IN THE COURT OF COMMON PLEAS
OF PHILDELPHIA COUNTY

CIVIL TRIAL DIVISION

GEORGE GRIGOS, and ARAMINGO DINER, INC.,	:	DECEMBER TERM, 2008
Plaintiff,	:	NO. 01907
v.	:	
CERTAIN UNDERWRITERS AT LLOYDS, LONDON subscribing to policy No. WAPC20060221-056-06.	:	COMMERCE PROGRAM
Defendant.	:	CONTROL NO. 10090785

FILED
DEC 16 2010
S. HART
CIVIL ADMINISTRATION

ORDER

AND NOW, this 15TH day of Dec, 2010, upon consideration of Defendant's Motion for Partial Summary Judgment and Plaintiff's Cross Motions for Summary Judgment, it is hereby **ORDERED** that Defendant's Motion is **DENIED** and Plaintiff's Motion is **GRANTED** in part as follows.

On Plaintiff's breach of contract claim, Defendant having paid all sums due under the insurance contract, summary judgment is **GRANTED** in the amount of $0. On Plaintiff's statutory bad faith claim, summary judgment is **GRANTED.** It is further **ORDERED** that this case shall proceed to trial for assessment of damages on the statutory bad faith claim on January 6, 2011 at 9:30 a.m. in Courtroom 246. Plaintiff's Motion for Summary Judgment is **DENIED** as to all other claims.

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12/15/10
DATE

BY THE COURT

MARK I. BERNSTEIN, J.

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OPINION

On December 10, 2008, plaintiff Aramingo Diner, Inc. commenced this action for breach of contract and insurer bad faith based on an insurance policy issued by defendant "Those Certain Underwriters at Lloyd's, London who subscribe to Certificate Number WAPC20060221-056-06." The lawsuit concerned a fire, a covered cause of loss, which occurred at the Aramingo Diner on December 14, 2006. On September 7, 2010, defendant moved for partial summary judgment. On October 4, 2010, plaintiff responded and moved for summary judgment.[1]

As a result of the fire plaintiff sustained damage to its building, damage to its business property, and loss of income while the diner was forced to close. Plaintiff was insured by defendant under an insurance policy which forms the basis of this lawsuit. The policy required that defendant pay for "direct physical loss of or damage to Covered property . . . caused by or resulting from any Covered Cause of Loss." Covered property included plaintiff's building and "business personal property." Business personal property included "Stock," defined as

[1] In a letter to the Court dated November 2, 2010, defendant waived any argument that plaintiffs' cross-motion for summary judgment was untimely and consented to this Court's review of the motion on the merits.

"merchandise held in storage or for sale, raw materials and in-process or finished goods." The policy defined covered causes of loss as any risk of direct physical loss that did not fall within an enumerated exclusion or limitation. Fire was not excluded and thus was a covered cause of loss. Building damage was covered up to a $1,000,000 limit of liability and business personal property was covered up to a $400,000 limit of liability.

The policy also covered plaintiff's loss of business income if the business had to close because of property damage caused by a "Covered Cause of Loss." Loss of business income was covered up to a $300,000 limit of liability. Plaintiff also paid for an "Enhanced Endorsement" which provided $25,000 of additional coverage for "Spoilage of Food Stuff from Covered Perils."

The day after the fire, plaintiff notified defendant about the fire and the claims it would be making. Defendant's American representative, Walnut Advisory, assigned all claims handling to Raphael & Associates. Raphael & Associates assigned Kenneth Holdom to adjust the claims. Plaintiff could not contact defendant directly. Defendant required that all communications go through Holdom.[2]

On January 9, 2007, plaintiff's public adjuster, Young Adjustment Company ("Young"), told Holdom that the policy's "Business Personal Property" coverage covered all of plaintiff's food loss. On January 17, 2007, Young sent Holdom a business income loss claim for the first thirty (30) days totaling $83,091, and requested a $50,000 advance.[3]

From the start, Holdom hindered plaintiff in presenting its claims. On January 18, 2007, Holdom wrote Young telling it that the policy's "Business Personal Property" coverage did not

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[2] Letter dated December 15, 2006 attached at Def.'s Mot. For Summ. J., Ex. 3. Although defendant purports to disassociate its behavior from Holdom's this position is absurd. It is believed defendant has abandoned this position.

