IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

PRIME MEDICA ASSOCIATES	:	NOVEMBER TERM 2004
Plaintiff	:	
	:	No. 0621
v.	:	
	:	(Commerce Program)
VALLEY FORGE INSURANCE COMPANY, t/a CNA, *et al*.	:	
Defendants	:	Superior Court Docket
	:	No. 3279 EDA 2006
		No. 3331 EDA 2006

O P I N I O N

Albert W. Sheppard, Jr. J. ……April 26, 2007

This Opinion is submitted relative to the cross-appeals of plaintiff, Prime Medica Associates ("plaintiff") and defendant Valley Forge Insurance Company ("defendant") of this court's Order of October 18, 2006. In that Order this court denied plaintiff's Post-Trial Motions for pre-judgment interest, and for punitive damages and attorney's fees. This court had previously granted, in part, defendant's Motion for Remittitur and ordered plaintiff's damages reduced from $4 million to $2,049,000. Plaintiff also appeals this Order.

Further, in that Order the court denied defendant's Post-Trial Motions for Judgment J. N. O. V. or, in the alternative for a New Trial.

For the reasons discussed, this court submits that its decision should be affirmed.

BACKGROUND

Plaintiff[1] purchased an office building at 207 North Broad Street in Philadelphia in 1974. In September 1984, plaintiff entered into a lease agreement with Medic. Medic occupied four and a half floors of the building and used the space as a diagnostic imaging center. Medic made significant structural changes to the office space in order to accommodate its imaging equipment, which included a CT scanner and an MRI unit. The MRI unit was surrounded by three-inch thick steel walls, and there were lead-lined walls surrounding the CT scanner. Plaintiff testified that he spent $1.4 million to renovate the office building to accommodate this equipment. Upon termination of the lease with plaintiff, Medic had the option of either leaving the equipment in operating order, or replacing it with like kind. Alternatively, if Medic chose to remove the equipment, it had to restore the space to its original condition. In November 1998, Tenet Healthcare Systems took over the lease from Medic.

In 1999, plaintiff became insured by defendant. In November 2000, Tenet notified plaintiff that they intended to terminate the lease on March 30, 2001. On March 15, 2001, Doctor Lorenzo, the principal of plaintiff, testified that he went into the space occupied by Tenet and discovered that Tenet had abandoned the property. Tenet had removed some of the medical equipment but failed to remove the MRI unit and the CT scanner. Plaintiff testified that the space was left in shambles. On April 16, 2001 plaintiff's building was vandalized and additional medical equipment was taken. Plaintiff was told by Joel Fagerstrom, chief operating officer of Hahnemann University Hospital,

[1] The named plaintiff is Prime Medica Associates. However, the word "plaintiff" will also apply to Doctor Lorenzo, the sole owner of Prime Medica Associates.

that Tenet's service company, Biomagnetics, was responsible for removing this equipment. Plaintiff did not report this incident to the police.

Tenet ceased paying rent on April 1, 2001. Plaintiff was unsuccessful in his attempts to re-lease the space vacated by Tenet. Plaintiff filed suit against Tenet on September 15, 2001 for damages arising from the removal of the medical equipment, the subsequent vandalism of the property, and for interruption of rentability. In the meantime, plaintiff had become unable to maintain his mortgage payments for the building. The property was foreclosed upon and went to sheriff's sale on November 12, 2002 where it sold for $1.8 million. During the foreclosure proceedings, plaintiff was represented by George Milner. Milner formally advised defendant of the claim for damages on May 22, 2002, a little more than one year from the date of plaintiff's loss.

On May 30, 2003, the jury in the Tenet litigation awarded plaintiff damages for business interruption and for cleanup and removal of the medical imaging equipment. However, the amount awarded by that jury was well short of the amount necessary to cover plaintiff's losses. As a result, plaintiff instituted the instant litigation.[2]

As noted, plaintiff submitted the claims for damages through Mr. Milner. The claims were investigated and ultimately, defendant denied coverage on November 5, 2003.

