

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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Tara Ann O'Neill, etc.,

Plaintiff,

CV-97-7467 (CPS)

- against -

MEMORANDUM
AND ORDER

JC Penney Life Insurance Company,

Defendant.

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SIFTON, Chief Judge

Tara Ann O'Neill, as administratrix of the estate of her father, Patrick O'Neill ("O'Neill"), brings this action against JC Penney Life Insurance Company ("JC Penney") to recover payments under a group insurance policy issued to the deceased. Presently before the Court is defendant's motion for summary judgment. For the reasons set forth below, the motion is granted.

BACKGROUND

The following facts are taken from the complaint, the answer, and the submissions of the parties in connection with the instant motion and are undisputed except where noted. Plaintiff is a resident of New York. JC Penney is a Vermont corporation with its principal place of business in Texas.

On December 1, 1995, JC Penney issued a group accident insurance policy ("the policy") to Chemical Bank. On August 16, 1996, JC Penney issued a certificate of insurance ("the

certificate") to O'Neill, providing \$100,000 in death benefits, subject to the terms and conditions of the policy.

The policy provided that it was "issued in the State of Illinois" and that "its terms shall be construed in accordance with the laws of the State of Illinois." The policy further stated, in a section entitled "Exclusions," that "[n]o benefit shall be paid for Injury that occurs while the Covered Person's blood alcohol level is .10 percent weight by volume or higher." Identical language appears in the certificate.

According to a police report completed by the Pennsylvania state police, Patrick O'Neill died in an automobile accident on Pennsylvania State Route 2001, in Pike County, Pennsylvania, at 10:40 P.M. on August 29, 1996. The police report states that, while traveling north on Route 2001 and negotiating a right-hand turn, O'Neill's car crossed the double yellow line and struck, head-on, an oncoming truck. There were skid marks on the road behind the truck but not behind O'Neill's car. The officer who completed the report wrote that he "noticed a strong odor of an alcoholic beverage about [O'Neill's] body." The officer "also noticed a strong odor of an alcoholic beverage in and about [O'Neill's] vehicle."

The coroner's report, from an autopsy performed on August 30, 1996, notes that O'Neill died of "fractures of ribs & left lower extremity; transection of aorta; lacerations of liver & mesentery; [and] massive internal hemorrhage." The report further states:

Son-in-law stated that [O'Neill] was drinking a lot since wife died a year ago; also took about 10 different medications and had a history of coronary bypass (6 yrs), was hypertensive, and had bad hearing & eyesight.

A supplemental police report notes that a policeman and a mechanic examined O'Neill's car and found that both the steering and braking mechanisms were in functional order at the time of the accident.

On September 13, 1996, the coroner received a toxicology report from National Medical Services, Inc., of Willow Grove, Pennsylvania, which found that O'Neill's blood alcohol level was 0.15% weight per volume. The laboratory report states that "[t]he blood alcohol concentration (BAC) encountered in the decedent represents an absorbed body burden of approximately 6 "drinks" of an alcoholic beverage in an adult of average size weighing approximately 155 lbs." The report concludes that "[t]his analysis was performed under chain of custody. The chain of custody documentation is on file at National Medical Services, Inc."

On November 6, 1996, JC Penney denied plaintiff's request for benefits under the certificate, claiming that O'Neill's blood alcohol level excluded him from coverage. On or about November 21, 1997, plaintiff filed this action in the New York State Supreme Court, New York County. Plaintiff alleges three separate causes of action: the first alleges breach of the insurance contract; the second alleges that JC Penney was negligent in not investigating the circumstances under which the

laboratory work was performed; the third alleges breach of the duty of fair dealing in connection with the performance of the contract. Plaintiff seeks \$100,000, the value of the policy, for each of the three claims, for a total of \$300,000.

Defendant removed to this court on December 19, 1997, answered the complaint on December 23, 1997, and moved for summary judgment on January 13, 1998.

DISCUSSION

This court has jurisdiction over this action pursuant to 28 U.S.C. §§ 1332, 1441. Federal Rule of Civil Procedure 56(c) provides that summary judgment must be granted if there is no genuine issue as to any material fact and if the moving party is entitled to judgment as a matter of law. The moving party has the burden of demonstrating the absence of any disputed material facts, and the court must resolve all ambiguities and draw all inferences in favor of the party against whom summary judgment is sought. See *Thompson v. Gjivoje*, 896 F.2d 716, 720 (2d Cir. 1990).

