

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

Charter Oak Insurance Co.,	:	CIVIL CASE
Plaintiff,	:	
	:	
v.	:	
	:	
Maglio Fresh Food d/b/a Maglio's	:	
Sausage Co., et al.,	:	
Defendants.	:	NO. 12-3967

MEMORANDUM RE SUMMARY JUDGMENT MOTIONS

Baylson, J.

July 14, 2014

I. Introduction

This action involves counterclaims by an insured, Maglio Fresh Food (“Maglio”) for bad faith based on the conduct of two insurers, Charter Oak Insurance Company (“Charter Oak”), the issuer of primary coverage, and American Guarantee and Liability Insurance Company (“American Guarantee”), the issuer of an excess and umbrella policy.

As noted in this Court’s Scheduling Order, dated January 23, 2013, the parties agreed that the Court should decide the coverage issues first, before addressing the counterclaims for bad faith. The parties therefore submitted cross-motions for summary judgment on the issue of coverage last summer.

On October 24, 2013, this Court decided those motions, finding that neither policy provided coverage for the Maglio brand claim and that Maglio could not meet its burden to show that the damages awarded for the Forte brand claim were based on a covered claim.¹ Charter Oak Ins. Co. v. Maglio Fresh Food, 979 F. Supp. 2d 581, 584 (E.D. Pa. 2013) [hereinafter October 24 Order and Memorandum].

¹ A detailed summary of the procedural history of this lawsuit can be found in this Court’s October 24, 2013 Memorandum and Order. ECF 58-59. Because that Memorandum defines the terms “Maglio brand claim” and “Forte brand claim,” this Order will assume familiarity with them. Id.

Maglio then amended its counterclaims for bad faith against each insurer. Maglio alleges that Charter Oak violated its duty to act in bad faith in the following ways: (1) by failing to acknowledge a conflict of interest between Charter Oak and Maglio, advise Maglio of its right to independent counsel as a result of that alleged conflict, and provide independent counsel; (2) by failing to intervene in the underlying litigation in a timely manner in order to submit jury interrogatories as means of clarifying whether the jury found against Maglio based on a theory of liability that the insurance policies would cover (i.e., trade libel) or on an uncovered theory; and (3) by failing to consider settlement offers and attempt to settle the underlying lawsuit in good faith. Maglio alleges that American Guarantee acted in bad faith by (1) failing to conduct a reasonable investigation before disclaiming coverage for Maglio's claims, and (2) failing to provide a defense to Maglio and refusal to post an appeal bond upon the exhaustion of Charter Oak's policy limits.

Both insurers moved for summary judgment on these claims. ECF 130 (Mot. for Summ. J. filed by Charter Oak on June 2, 2014); ECF 129 (Mot. for Summ. J. filed by American Guarantee on June 2, 2014). Maglio also moved for summary judgment. ECF 131 (Mot. for Summ. J. as to claims against Charter Oak, filed by Maglio on June 2, 2014); ECF 133 (Mot. for Summ. J. as to claims against American Guarantee, filed by Maglio on June 3, 2014). The Court held oral argument on these motions on June 26, 2014. ECF 150.

This Memorandum will address two contested legal issues and then address the disputed factual issues. Because certain disputed facts are material to the disposition of this action, the Court will deny the Motions for Summary Judgment.

II. Legal Issues

Before reaching the disputed facts, the Court will confront two legal arguments of Charter Oak regarding the scope of this Court's October 24, 2013 Memorandum and Order (ECF 58-59).

Charter Oak maintains that this Court's Order, in which the Court found that the insurers did not have a duty to indemnify, bars Maglio from proceeding on its bad faith claims. In doing so, Charter Oak misstates the law. Pennsylvania courts are clear: "An insurer's duty to defend is broader than its duty to indemnify." Am. & Foreign Ins. Co. v. Jerry's Sport Ctr., Inc., 2 A.3d 526, 540 (Pa. 2010). The duty to defend "is a distinct obligation, separate and apart from the insurer's duty to provide coverage." Id. at 541. Where there are multiple causes of action in the underlying litigation and one potentially constitutes a claim within the scope of the policy's coverage, the insurer has a duty to defend the insured until it can confine the claim to a recovery excluded from the policy. See Penn-Am. Ins. Co. v. Peccadillos, Inc., 27 A.3d 259, 264-65 (Pa. Super. Ct. 2011).