[2] In addition to the damage resulting from the removal of the medical equipment, plaintiff became aware of water damage to the building. On April 27, 2001, plaintiff filed a notice of property loss with his insurance broker, and was subsequently contacted by James White, an insurance adjustor. Mr. White met plaintiff on May 8, 2001, and toured and photographed the space vacated by Tenet. Ultimately, there were three water damage claims filed with the insurance company due to a water main break, a leak from the parking lot, and a leak from the roof of the building. The damages claims for the water main break and for the leak from the parking lot were denied.

Plaintiff instituted this lawsuit in November 2004. After a comprehensive trial, the jury returned a verdict in favor of plaintiff in the amount of $4 million.

Following the verdict the court conducted a bench trial relative to plaintiff's bad faith claim. The attorneys agreed that the court could incorporate by reference any trial testimony pertinent to the bad faith claim.

This court found this to be a very difficult decision in that it believed that the carrier had **not** acted appropriately. At the same time, the court wrestled with the conclusion that the carrier put forth a reasonable basis for its decision to deny coverage. After much soul searching, this court denied plaintiff's bad faith claim.

Both sides filed comprehensive Post-Trial Motions. The decisions of the court - - that, after all was said and done, a verdict of $2,049,000. should be entered for plaintiff - - pleased no one. These appeals ensued and numerous issues have been raised by the parties.

DISCUSSION

I. DEFENDANT'S APPEAL

A. This Court Did Not Err in Denying Defendant's Motion for a New Trial.[3]

Defendant argues that this court erred in denying its post-verdict motion for a new trial. Defendant cites three grounds in support of its position: (a) that plaintiff's expert, Mr. Milner, impermissibly testified and made comments in the presence of the jury regarding defendant's alleged bad faith, (b) that the damages awarded by the jury were

[3] This court finds that there is no merit to the defense claim that the carrier is entitled to a Judgment N.O.V. The test necessary for a finding of Judgment N.O.V. has not been met. Accordingly, the court will address, only, the new trial claim.

against the clear weight of the evidence,[4] and, (c) that plaintiff's valuation expert was improperly permitted to testify as to matters without a proper foundation or basis to do so.

The decision to grant a new trial is well within the discretion of the trial court.[5] "A new trial will be granted on the grounds that the verdict is against the weight of the evidence where the verdict is so contrary to the evidence it shocks one's sense of justice….[a]n appellant is not entitled to a new trial where the evidence is conflicting and the finder of fact could have decided either way."[6] An appellate court will not reverse the trial court's decision to deny a motion for a new trial absent an abuse of discretion or an error of law that controlled the outcome of the case.[7] "[A]n abuse of discretion may not be found merely because the appellate court might have reached a different conclusion, but requires a showing of manifest unreasonableness, or partiality, prejudice, bias, or ill-will, or such lack of support as to be clearly erroneous."[8]

(a) The Testimony of Plaintiff's Expert Mr. Milner Does Not Require A New Trial.

The expert did not testify in any way that would suggest such prejudice that would require a new trial.

At the outset, it must be noted that in granting one of defendant's Motions in Limine, the court precluded Mr. Milner from stating that defendant had engaged in bad faith. The court believes that Mr. Milner did as he was told. A fair reading of his

[4] In this connection defendant contends that consequental damages are not recoverable in the case involving first-party claims. This court disagrees and believes this an important issue. More on this later.
[5] Fanning v. Davne, 795 A.2d 388, 393 (Pa. Super. 2002).
[6] Id.
[7] Id.
[8] Id.

testimony does not result in a conclusion that any of his testimony was prejudicial. This claim by defendant is meritless.

(b) The Jury Verdict as Remitted Should Stand.

A major complaint of defendant is that this court erred in denying its Motion for a New Trial on the ground that the jury awarded damages against the clear weight of the evidence. The jury awarded plaintiff $4 million in damages. It was abundantly clear that the jury did not like the conduct of, and was upset with the defendant. In his closing, counsel for the plaintiff put the number $3.3 million on the board. Yet, the jury awarded $4 million. Certainly, the jury engaged in unreasonable speculation in awarding these damages.

