

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

KAREN BRACKEN-BOVA,	:	
	:	C.A. No. K10C-11-034 WLW
Plaintiff,	:	
	:	
v.	:	
	:	
LIBERTY MUTUAL FIRE	:	
INSURANCE COMPANY, a	:	
Foreign corporation,	:	
	:	
Defendant.	:	

Submitted: September 14, 2011

Decided: October 7, 2011

ORDER

Upon Defendant's Motion to Dismiss.

Granted in part; Denied in part.

William D. Fletcher, Jr., Esquire of Schmittinger & Rodriguez, P.A., Dover, Delaware; attorneys for the Plaintiff.

Nancy Chrissinger Cobb, Esquire of Chrissinger & Baumberger, Wilmington, Delaware; attorneys for the Defendant.

WITHAM, R.J.

FACTS

_____Karen Bracken-Bova (“Plaintiff”) was injured in an automobile accident that occurred on January 9, 2008 when a vehicle driven by Eldora Frisby ran a red light striking the Plaintiff’s vehicle. Eldora Frisby pleaded guilty to inattentive driving charges stemming from the accident. The Plaintiff filed a personal injury action against Frisby. The lawsuit ultimately settled for the coverage limit of \$15,000 under Frisby’s automobile insurance policy.

According to the complaint, the settlement with Frisby was insufficient to cover the Plaintiff’s medical costs. The Plaintiff claims to have expended \$38,398.07 to obtain medical treatment for injuries sustained in the accident. She made claims for \$38,024.07 on her own automobile insurance policy with Liberty Mutual Fire Insurance Company (“Defendant”). The policy contains uninsured/underinsured personal injury protection coverage of up to \$50,000.

The Defendant hired Dr. Kevin Hanley, a board certified physician, to conduct an independent medical evaluation. Hanley examined the Plaintiff on March 10, 2009 and prepared a report. He determined that her cervical injuries were due to pre-existing degenerative disease, which had been temporarily aggravated by the accident. He also found that the accident caused the Plaintiff’s elbow injury. Dr. Hanley concluded,

Treatment to date has been protection of the elbow with an elbow pad but progressive ulnar neuropathy can be treated surgically. In this particular case, I do not believe that she has come to that. No further intervention is necessary at least at this point in time but I do believe

that one has to conclude that she does have residual symptoms in the elbow related to the accident. She has reached maximum medical improvement.

The Defendant sent a letter to the Plaintiff, explaining that medical claims related to the accident would not be honored after April 8, 2009. The letter explained that the decision was based on the results of the independent medical evaluation.

PROCEDURAL HISTORY

The Plaintiff filed her complaint on November 24, 2010. She is seeking three different remedies for the Defendant's alleged breach of contract: (1) compensatory damages for breach of contract; (2) punitive damages for the Defendant's alleged bad faith refusal to pay her claim; and (3) statutory damages under 21 Del. C. § 2118B. The Defendant has filed a 12(b)(6) motion to dismiss the claims for punitive and statutory damages. The Defendant has supported its motion with an exhibit containing Dr. Hanley's medical report prepared as part of the independent medical evaluation.

Standard of Review

A Rule 12(b)(6) motion to dismiss that relies on materials beyond the pleadings shall be treated as a motion for summary judgment.¹ Summary judgment should be granted only if the record shows that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.² The facts must be

¹Super. Ct. Civ. R. 12(b) (2011).

² Super. Ct. Civ. R. 56(c) (2011).

viewed in the light most favorable to the non-moving party.³ Summary judgment may not be granted if the record indicates that a material fact is in dispute, or if it seems desirable to inquire more thoroughly into the facts in order to clarify the application of the law to the circumstances.⁴ However, when the facts permit a reasonable person to draw but one inference, the question becomes one for decision as a matter of law.⁵

DISCUSSION

Timing of Motion for Summary Judgment

The Plaintiff's argument that the Defendant's Motion for Summary Judgment is premature is well-taken. As per the Court's June 9, 2011 Scheduling Order, discovery is in its nascent stage. The prematurity of such a motion for summary judgment ordinarily leads to a denial without prejudice.⁶ The Defendant's motion is premature as to the bad faith claim because the Court does not have the benefit and assurance of factual investigation that discovery provides. The Plaintiff must be given the benefit of discovery to investigate and uncover any facts relevant to her claim. If, for example, the Court in *Swetland*⁷ entertained and granted a motion for partial summary judgment at such an early stage in the proceedings, the plaintiff may

³ *Guy v. Judicial Nominating Comm'n*, 659 A.2d 777, 780 (Del. Super. 1995).

⁴ *Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del. 1962).

⁵ *Wooten v. Kiger*, 226 A.2d 238, 239 (Del. 1967).

⁶ *Hampton v. Warren-Wolfe Assocs, Inc.*, 2004 WL 838847, at *2, Witham, J. (Del. Super. Mar. 25, 2004).

⁷ *Swetland v. Allstate Insurance Co.*, 1987 WL 16730 (Del. Super. July 27, 1987).

never have uncovered all of the facts necessary to prove that Allstate withheld pertinent information from their independent medical examiner.⁸ Thus, as to the Defendant's Motion for Partial Summary Judgment of the Plaintiff's bad faith claim, the Court finds the motion premature and denies the motion without prejudice. As to statutory damages and attorney's fees, these claims may be evaluated on the basis of the undisputed letter received by the Plaintiff's attorney from the Defendant, which the Court addresses below.

Statutory Damages and Attorney's Fees

The Plaintiff seeks statutory damages and attorney's fees under 21 Del. C. § 2118B. Section 2118B provides statutory damages in circumstances where an insurer has failed to promptly pay a claim or provide a letter setting forth the reasons for its decision to deny the claim no later than 30 days following receipt of a written request for benefits and supporting documentation.⁹ The addition of attorney's fees requires success under the statute as well as bad faith on the part of the insurer.¹⁰ While the Court does not preclude the possibility of bad faith, the Defendant mailed a letter to the Plaintiff's counsel, dated May 7, 2009, explaining that it would deny her claims as of April 8, 2009 on the basis of the independent medical evaluation of Dr. Hanley. The Defendant has complied with the statute because it gave 30 days notice that it

⁸*See id.*

⁹21 Del. C. § 2118B(c) (2011).

¹⁰§ 2118B(d).

Karen Bracken-Bova v. Liberty Mutual Fire Ins. Co.

C.A. No. K10C-11-034 WLw

October 7, 2011

would deny her medical claims related to her accident, and it provided the reason for its decision. There is no basis for either statutory damages or attorney's fees under these facts.

CONCLUSION

For the foregoing reasons, the Defendant's motion for partial summary judgment is granted as to statutory damages and attorney's fees and denied as to the bad faith claim without prejudice.

IT IS SO ORDERED.

/s/ William L. Witham, Jr.
Resident Judge

WLW/dmh

oc: Prothonotary

xc: Counsel