Moreover, Charter Oak is correct that Pennsylvania courts allow an insurer to provide and control a defense of the insured subject to a reservation of rights, and doing so does not inherently constitute bad faith. However, that recognition – that an insurer can defend its insured, subject to a reservation of rights, without acting in bad faith – does not support Charter Oak's contention that an insurer never acts in bad faith under those circumstances. As the Superior Court of Pennsylvania recently observed, "[t]his is not to say that, when an insured accepts the insurer's defense, the insurer's conduct of the litigation is subject to no further scrutiny." Babcock & Wilcox Co. v. Am. Nuclear Insurers, 76 A.3d 1, 16 (Pa. Super. Ct. 2013) appeal granted on other grounds, 84 A.3d 699 (Pa. 2014). Rather, the insurer "remains bound by

its fiduciary obligation to represent the insured's interests, and to settle the case when appropriate, in keeping with its obligation of good faith." Id.

Charter Oak also seems to contend that this Court's Memorandum and Order on indemnification also resolved certain factual issues related to bad faith. For example, Charter Oak suggests that this Court's observation that Charter Oak did not have a duty to intervene in the underlying litigation also resolves the question of whether Charter Oak's failure to do so in a timely fashion constitutes bad faith, when doing so may have been advantageous to Maglio. At the time, Maglio faced potential liability based on certain claims, some of which were not covered by the policy and some of which may have been. Although this Court later determined that Charter Oak did not have to indemnify Maglio, such a determination was by no means certain at the time Charter Oak made a number of decisions relevant to Maglio's current bad faith claims. Note that this clarification does not necessarily lead to a finding of bad faith; rather, the point is simply to clarify the inquiry: In order to determine whether Charter Oak acted in bad faith, the factfinder must evaluate Charter Oak's conduct vis-a-vis the factual landscape that existed at the time of the conduct in question, not based on this Court's later determinations. Cf. La Rocca v. State Farm Mut. Auto. Ins. Co., 329 F. Supp. 163, 169 (W.D. Pa. 1971) ("The event constituting breach of the fiduciary duty to handle settlement negotiations in good faith is the refusal to accept a settlement offer which would be reasonably advantageous to the insured in light of all circumstances known at the time." (emphasis added)).

Having established the limits of this Court's October 24 Memorandum and Order, I now turn to the disputed factual issues preventing the grant of the pending motions for summary judgment.

III. Factual Issues

Certain factual disputes as to the conduct of both Charter Oak and American Guarantee prevent this Court from granting the motions for summary judgment.

A. Charter Oak

There are several factual disputes regarding Maglio's claims of bad faith against Charter Oak, which prevent the Court from granting either party's motion for summary judgment as to the claims against Charter Oak.

1. The Intervention/Jury Interrogatory Issue

Specifically, as discussed at the oral argument on summary judgment motions, this issue concerns whether Charter Oak adequately protected Maglio's interests in securing a separate jury answer to a jury interrogatory concerning the "trade libel" claim that had been made.

Charter Oak acknowledged in its updated reservation of rights letter to Maglio dated June 22, 2011, that a verdict against Maglio for trade libel would potentially be covered under the Charter Oak policy, although Charter Oak continued to dispute the coverage for any other claims.

To the extent that a trial involved potentially covered theories of liability, Maglio had an interest, and indeed a right, to have Charter Oak take appropriate steps so that the jury could be instructed on, and if the evidence warranted under the law, return a verdict of liability on the trade libel claim. The record shows that the first trial concerned both the Forte brand claim and the Maglio brand claim until the end,² and that the Forte brand trial also included some potentially covered theories of liability as well as other theories that the policies would not cover.

² At the June 26, 2014 oral argument, counsel for Charter Oak suggested that Leonetti's withdrew its trade libel claim during the trial, removing the trade libel claim from the suit. Careful review of the briefs submitted by Charter Oak and the accompanying exhibits, as well as the overall record, does not confirm that assertion. Nevertheless, the record is clear that the

The best way to describe the events leading up to the verdict against Maglio on the Maglio brand claim on October 3, 2011 is by means of a chronology. Although a limited chronology was attached to this Court's October 24, 2013 Memorandum, the discovery record has now allowed an expansion of this chronology, which is included at Appendix B.³