The showing needed on summary judgment reflects the burden of proof in the underlying action. The court must consider "the actual quantum and quality of proof" demanded by the underlying cause of action and must consider which party must present such proof. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254 (1986). Therefore, where the ultimate burden of proof is on the nonmoving party, the moving party meets his initial burden for summary judgment by "'showing' — that is,

pointing out to the district court — that there is an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). To survive the motion, the nonmoving party must then "make a showing sufficient to establish the existence of [the challenged] element essential to [that party's] case." *Id.* at 322. While the court views the evidence in the light most favorable to the nonmoving party, see *O'Brien v. National Gypsum Co.*, 944 F.2d 69, 72 (2d Cir. 1991), "the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment." *Anderson*, 477 U.S. at 247-48. Rather, summary judgment is appropriate "[w]hen the record taken as a whole could not lead a rational trier of fact to find for the non-moving party." *Matsuhita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

Analysis of the instant motion begins with a choice of law issue. In diversity cases this court applies New York's choice of law rules. See *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496-97 (1941); *Lazard Freres & Co. v. Protective Life Ins. Co.*, 108 F.3d 1531, 1539 (2d Cir. 1997). In this case, the policy provided that "its terms shall be construed in accordance with the laws of the State of Illinois." The appellate division recently considered a clause in an insurance policy stating that the "policy [would] be construed in accordance with the laws of Delaware" and held that it "would give effect to the choice of law provision in the insurance

contract itself to determine a material term going to the heart of that contract." *McCarthy v. Aetna Life Ins. Co.*, 661 N.Y.S.2d 625, 627 (1st Dept. 1997) (emphasis added). Given that the language of the two quoted choice of law clauses is essentially identical, Illinois law governs disputes as to the meaning of the policy's terms.

The choice of law clause, however, does not apply to the substantive questions of contract and tort law involved in this lawsuit. Absent an express choice of law clause covering these issues, I apply the choice of law rules of New York to determine the applicable law. See *Klaxon*, 313 U.S. at 496-97. Under New York law, contract and tort claims are analyzed separately for choice of law purposes. See *Pereira v. Aetna Casualty & Surety Co. (In re Payroll Express Corp.)*, ___ B.R. ___, No. 95 Civ. 4385 (SAS), 1997 WL 620881 at *7 (Oct. 1, 1997) (separately analyzing choice of law as to plaintiff's breach of contract and tort claims).

Turning first to the cause of action alleging breach of contract, I note:

In contract cases, New York courts now apply a "center of gravity" or "grouping of contacts" approach. Under this approach, courts may consider a spectrum of significant contacts, including the place of contracting, the places of negotiation and performance, the location of the subject matter, and the domicile or place of business of the contracting parties. New York courts may also consider public policy "where the policies underlying conflicting laws in a contract dispute are readily identifiable and reflect strong governmental interests."

Lazard Freres & Co., 108 F.3d at 1539 (quoting *Brink's Ltd. v. South African Airways*, 93 F.3d 1022, 1030-31 (2d Cir. 1996)). In cases involving insurance contracts, New York courts have looked at factors including the location of the insured, the insurer's place of business, where the policy was issued and delivered, where the issuing broker is located, and where the premiums were paid. See *Olin Corp. v. Ins. Co. of North America*, 743 F. Supp. 1044, 1048-49 (S.D.N.Y. 1990) (citing cases), *aff'd*, 929 F.2d 62 (2d Cir. 1991).

"In tort cases," as the circuit has noted,

New York courts apply an "interests" analysis. [In *re Istim, Inc. v. Chemical Bank*, 78 N.Y.2d 342, 347-48, 575 N.Y.S.2d 796, 798 (1991).] Courts must examine the purposes and policies of the conflicting laws in the context of the facts of the case. "If conflicting conduct-regulating laws are at issue, the law of the jurisdiction where the tort occurred will generally apply because that jurisdiction has the greatest interest in regulating behavior within its borders." [Cooney v. Osgood Mach., Inc., 81 N.Y.2d 66, 72, 595 N.Y.S.2d 919, 922 (1993).] If post-event remedial rules, or loss-allocating rules, are at issue, "other factors are taken into consideration, chiefly the parties' domiciles." *Id.* In short, "interests analysis" determines "which State has the greater interest in having its law applied." *Istim, Inc.*, 78 N.Y.2d at 348, 575 N.Y.S.2d at 798.

Brink's, 93 F.3d at 1031.