In response to defendant's Motion, the court reduced the verdict to $2,049,000 - - the pertinent policy limits less the $1,000 deductible - - and it felt comfortable doing so. Despite the fact that the jury's damage award of $4 million was excessive and speculative, there was sufficient evidence to support a substantial verdict. The jury heard evidence of the significant amount of damage to plaintiff's property that occurred when Tenet abandoned its office space.[9] Plaintiff testified credibly regarding his unsuccessful attempts to re-lease the office space vacated by Tenet.[10] There was credible evidence that because plaintiff could not lease the space, he became unable to maintain his mortgage payments, and consequently lost his property at a sheriff's sale.[11]

It was the jury's responsibility to evaluate the evidence and reach a verdict. Both plaintiff and defendant were given the unfettered opportunity to cross-examine the witnesses. Ultimately, the jury determined that there was sufficient evidence to find that

[9] See e.g., N.T. July 27, 2006 at 66:15-67:7, 85:3-100:15, 165:2-14, 207:18-208:19.
[10] See N.T. July 27, 2006 at 67:16-23, 146:19-147:6.
[11] See N.T. July 27, 2006 at 118:8-16.

plaintiff was entitled to damages for defendant's failure to cover plaintiff's loss under the terms of the insurance policy.[12] Because the jury's determination as reduced by the court was "not so contrary to the evidence as to shock one's sense of justice,"[13] this court properly denied defendant's motion for a new trial based on this claim.

These considerations presented the court with a difficult and important issue - - that is, whether in a first-party insurance claim, the insured-plaintiff is to be denied the right to obtain consequential damages. Defendant urges that this is the law and that the insured is relegated to the statutory claim for bad faith damages.

This court submits that this should **not** be so. Here, this court, somewhat reluctantly did not find bad faith. But, the court agreed with the jury that the carrier was negligent and plain wrong in its decision, thereby causing damages to the insured. Under these conditions consequential damages should be recoverable. A comprehensive study of this carrier's conduct leads to a conclusion that the carrier was so close to acting in bad faith that it was teetering with one leg hanging over the bad faith abyss. This court submits that there exists no appropriate policy reason to deny **this** plaintiff in **this** case the right to sue for consequential damages.

The undersigned hopes that the Superior Court will agree and will say so.

(c) The Court Did Not Err In Permitting Plaintiff's Evaluation Expert to Testify.

Defendant objected to the testimony of Daniel Connell, plaintiff's valuation expert. Defendant argues that the court failed to exercise its role as "gatekeeper" by permitting Mr. Connell to testify.

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[12] Defendant argues that plaintiff's loss did not result from physical loss or damage to covered property under the policy. This court finds that the property was covered under the policy.
[13] Fanning, 795 A.2d at 394.

> It is well established in this Commonwealth that the standard for qualification of an expert witness is a liberal one. The test to be applied when qualifying an expert witness is whether the witness has any reasonable pretension to specialized knowledge on the subject under investigation. If he does, he may testify and the weight to be given to such testimony is for the trier of fact to determine. It is also well established that a witness may be qualified to render an expert opinion based on training and experience.[14]

The trial court is in the best position to evaluate the manner in which the evidence is presented and determine its effect upon the jury.[15] Here, the court determined that Mr. Connell's expert testimony was admissible, particularly taking into account his years of experience in the imaging equipment industry. Moreover, defendant had a fair opportunity to cross-examine the witness. The court's decision to admit the witness' testimony and permit the jury to assess its value was a proper one.

(d) Plaintiff's Claim Is Not Barred by the Doctrine of *Res Judicata*.

Defendant asserts that plaintiff's lawsuit was barred by the doctrine of *res judicata*. This court disagrees. The doctrine of *res judicata* precludes a claimant from asserting the same cause of action in a later lawsuit. The two actions must have the following common elements: identity of the thing sued upon; identity of the cause of action; identity of the parties; and, identity of the capacity of the parties.[16] In September 2001, plaintiff filed suit against Tenet Healthcare for Tenet's breach of its lease with plaintiff. Plaintiff had to sue Tenet first to mitigate its damages. In this case, plaintiff sued its insurance company for refusing to pay damages under the terms of plaintiff's insurance policy. The parties to these actions were not the same, nor does plaintiff make

[14] Miller v. Brass Rail Tavern, Inc., 541 Pa. 474, 480-481; 664 A.2d 525, 528 (1995).
[15] Morrison v. Commonwealth of Pennsylvania Dep't of Pub. Welfare, 538 Pa. 122, 135; 646 A.2d 565, 572 (1994).
[16] Kelly v. Kelly, 887 A.2d 788, 792 (Pa. Super. 2005).

the same claim against them. Indeed, plaintiff seeks here to recover those damages he sustained but could not recover in the Tenet litigation. Plaintiff's claim is not barred by the doctrine of *res judicata*.

