

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

SELECTIVE WAY INSURANCE CO.,

Plaintiff

v.

SERVPRO OF KING OF PRUSSIA and
MARY PRIETZ,

Defendants

CIVIL ACTION

No. 99-956

MEMORANDUM/ORDER

January 31, 2006

Defendants Mary Prietz and ServPro of King of Prussia (“defendants”) have filed three motions *in limine*. Plaintiff Selective Way Insurance Company (“plaintiff”) has filed one motion *in limine*. All four motions will be addressed, seriatim, in this memorandum and order.

Defendants’ first motion *in limine* (Docket # 94) is titled a “Motion in Limine to preclude evidence or testimony regarding defendant Mary Prietz’s having been a suspect in criminal investigation about the subject fire, the fact that she was never charged with any crime relating to the fire, and the reason(s), purported or otherwise, for the lack of criminal charges being filed against the defendant, Mary Prietz, in connection with the subject fire.” The “subject fire” refers to the fire which occurred on or about August 14, 1998 at the defendants’ business. This motion is unopposed by plaintiff and shall be

granted. *Cf. American Home Ins. Co. v. Sunshine Supermarket, Inc.*, 753 F.2d 321 (3d Cir. 1985); Fed. R. Evid. 403; 801(c).

Plaintiff's have also filed a motion *in limine* (Docket # 102) concerning the admissibility of evidence regarding the "absence of arrest, indictment, or conviction of Defendant, Mary Prietz, . . . or any other person, regarding the fire in question" Once again, the fire in question is the fire which took place on or about August 14, 1998. This motion will also be granted. *Cf. American Home Ins. Co.*, 753 F.2d at 321; *Ryder Truck Rental, Inc. v. Nationwide Mut. Ins. Co.*, 1993 WL 210563 (E.D. Pa. June 8, 1993). It is appropriate for the preclusion not to be limited to testimony relating to Ms. Prietz; testimony about the status of "any other person" might potentially have implications with respect to the status of Ms. Prietz. Thus, defendants shall be precluded from presenting or eliciting any testimony or evidence "concerning the absence of arrest, indictment, or conviction of Prietz, or any other person," regarding the August 14, 1998 fire.

Defendants' second motion (Docket # 95) is titled a "Motion in Limine to preclude evidence, testimony or argument regarding Defendant, Mary Prietz's having been requested to take a polygraph examination." This motion is unopposed and shall be granted. *Cf. United States v. Pitz*, 2 F.3d 723, 730 (7th Cir. 1993); *cf. also Ryder Truck Rental, Inc. v. Nationwide Mut. Ins. Co.*, 1993 WL 210563 (E.D. Pa. June 8, 1993); *Quigley v. Phila. Civil Srv. Com.*, 528 Pa. 195, 596 A.2d 144 (1991).

Defendants' third and final motion *in limine* (Docket #96) requests that plaintiff be

precluded from introducing any evidence based on “any investigation by Plaintiff, or third parties at Plaintiff’s request and/or law enforcement agencies after February 10, 1999.”

February 10, 1999 is the date upon which Plaintiffs reportedly first informed defendants that coverage would be denied. (Defendants allege this in their motion, and plaintiff’s response admits this allegation.)

Defendants’ motion states that they “believe and therefore aver that Plaintiff will attempt to rely upon evidence and/or testimony garnered after the issuance of the denial letter.” Defendants’ Motion in Limine ¶ 13. Plaintiff, in fact, admits that it “may attempt to introduce evidence through cross-examination of Defendants’ witnesses regarding investigation conducted by public authorities after the issuance of the declination of liability, as said evidence is believed to support Plaintiff’s contention that they had a sufficient and reasonable basis to issue a declination of liability.” Plaintiff’s Response ¶ 13.

Defendants’ motion will be granted in part and denied in part. Plaintiff may present evidence gathered after February 10, 1999 to establish that defendants were responsible for the fire, as is alleged in Plaintiff’s breach of contract claim, as well as Plaintiff’s fraud and material misrepresentation claim. *See* Complaint (Counts I and II); Answer by Plaintiff Selective Way to Defendants’ Counterclaims (arson); *cf. Fratto v. Northern Ins. Co.*, 242 F. Supp. 262 (W.D. Pa. 1965), *aff’d* 359 F.2d 842 (3d Cir. 1965); *Giambra v. Aetna Casualty & Surety Co.*, 461 A.2d 1256, 1257 (Pa. Super. 1983). Plaintiff may not, however, rely upon such after-acquired evidence to defend against

defendants' counterclaim of bad faith brought pursuant to 42 Pa. C.S.A. § 8371.

Therefore, the jury charge will include a limiting instruction, **explaining that only that information which was** part of the insurance company's investigation prior to its denial of coverage on February 10, 1999, may factor in the jury's determination of the statutory bad faith counterclaim.

Under Pennsylvania law, to recover against an insurer on a statutory claim of bad faith, the insured must show by clear and convincing evidence that the insurer did not have a reasonable basis for denying benefits under the policy, and that the insurer knew of or recklessly disregarded its lack of a reasonable basis in denying the claim. *See, e.g., Frog, Switch & Mfg. Co. v. Travelers Ins. Co.*, 193 F.3d 742, n.9 (3d Cir. 1999) (finding that, under Pennsylvania law, "bad faith is a frivolous or unfounded refusal to pay, lack of investigation into the facts, or a failure to communicate with the insured"); *D'Ambrosio v. Penn. Nat'l Mut. Casualty Ins. Co.*, 431 A.2d 966, 968 (Pa.1981).

The determination of whether or not the insurer has acted in bad faith is based on the reasonableness of the insurance company's position, in light of its factual investigation. *See Peer v. Minn. Mutual Fire & Casualty Co.*, 1995 WL 141899 (E.D. Pa. Mar. 27, 1995) (finding that "[i]n light of the evidence of fraud obtained by Minnesota in its investigation, . . . Minnesota had a reasonable basis for denying the Peer's claims); *see also* Plaintiff's Response at 6 (citing *Pershau v. USF Ins. Co.*, 1999 U.S. Dist. LEXIS 3334 (E.D. Pa. Mar. 22, 1999)).

Upon consideration of the parties' submissions and the relevant law, it is hereby

ORDERED that:

(1) Defendants' motion *in limine* to preclude evidence or testimony regarding defendant Mary Prietz's having been a suspect in criminal investigation about the subject fire, the fact that she was never charged with any crime relating to the fire, and the reason(s), purported or otherwise, for the lack of criminal charges being filed against the defendant Mary Prietz, in connection with the August 14, 1998 fire (Docket #94) is GRANTED.

(2) Plaintiff's motion *in limine* to preclude evidence, testimony, or argument regarding the absence of arrest, indictment, or conviction of defendant Mary Prietz, or any other person, regarding the August 14, 1998 fire (Docket #102) is GRANTED.

(3) Defendants' motion *in limine* to preclude evidence, testimony or argument regarding defendant Mary Prietz's having been requested to take a polygraph examination (Docket #95) is GRANTED.

(4) Defendants' motion *in limine* to preclude evidence, testimony, or argument regarding any investigation conducted after February 10, 1999 (Docket #96) will be GRANTED only with regard to plaintiff's statutory bad faith counterclaim; in all other respects the motion will be DENIED. The jury charge will contain a limiting instruction.

/s/Louis H. Pollak
Pollak, J.