IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

T. BRUCE WILMOTH and DONNA., WILMOTH, husband and wife,	:	
Plaintiffs,	:	
	:	C.A. No.: 00C-11-237 SCD
v.	:	
DONEGAL INSURANCE COMPANY a/k/a DELAWARE ATLANTIC INSURANCE COMPANY and CONNECTIV f/k/a DELMARVA POWER AND LIGHT COMPANY,	:	
Defendants.	:	

Submitted: December 22, 2003
Decided: January 6, 2004

Decision After Non-Jury Trial

ORDER

For the reasons set forth in the Court's Memorandum Opinion of January 6, 2004, the judgment is entered in favor of Connectiv f/k/a Delmarva Power and Light Company. The Motion for Involuntary Dismissal of defendant Donegal Insurance Company a/k/a Delaware Atlantic Insurance Company is GRANTED as announced during the course of trial.

IT IS SO ORDERED this 6th day of January, 2004.

_____
Judge Susan C. Del Pesco

Original to Prothonotary
xc: Andrew G. Ahern, III, Esquire
Stephen P. Casarino, Esquire
Somers S. Price, Jr., Esquire

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MEMORANDUM OPINION

Andrew G. Ahern, III, Esquire, Joseph W. Benson, P.A., 1701 North Market Street, P.O. Box 248, Wilmington, DE 19899, attorney for the plaintiff;

Stephen Casarino, Esquire, Casarino, Christman & Shalk, Conectiv Building, 2nd Floor, 800 North King Street, Wilmington, DE 19899, attorney for defendant Donegal Insurance Company a/k/a Delaware Atlantic Insurance Company; and

Somers S. Price, Esquire, Potter, Anderson & Corroon, Hercules Plaza, 6th Floor, 1313 North Market Street, Wilmington, DE 19899, attorney for defendant Connectiv f/k/a Delmarva Power and Light Company.

Del Pesco, J.

T. Bruce Wilmoth ("Wilmoth") and his wife Donna Wilmoth, plaintiffs, own a property at 915 Overbrook Road, Westover Hills, Wilmington, Delaware which they purchased in the early 1990's.

On November 29, 1997, the property sustained damage as a result of water which flowed through the return lines of the steam radiator heating system into rooms on the first and second floor of the house. Utilities to the house had been disconnected on November 17, 1997, then returned to service that same day, but the heater had not been fired-up. Wilmoth made repeated calls to Delmarva Power and Light Company ("Delmarva") regarding the lack of heat in the house, and claims that when Delmarva finally responded to his calls, the boiler was negligently restarted, leading to the flooding.

Donegal Insurance Company ("Donegal") provided homeowners insurance coverage for the property.[1] Donegal is charged with breach of contract and bad faith in its handling of the claim.

This case was tried non-jury for five days, December 15 to the 19, with closing arguments presented on December 22. At the close of the plaintiffs' case Donegal sought involuntary dismissal of the plaintiff's claim. I initially reserved decision to permit the uninterrupted presentation of testimony. After hearing arguments of counsel which, to accommodate various witnesses, were not completed until after Donegal had presented its defense, I announced my ruling. This decision provides an expanded recitation of the factual and legal basis for concluding that the claim against Donegal was barred by the statute of limitations; that no waiver applied, and that plaintiff had failed to present

[1] Donegal is the successor to the Delaware Atlantic Insurance Company.

evidence sufficient to create a factual issue as to Donegal's bad faith conduct. Additionally, it decides the negligence claim against Delmarva.

Statement of Facts

The property at 915 Overbrook is a large two-story house with a full basement built in the 1930's. It includes an addition to the left side which also has a basement area and two floors. The addition is referred to throughout the trial as the "left side" or "the addition." The addition, which was added shortly after the house was built, at all times relevant to this suit was uninhabited and unheated. After its acquisition by Wilmoth in the early 1990's, the property was occupied by his brothers and unrelated tenants for a period of time, but immediately before this incident, it was occupied by a small business, Jade Tree, and its owner/operators.