The facts included at Appendix B are generally undisputed because they are based on documentary evidence, the authenticity and admissibility of which is clear. From this chronology, the Court draws a conclusion that Charter Oak acted appropriately in virtually all respects in discharging its obligations to its insured Maglio. The only caveat is the fact that Judge Bernstein denied the Charter Oak petition for limited intervention filed on July 11, 2011 as untimely, which could imply that Charter Oak should have and could have taken such a step in an earlier proceeding. However, notwithstanding this one potential defect in Charter Oak's discharge of its obligations as insurer, the record shows that Judge Bernstein nonetheless considered submitting special interrogatories to the jury, and gave Charter Oak's counsel an opportunity to present its suggested interrogatories to Maglio's counsel. Indeed, at the Motion for Rehearing on the denial of the Petition to Intervene, Judge Bernstein directed Mr. Kelbon to consider any jury interrogatories that were suggested by Charter Oak and to submit them to the court if doing so did not conflict with his representation of Maglio. A letter sent from Ms. Hogan of Kramon & Graham, Charter Oak's coverage counsel, to Maglio's counsel, attaching proposed interrogatories – which included a question as to trade libel – demonstrates that Charter Oak complied with Judge Bernstein's instruction.

Forte brand claim – the only claim involving a potentially covered theory of liability – resulted in a mistrial at the end of the first trial and was retried in December 2011.

³ Appendix A identifies the key figures involved in the events in question.

From the above facts, the Court can only conclude that Charter Oak was acting in good faith in having retained special coverage counsel, in giving Mr. Kelbon full latitude in representing Maglio, and in advocating special interrogatories, which could have, if submitted to the jury, resulted in a verdict as to which there was coverage under the policy, albeit for the Forte brand claim.

The missing facts as to this aspect of the case relate to Mr. Kelbon's conduct and decision making. In retrospect and with the clarity of hindsight, it is hard to understand Mr. Kelbon's reason for not taking advantage of the Court's willingness to submit special interrogatories. It would seem that Maglio would have every interest, if the jury was inclined to find damages against Maglio, that the damages be based on a claim that the insurance policies would have covered. Granted Mr. Kelbon may have been walking a tight rope,⁴ but his deposition failed to reveal any reasons for his decisions, and with due respect for counsel in this case, he was not cross-examined closely on this topic. Mr. Silverman asked Mr. Kelbon, "wouldn't it be true if Maglio had asked you, would I rather have a general verdict or a special verdict, you would tell them a general verdict?" ECF 139, Ex. 2 ("Kelbon Dep.") at 129:3-7. Mr. Kelbon responded: "No, I don't know what I would have told them under specific facts. I'd have to go back in that case at that specific point in time and look at everything and make a determination on what would work best for the client. I can't sit here today and say what would have been best and

⁴ Maglio has brought a malpractice claim against Mr. Kelbon, which has been stayed pending this litigation. As a result of the malpractice claim, the Court understands that Maglio may have been unwilling to press Mr. Kelbon at his deposition in this case. By the same token, Mr. Kelbon, being a defendant in the malpractice suit, may have been hesitant to state his true reasons for his conduct and advice during the trial. Mr. Kelbon's testimony must be taken in this full context since the existence of the malpractice claim may be admissible to cross-examine Mr. Kelbon as it could call into question his motivation and credibility.

what would not have been best.” Id. at 129:10-20. Mr. Kelbon continued to testify that he could not recall the specific circumstances surrounding the issue:

Q. And do you recall that Judge Bernstein, in his order, suggested that [Charter Oak] could give defense counsel, your firm, and you, sir, copy of their proposed interrogatories, and then you could decide whether or not you would submit them or not?

A. And I don’t recall what the order said, you know, one way or the other.

Q. Do you recall being given by Mr. Greenleaf, or any other firm that represented [Charter Oak], special jury interrogatories with the request that these be submitted to the Court?

A. I don’t have a recollection at this point in time to that.

Q. Okay.

A. I just don’t remember, quite frankly.

Id. at 130:13-131:8.

This missing fact, i.e., why Mr. Kelbon took the positions that he did at the September 19 conference and the September 28-29 charge conference, is open only to speculation, unless and until Mr. Kelbon testifies at trial. The record also does not show whether any principal of Maglio took a position as to the special interrogatories, or whether there were any communications from Charter Oak that are not disclosed by the current record.

As the record stands, Charter Oak appears to have been acting in good faith. Since Charter Oak is the moving party on summary judgment, and has established facts showing its good faith, then under Rule 56, Maglio bears the burden of coming forth with disputed facts upon which a jury could find in Maglio’s favor on this issue. Arguably, Charter Oak could be entitled to partial summary judgment as to this issue; however, since, as noted below, the “settlement” issue must still go to trial, the Court believes that the better course of action is to submit this aspect of Maglio’s bad faith claim to a trial process as well.

