

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

BRUCE A. DRAINER,)
)
Plaintiff,)
)
v.)
)
AIG ANNUITY INSURANCE)
COMPANY, a foreign corporation,) C.A. No. 05C-04-007 CLS
and NATIONWIDE MUTUAL)
INSURANCE COMPANY, a)
foreign corporation,)
)
Defendants.

ORDER

On this 14th day of May, 2009, it appears to the Court that:

1. Defendant Nationwide Mutual Insurance Company (“Nationwide”) has moved for summary judgment on Plaintiff’s uninsured motorist claim. Nationwide argues that the claim is barred by Plaintiff’s failure to notify the police or proper governmental authority as required by 18 *Del.C.* § 3902(a)(3)(c), Delaware’s Uninsured Motorist statute.¹

¹ 18 *Del.C.* § 3902(a)(3)(c) provides: A hit-and-run motor vehicle that causes an accident resulting in bodily injury or property damage to property of the insured. Bodily injury or property damage must be caused by physical contact of the hit-and-run vehicle with the insured or with an insured motor vehicle, or by a noncontact vehicle where the identity of both the driver and the owner of such vehicle are unknown. The accident must be

2. Plaintiff filed his initial Complaint against the defendants on April 1, 2005.² In the Complaint, Plaintiff claims that he was the victim of a hit-and-run accident that occurred on October 22, 2003 while he was on duty working for Diamond Delchester Oil. Immediately following the accident, Plaintiff reported the accident to his employer. Plaintiff concedes that did not report the incident to the police or any governmental authority. He also did not report the accident to Nationwide. According to Nationwide, it was first notified of the accident upon Plaintiff's filing of this suit, nearly one and half years after the accident occurred. Plaintiff's employer carried a primary policy with AIG and Plaintiff carried a secondary policy with Nationwide. AIG was granted summary judgment on January 10, 2006 because Plaintiff's employer rejected in writing uninsured motorist coverage on its work vehicles.³
3. Nationwide moves this Court for summary judgment based on Plaintiff's failure to notify the police or proper governmental authority. Summary judgment may be granted only when no issues of material fact exist, and the moving party bears the burden

reported to the police or proper governmental authority. The insured must notify his insurer within 30 days, or as soon as practicable thereafter, that the insured or his legal representative has a legal action arising out of the accident.

² Compl., D.I. 1.

³ Order, D.I. 12.

of establishing the non-existence of material issues of fact.⁴ The moving party bears the initial burden of showing that no material issues of fact are present.⁵

4. Delaware's Uninsured Motorist statute is a notification statute. Under Delaware insurance law, notification provisions are generally not given preclusive application in the absence of prejudice.⁶ The Supreme Court of Delaware has held that "an insured's breach of the notice provision, without prejudice to the insurer, will not relieve the company of its liability under the contract."⁷ Therefore, to prevail on its motion for summary judgment, Nationwide must show that Plaintiff failed to comply with the Uninsured Motorist statute and that it suffered prejudice as a result.
5. It is not clear that Plaintiff has failed to comply with the Uninsured Motorist statute. 18 *Del. C.* § 3902(a)(3)(c) sets forth two reporting requirements: (1) claimant must notify the police or proper governmental authority of his involvement in a hit-and-run

⁴ Super. Ct. Civ. R. 56(c); *Burkhart v. Davies*, 602 A.2d 56, 59 (Del. 1991).

⁵ *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979).

⁶ *Allstate Ins. Co. v. Lazarczyk*, 1996 WL 944906 (Del. Super., Dec. 17, 1996).

⁷ *State Farm Insur. Co. v. Johnson*, 320 A.2d 345, 346 (Del. 1974). *See also Nationwide Mut. Ins. Co. v. Starr*, 575 A.2d 1083, 1088 (Del. 1990).

accident and (2) claimant must notify his insurer within 30 days of the accident, “or as soon as practicable thereafter...”

6. As to the first requirement, the statute simply states that the accident must be reported to the police or proper governmental authority but it does not set a time frame in which the reporting must be done. Theoretically, Plaintiff can still report the accident to proper authorities and satisfy the first requirement of the statute. The purpose behind the police reporting requirement is to prevent the filing of fraudulent claims. Although not to the police, Plaintiff did report the accident to his employer immediately after it occurred. This fact bolsters the authenticity of Plaintiff’s claim and diminishes any suspicion of fraud. Although the statute’s second requirement, that Plaintiff must report the accident to his insurer, does provide for a time period, it is similarly lenient. According to the statute, Plaintiff must report the accident to his insurer within 30 days or “as soon as practicable.” Plaintiff claims that he thought he was covered by his employer’s primary AIG policy and that “it is unreasonable to expect that [he] should have had the prescience to know his employer rejected UM/UIM coverage on its company vehicles and that he should have

contacted Nationwide to let it know he would be making a UM claim under his personal policy in one and a half years.”⁸ Whether Plaintiff reported the accident to Nationwide “as soon as practicable” under these circumstances is a question of fact for a jury to determine.

7. Whether Plaintiff failed to comply with the requirements of 18 *Del. C.* § 3902(a)(3)(c) involves questions of fact for the jury to determine. Even if the jury determines that Plaintiff did not comply with the statute, it must determine whether Nationwide suffered prejudice sufficient to preclude Plaintiff’s claim. Because questions of material fact still exist, Defendant’s Motion for Summary Judgment is **DENIED**.

IT IS SO ORDERED.

Judge Calvin L. Scott, Jr.

⁸ Pl. Response to Def.’s Supp. Mot. for Summ. J. at 2, D.I. 42.