

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

GARY W. GUESNT and	:	CIVIL ACTION
LISA GUESNT,	:	
Plaintiffs,	:	
	:	
v.	:	
	:	
WESTERN PACIFIC MUTUAL	:	
INSURANCE COMPANY,	:	
Defendant,	:	
	:	
v.	:	
	:	
RESHETAR GROUP, INC., et al.,	:	
Third Party	:	
Defendants,	:	
	:	
v.	:	
	:	
REDI CONCRETE COMPANY,	:	
Fourth Party	:	
Defendant	:	
	:	
v.	:	
	:	
RAHN'S CONSTRUCTION	:	
MATERIALS CO., INC.,	:	
Fifth Party	:	
Defendant	:	NO. 97-4704

Newcomer, J. March , 1998

M E M O R A N D U M

Presently before the Court are defendant Western Pacific Mutual Insurance Company's Motion for Partial Summary Judgment and plaintiffs' response thereto. For the reasons that follow, said Motion will be granted in part and denied in part.

**A. Background**

This is a case involving a newly-constructed house purchased by plaintiffs, Gary and Lisa Guenst, which was covered by a ten-year limited home warranty. Defendant Western Pacific Mutual Insurance Company ("WPMIC") is the insurer which

underwrote plaintiff's limited warranty policy through its agent, Residential Warranty Corporation ("RWC"). Plaintiffs allege that large cracks began to form in the foundation walls of their house, and that these fractures constitute major structural defects for which they are covered under their warranty policy. Eventually plaintiffs and RWC, as an agent of defendant, proceeded to arbitration, and on August 14, 1996, the arbitrator found that three of plaintiffs' claims were not valid but that plaintiff's claim that the rear back wall was broken and that this constituted a major structural defect affecting the integrity of the entire house was valid. Accordingly the arbitrator ordered that the condition be repaired within ninety days after plaintiffs accepted the award and RWC acknowledged it. After the award was accepted and acknowledged, however, plaintiffs and defendant could not agree on the appropriate repairs. Caught in an impasse, plaintiffs instituted the present action on three counts: confirmation of the arbitration award, a bad faith claim under 42 Pa. Cons. Stat. Ann. § 8371, and a claim under the Pennsylvania Unfair Trade Practices and Consumer Protection Law ("PUTPCPL"). Defendant also asserted a counterclaim.

Upon motion, this Court confirmed and entered judgment on the award of the arbitrator and dismissed defendants' counterclaim, leaving for trial the following issues or claims: (1) a determination as to what repairs will constitute implementation of the arbitration award; (2) the bad faith claim;

and (3) the unfair trade practices claim. Thereafter defendant WPMIC filed an impleader complaint against Reshetar Group, Inc. ("Reshetar"), the builder of plaintiffs' home on a contractual indemnification provision. Reshetar then impleaded Redi Concrete Company ("Redi"), the subcontractor who laid the concrete for plaintiffs' foundation walls, on a warranty theory. Redi then impleaded Rahn's Material Company, Inc. ("Rahn's"), the supplier of the concrete, also on a warranty theory. Thus at this juncture four distinct actions exist in this case.

Defendant WPMIC now moves for partial summary judgment, seeking judgment in its favor as to plaintiffs' demands for repair of any other part of the house aside from the rear foundation wall, as well as judgment in its favor as to plaintiffs' bad faith and unfair trade practices claims. Defendant asserts that the only issue that should remain for trial is the nature and scope of repairs to the rear foundation wall. The Court deals with each argument in turn.

**B. Summary Judgment Standard**

A reviewing court may enter summary judgment where there are no genuine issues as to any material fact and one party is entitled to judgment as a matter of law. White v. Westinghouse Elec. Co., 862 F.2d 56, 59 (3d Cir. 1988). The evidence presented must be viewed in the light most favorable to the non-moving party. Id. "The inquiry is whether the evidence presents a sufficient disagreement to require submission to the jury or whether it is so one sided that one party must, as a

matter of law, prevail over the other." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). In deciding the motion for summary judgment, it is not the function of the Court to decide disputed questions of fact, but only to determine whether genuine issues of fact exist. Id. at 248-49.

