

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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CARMELLA M. PINTO

Plaintiff,

MEMORANDUM & ORDER

-against-

95-CV-2807 (ILG)

ALLSTATE INSURANCE COMPANY,

Defendant.

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GLASSER, United States District Judge:

BACKGROUND

In November of 1988, plaintiff Carmella M. Pinto ("Pinto") suffered neck injuries as the result of an accident that occurred when the car she was driving was struck by another automobile that was owned and operated by Reginald Bell, Jr. ("Bell"). Bell was insured by defendant Allstate Insurance Company ("Allstate") to the extent of \$100,000.

In December of 1989, plaintiff instituted a lawsuit against Bell alleging that the accident was caused by the negligence, carelessness, and recklessness of Bell in the operation of his vehicle. Plaintiff claimed damages of \$1,000,000. Under the terms of Bell's insurance policy, Allstate had a duty to take charge of this action against Bell, and did so.

Plaintiff's attorney made several settlement demands on Allstate for varying amounts within the policy's limits. However, each demand was rejected by Allstate, which, in turn, offered \$30,000 to settle plaintiff's claims. This offer was rejected by plaintiff.

The lawsuit proceeded to trial and a jury rendered a verdict in favor of Pinto. A judgement of \$331,200 was awarded. After all post-trial motions and appeals were exhausted,

Allstate paid plaintiff the \$100,000 that was the limit of Bell's policy plus interest. In March of 1995, Bell transferred and assigned to plaintiff his right, title, and interest in any claim that he might have against Allstate arising out of the manner in which Allstate defended Bell in the lawsuit by Pinto.

On July 14, 1995, plaintiff filed the present lawsuit, alleging that Allstate violated its implied covenant of good faith and fair dealing by "recklessly rejecting" plaintiff's settlement demands, "although, at the time the demands were made, there was no doubt about [Bell's] liability and the damages sustained by [Pinto] were far in excess of the demand of the insurance policy to settle the case." Compl. ¶ 19.

Plaintiff now moves for summary judgment and defendant cross moves for summary judgment.

DISCUSSION

Summary Judgment Standard

Summary judgment under Rule 56 is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." See Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). The moving party bears the burden of proof on such a motion. See United States v. All Funds, 832 F. Supp. 542, 550-51.

A genuine factual issue exists if there is sufficient evidence favoring the nonmovant such that a jury could return a verdict in its favor. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). The court must resolve all ambiguities and draw all inferences in favor of the non-moving party. Id. at 255. If there is any evidence in the record drawn in favor of the non-

moving party on a material issue of fact, summary judgment is improper. Chambers v. TRM Copy Centers Corp., 43 F.3d 29, 37 (2d Cir. 1994).

Legal Standard for Bad Faith

Under New York law, an insurer may be held liable for the breach of its duty of “good faith” in defending and settling claims for its insured over which the insurer exercises exclusive control. See Gordon v. Nationwide Mutual Ins. Co., 30 N.Y.2d 427, 334 N.Y.S.2d 601, 285 N.E.2d 849 (1972).

The duty of “good faith” settlement is an implied obligation derived from the insurance contract Naturally, whenever an insurer is presented with a settlement offer within policy limits a conflict arises between, on the one hand, the insurer’s interest in minimizing its payments and on the other hand, the insured’s interest in avoiding liability beyond the policy limits By refusing to settle within the policy limits, an insurer risks being charged with bad faith on the premise that it has “advanced its own interests by compromising those of its insured”

Pavia v. State Farm Mutual Automobile Ins. Co., 82 N.Y.2d 445, 452, 626 N.E.2d 24, 27, 605 N.Y.S.2d 208, 211 (1993) (citations omitted).

In order to establish a prima facie case of bad faith, the plaintiff must establish that the insurer’s conduct constituted a “gross disregard” of the insured’s interest —

that is, a deliberate or reckless failure to place on equal footing the interest of its insured with its own interest when considering a settlement offer. (see, Lozier v. Auto Owners Ins. Co., 951 F.2d 251 [9th Cir.]). In other words, a bad faith plaintiff must establish that the defendant insurer engaged in a pattern of behavior evincing a conscious or knowing indifference to the probability that an insured would be held personally accountable for a large judgment if a settlement offer within the policy limits were not accepted.