[3] Letter dated January 17, 2007 attached at Def.'s Mot. For Summ. J., Ex. 10.

cover food "damaged as a result of decay and deterioration," claiming that "[d]ecay and deterioration are exclusions of the policy."[4] According to Holdom, food loss was only covered by the policy's "Enhancement" coverage, up to a $25,000 limit of liability. In fact, the policy did not contain any decay or deterioration exclusion. In fact, the "enhancement coverage" was not exclusive but actually added to the $400,000 primary coverage for food loss for a $425,000 limit of liability.

On February 9, 2007, Holdom received a report from defendant's investigator which valued plaintiff's destroyed food at $36,240.[5] Despite its own conclusion, defendant did not offer even the $25,000 limit that Holdom claimed he believed applied.

As time passed, plaintiff continued to lose income. The diner remained closed. Plaintiff could not afford the needed repairs to reopen. Desperate, on February 22, 2007, plaintiff's principal, George Grigos, hand printed a letter to Lloyd's:

> I have experienced extreme difficulty in the processing of my claim, and would like at this point to express my displeasure with the way my claim is being handled.
>
> I have fulfilled my obligations under our insurance contract and have met the requirements of my policy provisions and conditions, but I am increasingly perplexed over your lack of responsiveness regarding my claim. The delay of this claim has been unreasonable and I have not been given a proper explanation I would like to see this matter concluded to our mutual benefit.
>
> In consideration of all resultant and consequential cost I have incurred I am requesting and immediate loss advance to offset my out of pocket until this matter can be addressed. . . .[6]

Plaintiff faced additional delay and opposition from Holdom on its business income loss advance. Young requested $50,000. Holdom said the claim was only worth $10,000 but would not provide any calculation.

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[4] Letter dated January 18, 2007 attached at Def.'s Mot. For Summ. J., Ex. 11.
[5] Def.'s Salvage Report dated February 9, 2007 attached at Def.'s Mot. For Summ. J., Ex. 16.
[6] Letter dated February 22, 2007 attached at Pl.'s Cross-Mot. For Summ. J, Ex. 18

In the face of this intransigence, Young faxed Holdom a signed sworn proof of loss for only $10,000 on February 27, 2007.[7] Even after minimizing the requested advance, Holdom delayed all payment an additional month. Holdom refused to start even the preliminary processing of plaintiff's claim until he received an original signature.[8] Ed Williamson, a Young employee, hand delivered the original proof of loss for the business income loss advance to Holdom.[9] After doing nothing with the original for two weeks, Holdom finally faxed the paperwork to Walnut Advisory. On April 5, 2007, nearly four months after the fire, plaintiff received an advance check for $10,000, $40,000 less than was needed.[10]

On May 1, 2007, Young sent Holdom additional proofs of loss. Holdom waited nine days to "reject" these proofs of loss. His "rejection" offered no explanation. Only after Young specifically asked why the proofs had been rejected and warned that the failure to provide an explanation violated the Unfair Claims Practices Act did Holdom say that he needed more detailed estimates. Young immediately forwarded Holdom what was requested.[11]

Five months after the fire, it was clear defendant would not pay the valid claims voluntarily. On June 4, 2007, plaintiff sent Holdom a letter which demanded an appraisal, named plaintiff's appraiser, and requested that Holdom name defendant's appraiser. The policy required appraisal whenever the parties could not agree on the amount of a loss.[12]

Despite clear language explicitly requiring appraisal, Holdom refused to cooperate. After waiting a month to respond, Holdom stated that plaintiff's claims did not qualify for appraisal because "[t]he building damages, the business personal property damages and the business

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[7] Letter dated February 27, 2007 attached at Pl.'s Cross-Mot. For Summ. J, Ex. 19.
[8] Nowhere is there any indication that Holdom actually questioned the authenticity of the signature he received.
[9] Dep. of Ed Williamson at 45-46.
[10] Fax dated April 5, 2007 attached at Pl.'s Cross-Mot. For Summ. J, Ex. 25.
[11] Letter dated May 22, 2007 attached at Pl.'s Cross-Mot. For Summ. J, Ex. 36.
[12] Building and Personal Property Coverage Form 9; Business Income (And Expense) Coverage Form 4.

income damages all have disputes as to the scope of the damages. Consequently, there is no basis for a dispute over the amount of the loss as we cannot agree upon what is damaged and to what extent it is damaged."[13] Nothing in the policy suggests that a dispute over the amount of damages, even if characterized as "scope," precludes appraisal. To the contrary, the dispute was precisely the precondition permitting appraisal.

