IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

JACQUELINE M. GEORGE,	)	
	)	C.A. No. 02C-04-007 JTV
Plaintiff,	)	
	)	
v.	)	
	)	
DONEGAL MUTUAL INSURANCE COMPANY,	)	
	)	
	)	
Defendant.	)	

Submitted: July 11, 2003
Decided: August 21, 2003

Stephen A. Hampton, Esq., Grady & Hampton, Dover, Delaware. Attorney for Plaintiff.

Colin M. Shalk, Esq., Casarino, Christman & Shalk, Wilmington, Delaware. Attorney for Defendant.

Upon Consideration of Defendant's
Motion for Partial Summary Judgment
GRANTED

VAUGHN, Resident Judge

George v. Donegal Insurance
C.A. No. 02C-04-007 JTV
August 21, 2003

ORDER

Upon consideration of the defendant's motion for partial summary judgment, the plaintiff's opposition, and the record of the case, it appears that:

1. In this action the plaintiff, Jacqueline M. George, alleges that the defendant, Donegal Mutual Insurance Company, wrongfully failed to pay lost wages, COBRA premiums and medical bills under the personal injury protection provisions of an automobile insurance policy. She also seeks damages on the grounds that the defendant acted arbitrarily, capriciously and with bad faith in failing to pay the lost wages and COBRA premiums. The defendant has moved for summary judgment on the bad faith claim.

2. Summary judgment should be rendered 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.[1] The facts must be viewed in the light most favorable to the non-moving party.[2] 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.[3] However, when the facts permit a reasonable person to draw but one inference, the question

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[1] Superior Court Civil Rule 56(c).

[2] *Guy v. Judicial Nominating Comm'n*, 659 A.2d 777, 780 (Del. Super. 1995) *Figgs v. Bellevue Holding Co.,* 652 A.2d 1084, 1087 (Del. Super. 1994).

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

becomes one for decision as a matter of law.[4]

3. On March 26, 2001, the plaintiff was struck by a car insured by the defendant. She was a pedestrian. At the time, she was working at Midway Slots in Harrington, Delaware. She contends that she received injuries in the accident which rendered her unable to work at her job at Midway Slots thereafter.

4. Initially, the defendant paid the plaintiff the full amount of her lost wages and COBRA premiums under the provisions of its insured's personal injury protection. On March 1, 2002, a little less than a year after the accident, the plaintiff's doctor signed a form indicating that she could perform light duty work. Upon receipt of that form, the defendant asked its attorney, a member of the Delaware bar, for an opinion as to whether it should continue providing personal injury protection benefits to the plaintiff for lost wages and COBRA premiums. The attorney advised the defendant that Delaware law imposed a duty to mitigate damages, and since the plaintiff had been released to permanent light duty, the defendant should discontinue payments for the plaintiff's lost wages and COBRA benefits. On March 15, 2002, the defendant informed the plaintiff's attorney that it would no longer be paying wage or COBRA payments.

5. The plaintiff then filed this suit on April 4, 2002. At the request of the defendant, the plaintiff was examined by Dr. Lawrence Piccioni, M.D. Prior to the examination, the defendant's attorney provided Dr. Piccioni with the plaintiff's medical records and a copy of her job description at Midway Slots. The job

[4] *Wooten v. Kiger*, 226 A.2d 238 (Del. 1967).

description was that of a slot floor attendant. It indicated that physical demands of the job included moderate lifting, 30 to 50 pounds. In his report of his examination, dated June 21, 2002, Dr. Piccioni stated in pertinent part as follows:

> Currently, the patient states that she is not working. The type of work that she did was hostessing at Dover Downs.
>
> * * *
>
> She states she is seeking employment on her own, but given her restrictions, she has been released to permanent light duty restrictions by Dr. Schwartz, she feels it is difficult to find a job, at this point.
>
> * * *
>
> As far as her returning to work, based on the description of her job, and being discharged to light to light medium duty work, under the standard guidelines of light duty work, her job fits well within this category, and she should be able to return to her place of employment.

