

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

CINDY KEEFE,
Plaintiff,

v.

PRUDENTIAL PROPERTY & CASUALTY
INSURANCE COMPANY,
Defendant.

Civil Action
No.97-3312

O R D E R

AND NOW, this day of June, 1998, Defendant's Motion
for Judgment on the Pleadings, or, in the alternative, for
Summary Judgment (Doc. No. 31) is DENIED; and

Plaintiff's Motion for Judgment on the Pleadings on
Defendant's Counterclaim (Doc. No. 24) is GRANTED in part and
DENIED in part.

BY THE COURT:

Robert S. Gawthrop, III J.

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

CINDY KEEFE,
Plaintiff,

v.

PRUDENTIAL PROPERTY & CASUALTY
INSURANCE COMPANY,
Defendant.

Civil Action
No.97-3312

Gawthrop, J.

June , 1998

M E M O R A N D U M

Before the court is defendant's motion for Judgment on the Pleadings, or in the alternative Summary Judgment on this bad faith insurance claim. Plaintiff has also filed a motion for Judgment on the Pleadings on defendant's counterclaim of bad faith. Upon the following reasoning, I shall deny defendant's motion and deny in part and grant in part plaintiff's motion.

Defendant filed its motion without any supporting affidavits, depositions, answers to interrogatories, or indeed any documentation at all. A motion for Judgment on the Pleadings, Fed. R. Civ. P. 12(c) does not generally require such support, but a motion for Summary Judgment, which defendant has moved for in the alternative, usually does require such support, Fed. R. Civ. P. 56. A motion for Judgment on the Pleadings may be converted to a motion for Summary Judgment if "matters outside the pleadings are presented to and not excluded by the court." Id. Although the defendant did not come forward with any

evidence, the plaintiff, in her response to defendant's motion, did present records and deposition testimony in support of her arguments. Defendant then cited to plaintiff's appendix in its reply to plaintiff's response. I thus considered this motion as one for Summary Judgment.

Both plaintiff, in the complaint, and defendant, in a counterclaim, make claims for breach of a duty of good faith and fair dealing and make claims for violation of Pennsylvania's statute titled "Actions of Insurance Policies," 42 Pa. C.S.A. § 8371. Although listed as one combined count in both complaints, I considered each as making two claims: one for breach of the contractual duty and one for violation of the statute.

In considering a motion for summary judgment, the court does not resolve factual disputes or make credibility determinations, and must view facts and inferences in the light most favorable to the party opposing the motion. Celotex Corp. v. Catrett, 477 U.S. 317 (1986); Siegel Transfer, Inc. v. Carrier Express, Inc., 54 F.3d 1125, 1127 (3d Cir. 1995). Because there is a genuine issue of material fact as to defendant's alleged bad faith delay in paying proceeds due and owing on an insurance contract between the parties, the defendant's motion must be denied.

Plaintiff asserts defendant's breach of a contractual duty of good faith and fair dealing. The Superior Court of Pennsylvania described this duty as one "to do and perform those

things that according to reason and justice [each party] should do in order to carry out the purpose for which the contract was made and to refrain from doing anything that would destroy or injure the other party's right to receive the fruits of the contract." Somers v. Somers, 613 A.2d 1211, 1214 (Pa. Super. 1992). This duty is owed by both parties to a contract. Greater New York Mut. Ins. Co. v. North River Ins. Co., 872 F. Supp. 1403, 1408 (E.D. Pa. 1995), aff'd, 85 F.3d 1088, 1094 (3d Cir. 1996); see discussion infra of defendant's counterclaim. Plaintiff also asserts her claim of bad faith under 42 Pa. C.S.A. § 8371 (Supp. 1995), which provides that:

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 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 attorneys fees against the insurer.

The duty of good faith and fair dealing underlies § 8371; the statute provides to an insured additional remedies not available under contract law. See Klinger v. State Farm Mutual Auto. Ins. Co., 895 F. Supp. 709, 715 (E.D. Pa. 1995). To succeed on a claim under § 8371, the insured must establish by clear and convincing evidence that the insurer did not have a reasonable basis for denying benefits under the policy and that it knew or recklessly disregarded its lack of reasonable basis. Terletsky v. Prudential Prop. & Cas. Ins. Co., 649 A.2d 680, 688 (Pa. Super. 1994), appeal den., 659 A.2d 560 (Pa. 1995).