While JC Penney urges application of New York law and plaintiff urges application of Illinois law, neither party is correct. Under New York's choice of law rules, Pennsylvania law applies in this case. Although JC Penney has its principal place of business in Texas, Texas has no other involvement with this case. New York, similarly, has only an attenuated connection to

this lawsuit — namely, that O'Neill's daughter resides here. Absent the inclusion of its law in the policy's choice of law provisions, Illinois would not be involved in this lawsuit at all. In contrast to these states, Pennsylvania clearly has the greatest concentration of contacts with the case: the decedent lived in Pennsylvania, the accident occurred in Pennsylvania, and the investigation upon which the declination of coverage was based was done in Pennsylvania, in part by an agency of government of the state. Accordingly, I conclude that Pennsylvania law should govern this action except as controlled by the policy's express choice of law clause.

I turn, then, to defendant's motion to dismiss each of plaintiff's causes of action. Plaintiff's first claim is that JC Penney breached its insurance contract by denying coverage under the insurance policy. Plaintiff's sole assertion in this count of the complaint, however, is that the defendant's "denial of coverage was improper and without legal justification," (Compl. at ¶ 43), thus breaching the contract. (Compl. at ¶ 44.) Absent any further detail, I assume that plaintiff's claim is simply that the terms of the contract did not permit JC Penney to decline coverage. As set forth above, the contracts' terms are to be construed under Illinois law.

"Under Illinois law, the construction of an insurance policy is a question of law to be decided by the court." *Transamerica Ins. Co. v. South*, 125 F.3d 392, 398 (7th Cir.

1997); accord *Outboard Marine Corp. v. Liberty Mut. Ins. Co.*, 607 N.E.2d 1204, 1212 (Ill. 1992). As the Seventh Circuit has noted,

[w]hen an exclusionary clause is relied upon to deny coverage, its applicability must be clear and free from doubt. If there is an ambiguity, it should be construed in favor of the insured, but courts will not create an ambiguity where one does not exist — if a provision is clear and unambiguous, it will be applied as written.

Transamerica, 125 F.3d at 398; accord *Outboard Marine Corp.*, 607 N.E.2d at 1212.

In this case, the exclusionary clause relied on by defendant could not be more succinct. It states that "[n]o benefit shall be paid for Injury that occurs while the Covered Person's blood alcohol level is .10 percent weight by volume or higher." Plaintiff would avoid the terms of the bargain into which her father entered by contending that there exists a material dispute as to O'Neill's blood alcohol level at the time of the accident. In fact, no genuine dispute of fact exists. As defendant notes in its reply papers, plaintiff does not contest the facts, properly asserted by defendant, that O'Neill's son-in-law said that the decedent had been drinking; that the police officer investigating the accident smelled alcohol on the decedent's person and in his car; that there were no skid marks behind decedent's vehicle; and that the steering and braking mechanisms of O'Neill's car were functioning on the date of the accident. Uncontested, these facts are assumed true for purposes of this motion. See Rule 56.1(c) of the Local Civil Rules for the Southern and Eastern Districts of New York (Apr.

15, 1997) ("All material facts set forth in the statement required to be served by the moving party will be deemed to be admitted unless controverted by the statement required to be served by the opposing party.") While not dispositive of the deceased's blood alcohol level, these facts provide a basis for a determination whether a reasonable trier of fact could decide in plaintiff's favor at trial. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986).

Plaintiff's sole factual contention is that the autopsy and blood alcohol test were inaccurate. Plaintiff provides an affidavit of Jesse H. Bidanset, board certified toxicologist, retired professor of pharmaceutical sciences at St. John's University, former chief toxicologist of the Nassau County Office of the Medical Examiner, and current toxicologist of record for the Rockland County Office of the Medical Examiner. It is Bidanset's "opinion, with a reasonable degree of scientific certainty that the blood alcohol content of the deceased as contained in the Autopsy report is suspect and unreliable due to contamination." He explains that in the eighteen hours that purportedly elapsed between the car accident and the autopsy, alcohol in O'Neill's abdomen could have diffused into the surrounding tissues and fluid and, thus, could have been included in the specimen of blood drawn from the decedent's heart. Mr. Bidanset states that "[i]t is not uncommon in vehicular accidents where a person sustains blunt trauma to the abdomen that heart blood samples are contaminated via direct contamination of the

blood by gastric contents and other bloody fluids which contain high alcohol content." Mr. Bidanset also states that it is important to analyze the chain of custody of the blood sample to ensure that no contamination occurred when the sample was transferred from the coroner to the laboratory. From these observations, Bidanset concludes "with a reasonable degree of certainty, as a Board Certified Forensic Toxicologist, contamination from the abdominal cavity due to the massive trauma affected the decedent's heart blood specimen which, in turn, affected the blood alcohol content reading." He further concludes that the true blood alcohol content reading would have been below .10 percent.