Pavia, 82 N.Y.2d at 453-54, 626 N.E.2d at 27-28, 605 N.Y.S.2d at 211-12.

Application of Bad Faith Standard

“While the New York rule is unquestionably that the insurer must act in good faith, in the unending variety of fact patterns which continue to plague courts in these cases, there is no pat formula which can be routinely applied to determine its presence.” Peterson v. Allcity Ins. Co., 472 F.2d 71, 77 (2d Cir. 1972). Pavia, offers the following guidance:

The bad faith equation must include consideration of all the facts and circumstances relating to whether the insurer’s investigatory efforts prevented it from making an informed evaluation of the risks of refusing settlement. In making this determination, courts must assess the plaintiff’s likelihood of success on the liability issue in the underlying action, the potential magnitude of damages and the financial burden each party may be exposed to as a result of a refusal to settle. Additional considerations include the insurer’s failure to properly investigate the claim and any potential defenses thereto, the information available to the insurer at the time the demand for settlement is made, and any other evidence which tends to establish or negate the insurer’s bad faith in refusing to settle.

Pavia, 82 N.Y.2d at 454-55, 605 N.Y.S.2d at 212, 626 N.E.2d at 28.

In this case, the liability in the underlying action was never seriously questioned. Thus, plaintiff’s bad faith claim centers around the question of whether Allstate’s determination that plaintiff’s damages would not exceed the policy limits was made in good faith.

A review of the deposition testimony as well as the claim file maintained by Allstate, reveals that Allstate thoroughly and diligently investigated plaintiff’s claim. In order to determine the extent of plaintiff’s damages, Allstate examined all the medical documentation that was provided by plaintiff regarding the seriousness of her injuries. Allstate also had an independent physician, Dr. Jay A. Rosenblum, examine plaintiff and provide a report of her condition. Dr. Rosenblum’s findings, documented in a letter dated April 17, 1990, were as follows:

This patient exhibits some non-physiological findings. This examiner's objective clinical neurological examination was normal. I do take note of the abnormal reports of the MRI cervical spine and EMG examination. This examiner did not find any objective clinical manifestations of same.

Indeed, Dr. Rosenblum was so convinced that plaintiff's claim was specious that he went so far as to phone Allstate to offer his opinion that plaintiff had greatly exaggerated her injuries. Dr. Rosenblum was quoted in Allstate's file on plaintiff's case as stating that plaintiff was "as phoney as a \$3 bill." Def.'s Ex. 1 (Allstate's claim log). Thus, Dr. Rosenblum's findings gave Allstate reason to believe that plaintiff's damages were minimal.

Nevertheless, Luis Barraza, the claims adjuster who handled the Pinto claim file from September 1990 through trial, testified that he was aware that there were differences of opinion among the physicians who evaluated plaintiff as to whether or not she has a herniated disc. Allstate was, therefore, willing to offer plaintiff a settlement of \$30,000, although it believed that her actual damages were likely worth less than this amount.

Thus, Allstate has presented evidence that it made an "informed evaluation of the risks of refusing settlement," Pavia, 605 N.Y.S.2d at 212, 82 N.Y.2d at 454 and that its decision not to settle for the policy limits did not show a gross disregard of its insured's interests. Plaintiff, however, argues that defendant's failure to depose plaintiff prior to trial is suggestive of bad faith.

While Allstate's failure to depose plaintiff prior to trial may be considered negligent, it does not establish that defendant failed to exercise good faith. As already noted, Allstate had examined several physician's evaluations of plaintiff's condition and was aware that there was some discrepancy in the extent of her injuries. Furthermore, Barraza testified that

plaintiff's testimony on the stand did not present defendant with any information that it was not aware of before trial. See Def.'s Ex., p. 224 (Barraza Dep.) ("Well, there was nothing new for us. We knew that she was claiming that she wasn't able to do her, she was claiming that she wasn't able to do her normal routines and her normal exercises. We knew that. . . . We took it into consideration, we didn't ignore any part of her testimony or any other thing, but you know, we considered it in the evaluation.") Thus, a pre-trial deposition would not have provided Allstate with any information that would have convinced it to settle for a sum greater than \$30,000.

Plaintiff also argues that when she rested her case at trial, Allstate simply ignored its trial counsel's opinion that the insured's policy was "going to be lost." Pl. Mem. of Law 14. And, Allstate ignored it's counsel's opinion a second time when, after Allstate's only witness, Dr. Rosenblum, testified Allstate's counsel stated that the jury would return a verdict in excess of the policy. Id.