In the mid 1990's, in order to reduce the cost of heating this large house, Wilmoth hired David H. Geiger, a plumbing/heating technician, to remove the radiators and cap the supply lines for the heating system in the addition. The return lines were not capped. It is undisputed that roof leaks in several areas had caused some localized wall and ceiling damage in the addition.

Darren Walters of Jade Tree leased the property on a month-to-month basis beginning in early 1997. Walters, whose responsibilities included managing the business side of the Jade Tree enterprise, decided to terminate the lease effective November 15, 1997. He testified that he sent Wilmoth written notices of his intentions, but that there was no acknowledgement by Wilmoth. In preparation for his exit from the property, Walters requested on November 3, 2003, that Delmarva discontinue gas/electric service when Jade Tree departed. Utilities were cut-off on November 17, 2003. The same day,

Wilmoth became aware that the house was without utilities, and requested that Delmarva restore service. Delmarva's records indicate that the service was shut off about 9:30 in the morning and restored about midnight. When the power was restored, the heater was tested, but not left on, because the pressure gauges were reading zero and the Delmarva service man, John Woodward, was concerned about the adequacy of water in the system. Woodward gave a statement shortly after the incident and reiterated at trial that upon his departure he left a note that said "gas meter on. Water heater gas off at control knob, water on floor in front of unit. Boiler off at elec switch, make sure water in system before turning on [sic]."[2]

According to the routinely kept reports at Delmarva the subsequent communications were as follows:[3]

> November 26, 1997 13:19 – Received call from Mr. Wilmoth. Customer wanted to schedule turn off 12/01; but did not want turn off, just wanted order issued to read meter and then put in tenants' name. Delmarva advised we needed tenant to call. Mr. Wilmoth was aware no order was issued. Then Mr. Wilmoth claimed serviceman did not light appliance when we were out on 11/17. Issued F1 (turn on gas) to make sure gas is on and to call 762-0958, 15 minutes before going out then transferred to Telesales for heater contract.
>
> November 26, 1997 13:36 – Received call from Bruce. . . . Note: Landlord wants account to be registered in the name of Carole H. Schneider at the above and effective 12/1/97.
>
> November 27, 1997 8:31 – Gas serviceperson went to residence to turn on gas and noted "no one here for access, meter is on". [sic]
>
> November 28, 1997 10:14 – Received call from Bruce Wilmoth. Inquiry into whether gas meter is on. Advised customer service is on. Wanted to know if pilot lights were lit and explained to Mr. Wilmoth that service was

[2] Notes of John Woodard, Delmarva Power & Light Co., Dec. 3, 1997.

[3] The recitation of contacts was outlined in the Wallace-Simms letter of March 3, 1998, *infra* note 5. She has written the substance of the entries in intelligible form since the actual computer notes, also in evidence, contain numerous abbreviations and codes which would be otherwise meaningless.

originally turn on on 11/17 and pilot lights should be on. Advised that I (Customer Service Representative) will look into it.

November 28, 1997 10:21 – Received call from Bruce Wilmoth. Issued service order for checking why still no gas on. Issued service order F1 (turn on gas), go to basement door for access.

November 28, 1997 16:04 – Gas Serviceperson Orlando Brown stated meter on upon arrival but had no access to the house. *Tried all three doors.* (emphasis supplied)[4]

November 29, 1997 9:27 – Received call from owner. Customer terribly upset – stated that this was the fifth time that he requested Delmarva relight appliances at this location. . . . Called Chris in Dispatch who stated that the next available serviceman was in Hockessin on an X3 (outside gas leak) and that he will make this location next job. As per customer's request, transferred him to a supervisor.

November 29, 1997 9:36 – Received call from Bruce. Customer upset that heater/hot water has no been lit; has called numerous times reference to same; demands we get someone there within 10 minutes. Checked with Chris, Dispatch, and we have one person on call – on a gas leak now in Hockessin and will make this next job. Advised customer will have someone there as soon as possible. Noted to call ahead. Customer states because service has not been turned on, tenant is threatening to break lease. If does, we will be liable. Advised will have someone there as soon as possible.

