lexington Ins. Co., et al.*, No. 03-6537, 2005 WL 272968, at *4 (E.D. Pa. February 3, 2005) (holding that the terms “unnamed locations,” “manuscript form,” and “as per schedule on file with the company” are ambiguous in the context of the policies as a whole).

In reaching that conclusion, the court interpreted the language of the policies themselves, taking into account the opposing interpretations of the parties; the court did not, as defendants mistakenly assert in their brief, simply rely on the affidavits of Mr. Carlson and Mr. Sicree to hold that the provisions were ambiguous.⁶ Although the record has now been more fully

⁶To determine whether a contract is ambiguous, “the court must examine the questionable term or language in the context of the entire policy and decide whether it is reasonably

developed, nothing has been added to the record subsequent to the entry of the February 3 order that changes the court's analysis of the language in the policies or disturbs the conclusion that the relevant policy provisions are reasonably susceptible of more than one interpretation. It is therefore unnecessary to revisit the issue of which policy limit applies to the Naval Home claim. The question is one for a jury.

Even if the court could hold, as a matter of law, that the one million dollar sublimit applies to plaintiff's claim, the reporting requirement in the sublimit provision is itself ambiguous; the policies are silent on their face as to what triggers the running of the 120-day reporting period. The provision is cryptically terse: "(d) \$1,000,000 newly acquired locations or unnamed locations; 120 days reporting required." Defendants assert that the period began to run on the date of the inception of the policies, yet there is nothing in the language of the policies that links the running of the reporting period to the policies' date of inception. Plaintiff maintains that the custom in the industry is for a reporting requirement to apply to newly acquired locations only, with the 120-day period running from the date of acquisition of the property. That may well be true, but the court must be guided in the first instance by what the policies actually say, and on the face of the policies, the requirement applies to unnamed and newly acquired locations alike. It is simply not clear from the policies themselves when the 120-day reporting period begins to

susceptible of different constructions and capable of being understood in more than one sense." *Reliance Ins. Co. v. Moessner*, 121 F.3d 895, 900 (3d Cir. 1997) (internal quotation and citation omitted). The court looked to the Carlson and Sicree affidavits in order to understand plaintiff's construction of the relevant terms in the policies. Such an understanding was instrumental in, but hardly determinative of, the court's assessment of whether the terms in question are reasonably susceptible of different constructions. Concluding that both plaintiff and defendants offered reasonable but divergent constructions of the relevant terms, I held that the policies were ambiguous.

run.

So, in addition to ambiguity concerning which limit of liability applies, there is ambiguity in the policies concerning the reporting requirement contained in the sublimit provision. The interpretation of the ambiguous terms in defendants' insurance policies is an undertaking for a finder of fact, not for the court. *See Mellon Bank, N.A. v. Aetna Business Credit, Inc.*, 619 F.2d 1001, 1011 n.10 (3d Cir. 1980) (holding that "ambiguous writings are interpreted by the fact finder and unambiguous writings are interpreted by the court as a question of law"). The parties' respective motions for summary judgment on plaintiff's breach of contract claim are therefore denied.

B. Bad Faith

Pennsylvania's Bad Faith Statute creates a private right of action in the event "an insurer has acted in bad faith toward the insured." *UPMC Health Sys. v. Metropolitan Life Ins. Co.*, 391 F.3d 497, 505 (3d Cir. 2004) (citing 42 Pa.C.S. § 8371). Pennsylvania courts have held that bad faith exists where there is a "frivolous or unfounded refusal to pay proceeds of a policy," and that "such conduct imports a dishonest purpose and means a breach of a known duty...through some motive of self-interest or ill will." *Id.* (quoting from *Terletsky v. Prudential Prop. & Cas. Ins. Co.*, 649 A.2d 680 (Pa. Super. Ct. 1994)).

In order to recover on a claim of bad faith, a plaintiff must show by clear and convincing evidence (1) that the defendant did not have a reasonable basis for denying benefits under the policy and (2) that the defendant knew or recklessly disregarded its lack of reasonable basis in denying the claim." *J.C. Penney Life Ins. Co. v. Pilosi*, 393 F.3d 356, 367 (3d Cir. 2004). The clear and convincing evidence standard requires the plaintiff to show that the evidence is "so

clear, direct, weighty and convincing as to enable a clear conviction, without hesitation, about whether or not the defendant is acted in bad faith.” *Id.* The plaintiff’s burden in opposing summary judgment on a bad faith claim is “commensurately high in light of the substantive evidentiary burden at trial.” *Id.* Moreover, a claim for bad faith is defeated if the defendant shows that it had a reasonable basis for denying the claim. *Id.* at 368.