Because of Holdom's unreasonable refusal to participate in the required appraisal plaintiff needed to hire an attorney to file a "Petition to Compel Appraisal and Appoint Umpire" in the Court of Common Pleas of Philadelphia County. Defendant delayed plaintiff's claims further by waiting the entire twenty day response period to answer the petition. In its response, defendant disavowed its position and agreed to appraisal. Despite two years of litigation, defendant has not to this date explained its appraisal refusal. During litigation, Stephen Abbott, defendant's corporate designee, acknowledged that appraisal was required:

> Q: Have you had an opportunity to look back in time and evaluate whether or not in your – in [defendant's] mind the initial denial to refuse to go to appraisal was right or wrong?
> A: It was wrong. It was a mistake.[14]

During the appraisal a different "mistake" was admitted. On October 8, 2007, by letter to plaintiff's counsel, defendant admitted that the entire food loss claim of $41,618.43 was a covered loss and must be paid:

> Additionally, Underwriters have reviewed your client's assertion that coverage for the "food stuff" should be included under the limits provided for business personal property and should not be limited by the limit of the Enhanced Endorsement. Following that review, please be advised Underwriters agree to accept the food stuffs loss under the business personal property limit.[15]

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[13] Letter dated June 27, 2007 attached at Def.'s Mot. For Summ. J., Ex. 32.
[14] Dep. of Stephen Abbott at 95 ln. 5-11.
[15] Letter dated October 8, 2007 attached at Pl.'s Cross-Mot. For Summ. J, Ex. 47.

Defendant has not to this date presented any reasonable basis for its position that the food loss claim was limited to the "Enhancement" coverage. Defendant has never presented *any* explanation for its initial refusal to cover plaintiff's entire food loss. Similarly, defendant has never explained why it made no offer when its own investigation revealed that at least $25,000 was due because defendant's own investigation revealed a greater loss.

On January 28, 2008, the two appraisers and the umpire concluded that the business income loss was $202,857. Defendant paid the claim the next day. On May 23, 2008, the two appraisers and the umpire concluded that the building damage was $340,221 and the business personal property loss was $52,818.[16] On June 11, 2008, defendant paid these claims.

Summary judgment is appropriate whenever there is no genuine issue of any material fact as to a necessary element of the cause of action or defense and therefore a party is entitled to judgment as a matter of law.[17] The parties agree that summary judgment is appropriate in this case because the material facts are undisputed.

Plaintiff was entitled to demand appraisal under the policy. Despite this clear entitlement defendant improperly refused to proceed to appraisal.[18] Plaintiff was also entitled to receive prompt payment for its covered food loss. Instead, defendant mislead plaintiff by claiming nonexistent exclusions and then withheld payment of undisputed amounts. When defendant knew plaintiff was facing financial ruin and needed payment immediately it still delayed plaintiff's claims despite no substantive objections. Defendant breached the policy of insurance.

Defendant's breach required plaintiff to file for a court order and incur attorney's fees. In damages, plaintiff seeks those attorney's fees and the costs of its accountant witness during appraisal. Plaintiff also seeks damages for costs associated with its chosen appraiser and the

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[16] Appraisal Award attached at Pl.'s Cross-Mot. For Summ. J, Ex. 30.
[17] Pa.R.Civ.P. 1035.2.
[18] Dep. of Stephen Abbott at 95 ln. 5-11.

umpire that were incurred during the appraisal. However, unless expressly provided by contract, attorney's fees and witness costs are not recoverable as damages in a breach of contract action. The policy does not provide for any recovery of attorney's fees or witness costs even when unnecessarily incurred. The policy also requires each party to pay its chosen appraiser's fees and one half the umpire's fee. Therefore, on the breach of contract claim, summary judgment is granted for plaintiff as to liability. There are however no damages to be awarded. The law does not allow any recovery for bad faith in contract where, as here, all claims under the policy have been paid.[19]