The moving party has the initial burden of identifying evidence which it believes shows an absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986); Childers v. Joseph, 842 F.2d 689, 694 (3d Cir. 1988). The moving party's burden may be discharged by demonstrating that there is an absence of evidence to support the nonmoving party's case. Celotex, 477 U.S. at 325. Once the moving party satisfies its burden, the burden shifts to the nonmoving party, who must go beyond its pleadings and designate specific facts, by use of affidavits, depositions, admissions, or answers to interrogatories, showing that there is a genuine issue for trial. Id. at 324. Moreover, when the nonmoving party bears the burden of proof, it must "make a showing sufficient to establish the existence of [every] element essential to that party's case." Equimark Commercial Fin. Co. v. C.I.T. Fin. Servs. Corp., 812 F.2d 141, 144 (3d Cir. 1987) (quoting Celotex, 477 U.S. at 322). Summary judgment must be granted "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." White, 862 F.2d at 59 (quoting Celotex, 477 U.S. at 322).

**C. Discussion**

1. Scope of the Arbitration Award

To begin, the Court notes that the arbitration award at issue in this case has been confirmed, and judgment has been entered on it. Thus both parties, the Guensts and WPMIC, are bound by this judgment. As such, there no longer remains any issue as to whether the condition specified in the award constitutes a major structural defect. The award definitively finds that the claim "rear back wall broken; major structural defect affecting integrity of entire house; of basement" is valid. Thus it is established as fact for purposes of this suit between the Guensts and WPMIC that the condition of the rear back wall is a major structural defect which is covered under WPMIC's home warranty. Also, as the Court has dismissed WPMIC's counterclaim, there no longer remains any issue as to the applicability or enforceability of the warranty policy as between the parties. Thus what remains as an issue for trial disposition is the nature and method of repairs that are necessary to correct this major structural defect as purposed by the arbitration award.

In view of this background, defendant WPMIC argues in the instant Motion that plaintiffs' demands for repairs to any portion of the house, other than the rear foundation wall, exceeds the scope of the arbitration award. WPMIC also argues that plaintiffs' demands for a complete foundation replacement is unfounded because the plaintiffs' own compressive strength tests

establish that the foundation satisfies the applicable building code requirements. Defendant thus moves for summary judgment on these issues. Plaintiffs respond that the arbitration award contemplates more than the rear foundation wall because the award states that the condition of that wall affects the integrity of the entire house. Plaintiffs also argue that WPMIC's warranty covers additional damage caused by a major structural defect.

After careful consideration of the arbitration award, the Court determines that the "major structural defect" referred to in the award, for which the plaintiffs are covered pursuant to the home warranty, is limited to the rear foundation wall. Thus the award itself contemplates repairs to the rear foundation wall only. The award reveals that the arbitrator rejected as invalid plaintiffs' claim that the garage side basement wall was broken. The arbitrator definitively found that the condition of the garage side basement wall did not constitute a "major structural defect" under the terms of the warranty agreement. Thus to construe the award as contemplating repairs to all the walls is to ignore a direct finding of the arbitrator. Although it may be true, as plaintiffs argue, that to limit the scope of the award to one wall in effect precludes plaintiffs from seeking a full remedy for the alleged defects in their home, the Court notes that just as defendant WPMIC is bound to the arbitration and cannot assert defenses which should have been raised at the arbitration, likewise plaintiffs cannot expect to raise claims that were not litigated at the arbitration. As the Court has

previously stated, the award does not limit repairs to certain causes and not to others; thus plaintiffs are not precluded from presenting evidence as to the alleged reasons for the defective condition of the wall--which appear to be manifold. However, plaintiffs are bound by the scope of the arbitration award--the award on which they chose to sue--and cannot now seek to expand the award to cover all four walls when the explicit language of the award limits the "major structural defect" to the rear basement wall.

The analysis does not end at this point, however. As plaintiffs point out, the warranty policy between WPMIC, through its agent RWC, and the plaintiffs includes the following provision under the sub-heading "WPIC's Responsibility And Purchaser's Rights: Years Three Through Ten":

If [a] Major Structural Defect (as defined in Section B of this Agreement) arises in your home during years three through ten of this Agreement, WPIC, at its sole option, will repair or replace, or pay you the reasonable cost of repairing or replacing, the defective item, limited to such actions necessary to restore load-bearing capacity to the load-bearing components of the home and to repair those elements of the home damaged by the Major Structural Defect which make the home unsafe or unlivable.

