

Plaintiff includes three counts in his Complaint: Count I for breach of contract; Count II for breach of duty of good faith and fair dealing; and Count III for violations of the Pennsylvania Unfair Trade Practices and Consumer Protection Law (“UTPCPL”). In Count I, Plaintiff avers that Defendant is obligated to pay for the damages to Plaintiff’s property and has refused to do so in breach of the homeowners’ insurance policy. Count II alleges that Defendant breached its’ duty of good faith and fair dealin in investigating and paying Plaintiff’s claim. Specifically, Plaintiff claims, inter alia, that Defendant: misrepresented facts about the policy relating to coverage; failed to act promptly upon notification of the claim; failed to reasonably investigate the claim; failed or refused to pay the claim without conducting a reasonable investigation; refused to submit Plaintiff’s claim to the appraisal process as Plaintiff claims is required by the policy; failed to attempt to effectuate a prompt, fair and equitable settlement; and instructed Plaintiff to repair the damaged property and then refused to make payments for the amount of the repairs. Plaintiff seeks punitive damages as a result of Defendant’s alleged bad faith. Finally, in Count III of the Complaint (for violation of the UTPCPL), Plaintiff asserts many of the same allegations made against Defendant in Count II. Essentially, in addition to making numerous assertions regarding Defendants failure to pay the claim as Plaintiff believes it should have been paid, Plaintiff also alleges that Defendant caused the likelihood of confusion or misunderstanding regarding the nature, scope, and extent of coverage allowed under the policy. Plaintiff seeks treble monetary damages and attorney’s fees on this claim.

II. MOTION FOR PARTIAL SUMMARY JUDGMENT

Defendant now moves for summary judgment on Counts II and III of the Complaint. Defendant argues that summary judgment should be awarded in its favor on Plaintiff’s bad faith claim because the parties genuinely dispute whether portions of the claim are covered under the policy. Defendant asserts that not all of the claimed damages Plaintiff’s

home suffered are the result of the storm and fallen tree. Therefore, Defendant concludes that it could not have acted in bad faith, but rather investigated the claims and disputes issues of coverage. Defendant further maintains that because there exists a reasonable basis for its' denial of a portion of Plaintiff's claim, it cannot be found to have acted in bad faith. Defendant also contends that Plaintiff's claim did not have to be submitted to appraisal - as Plaintiff complains was required - because Defendant did not admit liability. In response Plaintiff states that Defendant has not conducted the investigation of his claim in a fair and objective manner. Moreover, Plaintiff claims that an investigation of the claim never took place. (Pl.'s Reply at 6).

Regarding the claim for violation of the UTPCPL Defendant argues that an insurer's refusal to pay a claim is nonfeasance and is not actionable under the UTPCPL. In response Plaintiff argues that Defendant has accepted liability for this claim, paid a portion of the claim, and has refused to cover and pay for other aspects of the loss. (Pl.'s Reply at 6). Plaintiff does not respond to Defendant's argument that an insurer's refusal to pay a claim is not actionable under the UTPCPL, but instead argues that Defendant's bad faith is evidenced by its' failure to comply with provisions of the UTPCPL. Specifically, Plaintiff argues that Defendant did not provide Plaintiff with a written explanation of why Plaintiff's claim was being denied and the controlling policy language supporting the denial.

III. DISCUSSION

Summary judgment shall be granted "...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). Summary judgment will be inappropriate where a dispute regarding a material fact is genuine, that is, if the evidence is such that a reasonable jury could return a verdict for the non-moving party. The evidence presented must be viewed in the light most favorable to the non-moving party. Lang v. New York Life Ins. Co., 721 F.2d 118, 119 (3d

Cir. 1983). In deciding this motion, I must draw all reasonable inferences in favor of the party against whom judgment is sought. See, American Flint Glass Workers, AFL-CIO v. Beaumont Glass Co., 62 F.3d 574, 578 (3d Cir. 1995). The substantive law controlling the case will determine those facts that are material for the purpose of summary judgment. See, Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 2510 (1986). The moving party has the initial burden of demonstrating that no genuine issue of material fact exists. See, Celotex Corp. v. Catrett, 477 U.S. 316, 323 (1986), 106 S.Ct. 2548, 2552 (1986).

A. Bad Faith Claim.

Pennsylvania's bad faith statute provides a remedy for an insurer's bad faith in acting upon an insured's claim. 42 Pa..C.S.A. § 8371. Bad faith "on part of [an] insurer is any frivolous or unfounded refusal to pay proceeds of a policy; it is not necessary that such refusal be fraudulent." O'Donnell ex rel. Mitro v. Allstate Ins. Co., 734 A.2d 901 (Pa.Super., 1999.) For purposes of an action against an insurer for failure to pay a claim, such conduct imports a dishonest purpose and means a breach of a known duty (i.e., good faith and fair dealing), through some motive of self-interest or ill will; mere negligence or bad judgment is not bad faith. Id. (citing, Romano v. Nationwide Mut. Fire Ins. Co., 435 Pa.Super. 545, 646 A.2d 1228, 1232 (1994); Terletsky v. Prudential Property & Casualty Ins. Co., 437 Pa.Super. 108, 649 A.2d 680, 688 (1994), appeal denied, 540 Pa. 641, 659 A.2d 560 (1995)).

In the instant matter, Plaintiff has provided the court with his and his wife's affidavits which state that Pileggi was instructed not to inspect the first floor bathroom of Plaintiff's home because Defendant had previously determined, prior to Pileggi's inspection, to deny the portion of the claim relating to the first floor bathroom damages. Pl.'s Resp, Exh. A. In viewing the evidence and making all reasonable inferences in favor of Plaintiff, the court cannot determine that no reasonable jury would return a verdict in Plaintiff's favor on his bad faith claim. The court is not determining that Defendant's denial of the portion of the claim

concerning the first floor bathroom was bad faith; rather, the court finds that Plaintiff has raised a genuine issue of material fact on this claim. On summary judgment, Plaintiff is required to - and has - provided the court with evidence sufficient to create a genuine issue of material fact regarding Defendant's alleged bad faith. From the evidence before the court, It can reasonably be inferred that Defendant had no basis for it's partial denial of Plaintiff's claim. Defendant's motion for summary judgment on this claim will be denied.

B. Unfair Trade Practices and Consumer Protection Law Claim

Defendant argues that in Pennsylvania only malfeasance, the improper performance of a contractual obligation, raises a cause of action under the Unfair Trade Practices and Consumer Protection Law, 73 P.S. § 201-1 et seq., and an insurer's mere refusal to pay a claim which constitutes nonfeasance, the failure to perform a contractual duty, is not actionable. However, in this matter Defendant has paid a portion of Plaintiff's claim - and may have done so improperly - and denied a portion of the claim. Based on the evidence before it, and viewing such in the light most favorable to Plaintiff, the court cannot decide as a matter of law that the contract was not improperly performed. Therefore Defendant's motion for summary judgment on this claim will also be denied.

An appropriate Order follows.

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

H. JAMES AGNEW,	:	
Plaintiff,	:	
	:	
v.	:	No. 03-CV-3658
	:	
STATE FARM FIRE AND CASUALTY CO.,	:	
Defendant	:	
	:	

MEMORANDUM

AND NOW, this 26th day of January 2005 , **IT IS HEREBY ORDERED** that Defendant's Motion to for Partial Summary Judgment on Count II and Count III of Plaintiff's Complaint is **DENIED**.

IT IS FURTHER ORDERED the Deputy Clerk schedule this matter for trial.

BY THE COURT:

S/_____
Clifford Scott Green, S.J.