(e) Plaintiff's Claim Is Not Barred For Failure to Comply With the Policy Provisions.

Defendant contends that plaintiff's lawsuit is barred because (a) plaintiff failed to timely notify defendant of its loss; (b) plaintiff did not notify the police of the suspected theft of its property; (c) plaintiff did not mitigate its damages; and, (d) plaintiff failed to bring suit within two years from the date of plaintiff's loss as required under the policy.

First, defendant argues that plaintiff's claim is barred as a matter of law for failure to promptly notify defendant of its loss. In Brakeman v. Potomac Insurance Company, our Supreme Court held that "where an insurance company seeks to be relieved of its obligations under a liability insurance policy on the ground of late notice, the insurance company will be required to prove that the notice provision was in fact breached and that the breach resulted in prejudice to its position."[17] The Court's reasoning is persuasive.

> Allowing an insurance company, which has collected full premiums for coverage, to refuse compensation to an…insured on the ground of late notice, where it is not shown timely notice would have put the company in a more favorable position, is unduly severe and inequitable. Moreover, we do not think such a result comports with the reasonable expectations of those who purchase insurance policies.[18]

Defendant claims that it was prejudiced by plaintiff's failure to notify defendant of its loss because had plaintiff done so, defendant would have been within its rights to require

[17] Brakeman v. Potomac Ins. Co., 472 Pa. 66, 76-77; 371 A.2d 193, 198 (1977); see also Perry v. Middle Atlantic Lumbermans Assoc., 373 Pa. Super. 554, 571; 542 A.2d 81, 89 (Pa. Super. 1988) (noting that Brakeman's prejudice requirement has been extended to other types of insurance contracts).

[18] Brakeman, 472 Pa. at 76.

plaintiff to accept the return of the damaged equipment as part of plaintiff's duty to mitigate its damages.

In a recent decision involving an insurance carrier's right to subrogation and the extent to which the insurance carrier may have been prejudiced by late notice of a claim, the Superior Court stated that "if a claimant defeats a viable subrogation right, this will provide the prejudice needed for the insurer to deny coverage."[19] In this case, defendant fails to show that it was prejudiced by plaintiff's delay in filing its claim. Plaintiff's claim does not involve an insurance carrier's right to subrogation. It is simply a claim for damages for loss of medical equipment. Moreover, Nick Bozovich, an insurance adjustor for Valley Forge who worked on plaintiff's claim, testified that there is no set time limit within which an insured must report a claim, and that a one-year delay in reporting a claim would not necessarily be unreasonable.[20]

Second, defendant argues that plaintiff failed to notify the police of the suspected theft of its property as required by the policy, and cites State Farm Mutual Automobile Ins. Co. v. Foster[21] in support of its argument. In Foster, State Farm denied uninsured motorist benefits after Foster failed to report an accident to the police as required by both State Farm's insurance policy and the Motor Vehicle Financial Responsibility Law (MVFRL).[22] The question presented was "whether an insurer must demonstrate prejudice, pursuant to Brakeman, when the insured has failed to report the accident to the police ***as required by § 1702 of the MVFRL***" (emphasis added).[23] The Court found that

[19] American States Ins. Co. v. Braheem, 2007 Pa. Super. 23, *P13 (remanding the case to the trial court to determine if American States was prejudiced by the loss of its subrogation rights).
[20] See N.T. August 1, 2006 at 109:24-111:2.
[21] State Farm Mutual Automobile Ins. Co. v. Foster, 585 Pa. 529; 889 A.2d 78 (2005).
[22] 75 Pa.C.S. §§ 1701-1799.7.
[23] Foster, 889 A.2d at 80.