Defendants argue in their motion that plaintiff fails to meet its burden of proof with respect to the first element of a bad faith claim. This argument is a compelling one, in light of what this court has already held: that defendants and plaintiff both proffered reasonable interpretations of ambiguous terms in the policies. Because defendants reasonably interpreted the policies to exclude coverage for fire damage to Biddle Hall, they acted reasonably—and, therefore, not in bad faith—when they denied coverage for plaintiff’s claim.

In addition to alleging that defendants denied coverage in bad faith, plaintiff alleges that defendants handled the investigation of its claim in bad faith. Plaintiff argues, citing *O’Donnell v. Allstate Insurance Co.*, 734 A.2d 901 (Pa. Super. Ct. 1999), that an action for bad faith is not limited to the denial of a claim and may extend to the insurer’s investigative practices. Plaintiff alleges that defendants, in conducting their investigation, committed several violations of the Unfair Insurance Practices Act (“UIPA”), and that these violations are probative of bad faith. *See O’Donnell*, 734 A.2d at 906 (holding that conduct constituting a violation of the UIPA may be considered in determining whether an insurer acted in bad faith under § 8371). Specifically, plaintiff alleges that defendants violated the UIPA by failing to conduct a reasonable investigation; failing to attempt to make a prompt and fair settlement when their liability was clear; forcing plaintiff to litigate the claim by offering a “low ball” settlement; failing to provide

a reasonable explanation for the denial of the claim; and misrepresenting policy provisions.

All of plaintiff's allegations that defendants' investigation violated the UIPA boil down to an argument that, had defendants conducted a reasonable investigation of the claim, they simply could not have denied coverage in good faith. The argument would be persuasive if the decision defendants reached had been unreasonable as a matter of law. But this court has already held that relevant terms of the policy are ambiguous, and that defendants' interpretation of those terms (as well as plaintiff's) is reasonable in light of the facts. Because liability in this case is not clear, defendants' failure to interpret the policies as plaintiff has interpreted them, or to voluntarily accept liability, or to propose a substantial settlement does not amount to clear and convincing evidence of bad faith.

It is true, as plaintiff alleges, that defendants have abandoned their reliance on some of the exclusions upon which they initially relied to deny coverage. Such evidence of inconsistent positions may suggest bad faith, but it may also be interpreted to suggest nothing more sinister than a realization that some of the reasons defendants initially relied upon turned out to be inapplicable upon further investigation of the policies and the facts underlying the claim. At the time of the fire at Biddle Hall, the policies governing the claim were undergoing revision and renewal, and final versions of them had not even yet been issued.⁷ In light of the fact that the policies were in a state of flux, defendants' altered rationale for denying coverage does not amount to clear and convincing evidence of their bad faith. *See J.C. Penney Life Ins. Co.*, 393 F.3d at 367-368 (holding that evidence of inconsistent positions on the part of the insurer was not

⁷The parties do not dispute this, although they differ as to the nature and scope of the revisions being contemplated. See *See* Doc. #43, Defendants' Statement of Facts at ¶ 47; Doc. #53-1, Plaintiff's Statement of Facts at ¶ 46-48.

sufficient to support a conclusion that denial of a claim was unreasonable, in light of the existence of a legitimate reason for denial).

While the defendants' alleged bad faith need not be limited to the literal act of denying a claim, and may extend to the investigation of a claim, "the essence of a bad faith claim must be the unreasonable and intentional (or reckless) denial of benefits." *UPMC Health Sys.*, 391 F.3d. at 505-506. There was no frivolous or unfounded denial of benefits in this case, nor has plaintiff adduced clear and convincing evidence that there was an unreasonable claims investigation.

Although an insurance company has an obligation to give the interests of its insured the same consideration it gives to its own interests, "an insurer is not bound to submerge its own interest in order that the insured's interests may be made paramount, and an insurer does not act in bad faith by investigating and litigating legitimate issues of coverage." *J.C. Penney Life Ins. Co.*, 393 F.3d at 368 (internal citations and quotations omitted). Defendants' motion for summary judgment on plaintiff's bad faith claim is therefore granted.

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Plaintiff,	:	
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LEXINGTON INSURANCE COMPANY,	:	
<i>et al.</i> ,	:	
Defendants.	:	
	:	
	:	

Order

AND NOW, this ____ day of August, 2005, after consideration of plaintiff's motion for partial summary judgment (Doc. #42), defendants' motion for summary judgment (Doc. #43), and the responses and replies, it is hereby ORDERED that plaintiff's motion for partial summary judgment on its breach of contract claim is DENIED; defendants' motion for summary judgment on plaintiff's breach of contract claim is DENIED; and defendants' motion for summary judgment on plaintiff's bad faith claim is GRANTED.

William H. Yohn, Jr., Judge