However, both Diana Scheid, Barraza's immediate supervisor, and Steven Bove, Allstate's Claims Office Manager, testified that trial counsel's statements regarding the verdict did not change their opinion of plaintiff's case. Bove stated at his deposition that in his experience, "just because our attorney states one amount doesn't mean that's going to happen since he cannot read the minds of the jury." Def.'s Ex. 2, p. 114 (Bove Dep.). Scheid stated that they took trial counsel's opinion into consideration "with all the other information we were receiving," but did not agree that the jury would return a verdict in excess of the policy. Def.'s Ex. 7, pp. 94-95 (Schied Dep.). Defendant further points out that although Allstate's attorney stated his opinion regarding the jury's verdict, he never advised Allstate to settle for the policy

amount.

In retrospect, it is clear that Allstate was incorrect in its belief that the jury would not return a verdict in excess of the policy limits. Once again, although Allstate's decision not to settle for the policy amount may evince poor judgment, it does not rise the level of gross disregard. See Hartford Ins. Co. v. Methodist Hospital, 785 F. Supp. 38, 40 (E.D.N.Y. 1992) ("An insurer is not liable if its decision not to settle was the result of an error of judgment or mere negligence.") (citations omitted).

Finally, argues plaintiff, Allstate received actual notice no fewer than two times during the trial that its insured was at serious financial risk. During deliberations, the jury sent a note that asked whether it was bound by plaintiff's demand for damages. Upon hearing this, Allstate's counsel remarked that the jury question "has to be viewed as extremely negative" and stated that Allstate should prepare for a "very large verdict." Pl. Mem. of Law 15 (citing Ex. K, Hannafey Dep.). Allstate then received a second notice that the verdict would exceed the policy when the jury returned and informed the court that it reached a verdict and that it awarded Pinto \$210,000. The court's poll of the jury, however, found that the jury had not reached an actual verdict on one of the questions on the verdict sheet, and the jury was sent to continue deliberations. Allstate's attorney again advised Allstate that he believed that the jury would return a verdict in excess of the policy.

Plaintiff, however, cannot establish that during this point in the trial, "the insured lost an actual opportunity to settle . . . the claim," Pavia, 82 N.Y.2d at 454, 605 N.Y.S.2d at 212, 626 N.E.2d at 28 (citations omitted), as required to establish bad faith. There is no admissible evidence that, if defendant had offered to settle for the policy's limit, plaintiff would have

accepted such an offer. Indeed, plaintiff at her deposition testified that she does not remember whether she would have settled for \$100,000. See Def.'s Ex. 17, pp. 40-41 (Pinto Dep.). Indeed, plaintiff's adamant assertion here that the jury's question and its false verdict were strongly suggestive of a large award for plaintiff implies that she would not have been willing to settle for \$100,000.

Furthermore, defendant's belief that the false verdict did bode well for its case is reasonable. As Barraza, Allstate's claims adjuster, explains: "[t]he jury was at a four, two margin and never answered the threshold question. At this point, in our judgment we still believed we might have a decent case." Def's. Ex. 6, p. 236 (Barraza Dep.).

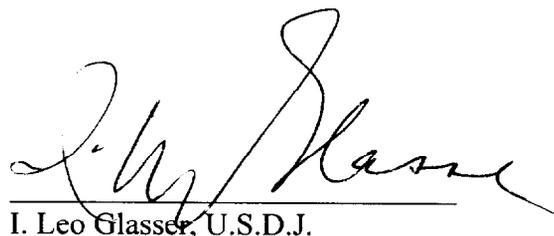
Again, although in hindsight it is evident that Allstate should have settled for the policy limits at the time of trial, plaintiff has not presented sufficient evidence to allow a reasonable finder of fact to determine that Allstate's decision to await the jury verdict constitutes bad faith.

CONCLUSION

Since plaintiff has failed to establish a prima facie case of bad faith and defendant had presented evidence that it acted in good faith, plaintiff's summary judgment motion is denied and defendant's motion for summary judgment is granted.

SO ORDERED.

Dated: September ¹⁰₁₀, 1998
Brooklyn, New York


I. Leo Glasser, U.S.D.J.

A copy of the foregoing Order was this day sent to:

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