Mr. Bidanset never examined the decedent, his blood sample, or the chain of custody report made available by the laboratory. His conclusions are based on his experience as a toxicologist but have no grounding in the facts of this case.^{1/} In determining whether to consider an expert's affidavit in response to a motion for summary judgment, I must determine whether the affidavit would constitute admissible evidence. See *Raskin v. Wyatt Co.*, 125 F.3d 55, 66 (2d Cir. 1997) (citing Fed. R. Civ. P. 56(e)). Part of this inquiry concerns the reliability

^{1/} As counsel for JC Penney noted at oral argument, the only facts in the record relevant to Bidanset's opinion cut against his hypothetical. The pathologist who performed the autopsy found O'Neill's gastrointestinal system to be "unremarkable" except for "extensive lacerations of the mesentery." The mesentery is a sac that encloses the greater part of the small intestine, specifically the jejunum and ileum, and attaches the intestine to the posterior abdominal wall. See *Stedman's Medical Dictionary* 859 (5th Unabr. Lawyer's ed. 1982). Given that O'Neill's jejunum and ileum within his mesentery were themselves "unremarkable," Bidanset's opinion appears to be not only speculative and, thus, inadmissible on summary judgment, but also incorrect.

of the evidence, and in this regard I "perform[] the same role at the summary judgment phase as at trial," *id.*, pursuant to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 592-93 (1993), "function[ing] as the gatekeeper for expert testimony." *Raskin*, 125 F.3d at 66. Although the parties do not address this issue, I have no doubt that toxicology is not "the kind of 'junk science' problem that *Daubert* meant to address." See *Iacobelli Constr., Inc. v. County of Monroe*, 32 F.3d 19, 25 (2d Cir. 1994).

A second part of the inquiry into the admissibility of an expert's affidavit, however, relates to the foundation on which his opinion is based. Rule 56(e) requires that an affidavit in opposition to a motion for summary judgment "set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). There is a tension between this requirement and Rule 703 of the Federal Rules of Evidence, which makes admissible the opinion of an expert if based on sources reasonably relied on by experts in the field, even if the basis of the opinion is not itself admissible. As Judge J. Skelly Wright observed, while Rule 703 was intended to permit a broad range of expert opinion to be admitted, its purpose is not "to make summary judgment impossible whenever a party has produced an expert to support its position." *Merit Motors, Inc. v. Chrysler Corp.*, 569 F.2d 666, 673 (D.C. Cir. 1977). The circuits have split over how the "set forth specific facts" language in Fed. R. Civ. P. 56(e) accords with the loose requirements of Fed. R. Evid. 703. The First and Seventh Circuits require experts to

provide, in their affidavits in opposition to motions for summary judgment, the facts on which they rely and the reasoning process that leads to their opinions. See *Hayes v. Douglas Dynamics, Inc.*, 8 F.3d 88 (1st Cir. 1993); *Mid-State Fertilizer Co. v. Exchange Nat'l Bank of Chicago*, 877 F.2d 1333 (7th Cir. 1989). The Ninth Circuit and the D.C. Circuit require that the factual basis for the expert's opinion be set forth but do not require the expert to explain his reasoning process. See *Ambrosini v. Labarraque*, 966 F.2d 1464 (D.C. Cir. 1992); *Bulthuis v. Rexall Corp.*, 789 F.2d 1315 (9th Cir. 1985).

The Second Circuit has not ruled on this issue directly but, in holding that expert affidavits were sufficient for consideration at the summary judgment stage, has cited the Seventh Circuit's decision in *Mid-State* as an example of an inadequate affidavit. See *B.F. Goodrich v. Betkowski*, 99 F.3d 505, 526 (2d Cir. 1996); *Iacobelli*, 32 F.3d at 25. In *Mid-State*, the expert's affidavit consisted solely of seven conclusory sentences "devoid of factual references or reasoning." *B.F. Goodrich*, 99 F.3d at 526 (citing *Mid-State*, 877 F.2d at 1338-39). In contrast, the expert's affidavit in *B.F. Goodrich* was "detail[ed,] ... thorough and well-supported," *id.*, and the experts' affidavits in *Iacobelli* "explain[ed] in detail which documents were reviewed, relevant industry customs and practices, and the general bases for [the experts'] opinions." 32 F.3d at 25.