Brakeman did not apply, citing different purposes behind the reporting requirements in Brakeman, which is designed to protect the private interest of the insurer, and the MVFRL, which protects the public's interest in affordable automobile insurance.[24] Thus, the reporting requirement found in the MVFRL controlled the outcome of the case. In the instant case, Brakeman is the appropriate standard to apply, and because defendant cannot show prejudice due to untimely notice of plaintiff's claim, plaintiff's lawsuit is not barred for failure to report its loss to the police.[25]

Third, defendant argues that if plaintiff had notified defendant of its loss in a timely manner, defendant would have been able to require plaintiff to mitigate its damages. Dr. Lorenzo testified that when he complained to Joel Fagerstrom, chief operating officer of Hahnemann University Hospital, about the damage that had been done to the building in the course of removing the medical equipment, Mr. Fagerstrom informed him that Tenet no longer had possession of the medical equipment from plaintiff's building. Pieces of the equipment had been sent to other Tenet offices, and furthermore, Mr. Fagerstrom stated that the parts had "no value in the marketplace."[26]

Importantly, this court believes that plaintiff tried appropriately to mitigate its damages. Plaintiff testified credibly that he tried to negotiate with Tenet and tried to re-rent the space vacated by Tenet.[27] Plaintiff brought suit against Tenet in September 2001 to recover damages against Tenet for breach of its lease. Taking this into account and in

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[24] Id. at 81.
[25] Plaintiff testified that he spoke to Tony Melchiorre, who was the head of a criminal division for the City of Philadelphia and also a patient of plaintiff, about the vandalism incident. Mr. Melchiorre told plaintiff that he did not think this incident was a criminal matter. He believed it was a landlord/tenant dispute. Plaintiff also testified that he felt that, because Tenet was one of the City's largest employers, the police would not be aggressive in investigating plaintiff's vandalism claim. See N.T. July 27, 2006 at 135:6-137-5.
[26] See N.T. July 31, 2006 at 104:22-106:7.
[27] See N.T. July 27, 2006 at 67:16-23, 102:17-21, 146:19-147:6.

combination with plaintiff's testimony, even if defendant had earlier notice of plaintiff's claim, it is not clear that there would have been any additional opportunity for plaintiff to further mitigate its damages.

Lastly, defendant urges that plaintiff's claim is barred for failure to initiate suit within the time limit specified in the policy. Under the terms of the policy, plaintiff was required to bring suit against defendant within two years after the date on which the physical loss or damage occurred. Such provisions have been approved by our Supreme Court.[28] However, an insurer can effectively toll this limitations provision "if, by its actions, it induces an insured to forbear bringing suit within the prescribed period."[29]

In this case, plaintiff was induced to forbear bringing a lawsuit against defendant within the two-year period in that defendant was still in the process of investigating plaintiff's claim. Plaintiff became aware of the loss to its building and medical equipment in March or April 2001. It was not reported to defendant until May 2002. Defendant denied plaintiff's claim on November 5, 2003. According to defendant's argument, plaintiff should have initiated this lawsuit no later than April 2003.

Defendant contends that plaintiff should have known to toll the running of the suit limitation provision. However, Mr. Bozovich testified that even if plaintiff had made such a request, there was no guarantee that it would have been granted.[30] In addition, George Milner, plaintiff's insurance expert, testified that in 42 years of practice, he could not recall an insurance company invoking a suit limitation clause where, as in this case,

[28] Samuels v. Blue Cross of Greater Philadelphia, 592 A.2d 1310 (Pa. Super.1991); see also Terpeluk v. Ins. Co. of North America, 150 A.2d 558, 561 (Pa. Super.1959).
[29] Samuels, 592 A.2d at 1312.
[30] See N.T. August 1, 2006 at 40:9-41:4.

the insurance company continued to request information from the insured.[31] Moreover, it would have been entirely unreasonable for plaintiff to strictly adhere to the policy provisions and bring suit against defendant before defendant made a decision regarding plaintiff's insurance claim. Given that defendant has failed to show it was prejudiced by plaintiff's delay in filing its claim, that there was no meaningful way for plaintiff to mitigate its damages and, that plaintiff was induced to forbear from bringing a lawsuit against defendant, plaintiff's lawsuit is not barred by the terms of the insurance policy.