November 29, 1997 10:29 – Gas serviceperson noted switch on side of boiler was on. Pilot was lit on left. Customer had water leaking throughout house claims; it's Delmarva's fault. Serviceperson shut off emergency switch to boiler and customer shut off water to house. Serviceperson then called Supervisor and Claims Department.[5]

As the Delmarva log indicates, the flooding was recorded on November 29, 1997, at 10:29, when Dave Thomas, a gas serviceperson from Delmarva, arrived at the house. The field supervisor, Leslie Warwick and the claims representative, Enid Wallace-Simms

[4] Orlando Brown's computer note does not state that he tried all 3 doors. Mrs. Wallace-Simms testified that Mr. Brown provided this information when interviewed shortly after the incident.

[5] Letter from Enid D. Wallace-Simms, Claims Representative, Delmarva Power and Light Co., to Bruce Wilmoth, Mar. 3, 1998.

were called to the house. Warwick investigated the cause of the flooding by examining the boiler. He saw that the pilot which had been lit on the 17th was still in the ON position. The electrical switch was in the OFF position, but had been in the ON position earlier that morning when the Thomas had arrived. He found the bypass valve for manually filling the system had been opened and had flooded the system. Upon discovery of that, he went to the owners and asked them to go to the basement so he could show them what had caused the problem. He then shut the valve off, got a garden hose to drain the excess water from the boiler, turned the electric switch to ON, and fired-up the boiler. He explained that the flooding in the house occurred because someone had opened the bypass valve, turned on the electricity and fired-up the heater but had not turned off the valve. Water pressure opened the "controlling limit operator" which flooded the burner and allowed water to enter the return line of the house heating system. The conditions were likened to leaving a hose on pumping water into the heating system.

Wilmoth and his wife took steps to remove water from the house, but they did not seek the assistance of professionals in water damage clean-up. The heated portion of the house sustained considerably less water infiltration because the radiators were in place. The unheated portion of the house was flooded, and the water penetrated the flooring. When the house heat was restored, the addition remained unheated.

It was not until March 1998 that Delmarva formally denied responsibility for the claim. It's letter to Wilmoth reviewed Delmarva's contacts with the property and concluded that "since there was no one attending the property at the time of the service call [referring to November 17 when the power was restored], the serviceperson left the

note advising you that he could not turn on the boiler in the basement due to water on the floor in front of the unit and his wanting to make sure there was water in the system prior to turn on [sic]. . . . [O]ur investigation reveals that Delmarva is not responsible [for the loss] and we must deny your claim." [6]

On May 7, 1998, over 5 months after the loss, Wilmoth filed a claim with Donegal seeking homeowner's coverage. He provided Donegal with a copy of the letter from Delmarva wherein responsibility for the loss was denied. Investigation of the loss was turned over to C.H. Hetrick Associates ("Hetrick"). According to Hetrick's records, its representative, Peter Drake, contacted Wilmoth and set an appointment to see the house on May 28, 1998.[7] Wilmoth failed to appear. Drake called Wilmoth and left a message the next day to set another appointment, then wrote on June 3rd requesting a call, but there was no response. Wilmoth was informed by letter dated June 16th that the file would be closed in fifteen days if there was no word from him.[8] A further appointment was set for June 30th, and Wilmoth again failed to appear. By letter dated July 9, 1998, Hetrick denied the claim because of the late reporting of the claim and the failure to provide access to the property.[9]

At Wilmoth's request, the file was reopened and transferred to a different adjuster, John Walsh. Walsh inspected the property on July 15, 1998 and by letter dated July 29, 1998, requested certain information in order to evaluate the claim. He notes in the letter that under the terms of the policy, Wilmoth was required to provide prompt notice of a

[6] Letter from Wallace-Simms to Wilmoth, Mar. 3, 1998.

[7] Letter from Peter C. Drake, C.H. Hetrick Assoc., to T. Bruce Wilmoth, June 3, 1998.