Under the tests of any of these circuits, Bidanset's affidavit is insufficient to overcome a motion for summary judgment. He does not state that he examined any evidence in this case nor that he solicited and examined the chain of custody report that he terms critical. Instead, he avers that it is possible that the blood sample was contaminated. Possibility and speculation, however, do not suffice on a motion for summary judgment, even if voiced by an expert. Without a statement of the facts on which he relied, his affidavit is insufficient pursuant to Fed. R. Civ. P. 56(e).

Without Bidanset's affidavit, plaintiff cannot successfully oppose defendant's motion for summary judgment on the first cause of action. By its terms the contract clearly excludes coverage for accidents occurring where the deceased's blood alcohol level is above .10 percent. The evidence permits no genuine dispute as to O'Neill's blood alcohol. Accordingly, defendant is entitled to summary judgment in its favor on plaintiff's asserted breach of contract claim.

Turning to the second cause of action in the complaint, alleging that defendant "was negligent and careless in failing to properly ascertain whether or not the blood alcohol testing was done in a proper and medically accepted manner," defendant's motion for summary judgment must also be granted. Defendant contends that a tort claim cannot be maintained where its sole

allegation is, in essence, a negligent breach of contract.^{2/} As the Superior Court of Pennsylvania has recently observed, "[t]he determination as to whether causes of action sound in contract or tort is difficult due to the somewhat confused state of [Pennsylvania] law." *Phico Ins. Co. v. Presbyterian Med. Servs.*, 663 A.2d 753 (Pa. Super. Ct. 1995). Prior to the decision in *Phico Insurance*, there were two separate lines of cases, each establishing a different "test" to determine whether a cause of action was properly considered a contract or tort claim. The first line began with *Raab v. Keystone Ins. Co.*, 412 A.2d 638 (Pa. Super. Ct. 1979), in which the court held that a claim alleging failure to perform contractual duties ("nonfeasance") is a contract claim, while a claim alleging improper performance of contractual duties ("misfeasance") is a tort claim. *Id.* at 639. In *Phico Insurance*, Pennsylvania abandoned *Raab* and its progeny in favor of the test set forth in *Bash v. Bell Tel. Co.*, 601 A.2d 825 (Pa. Super. Ct. 1992). See *Phico Insurance*, 663 A.2d at 757. Under *Bash*, for a claim "to be construed as a tort action, the wrong ascribed to the defendant must be the gist of the action with the contract being collateral." *Phico Insurance*, 663 A.2d at 757. Further, "a contract action may not be converted into a

^{2/} Defendant relies on New York law, which, as set forth in the body of this opinion, is inapplicable. I note, however, that the same result would obtain under New York law. See *Eugene Iovine, Inc. v. Rudox Engine & Equip. Co.*, 871 F. Supp. 141, 146 (E.D.N.Y. 1994) ("Under New York law, a party may not maintain a claim for negligence if the purported claim is merely a claim for breach of contract; rather, the party must allege, and ultimately prove, the violation of a duty independent of the contract.") (citing *Clark-Fitzpatrick, Inc. v. Long Island R.R.*, 521 N.Y.S.2d 653, 656-57 (1987)).

tort action simply by alleging that the conduct in question was done wantonly." *Id.*

Under the *Bash* rule, plaintiff's second cause of action is untenable. Rather than being collateral to the second cause of action, the insurance contract between defendant and O'Neill is the genesis of that claim. As the *Phico Insurance* court held, a tort action does not arise simply by alleging that a contract was breached in a negligent or wanton manner. Accordingly, plaintiff's second cause of action fails to allege a cognizable claim for relief, and defendant's motion for summary judgment as to this cause of action is granted.^{3/}

Plaintiff's third cause of action alleges that JC Penney's failure to pay constituted a breach of an insurer's duty of good faith. Defendant seeks summary judgment as to this cause of action as well.^{4/} Until 1991, Pennsylvania law provided no action for bad faith against an insurer. See *D'Ambrosio v. Pennsylvania Nat'l Mut. Cas. Ins. Co.*, 431 A.2d 966, 969-70 (Pa. 1981). A 1991 statute, however, provides that "[i]n an action arising under an insurance policy, if the court finds that the

^{3/} I note that, had the *Phico Insurance* court adopted the *Raab* test instead of the *Bash* test, the result in this case would be unchanged. *Raab*, like the instant case, concerned a suit by an insured to force the insurer to pay when the insurer relied on an exclusion clause in the contract to avoid payment. The *Raab* court rejected plaintiff's claim that the insurance company's failure to pay benefits could be "negligent," as failure to pay is nonfeasance regardless of motive in not paying and is, thus, a contract claim under the *Raab* test.

