

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

JOHN F. SANTORA : CIVIL ACTION
 :
 v. :
 :
 COMMERCIAL UNION INSURANCE :
 COMPANY : NO. 96-6962

M E M O R A N D U M

WALDMAN J.

February 25, 1998

I. INTRODUCTION

Plaintiff asserts claims against defendant for breach of its contractual obligations under an insurance contract and bad faith pursuant to 42 Pa.C.S.A. § 8371. The court has subject matter jurisdiction pursuant to 28 U.S.C. § 1332(a).

Plaintiff alleged that defendant breached a contractual obligation to pay plaintiff for a loss covered under the policy and acted in bad faith in failing promptly to resolve and pay plaintiff's claim for that loss. Presently before the court is defendant's unopposed Motion for Summary Judgment.¹

¹ Defendant's motion and brief were filed on January 8, 1998 and were accompanied by a certificate of service via first class mail on plaintiff's counsel the same day. Plaintiff had until January 22, 1998 to respond to the motion. See L. R. Civ. P. 7.1(c). In an order of February 4, 1998, the court referenced plaintiff's failure timely to respond to the motion. The order was mailed and faxed to all counsel. The Court then deferred for another three weeks and must now conclude that

II. LEGAL STANDARD

When considering a motion for summary judgment, the court must determine whether "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986); Arnold Pontiac-GMC, Inc. v. General Motors Corp., 786 F.2d 564, 568 (3d Cir. 1986). Only facts that may affect the outcome of a case are "material." Anderson, 477 U.S. at 248. All reasonable inferences from the record must be drawn in favor of the non-movant. Id. at 256.

Although the movant has the initial burden of demonstrating the absence of genuine issues of material fact, the non-movant must then establish the existence of each element on which it bears the burden of proof. J.F. Feeser, Inc. v. Serv-A-Portion, Inc., 909 F.2d 1524, 1531 (3d Cir. 1990) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986)), cert. denied, 499 U.S. 921 (1991). The non-moving party may not rest on his pleadings but must come forward with evidence from which a reasonable jury could return a verdict in his favor. Anderson, 479 U.S. at 248; Williams v. Borough of West Chester, 891 F.2d

plaintiff has elected not to oppose defendant's motion.

458, 460 (3d Cir. 1989); Woods v. Bentsen, 889 F. Supp. 179, 184 (E.D. Pa. 1995).

III. FACTS

From the evidence, the pertinent facts as uncontested or otherwise viewed most favorably to plaintiff, are as follow.

On November 11, 1995, a wind and rain storm caused damage to plaintiff's house in Media, Pennsylvania. Plaintiff's house was insured at the time under a homeowner's policy issued by defendant. The following month, plaintiff submitted to defendant a claim for \$61,699.37. Following an investigation, defendant disagreed with plaintiff's valuation of the insured damage and issued a check in the amount of \$10,122.49 which plaintiff negotiated.

On September 12, 1996, plaintiff initiated this action in the Delaware County Court of Common Pleas. Defendant timely removed the case to federal court.

On November 4, 1996, defendant notified plaintiff that it was invoking the insurance policy appraisal provision. That provision provides:

Appraisal. If you and we fail to agree on the amount of loss, either may demand an appraisal of the loss. In this event, each party will choose a competent appraiser within 20 days after receiving a written request from the other. The two appraisers will choose an umpire. If they cannot agree upon an umpire within 15 days, you or we may request that the choice be made by a judge of a court of record in the state where the "residence premises" is located. The appraisers will separately set the amount of loss. If the appraisers

submit a written report of an agreement to us, the amount agreed upon will be the amount of loss. If they fail to agree, they will submit their differences to the umpire. A decision agreed to by any two will set the amount of loss.

The parties thereafter selected two appraisers, William Costello and Stan Jablonski.² On February 12, 1997, the appraisers selected Lee Davis as umpire. On June 23, 1997, Mr. Davis signed an award stating that \$15,984.46 was the total amount of the loss. Mr. Jablonski signed the award on July 2, 1997, establishing \$15,984.46 as the loss amount under the appraisal clause.

On July 15, 1997, defendant forwarded to plaintiff a check in the amount of \$5,361.97, the difference between the award and the amount previously paid minus the \$500 deductible.

IV. DISCUSSION

A. Breach of Contract Claim

Appraisal clauses in insurance contracts are enforceable and recognized under Pennsylvania law as favored alternate dispute resolution mechanisms. See Ice City, Inc. v. Insurance Co. of N. Am., 314 A.2d 236, 240-41 (Pa. 1974); Boulevard Assocs. v. Seltzer Partnership, 664 A.2d 983, 987 (Pa. Super. Ct. 1995). An appraisal made pursuant to the provisions of an insurance contract binds the parties by conclusively

² Upon a joint request by the parties, the court placed this action in suspense on November 21, 1996 pending the outcome of the appraisal process.

establishing the amount of the insured's loss. Ice City, 314 A.2d at 240; Patriotic Order Sons of Am. Hall Ass'n v. Hartford Fire Ins. Co., 157 A. 259, 261 (Pa. 1931).