[8] Letter from Peter C. Drake, C.H. Hetrick Assoc., to T. Bruce Wilmoth, June 16, 1998.

loss and that "[y]our insurance company would like to investigate this matter further, but in so doing does not intend to waive any of the rights of defenses available to them under the policy."[10] Wilmoth was asked to sign a letter acknowledging that by conducting an investigation the company does not intend to limit any potential coverage defenses known or which may become known in the future. Wilmoth signed the non-waiver letter on September 27, 1998.

Walsh suggested to Wilmoth that a professional cleaning company be contacted to determine whether certain carpeting was salvageable; he recommended Serve Pro or ServiceMaster for an estimate. Instead, ServiceMaster gave an estimate on September 4, 1998, for the drying, cleaning and deodorizing of the entire property—a cost range of $5,000 to $9,000. The estimate notes that "[d]escant dehumidifiers are needed to dry the back section of the house."[11]

Donegal hired a structural engineer, James Druecker, who inspected the house on October 13, 1998. On the basis of its investigation and the report of Druecker, Donegal prepared an evaluation of the loss on August 10, 1999, offering to pay $2,396.09 on the claim with the possibility of recapturing $707.70 once proof of repairs was documented. Critical to Druecker's evaluation was separating damage due to the pre-existing roof leaks and damage caused by the failure to mitigate – to adequately dry out the effected area. Wilmoth rejected the tendered sum; this lawsuit was commenced in November

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[9] Letter from Peter C. Drake, C.H. Hetrick Assoc., to T. Bruce Wilmoth, July 9, 1998.

[10] Letter from John D. Walsh, C.H. Hetrick Assoc., to T. Bruce Wilmoth, July 29, 1998.

[11] Letter from ServiceMaster Cleaning Services, to Bruce Wilmoth, Sept. 4, 1998.

2000, some three years after the loss. Later, and without prejudice to the position of either plaintiffs or Donegal, the tendered money was accepted.

The Donegal policy has a statute of limitations provision of one year.[12] It provides that an insured has a duty to give immediate notice in the event of a loss and to "protect the property from further damage, make reasonable and necessary repairs required to protect the property."[13] It is undisputed that the addition was not heated for the winter following the water loss -- it may not be heated to date -- and certain additional damage to the property has occurred as a result of the freezing and thawing of the plaster in the property.

The cause of the water loss is uncontested. What is contested is the identity of the individual who was responsible for opening the by-pass valve, turning on the electricity, and firing-up the burner on or about November 29th.

Also contested is the nature of the statements made by Delmarva representatives Warwick and Simms on November 29th regarding responsibility for the loss. Plaintiffs claim that Delmarva accepted responsibility for the loss immediately. As to the Donegal claim, plaintiffs acknowledge the one-year statute of limitations, but claim a waiver.

Claim against Delmarva Power and Light

Findings of Fact

The evidence is that the water which entered the return system of the steam radiator heating system entered at a volume roughly equivalent to a garden hose. Since the drains in the basement area were handling the water which flowed down, no one has

[12] Donegal Mutual Insurance Company Policy No. DFP 0027795 at p.6.

[13] *Id*. at p.5.

attempted to calculate how long the water might have been on before it was discovered. Reasoning backward, the flooding was discovered by Carole Schneider on the morning of the 29th, but apparently was not present when Schneider was at the house on the 28th. It appears that the critical time period was late on the 28th or early on the 29th. The individuals who had access to the house during that time period were the plaintiffs, plaintiffs' brother James Wilmoth, and Carol Schneider. Unfortunately, Schneider has never been deposed, or even interviewed, about the circumstances leading up to message on the 28th which says "no heat wants to start moving by tonight … no plumber -- not clean at all," and her message on the 29th which says "heat never clicked on, water is every [sic]."[14] Nor has any evidence from James Wilmoth been provided.