^{4/} Again, defendant's reliance on New York law is misplaced, but the result would be the same were New York law applicable. In New York an action against an insurer for breach of an implied covenant of good faith and fair dealing is "duplicative of the ... action for breach of contract and should [be] dismissed." *New York Univ. v. Continental Ins. Co.*, 639 N.Y.S.2d 283, 290 (1995).

insurer has acted in bad faith toward the insured, the court may" award interest, punitive damages, costs, and attorneys fees.

42 Pa. C.S.A. § 8371 (Purdon's Supp. 1991). While this statute moots the *D'Ambrosio* court's holding that the common law provides no right of action, Pennsylvania federal courts have applied to the statutory cause of action the Pennsylvania Supreme Court's observation that

in jurisdictions that recognize a cause of action for bad faith conduct on the part of an insurer, "a plaintiff must show the absence of a reasonable basis for denying benefits of the policy and the defendant's lack of knowledge or reckless disregard of the lack of a reasonable basis for denying the claim."

American Franklin Life Ins. Co. v. Galati, 776 F. Supp. 1054, 1064 (E.D. Pa. 1991) (quoting *D'Ambrosio*, 431 A.2d at 971); accord *Horowitz v. Federal Kemper Life Assurance Co.*, 57 F.3d 300, 307 (3rd Cir. 1995) ("plaintiff's bad faith claim must fail because under the circumstances, Federal Kemper had a reasonable basis to deny Mrs. Horowitz's claim").

In this case, there can be no question that defendant had a "reasonable basis" to deny plaintiff's claim for benefits. There is no dispute of material fact as to the propriety of defendant's declining coverage; O'Neill died under circumstances not governed by the policy. Even were there a dispute of material fact as to plaintiff's breach of contract claim, however, defendant's actions in denying coverage were "reasonable." Defendant examined two police reports, a coroner's report, and a blood analysis which all suggested that O'Neill had

been drinking on the date of his accident. According to O'Neill's son-in-law, such drinking was not uncommon for the deceased. There was nothing in any way "unreasonable" about defendant's decision to deny coverage. Accordingly, under Pennsylvania law, defendant is entitled to summary judgment on plaintiff's third cause of action. See, e.g., *Horowitz*, 567 F.3d at 308 (granting summary judgment where insurer's actions in declining coverage were reasonable).

Plaintiff seeks to avoid entry of summary judgment by arguing that defendant's motion is "[a]t best ... premature" because discovery needs to be conducted. Although no authorities are cited in support of this argument, I treat this as a motion pursuant to Rule 56(f), which provides:

Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

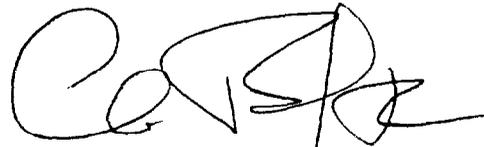
In this circuit, the opponent of a motion for summary judgment who seeks discovery under Rule 56(f) must file an affidavit explaining "(1) the information sought and how it is to be obtained; (2) how a genuine issue of material fact will be raised by that information; (3) what efforts the affiant has made to obtain the information; and (4) why those efforts were unsuccessful." *Sage Realty Corp. v. Insurance Co. of North America*, 34 F.3d 124, 128 (2d Cir. 1994). Plaintiff's affidavit,

although not explicit, could be construed as meeting the first of these two requirements in that it avers that deposition of the coroners' staff and the staff of the laboratory might produce facts showing that the blood sample was improperly preserved. As to the final two requirements, however, plaintiff's affidavit is completely deficient; no discovery attempts are described. At oral argument, defense counsel stated that plaintiff has, to date, served no discovery requests. Plaintiff's counsel does not dispute these statements. Plaintiff, having not attempted to conduct discovery during the pendency of this action or the instant motion, cannot now use Rule 56(f) to defeat an otherwise valid motion for summary judgment. Accordingly, defendant's motion for summary judgment is granted in all respects.

The Clerk of the Court is directed to enter judgment dismissing the complaint and to furnish a filed copy of the within to all parties and to the magistrate judge.

SO ORDERED.

Dated : Brooklyn, New York
August 6, 1998



United States District Judge