II. PLAINTIFF'S APPEAL

A. Plaintiff Is Not Entitled to Pre-Judgment Interest, Punitive Damage or Attorney Fees.

In Pennsylvania, pre-judgment interest may be awarded to a plaintiff as a matter of right in breach of contract cases. The right to interest accrues once payment is withheld "after it has been the duty of the debtor to make such payment."[32] Pennsylvania Courts have adopted the Restatement (Second) of Contracts §354 as the standard to employ when determining the award of pre-judgment interest.[33] Section 354 states:

> (1) If the breach consists of a failure to pay a definite sum in money or to render a performance with fixed or ascertainable monetary value, interest is recoverable from the time for performance on the amount due less all deductions to which the party in breach is entitled. (2) In any other case, such interest may be allowed as justice requires on the amount that would have been just compensation had it been paid when performance was due.[34]

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[31] See N.T. July 27, 2006 at 229:15-230:12, 230:22-25.
[32] Montgomery County v. Microvote Corp. et al., 2001 U.S. Dist. LEXIS 8737, at *13 (E.D. Pa. June 25, 2001).
[33] Id. at *14.
[34] See Restatement (Second) of Contracts §354.

Thus, a plaintiff must seek a certain, liquidated sum of damages: specifically, damages that were either stated in the contract or ascertainable by application of a formula stated in the contract.[35]

Defendant maintains that damages were neither liquidated nor certain. This was clearly reflected in the jury's decision to award plaintiff $4 million in damages, an amount that was significantly greater than the $3.3 million that plaintiff requested. This court agrees. At trial, the jury was presented with testimony regarding damages that was **not** specific enough to warrant the award of pre-judgment interest.[36] As in Vanalt, plaintiff relied upon the testimony of several experts to establish its claim for damages. Plaintiff's real estate expert gave multiple estimates of the building's worth. The jury heard testimony regarding the highest offer made for the building - $2 million - as well as the final amount of sale - $1.8 million. In closing, plaintiff instructed the jury to disregard testimony regarding damage to the medical equipment as those damages had been recovered through the Tenet litigation. The jury's confusion as to the amount of damages is clearly reflected in the excessive verdict it awarded plaintiff. Plaintiff's failure to request specific, liquidated damages precludes this court from awarding pre-judgment interest.

[35] Krain Outdoor Displays, Inc. v. Tennessee Continental Corp., 1986 U.S. Dist. LEXIS 21740, at *10 (E.D. Pa. Aug. 12, 1986).
[36] See Vanalt Electrical Construction, Inc. v. Selco Manufacturing Corp., 2005 U.S. Dist. LEXIS 33151 (E.D. Pa. Dec. 15, 2005) (denying pre-judgment interest where damages were uncertain and required detailed testimony by plaintiff at trial); Montgomery County, 2001 U.S. Dist. LEXIS 8737 (denying pre-judgment interest where the court could not determine the method by which the jury awarded damages).

A court, in its discretion, may award pre-judgment interest taking into account several factors:

> 1) the diligence of the plaintiff in prosecuting the action; 2) whether the defendants have been unjustly enriched; 3) whether the award would be compensatory; and 4) whether there are countervailing equitable considerations which militate against an award of prejudgment interest.[37]

Plaintiff argues that because defendants failed to pay under the insurance policy to settle plaintiff's claim, defendants were unjustly enriched. The court disagrees. The "mere fact [that defendant] had the use of the money rightfully paid it under the terms of the contract does not indicate that it was unjustly enriched."[38] Accordingly, pre-judgment interest was properly denied.

Finally, since this court did not make a finding of bad faith, the denial of plaintiff's request for punitive damages and attorney's fees was proper. There is no basis requiring this court to grant those claims for punitive damages and lawyer fees.

CONCLUSION

For the reasons discussed, this court respectfully submits that its Order of October 18, 2006 should be affirmed.

BY THE COURT,

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ALBERT W. SHEPPARD JR., J.

[37] Krain, 1986 U.S. Dist. LEXIS 21740 at *11.
[38] Id. at *12; Montgomery County, 2001 U.S. Dist. LEXIS 8737 at **15, 16.