Judicial review of appraisals is essentially limited to situations where fraud, misconduct, corruption or some other irregularity causes an unjust result. Boulevard Assocs., 664 A.2d at 987. There is no suggestion that the appraisal process in this case was tainted in any such manner.

A reviewing court may also examine the appraisers' scope of authority to determine if they exceeded the scope of their power. Id. Appraisers are limited to determining the amount of a loss. Any other issues are for the parties to settle or litigate. McGourty v. Pennsylvania Millers Mut. Ins. Co., 1997 WL 795974, *1 (Pa. Super. Ct. Dec. 31, 1997); Ice City, 314 A.2d at 240 n.12. Plaintiff does not contend and there is no evidence that the appraisers exceeded their authority.

To invoke the appraisal provision of an insurance policy, the insurer must admit liability and there must be a dispute only as to the dollar amount of the loss. Kester v. State Farm Fire and Cas. Co., 726 F. Supp. 1015, 1017 (E.D. Pa. 1989); Ice City, 314 A.2d at 240. Defendant avers that it "admitted coverage as to plaintiff's claim under the insurance contract. The only dispute was as to the amount of the loss." There is no evidence to show that the parties improperly

proceeded with the appraisal in the absence of a concession of liability. Moreover, as noted, defendant had already tendered over \$10,000.

The appraisers evaluated the "total actual cash value and total amount of loss" to plaintiff's property at \$15,984.46. That appraisal binds the parties to the determination of the amount of loss sustained by plaintiff because of the storm. Either party had a right to utilize an appraisal. Defendant has paid the amount of loss as determined by the appraisal. Defendant is entitled to summary judgment on the breach of contract claim.

B. Bad Faith Claim

An insurer who acts in bad faith toward an insured in a matter arising under an insurance policy may be liable to the insured for interest on his claim at the prime rate plus three percent, punitive damages, court costs and attorney fees. See 42 Pa. C.S.A. § 8371.

An insurer engages in bad faith when it denies benefits under a policy without a reasonable basis for doing so and knows or recklessly disregards its lack of such reasonable basis. Klinger v. State Farm Mut. Auto Ins. Co., 115 F.3d 230, 233 (3d Cir. 1997); Terletsky v. Prudential Property & Casualty Ins. Co., 649 A.2d 680, 688 (Pa. Super. 1994), app. denied, 659 A.2d 560 (Pa. 1995).

A determination of bad faith does not require proof that the insurer was motivated by a dishonest or improper purpose. See Klinger, 115 F.3d at 233-34. Recklessness or acts undertaken by the insurer with a reckless indifference to the interests of the insured can support a finding of bad faith. Id. at 235; PolSELLI v. Nationwide Mut. Fire Ins. Co., 23 F.3d 747, 751 (3d Cir. 1994).

A claimant, however, must prove bad faith by clear and convincing evidence. Id. at 750. Evidence is clear and convincing when it is so "clear, direct, weighty and convincing" that a finding of bad faith can be made with "a clear conviction." Id. at 752.

Following an investigation, defendant tendered a check for the portion of plaintiff's claim that it did not dispute. After plaintiff filed a lawsuit, defendant submitted the dispute to the appraisal process. No evidence has been presented of what, if any, contact occurred between the parties from the time the \$10,000 plus check was tendered to the day the suit was filed. Two weeks after the appraisal process settled the disputed loss amount, defendant sent a check to plaintiff for the balance owed.

There is no evidence to substantiate that defendant failed reasonably to assess plaintiff's claim in good faith. The appraisal was within \$5,500 of defendant's assessment and was

\$45,715 less than plaintiff's claim.

Putting aside the bald allegations in plaintiff's complaint, he has presented no evidence, let alone evidence which is "clear and convincing," that defendant acted in bad faith. If such evidence exists, plaintiff has failed to produce it.

IV. CONCLUSION

Plaintiff's disputed insurance claim was settled consistent with the terms of the parties' insurance contract. Plaintiff has presented no evidence from which a jury reasonably could find with "a clear conviction," or under virtually any standard of proof, that defendant acted in bad faith.

Accordingly, defendant's Motion for Summary Judgment will be granted. An appropriate order will be entered.

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O R D E R

AND NOW, this day of February, 1998, upon
consideration of defendant's Motion for Summary Judgment and in
the absence of any response thereto, consistent with the
accompanying Memorandum, **IT IS HEREBY ORDERED** that said Motion is
GRANTED and **JUDGMENT** is **ENTERED** in the above action for defendant
and against plaintiff.

BY THE COURT:

JAY C. WALDMAN, J.