(Def.'s Mot. for Summ. J. at Exh. 5, p.2.)

As previously noted, it is established as fact for purposes of this action between the Guensts and WPMIC, that the condition of the rear basement wall constitutes a "major structural defect." Thus no mention need be made as to any "load-bearing capacity" or "load-bearing component" limitations, nor the "unsafe or unlivable" proviso, as such qualifications are only reiterations

of the definition of a "major structural defect" as found in Section B of the warranty agreement<sup>1</sup> and as the condition of the rear foundation wall has already been found to constitute a major structural defect. As the Court interprets the above provision then, straightforward as it is, WPMIC, at its option, can choose either to repair or replace, or pay the cost of repairing or replacing, the major structural defect--in this case the rear foundation wall. This obligation on the part of WPMIC is limited, under this provision, to such actions as are necessary to (1) correct the major structural defect and (2) repair those elements of the home damaged by the major structural defect. In other words, WPMIC is obligated to correct both the major structural defect--the defective rear foundation wall--as well as any elements of the house that were damaged by the defective condition of the rear foundation wall. Accordingly, under the warranty, if it is found that the condition of the rear foundation wall caused damage to the other three walls, then WPMIC is obligated to repair those other walls as well. However, if the condition of the rear wall is found not to have caused damage to the other three walls, and instead if any defect therein arose independent of or simultaneously with the defect in the rear wall, then WPMIC is not obligated to repair those walls

---

<sup>1</sup> "Major structural defect" is defined therein as follows: "Only actual physical damage to the following specified load-bearing segments of the home, caused by a failure of such segments which affects their load-bearing functions to the degree that the home becomes unsafe or unlivable: . . . bearing walls and partitions . . . and foundation systems and footings."

under the arbitration award and the warranty agreement at this juncture. Instead, plaintiffs would presumably be forced to pursue yet another action to enforce the warranty agreement as to the other three walls.

The Court finds, however, that plaintiffs have failed to create a genuine issue of material fact as to whether the defective condition of the rear foundation wall "damaged" the other three walls. Although plaintiffs point the Court to numerous expert reports, the Court cannot, try as it might, find therein any opinion or statement that can be construed as faulting the rear wall for the defective condition of the rest of the foundation. Plaintiffs summarily state that "[a]ll of plaintiffs' experts have concluded that the entire foundation of the home has been affected by the inward deflection of the rear wall." (Pl.'s Resp. at p.9.) However, plaintiffs are unable to point the Court to any specific such statement, nor have plaintiffs attempted systematically to deduce from any of the expert reports such an opinion. All the plaintiffs' experts reports appear to agree that the foundation of plaintiffs' home suffers severe structural/engineering defects which require radical repair/replacement measures, but the Court cannot find in any of the same reports an opinion that the rear wall caused resulting damage to the other walls. Accordingly defendant's Motion is granted to the extent that, as to Count I of their Complaint, plaintiffs will be limited in the scope of their recovery to the rear foundation wall only.

With regard to the issue of compressive strength of the foundation concrete, however, the Court finds that a genuine issue of material fact exists. While defendant WPMIC persuasively argues that even the plaintiffs' experts' tests reveal a compressive strength that meets the BOCA requirement of being within 85% of 2500 psi, WPMIC fails to consider or refute the test results of KMV Contractors. This issue appearing to involve a battle of the experts, it is appropriately reserved for the jury. The Court reiterates that the arbitration award does not restrict the cause of the defective rear wall to certain reasons and not to others. Thus plaintiffs, as well as defendants, are free to and will no doubt do battle over what structural/engineering reasons caused the defective condition of the rear wall and what repairs are therefore necessitated by this condition.