Plaintiffs claim that Delmarva caused the mishap and points to the fact that a Delmarva employee was at the house on the 29th. Mr. Wilmoth testified that when Orlando Brown was on the stand he recalled that after Brown had left the property -- records show that Brown was there from 16:04 to 16:14 -- he spoke to Brown on the telephone, that the exchange was heated, and that Brown returned to the house and turned on the heat. He supports that testimony with photographs of the basement entrance which prove that Brown's testimony was incorrect regarding the placement of the heater. Brown testified that he looked through the nine-panel glass in the door and saw the boiler, but that he could not enter the basement because the door was locked. Brown also testified that he checked only one door, the one next to the driveway. Mr. Wilmoth presented photographs which show that the boiler was not visible through the door windows. Thus Wilmoth concludes that Brown was correct when he said that he saw the

[14] Telephone Message Slips of Donna Wilmoth, entered into evidence as Pltf's Ex. 11.

boiler, and incorrect when he said that the door was not open and he was not able to perform work on the boiler. He further challenges Brown's credibility because of the discrepancy regarding the doors checked.

I reconcile the facts differently. This incident occurred in 1997. Brown has not been back to this property, although he has no doubt been to hundreds of other properties. The contemporaneous records of Delmarva indicate that Brown was at the property very briefly, for only ten minutes, enough time to get out of his vehicle, go to the meters, satisfy himself that the gas and electric were on, check one or more doors, determine that no access was available, return to his vehicle, and enter the necessary information into the computer so that he could move on to his next call.[15] The amount of time spent by Brown in the failed attempt to enter the basement is consistent with the time spent by the other Delmarva employee, Robert Quinn, who went to the house on the 27th, reported no access, gas service on, and logged 8 minutes.[16] The testimony throughout the trial was that the technicians who go to residences get their instructions electronically on computers in their vehicles, and have no direct telephone conversation with customers. Significantly, this point was made as a statement of policy before Wilmoth testified in rebuttal that he had spoken to Brown on the evening of the 28th. In addition, Brown's contemporaneous log for the balance of the evening does not contain significant gaps nor does it show a return to the Wilmoth property. Under the totality of the circumstances, I find the testimony of Brown more persuasive.

Conclusions of Law

[15] *See* Delmarva Power & Light Co. RM System Report of Orlando Brown, Nov. 28, 1997.

[16] *See* Delmarva Power & Light Co. RM System Report of Robert Quinn, Nov. 27, 1997.

Delmarva cannot be found to have been negligent in a manner proximately causing this water loss because Delmarva was not inside the property between November 17 and the time of the loss.

Claim against Donegal Insurance Company

Motion for Involuntary Dismissal

Coverage

A motion for involuntary dismissal pursuant to Superior Court Civil Rule 41(b) permits a defendant to move for dismissal after the plaintiffs have completed the presentation of their evidence. Such a motion may be granted if "upon the facts and the law the plaintiff has shown no right to relief."[17] Upon the defendant's motion, "the Court, as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence."[18]

On the date of the occurrence, Wilmoth testified that he informed Donegal of the flood at the property, but did not file a claim for the loss because he expected Delmarva to accept responsibility and pay for the damages. More than three months later Delmarva denied any liability for the loss in a letter from its claims representative dated March 3, 1998.

The insurance policy allows for a one-year statute of limitations from the date of the loss for claims to be brought by the insured. Wilmoth concedes the limitations period bars the claim unless a waiver can be shown. Wilmoth argues Donegal has waived the limitations defense by authorizing a partial remediation of damages within the one-year

[17] Supr. Ct Civ. R. 41(b).

[18] *Id*.

limitation. Specifically, Wilmoth points to the July 29, 1998 letter from John D. Walsh, which requests that Wilmoth have a professional cleaning company spot clean the carpeting in the rear bedroom. The letter further states, "[p]lease provide the estimates and information regarding the cleaning contractor at your earliest opportunity. Other than the professional cleaning company's spot cleaning, please do not undertake any repairs until we have reached an agreement as to the full repair costs."[19] Additionally, it states "[the insurer] would like to investigate this matter further, but in doing so does not intend to waive any of the rights or defenses available to them under the policy."[20] On September 27, 1998, Wilmoth signed a non-waiver agreement in which he agreed that any action taken by Hetrick to investigate the claim shall not waive or invalidate any terms of the policy.