Statutory bad faith is set forth in 42 Pa.C.S.A. § 8371. Bad faith requires more than a showing of negligence.[20] The plaintiff must show "that the Defendant knew or recklessly disregarded its lack of reasonable basis in denying the claim."[21] Plaintiff must prove this by "clear and convincing" evidence.[22] Bad faith encompasses a wide variety of conduct. Conduct prohibited by the Unfair Insurance Practices Act ("UIPA")[23] may be bad faith.[24]

The UIPA specifically prohibits:

> (i) Misrepresenting pertinent facts or policy or contract provisions relating to coverage at issue.
> (ii) Failing to acknowledge and act promptly upon . . . communications with respect to claims . . . .
> (vi) Not attempting in good faith to effectuate prompt, fair and equitable settlements of claims in which the company's liability under the policy has become reasonably clear.
> (vii) Compelling persons to institute litigation to recover amounts due under an insurance policy . . . .
> (xiii) Failing to promptly settle claims, where liability has become reasonably clear, under one portion of the insurance policy

[19] See D'Ambrosio v. Pennsylvania Nat'l Mut. Casualty Ins. Co., 431 A.2d 966 (Pa. 1981).
[20] Terletsky v. Prudential Property & Casualty Ins. Co., 649 A.2d 680, 688 (1994).
[21] Id.
[22] Admissions by a corporate designee during litigation are "clear and convincing" proof as a matter of law.
[23] 40 P.S. § 1171.1.
[24] See, e.g., MacFarland v. U.S. Fidelity & Guarantee Co., 818 F.Supp. 108, 110 (E.D.Pa. 1993).

coverage in order to influence settlements under other portions of the insurance policy coverage . . . .

(xiv) Failing to promptly provide a reasonable explanation of the basis in the insurance policy in relation to the facts or applicable law for denial of a claim . . . .[25]

Defendant's actions were imbued with bad faith. Defendant knowingly misrepresented the policy[26] and intentionally delayed the resolution of plaintiff's claims.[27] Defendant refused, without explanation, to proceed to appraisal, compelling plaintiff to hire an attorney and institute litigation.[28] Then, on the last day for response, when it had no reasonable explanation for its refusal, defendant acknowledged plaintiff's right to appraisal. Likewise, defendant misrepresented the policy's contents, saying that food loss coverage was limited to $25,000 and claiming nonexistent "decay and deterioration" exclusions. Defendant refused to offer even the undisputed amounts which had been verified by its investigation. Finally, after delaying payment of a claim where liability had become reasonably clear for over eight months, defendant admitted the entire food loss claim was covered and paid the full amount during appraisal. Defendant repeatedly delayed the resolution of plaintiff's claims by simply refusing, without explanation, to process paperwork and requesting repetitive paperwork. Defendant's actions were imbued with bad faith.

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[25] 40 P.S. § 1171.5(a)(10).

[26] As a matter of law, defendant is charged with knowing and understanding the contents of its policy. Even an insured may not avoid clear policy provisions by claiming he failed to read or understand them. Standard Venetian Blind Co. v. American Empire Ins. Co., 469 A.2d 563 (Pa. 1983).

[27] Defendant has argued that it should not be charged with any of Holdom's misconduct despite the fact that he dealt exclusively with plaintiff on the insurance company's behalf. Defendant's contention, that it may insulate itself from bad faith liability by delegating authority to representatives who are malicious, incompetent, or just ignorant, is absurd, and that delegation itself in an appropriate case could be further evidence of bad faith.

[28] To the extent Holdom attempted to justify the company's refusal, he did so only by misrepresenting the policy's conditions for appraisal.

The claim handling was in bad faith, proven by "clear and convincing" evidence. As to the statutory bad faith claim, summary judgment is entered for plaintiff. A hearing on damages is scheduled for January 6, 2011 at 9:30 a.m. in Courtroom 246.

BY THE COURT

12/15/10
DATE

MARK I. BERNSTEIN, J.