Finally, the Court notes that although plaintiffs are hereby barred from seeking relief for all four walls of their foundation in this action brought under the arbitration award, the Court notes that plaintiffs are not barred from pursuing their bad faith claim--as hereinafter addressed--with respect to these remaining walls. The Court notes, and indeed, WPMIC would be hard-pressed to deny, that WPMIC has had notice of plaintiffs' additional claims under the warranty agreement for repair to the remaining foundation walls since at least June 11, 1997 when plaintiffs' attorney so informed RWC. As revealed by the instant law suit, defendant has not provided coverage to plaintiffs on

these remaining walls, and in fact pursuant to this Motion has succeeded in preventing plaintiffs from recovering on the remaining three walls under the arbitration award. Thus plaintiffs are entitled to pursue their bad faith claim as to these denials as well.

## 2. Plaintiffs' Bad Faith Claim

Defendant WPMIC also moves for summary judgment on Count II of plaintiffs' Complaint which asserts a bad faith claim under 42 Pa. Cons. Stat. Ann. § 8371. Section 8371 provides as follows:

In an action arising under an insurance policy, if the court finds that the insurer has acted in bad faith toward the insured, the court may take all of the following actions:

- (1) Award interest on the amount of the claim from the date the claim was made by the insured in an amount equal to the prime rate of interest plus 3%.
- (2) Award punitive damages against the insurer.
- (3) Assess court costs and attorney fees against the insurer.

42 Pa. Cons. Stat. Ann. § 8371. The purpose of the statute is to provide a statutory remedy to insureds for an insurer's bad faith denial of coverage. General Acc. Ins. Co. v. Federal Kemper Ins. Co., 682 A.2d 819, 822 (Pa. Super. Ct. 1996). It has been held that although the statute only enables "the court" to award damages, interest, costs, and fees, the Seventh Amendment entitles a party to a jury trial as to the issues of bad faith and punitive damages. Younis Brothers & Co., Inc. v. Cigna Worldwide Ins. Co., 882 F. Supp. 1468, 1476 (E.D. Pa. 1994). In order to succeed on a bad faith claim, plaintiffs must prove by clear and convincing evidence both of the following elements: (1)

that the insurer lacked a reasonable basis for denying the benefits, and (2) that the insurer knew or recklessly disregarded its lack of reasonable basis. Klinger v. State Farm Mut. Auto. Ins. Co., 115 F.3d 230, 233 (3d Cir. 1997); Terletsky v. Prudential Property & Cas. Ins. Co., 649 680, 688 (Pa. Super. Ct. 1994). The Court notes, furthermore, that the Third Circuit has explicitly rejected a third requirement that an insurer must have been motivated by an improper purpose such as ill will or self-interest. See Klinger, 115 F.3d at 233-34.

Given the above standard, the Court is amply satisfied that the instant case presents numerous issues of material fact that must be reserved for the jury. WPMIC argues that its refusal to implement plaintiffs' proposed repairs in lieu of its own does not constitute bad faith, and that the quality of its investigation into the plaintiffs' claim precludes a finding of bad faith. While perhaps WPMIC's experts' testimony as to the adequacy of WPMIC's proposed method of repair will be strong evidence that WPMIC had a reasonable basis for refusing to implement the plaintiffs' proposed repairs, nevertheless plaintiffs' have pointed to other evidence from which a jury could find that, from the beginning, WPMIC did not have a reasonable basis for rejecting plaintiffs' claims and for offering a repair at the cost of \$2,480.00. In particular, a jury could find that RWC's initial inspection was cursory in light of the technical engineering criteria--whether a load-bearing segment of the home was failing--used to determine the

denial or grant of benefits, and that therefore the decision to deny benefits was without reasonable basis. Accordingly, the Court finds that it cannot rule as a matter of law that a reasonable fact-finder could not find by clear and convincing evidence that WPMIC acted in bad faith. In fact the Court, construing the facts in a light most favorable to plaintiffs, the non-moving party, can see ample evidence from which a reasonable jury could find that WPMIC acted in bad faith toward the Guensts. Thus the Court reserves for the jury plaintiffs' bad faith claim.