The issue before the Court is whether Walsh's request that the carpets be spot cleaned waives the defense of statute of limitations. A waiver is the intentional relinquishment of a known right, either expressly or by conduct which clearly indicates an intention to renounce a known privilege.[21] It involves both knowledge and intent.[22] In *Salerno v. Servpro of Hockessin/Elsmere, Inc*, the court held "all acts or conduct giving rise to waiver or estoppel must have occurred within the time limitation contained in the policy."[23] A waiver of the limitations provision in an insurance policy "may occur 'when the insurer, by its acts or declarations, evidences a recognition of liability under the

[19] Letter from John D. Walsh, Claims Adjuster, C.H. Hetrick Assoc., to T. Bruce Wilmoth, July 29, 1998.

[20] *Id*.

[21] *Moore v. Travelers Indemnity Insurance Company*, 408 A.2d 298, 301 (Del. Super. 1979).

[22] *Id*.

[23] *Salerno v. Servpro of Hockessin/Elsmere, Inc*., 2003 Del. Super. LEXIS 207 at *10.

policy, and the evidence reasonably shows that such expressed recognition of liability and offers of settlement have led the insured to delay in bringing an action on the insurance contract.'"[24] Furthermore, "the process of investigation does not constitute a waiver by [the] insurer."[25]

Here, there has been no waiver. It is clear from the July 29 letter that Walsh did not promise to pay the claims, and that the investigation would continue. In addition, the non-waiver agreement which Wilmoth signed further states the intention that no rights have been waived. Wilmoth does not claim that he was induced by the conduct of Donegal to delay bringing this action. Plaintiffs' claim for breach of contract is barred by the one-year statute of limitations.

This case is a clear example of why immediate notice of a claim is necessary. Had Wilmoth contacted his insurer immediately, it would have hired a company such as Serve Pro or ServiceMaster to immediately mitigate the water loss by doing a rapid clean-up. Instead, the water damage persisted because of the lack of a comprehensive clean-up, and the lack of heat in the portion of the house where the greatest water spill occurred. While I do not have to reach the issue of whether or not other policy provisions would have provided a defense to this claim, the evidence supports the finding that Wilmoth's failure to protect his property led to a substantial increase in the amount of damage to the structure.

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[24] *Thomas v. Allstate Ins. Co*., 974 F.2d 706, 710 (6th Cir. 1992) (quoting *Hounshell v. American States Ins. Co*., 424 N.E.2d 311, 314 (Ohio 1981).

[25] *Thomas*, 974 F.2d at 710.

Bad Faith

The next issue is whether plaintiffs have presented evidence sufficient to create a factual issue as to Donegal's bad faith conduct. Bad faith requires that an insurer not have any reasonable justification for denial of a claim.[26] Hetrick first contacted Wilmoth on June 3, 1998, to inform him that they had been assigned by Donegal to investigate the claim for water damage. After scheduling two appointments for Hetrick to inspect the damage, which Wilmoth missed due to late arrivals, an inspection was finally performed on October 13, 1998. On October 16, 2003, in order to continue the investigation, Walsh requested Wilmoth identify former tenants names and addresses, as well as the name of the plumber, the address and the approximate date when the radiators in the addition were removed. On November 9, 1998, Walsh wrote a letter to Wilmoth indicating that in order to proceed with the investigation he needed the information requested in his prior letter, which had not been received to date. On November 16, 1998, Wilmoth responded that he could not reveal former tenants names due to privacy reasons and requested that the investigation conclude so he could make repairs. The ultimate denial of the claim was based on an investigation by an independent engineer, James Druecker, which raised legitimate concerns about certain facts essential to a conclusion about causation; an independent evaluation which justified an offer for certain repairs after the statute of limitations; and a denial of the broad damages sought by plaintiff. Clearly there existed reasonable justifications to deny the claim. Therefore, Donegal did not act in bad faith in denying the claim.

[26] *Tackett v. State Farm Fire & Casualty Ins. Co*., 653 A.2d 254, 264 (Del. 1995).