

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

JOHN S. CILLO, D.C., : NO. 05-00,918
Plaintiff :
 :
 : CIVIL ACTION - LAW
vs. :
 :
 :
ALLSTATE INSURANCE COMPANY, :
Defendant : Motion for Judgment on the Pleadings

OPINION AND ORDER

Before the Court is Defendant's Motion for Judgment on the Pleadings, filed August 8, 2005. Argument on the motion was heard September 15, 2005.

This action arises from a claim made by Plaintiff against Defendant, the carrier of his homeowner's insurance, for damages to personal property stored at his business premises. Defendant denied coverage on the basis Plaintiff had failed to prove the loss resulted from a named peril. The Complaint asserts breach of contract, bad faith and a violation of the Unfair Trade Practices and Consumer Protection Law (UTCPL)¹. In its Answer and New Matter, Defendant raises the defense of the statute of limitations as well as failure to state a claim upon which relief can be granted. In response to the Motion for Judgment on the Pleadings, Plaintiff concedes Count I, Breach of Contract, is barred by the one-year limitations period provided for in the insurance contract. That count will, therefore, be dismissed. The remaining two counts appear to survive that limitations provision, however,² and Defendant's request to dismiss them will be addressed on the merits of each claim.

To make out a claim for bad faith, an insured must show that the insurer lacked a reasonable basis for denying benefits and that the insurer knew of or recklessly disregarded its lack of a reasonable basis in denying the claim. Bostick v. ITT Hartford Group, Inc., 56 F.

¹ 73 Pa.C.S. § 201-1 et seq.

² 42 Pa.C.S. § 8371 creates a separate and independent cause of action for bad faith which is not subject to the one-year limitations period imposed on breach of contract actions, See Margolies v. State Farm Fire & Casualty Co., 810 F. Supp. 637 (E.D. Pa. 1992), and the UTCPL supplements common law remedies, See Agliori v. Metropolitan Life Insurance Company, 879 A.2d 315 (Pa. Super. 2005), and is subject to a limitations period of six years. Gabriel v. O'Hara, 534 A.2d 4 (Pa. Super. 1987).

Supp. 2d 580 (E.D. Pa. 1999). In seeking dismissal of the bad faith claim, Defendant argues that it did have a reasonable basis for denying the claim: it relied on the reports of two experts, hired by Plaintiff's business insurance carrier, which set forth inconclusive findings regarding the cause of the damage. Defendants also cite Bostick v. ITT Hartford Group, Inc., *supra*, for the proposition that it is not bad faith to reasonably rely on the conclusions of an independently retained expert. While the Court agrees with this premise, it must be noted that the question in Bostick was presented in the form of a motion for summary judgment and the Court determined that the plaintiff therein had failed to produce evidence that the insurance company had acted unreasonably in relying on the expert's report. Here, in a motion for judgment on the pleadings, it remains a viable issue whether Defendant's reliance on the reports as a basis for denial of the claim was reasonable. Plaintiff may be able to produce evidence that indeed it was not. Judgment on the pleadings on this count is thus inappropriate.

To state a claim under the UTPCPL, a plaintiff must show that the defendant committed a misfeasance, which is defined as the improper performance of a contracted obligation. Gordon v. Pennsylvania Blue Shield, 548 A.2d 600 (Pa. Super. 1988). The commission of a nonfeasance, defined as the mere failure to perform, is not actionable. Id. Defendant argues that Plaintiff's claim is simply for a refusal to pay benefits and, as such, is not actionable. Plaintiff counters that the claim is actually one for an improper post-loss investigation, thus constituting misfeasance, citing Smith v. Nationwide Mutual Fire Insurance Company, 935 F. Supp. 616 (W.D. Pa. 1996), and Parasco v. Pacific Indem. Co., 870 F. Supp. 644 (E.D. Pa. 1994). While these cases do stand for the proposition that an improper post-loss investigation is actionable under the UTPCPL as a misfeasance, they also draw an important distinction between an investigation performed improperly and a failure to investigate at all; the former is actionable, the latter is not. See also, Cake v. Provident Life & Accident Ins. Co., 1999 U.S. Dist. LEXIS 371 (E.D. Pa. 1999) (holding that an allegation of an unreasonable investigation of a claim suggests that defendant undertook an investigation and performed it improperly, distinguishing such from a mere failure to investigate).

In the instant case, Plaintiff's Complaint alleges only a failure to investigate, claiming in paragraph 23 that "[a]t no time ... did any agent, servant or employee of Defendant

ever investigate this claim”, in Paragraph 53a that Defendant “[f]ailed to make an investigation into Plaintiff’s damages”, and in Paragraph 53b that Defendant “[f]ailed to inspect the premises and investigate the cause of Plaintiff’s damages.” Plaintiff argues in his brief in opposition to the instant motion that the UTPCPL claim is nevertheless supported by allegations that Defendant “repeatedly placed the onus on the Plaintiff to ascertain the cause of the water damage and produce proof that the loss was caused by a named peril, insisted on a police report when she aware (sic) that did (sic) not exist and when she knew that is (sic) not a requirement under the policy, refused to identify what exclusions(s) Defendant relied upon, and selectively read the investigative reports that were provided to her”. Plaintiff’s Brief at 15. The Court believes, however, that while these allegations may be relevant to the bad faith claim, they do not convert Plaintiff’s claim of a failure to investigate into a claim of an improper investigation. Therefore, the third count must also be dismissed.

ORDER

AND NOW, this 17th day of October 2005, for the foregoing reasons, Defendant’s Motion for Judgment in the Pleadings is hereby granted in part and denied in part. Counts I and III of Plaintiff’s Complaint are hereby DISMISSED.

BY THE COURT,

Dudley N. Anderson, Judge

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Hon. Dudley Anderson