### 3. Plaintiffs' Unfair Trade Practices Claim

Finally, defendant WPMIC moves for summary judgment on Count III of plaintiffs' Complaint, which asserts a claim under the Pennsylvania Unfair Trade Practices and Consumer Protection Law ("UTPCPL"), 13 Pa. Cons. Stat. Ann. § 201-1 et seq. Section 201-9.2 of the statute gives a private right of action to "[a]ny person who purchases or leases goods or services primarily for personal, family or household purposes and thereby suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment by any person of a method, act or practice declared unlawful by section 3 of this act." 13 Pa. Cons. Stat. Ann. § 201-9.2. Recovery is limited to actual damages, although a court in its discretion can award treble damages, as well as costs and attorney's fees. Section 3 declares as unlawful any "unfair methods of competition" or "unfair or deceptive acts or practices." While the UTPCPL has been held to apply with respect to insurance contracts, "only

malfeasance, the improper performance of a contractual obligation, raises a cause of action under the [UTPCPL], and an insurer's mere refusal to pay a claim which constitutes nonfeasance, the failure to perform a contractual duty, is not actionable. Horowitz v. Federal Kemper Life Assur. Co., 57 F.3d 300, 307 (3d Cir. 1995).

Defendant argues that plaintiffs' allegations amount only to nonfeasance and that therefore plaintiffs' claim must fail. Although the distinction between "improper performance" and "failure to perform" appears somewhat technical, the Court is satisfied that plaintiffs' evidence makes a sufficient showing of malfeasance, or improper performance under the home warranty policy, to survive a motion for summary judgment. Plaintiffs point to the uncontested fact that in wrangling over the warranty policy, WPMIC offered a repair to the rear foundation wall at a cost of \$2,480.00. Plaintiffs' experts reports tend to show that this sum is grossly inadequate. A jury could infer from such evidence that WPMIC's offer under the warranty was unfair and even deceptive and in violation of the UTPCPL. Furthermore, the manner in which WPMIC has handled plaintiffs' claims under the warranty can also be construed by a jury to constitute unfair and deceptive practices barred by the act. In particular, the deposition testimony of Daniel Forcier persuades the Court that a reasonable jury could conclude that WPMIC deceptively tried to force upon the Guensts a repair solution not tailored to the needs of their home and in contravention of the terms of the

warranty that required WPMIC to repair or replace, or pay the reasonable cost of repairing or replacing, a major structural defect. Because such an act can be deemed violative of the UTPCPL, and because the Court finds that the instant case does not involve a simple refusal to pay a claim, but rather facts which can be construed to constitute improper performance of a contractual duty, the Court denies WPMIC's motion as to Count III of plaintiffs' Complaint.

**D. Conclusion**

In conclusion, defendant's Motion for Summary Judgment will be granted in part and denied in part for the aforementioned reasons.

An appropriate Order follows.

---

Clarence C. Newcomer, J.

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

GARY W. GUESNT and	:	CIVIL ACTION
LISA GUESNT,	:	
Plaintiffs,	:	
	:	
v.	:	
	:	
WESTERN PACIFIC MUTUAL	:	
INSURANCE COMPANY,	:	
Defendant,	:	
	:	
v.	:	
	:	
RESHETAR GROUP, INC., et al.,	:	
Third Party	:	
Defendants,	:	
	:	
v.	:	
	:	
REDI CONCRETE COMPANY,	:	
Fourth Party	:	
Defendant	:	
	:	
v.	:	
	:	
RAHN'S CONSTRUCTION	:	
MATERIALS CO., INC.,	:	
Fifth Party	:	
Defendant	:	
	:	NO. 97-4704

**O R D E R**

AND NOW, this            day of March, 1998, upon consideration of defendant Western Pacific Mutual Insurance Company's Motion for Partial Summary Judgment, and plaintiffs' response thereto, and consistent with the foregoing Memorandum, it is hereby ORDERED that said Motion is GRANTED in part and DENIED in part. It is further ORDERED as follows:

(1) The Motion is granted in part and denied in part as to Count I of plaintiffs' Complaint. Defendant's Motion is granted to the extent that plaintiffs' case under Count I of their Complaint, seeking enforcement of the arbitration award, is

hereby limited to the rear foundation wall only. The Motion is

denied to the extent that the issue of compressive strength remains for trial disposition.

(2) The Motion is denied as to Count II of plaintiffs' Complaint. Plaintiffs' bad faith claim will go to the jury.

(3) The Motion is denied as to Count III of plaintiffs' Complaint. Plaintiffs' unfair trade practices claim will also go to the jury.

AND IT IS SO ORDERED.

---

Clarence C. Newcomer, J.