In its motion, defendant contends that it had a reasonable basis for the delay because it had not received certain medical records relating to plaintiff's wrist problems before the accident. The defendant has not adequately demonstrated the lack of a genuine issue of material fact on this issue. As evidence of its alleged reasonable basis for delaying payment, defendant says that both a claims handler and counsel for Prudential have testified that they did not believe plaintiff ever substantiated that her claim was worth the policy limits. Yet defendant did not submit copies of deposition transcripts to support these statements, and they are not found in the material plaintiff submitted, so the court is unable to consider these alleged statements as evidence in support of the motion for summary judgment.

Plaintiff counters that much of her claim was for undisputed injuries and lost work, not related to the wrist injury, and that defendant had adequate medical information to determine that the accident did cause her wrist injury. She has submitted deposition transcripts and copies of Prudential's claims log to support her claims. Plaintiff also argues that Prudential's delay in tendering payment for the undisputed amounts, as well as numerous other actions, such as repeatedly putting off the independent medical exam it claimed was necessary before it could assess her claim and denying liability under the policy after earlier admitting such liability, show Prudential's bad faith. Regardless of the fact that defendant eventually paid the policy limits, plaintiff argues that defendant had a good-faith duty to pay more promptly the undisputed amount or to make an offer of settlement.

The issue is whether a reasonable jury could find that defendant's refusal to pay unconditionally the undisputed amount constitutes bad faith. Viewing the facts and all reasonable inferences drawn therefrom in the light most favorable to the plaintiff, I conclude that one could.

In an analogous case, Klinger, 895 F. Supp 709 (M.D. Pa. 1995), the court held that a reasonable jury could conclude that State Farm's failure to make an offer of settlement prior to an arbitration hearing constituted bad faith. The court concluded

that where there was no pending legal issue as to liability, but only as to the amount owed, a reasonable jury could find that State Farm's failure to offer any settlement was bad faith. By contrast, in Kauffman v. AETNA Casualty and Surety Co., 794 F. Supp. 137 (E.D. Pa. 1992), the court found that AETNA did not act in bad faith, where it paid an undisputed portion of an insured's benefits, but did not pay the disputed amount until after it had lost its case before the Third Circuit.

In this case, defendant failed to pay promptly and unconditionally money due for the undisputed injuries and waited until after plaintiff's bills forced her into bankruptcy before making any offer. Defendant contends that it was per se reasonable for it to wait until all its concerns had been resolved before making an offer of settlement. I disagree. It is for a jury to decide whether an insurance company acts in bad faith when it exerts this kind of pressure on an insured. Further, as the Klinger court concluded, the ultimate merit of the disputed claim does not necessarily determine, ex post, the reasonableness of this tactic.

Counterclaims

Defendant has also filed a counterclaim in this suit, claiming violation of 42 Pa. C.S.A. § 8371 and a breach of the duty of good faith and fair dealing, based upon plaintiff's delay

in producing copies of medical records. Defendant requests damages for the additional time and effort that the plaintiff's breach of said duty caused defendant, and also asks for attorneys' fees and costs. Plaintiff has brought a motion arguing that defendant has failed to state a claim on which relief can be granted.

Plaintiff first argues that 42 Pa. C.S.A. § 8371 only creates a claim for insureds against insurers. Defendant does not make any counter-argument and in fact, completely fails to address this element of the counterclaim. Reading the statute in question, I find that it does explicitly grant relief only to an insured. Accordingly, I shall grant judgment on the pleadings to plaintiff on the claim under 42 Pa. C.S.A. § 8371.

Plaintiff also argues that defendant has failed to state a claim on which relief may be granted because Pennsylvania does not recognize a common-law duty of good faith in contractual dealings between an insured and an insurer. Plaintiff points to several cases to support her argument that such a claim is recognized only when a fiduciary duty exists, and that an insured owes no such duty to an insurer. See Northeast Jet Ctr. Ltd. v. LeHigh-Northampton Airport Auth., No. Civ. A. 96-1262, 1996 WL 442784, at *18 (E.D. Pa. Aug. 1, 1996). Defendant argues that the Third Circuit has held that Pennsylvania courts would recognize such a claim. Defendant cites numerous cases which

explicitly hold that, as between an insurer and an insured, there is on both parties a contractual duty of good faith. See Jung v. Nationwide Mutual Fire Ins. Co., 949 F. Supp. 353, 360 (E.D. Pa. 1997); Greater New York, 872 F. Supp. at 1408; Garvey v. National Grange Mut. Ins. Co., No. Civ. A. 95-0019, 1995 WL 461228, (E.D. Pa. Aug. 2, 1995). There appears to be a split in the courts, as some of the cases plaintiff cites do indeed hold that a cause of action for breach of a duty of good faith must be limited to situations where there is a fiduciary duty between the parties.