At the beginning of trial, the Court will require Maglio to make an offer of proof as to any factual disputes on this issue not identified above, and to identify any evidence that Maglio will introduce to prove that Charter Oak acted in bad faith with regard to this issue.

a. Independent Counsel Issue

On a related point, and based on the above chronology and review of facts, the Court concludes that the factual record shows that Charter Oak appointed Edward Kelbon of Reger Rizzo & Darnall LLP in good faith. All available evidence shows that Charter Oak retained its own coverage counsel (Susan Hogan of Kramon & Graham PA and Stewart Greenleaf of Elliot Greenleaf) to state its coverage position and retained Mr. Kelbon to represent and defend Maglio's interests. Moreover, the record suggests that Charter Oak gave Mr. Kelbon full independence to defend Maglio in accordance with Maglio's instructions. This conclusion is particularly supported by Mr. Kelbon's decision not to submit jury interrogatories, even under pressure to do so from Charter Oak.

2. Refusal to Settle Issue

The Court has developed a separate chronology for the events concerning the settlement issue, which is included at Appendix C.

Based on that chronology, there is no factual issue that, at least until the verdict of October 3, 2011, Charter Oak did not breach any duty to Maglio to make its \$1 million policy limits available to settle the case. The principal, and obvious, reason for this is the valuation provided by Mr. Kelbon, as Maglio's counsel, and also by an expert retained by Kelbon, consistently fell below the policy limit amount. However, a factual issue arises as of the entry of the verdict on October 3, 2011 for over \$2 million as to the Maglio brand claim only, leaving the Forte brand claim. The question at that time is whether Charter Oak fully discharged its

fiduciary responsibilities to arrive at a settlement with Leonetti's. The Court believes there are the following separate factual issues which require a trial:

- a. It appears from the chronology at Appendix B that Leonetti's made a demand to settle the Forte brand claim only, originally for \$1.5 million, and then for \$1 million, the exact amount of Charter Oak's policy limits. Should Charter Oak have done so at that point in time, which was prior to the Forte brand verdict in the amount of \$660,000?
- b. Second, also prior to the Forte brand verdict, Charter Oak insisted that it would only agree to a global settlement of all claims. This insistence by Charter Oak should have seemed very attractive to Maglio, but apparently was rejected by Leonetti's. The facts surrounding these discussions raise several potential issues, which must be addressed at trial.
- c. Third, the Leonetti's letter of November 29, 2011, indicating that it would have settled all of the claims for under \$1 million, raises issues of fact as to why Leonetti's would send such a letter, after it had secured a verdict on the Maglio brand claim alone of over \$2 million.
- d. Fourth, Mr. Turchi's letter of December 16, 2011 appears to be the first time that Maglio demanded the policy limits. The timing of this request raises questions.
- e. Fifth, factual questions exist as to Charter Oak's motivations and reasons for its conduct in the period of time between the October 3 verdict on the Maglio brand claim, and the December 22 or December 23 (the record is not clear as to the date) verdict on the Forte brand claim, and whether Maglio was prejudiced by any act or omission by Charter Oak during this period of time.

- i. Specifically, factual questions are present as to the timing of the December 22, 2011 letter, in which Charter Oak offered its full policy limit for Maglio to attempt to negotiate a global settlement, where the Forte brand verdict followed so soon thereafter.
- f. It also appears from the record that there was a delay from the date when Charter Oak indicated it would put up its \$1 million and the date it actually did so. The reasons for this, and whether Maglio suffered any injury by any act or omission by Charter Oak during this period, might also be relevant.

B. American Guarantee

The chronology at Appendix A also raises a narrow but nonetheless unresolved set of factual issues as to American Guarantee as follows.

1. Prior to Forte Brand Verdict

Once the Maglio brand claim had been evaluated by the jury at over \$2 million, should American Guarantee have been on notice that Maglio's prior estimates of potential damages were unrealistic and that Leonetti's claims had much more jury appeal, whatever their legal strength? Specifically, should American Guarantee have initiated a new review of the situation, or seek some independent counsel's advice, recognizing that there was an increase risk that its fiduciary obligations to Maglio may be "triggered?" Should the ongoing litigation as to the Forte brand claim, including the trade libel claim as to which Charter Oak had admitted potential coverage, have required American Guarantee to step up because its excess insurance level may come into play in the retrial? Generally, from the period of October 3, 2011 through the date of the Forte brand verdict of \$660,000, did American Guarantee meet its potential defense obligations to Maglio?

2. After the Forte Brand Verdict – Bond for Appeal

Following the Forte brand verdict for \$660,000 – an amount below the Charter Oak policy limits – American Guarantee could arguably have continued its very limited involvement on the assumption that the Charter Oak primary policy would cover that claim. However, once Charter Oak decided to tender its full policy limit to Maglio on December 22, 2011, American Guarantee’s obligations may have changed.