6. As the litigation progressed, it became clear that there was a dispute between the parties as to whether the defendant was obligated to seek alternative employment after she was released to light duty work. The plaintiff's position was that the applicable policy provision did not require her to seek alternative employment. The defendant's position was that she did have a duty to mitigate her lost income by seeking substitute employment. In a ruling issued on April 28, 2003,

the Court held that the plaintiff was not obligated to seek alternative employment.[5]

7. The defendant contends that the facts, viewed in the light most favorable to the plaintiff, do not support a finding of bad faith. The plaintiff contends that they do. She contends that it was not reasonable for the defendant to rely on the legal opinion from its attorney. She contends that even if the plaintiff was under a duty to seek alternative, light-duty work, there was no evidence such work was available which would provide her with insurance benefits equal to those she had at Midway Slots. She contends it was bad faith at least for the defendant to stop paying COBRA benefits. She also contends that it was bad faith for the defendant to refuse to pay the difference between light duty wages and her wages at Midway Slots. She also contends that the defendant's reliance on Dr. Piccioni's report does not create a defense to her bad faith claim because (1) the defendant's attorney misled Dr. Piccioni into believing that the plaintiff had a light to medium work restriction, rather than light duty, which had the effect of overstating her lifting capacity, and (2) Dr. Piccioni's report was based upon a mistaken belief on his part that the plaintiff was working as a hostess at Dover Downs, not as a slot attendant at Midway Slots. She also contends that the defendant acted in bad faith by not resuming the payment of lost wages and COBRA benefits after the Court ruled that she was under no duty to seek alternative, light-duty work.

8. "[I]n order to establish 'bad-faith' the plaintiff must show that the insurer's

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[5] *George v. Donegal Mut. Ins. Co.*, 2003 Del. Super. LEXIS 154 (Del. Super. 2003).

refusal to honor its contractual obligation was clearly without any reasonable justification."[6] The question is "whether at the time the insurer denied liability, there existed a set of facts or circumstances known to the insurer which created a *bona fide* dispute and therefore a meritorious defense to the insurer's liability."[7] "[T]he question of bad faith refusal to pay should not be submitted to the jury unless it appears that the insurer did not have reasonable grounds for relying upon its defense to liability.[8]

9. The plaintiff's contention that it was unreasonable for the defendant to rely upon the advice of its attorney is unsupported by any authority. There is nothing in the record to suggest that the defendant was in any way on notice that the attorney's opinion was in error or otherwise unreliable. No reasonable juror could conclude, in this case, that the defendant acted in bad faith by asking for and receiving an opinion of experienced Delaware counsel and then acting in conformity with that advice.

10. It is true that there was some mixing of the words "light duty" and "medium light duty" in the letter from defense counsel to Dr. Piccioni and in Dr. Piccioni's report, and the doctor was apparently under a misunderstanding as to the defendant's work (slots attendant versus Dover Downs hostess). These factors may throw doubt on Dr. Piccioni's opinion that she could return to her original

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[6] *Casson v. Nationwide Ins. Co.*, 455 A.2d 361, 369 (Del. Super. 1982); *Tackett v. State Farm Fire & Cas. Ins.,* 653 A.2d 254, 264 (Del. 1996).

[7] *Casson*, 455 A.2d at 369.

[8] *Id.*

employment, but nothing in Dr. Piccioni's opinion disputes the opinion of the plaintiff's own doctor that she was able to return to light duty work. Consequently, nothing in Dr. Piccioni's report called into question the defendant's earlier decision, based upon counsel's advice, to terminate the plaintiff's benefits because she was able to work at light duty jobs.

10. In the April 28, 2003 decision, the Court ruled that the plaintiff was not obligated to seek alternative, light-duty employment to mitigate damages. The decision was based, for the most part, upon an analysis of *Casson v. Nationwide Ins. Co.*[9] and the particular policy language in the Donegal policy. The defendant's position, although it did not prevail, was based upon a good faith argument that under Delaware law and the policy language, there was a duty to mitigate. A *bona fide* dispute existed on that issue. The Court's decision did not specifically require the defendant to do anything. The defendant may wish to pursue the issue on appeal. Whether the plaintiff was unable to perform her previous employment at Midway Slots after March 2001 is an issue yet to be litigated. The plaintiff has provided no authority to support her contention that the defendant was obligated to resume lost wage or COBRA payments after the Court's April 28, 2003 ruling or that the failure to do so constitutes bad faith.

11. My conclusion is that the record, viewed in the light most favorable to the plaintiff, will not support a jury finding that the defendant acted in bad faith when it terminated the plaintiff's benefits in March 2001 or when it did not renew them in

[9] 455 A.2d 361 (Del. Super. 1982).

April 2003.

12. Therefore, the defendant's motion for partial summary judgment is ***granted***.

IT IS SO ORDERED.

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Resident Judge

oc: Prothonotary
cc: Order Distribution
File