Since the Pennsylvania Supreme Court has not ruled on the issue of a duty of good faith, I must predict how that court would rule. Rolick w. Collins Pine Co., 925 F.2d 661, 664 (3d Cir. 1991). "Proper regard must also be given to the decisions of [Pennsylvania's] intermediate appellate courts." Id. The Pennsylvania Superior Court has ruled numerous times that Pennsylvania has adopted the rule found in § 205 Restatement of Contracts, that each party to a contract owes a general duty of good faith and fair dealing in its performance. E.g. Liazis v. Kosta Inc., 618 A.2d 450, 454 (Pa. Super. 1992); see generally Seal v. Riverside Fed. Sav. Bank, 825 F. Supp. 686, 698 (E.D. Pa. 1993). The Third Circuit has also ruled that Pennsylvania courts would adopt such a rule. Greater New York, 85 F.3d 1088, 1094 (3d Cir. 1996). Several of these cases have dealt explicitly with the issue of a duty of good faith and fair dealing in

insurance contracts. Jung, 949 F. Supp. at 358; Garvey, 1995 WL 461228, at *2; Greater New York, 872 F. Supp. at 1408. The cases plaintiff cites, on the other hand, all concern business relationships other than that of insurer and insured.

Plaintiff also cites D'Ambrosio v. Pennsylvania Nat. Mut. Cas. Ins. Co. as support for the proposition that Pennsylvania does not recognize a common-law duty of good faith. 431 A.2d 966 (Pa. 1981). What D'Ambrosio actually holds, however, is that there is no action in tort for such a breach. There is a cause of action under Pennsylvania law for breach of the contractual duty of good faith and fair dealing. Jung, 949 F. Supp. at 358; see also New Concept Beauty Academy v. Nationwide Mutual Ins. Co., No. Civ. A. 97-5406, 1997 WL 746203, *2 (E.D. Pa. Dec. 1, 1997). I thus find that as concerns a contract claim for breach of duty of good faith in an insurance contract, Pennsylvania would recognize such a duty. Defendant has adequately alleged such a claim: that plaintiff failed to act in good faith by repeatedly failing to provide certain requested medical documents while at the same time demanding that defendant pay the policy limits. Accordingly, the plaintiff's motion for judgment on the pleadings as to this claim is denied.

Damages

Defendant asks for damages for the additional expense, costs

and attorney's fees that plaintiff's alleged bad faith caused it to incur. Plaintiff claims defendant has not suffered any damages and is not entitled to attorney's fees in a breach of contractual duty case. Under Pennsylvania law, breach of the duty of good faith and fair dealing is a contract claim, and so a claimant may recover contract damages. Woody v. State Farm Fire and Cas. Co., 965 F. Supp. 691, 693 (E.D. Pa. 1997). The non-breaching party may therefore recover damages causally related to the breach if the damages can be proved with reasonable certainty and would ordinarily result from the breach or were reasonably foreseeable at the time of the contract. Trans Penn Wax Corp. v. McCandless, 50 F.3d 217, 231 (3d Cir. 1995) (citing Logan v. Mirror Print. Co., 600 A.2d 225, 226 (Pa. Super. 1991)). If defendant is successful in proving that plaintiff violated her duty of good faith and fair dealing, defendant may recover such damages. Of course, the same applies to plaintiff's contractual claim.

Pennsylvania does not have a statutory entitlement to attorneys fees in contract actions, but rather leaves the parties to "bear their own expenses in the absence of an agreement to the contrary." Aircraft Guar. Corp. v. Strato-Lift, Inc., 951 F. Supp. 73, 77 (E.D. Pa. 1997); see also Corace v. Balint, 210 A.2d 882, 887 (Pa. 1965). Defendant has not claimed there is any such agreement here. Accordingly, defendant's demand for attorneys

fees is stricken.

An order follows.