Maglio contends that, although Charter Oak continued to provide for Maglio’s defense, American Guarantee had a duty to provide Maglio with the remaining funds necessary to post a bond to appeal the verdicts. American Guarantee argues that its duty to defend and post a bond is triggered only “when the applicable limit of the underlying insurance has been exhausted by payment of claims for which coverage is afforded under this policy.” ECF 128, Ex. 2 (American Guarantee policy). American Guarantee submits that the date of “payment of claims” was not until the funds that Charter Oak had put into interpleader were released, i.e., July 16, 2012. Two months prior to the release of those funds, Maglio and Leonetti’s had entered into a Settlement Agreement and, according to American Guarantee, no remaining claims existed to be appealed. Maglio disputes American Guarantee’s interpretation of the phrase “payment of claims,” and argues that the payment date is the date on which Charter Oak released its claims to the money, i.e., January 26, 2012. Maglio argues that Charter Oak’s interpleading of those funds triggered American Guarantee’s duty to defend and post an appellate bond. Further, although Maglio and Leonetti’s did enter a Settlement Agreement, Maglio points out that the Agreement would be “automatically terminated, rescinded and considered null and void if Maglio’s insurers (either collectively or individually) agree[d] in writing to post on Maglio’s behalf a valid and collectible bond for 120% of the Judgment” ECF 128, Ex. 31 (Settlement Agreement) ¶ 23. However,

the Court notes that the Settlement Agreement required any such bond to be paid “on or before May 18, 2012” in order for such termination to take place.

The Court declines to decide on the meaning of this contractual provision at this time, noting that the relevant language may be ambiguous and raise factual questions that will more appropriately be decided by the jury or after a fuller development of the record.

3. Reasonableness of American Guarantee’s Denial of Coverage

Although it is not clear from its pleadings and briefings, Maglio may be pursuing a claim against American Guarantee based on the reasonableness of its decision to deny coverage. American Guarantee has argued that this Court’s October 24 Order bars this claim, because Pennsylvania law applies an objective test that is met whenever an objectively reasonable basis existed to deny coverage, regardless of the insurer’s actual reason. See Robbins v. Metropolitan Life Ins. Co., No. 08-0191, 2008 WL 5412087, *8 (E.D. Pa. Dec. 29, 2008) (dismissing claim based on objective test, which establishes that “as long as a reasonable basis for denying the claim exists, even if it is not the actual basis relied upon by the insurance company, bad faith has not occurred”). The Court agrees that Maglio may not relitigate the issue of whether American Guarantee appropriately denied coverage or reserved its rights to deny coverage. However, as discussed above, Maglio’s claims extend beyond American Guarantee’s duty to indemnify and concern its duty to defend. Moreover, although this Court found that the insurers did not have a duty to indemnify for the Forte brand claim, it did so because the underlying trial record was not sufficiently clear such that Maglio would be able to meet its burden to show that the jury awarded Leonetti’s damages based on a covered, as opposed to a non-covered, claim. In light of this analysis, a question remains as to whether American Guarantee’s refusal to participate in Maglio’s defense was reasonable in light of (1) the principle that an insurer has a duty to defend

the insured until it can confine the claim to a recovery excluded from the policy, and (2) the existence of a possible trade libel claim against Maglio in the Forte brand trial.

IV. Conclusion

This is an unusual case that concerns a topic on which there is little appellate guidance. This Court believes that granting summary judgment for any party is not warranted at this time, not just because of lingering fact issues, but also because appellate review would be more informed if based on a trial record, with direct and cross examination of key witnesses in the context of disputed facts related to the underlying state court litigation.

An appropriate Order follows.

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

<p>CHARTER OAK INSURANCE CO.</p> <p style="text-align:center">v.</p> <p>MAGLIO FRESH FOOD d/b/a MAGLIO'S SAUSAGE CO. et al.</p>	<p>CIVIL ACTION</p> <p>NO. 12-3967</p>
--	---

ORDER

AND NOW, this 14th day of July, 2014, after review of the parties' cross-motions for summary judgment (ECF 129, 130, 131, 133) and the related responsive and reply briefs, and for the reasons set forth in the accompanying Memorandum, it is hereby **ORDERED** that the Motions for Summary Judgment are **DENIED**.

BY THE COURT:

/s/ **Michael M. Baylson**

MICHAEL M. BAYLSON, U.S.D.J.