IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Thomas Smith,	:	
Plaintiff	:	Civil Action 2:09-cv-780
v.	:	
State Farm Fire and Casualty Co.,	:	Magistrate Judge Abel
Defendant	:	

OPINION AND ORDER

This matter is before the Court pursuant to the motion of Defendant State Farm Fire and Casualty Company ("State Farm") for summary judgment (Doc. 21). For the reasons set forth herein, the motion is granted in part.

Factual background. The following uncontroverted facts are taken from the parties' briefs and the pleadings in this case. On January 11, 2009, a house in Jefferson County, Ohio belonging to Plaintiff Tom Smith ("Smith") caught fire and was rendered a total loss. Smith received the house in 2003 from his mother, who was moving into a nursing home, and with it the obligation to pay the utilities, mortgage, and insurance on the house. In 2007 and 2008, Smith worked as a janitor in Pittsburgh, Pennsylvania, approximately thirty miles away, and earned $10.00 per hour.

At the time of the fire, Smith had been suffering from financial difficulties; he missed two mortgage payments in 2008, and the bank threatened to foreclose. In

July 2008 he put the house up for sale, but received no offers. After an unsuccessful attempt to consolidate his debts with a debt management company, Smith worked out individual payment arrangements with his creditors. He discontinued gas service to the house in 2007 because he could not afford it, heating the home with electric space heaters instead.[1]

According to Smith, on the day of the fire he went to church, returned home, turned on an electric space heater, took a shower, and left to meet his girlfriend in Saint Clairsville for lunch. He had to meet her at 2:00 P.M; according to his wristwatch, it was 1:05 P.M. when he left his house. At deposition, he testified that he did not see any smoke or smell any burning wires or plastic as he left his home. At 1:12 P.M., a neighbor called 911 to report that the house was on fire. At least one of Smith's two cats died in the fire. The home was totally destroyed, and Smith filed a claim with Defendant State Farm, his insurer. When he presented his claim to his insurance agent, Smith reported that the fire department had told him that "space heater electrical connection started fire". (Doc. 22-2 at 1.) State Farm retained Dolence Electric Technical Consultants, Inc., ("Dolence"), an independent examiner, to investigate the cause of the fire.

Dolence investigated the site, including the area of the first floor where the fire had apparently broken out, as well as the remains of the space heater Smith

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[1] Plaintiff resumed gas service to the house in December 2008, approximately a month before the fire. (Doc. 21-1 at 3.) Neither party appears to have suggested that natural gas played a part in the house fire, and Defendant's expert witness discounted the possibility. (Doc. 21-5 at 3.)

had been operating and the electrical cord to which it had been plugged. They also took floor samples for laboratory analysis.[2] Dolence's report opined that a fire from an electrical failure or malfunction of a device or power cord is "typically a slow, smoldering fire that produces a discernable odor and/or smoke prior to the manifestation of flames", which was not consistent with Smith's testimony that he saw and smelled nothing when he left. (Doc. 21-5. at 10.) It considered, and ruled out, fire causes related to the space heater, its cord, and the extension cord into which it had been plugged. Dolence found that the heater had been located approximately a foot and a half from the nearby sofa, which was partially intact, and which "would have been consumed had the fire originated in this location. Also the fire and burn patterns were not consistent with a fire origin at the electric ceramic space heater." (*Id.*) Its conclusions were that laboratory analysis had indicated no evidence of an electrical failure or malfunction that caused or contributed to the fire, and that the minimal time between when Smith had left the house and when the fire occurred was not consistent with an accident. Dolence stated, however, that "[a]n intentional human act cannot be ruled out as to the cause of this fire." (*Id.* at 11.)

State Farm's investigators inspected the fire site on their own, interviewed

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[2] The analysis, performed by Barker & Herbert Analytical Laboratories, found that all samples had included turpentine residue, styrene, and pyrolytic degradation products of styrene. "While styrene and alpha-methylstyrene can be ignitable liquids, they are also common degradation products from burned styrene products." Moreover, turpentine was present naturally in coniferous wood, and could contaminate nearby objects when the wood was burned. (Doc. 21-5 at 8.)

neighbors and firefighters, looked into Smith's reputation, and examined Smith under oath pursuant to the terms of his insurance policy. It also retained a firm of investigative accountants to review Smith's financial condition, which concluded that Smith "had exhibited indications of financial distress prior to the fire loss" and that Smith was unable to meet his current obligations.[3] (Doc. 21-7 at 1.) On September 4, 2009, State Farm denied the claim pursuant to four clauses of Plaintiff's insurance policy: "Intentional Acts, Concealment or Fraud, Neglect, and The Loss was not Accidental".[4] (Doc. 21 at 5.) Plaintiff filed this action on August 6, 2009, claiming that State Farm had breached the insurance policy by refusing to cover his loss, that it had done so in bad faith, and that it had acted with "malice, fraud, insult, and in conscious disregard for" his rights, entitling him to punitive damages. (Doc. 3 at 1-2.) Defendant has now moved for summary judgment on all these claims.

Summary judgment. Summary judgment is appropriate "if the pleadings,

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[3] The accountants determined specifically that Plaintiff had a negative net worth of $5,266, and that his monthly expenses exceeded his income by about $100.00. (Doc. 27-1 at 2-3.) Plaintiff testified that he had a balance of $0.17 in his 401(k) account, and that he had withdrawn $1,200 from it in prior years. (Doc. 21-2 at 8.)

[4] These clauses provided, in brief, that (1) the policy was voided if the insured caused the loss for the purpose of obtaining insurance benefits; (2) the policy was voided if the insured intentionally concealed or misrepresented any material fact or circumstance relating to the insurance; (3) the insurer would not insure for any loss which would not have occurred but for the neglect of the insured to use all reasonable means to save and preserve property; and (4) the policy insured only "accidental direct physical loss" to property. *See* Doc. 21 at 6-7.

the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The movant has the burden of establishing that there are no genuine issues of material fact, which may be accomplished by demonstrating that the nonmoving party lacks evidence to support an essential element of its case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Barnhart v. Pickrel*, *Schaeffer & Ebeling Co.*, 12 F.3d 1382, 1388-89 (6th Cir. 1993). To avoid summary judgment, the nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986); *accord Moore v. Philip Morris Cos.*, 8 F.3d 335, 340 (6th Cir. 1993). "[S]ummary judgment will not lie if the dispute about a material fact is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

In evaluating a motion for summary judgment, the evidence must be viewed in the light most favorable to the nonmoving party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-59 (1970); *see Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000) (concluding that the court must draw all reasonable inferences in favor of the nonmoving party and must refrain from making credibility determinations or weighing evidence). In responding to a motion for summary judgment, however, the nonmoving party "may not rest upon its mere allegations [...] but [...] must set forth specific facts showing that there is a genuine issue for

trial." Fed. R. Civ. P. 56(e); *see Celotex*, 477 U.S. at 324. Furthermore, the existence of a mere scintilla of evidence in support of the nonmoving party's position will not be sufficient; there must be evidence on which the jury reasonably could find for the nonmoving party. *Anderson*, 477 U.S. at 251; *see Matsushita*, 475 U.S. at 587-88 (finding reliance upon mere allegations, conjecture, or implausible inferences to be insufficient to survive summary judgment).

Affirmative defense of arson. Defendant raises, in response to Plaintiff's claim of breach of contract, the affirmative defense of arson. Ohio law provides that:

> Although there is a dearth of Ohio authority upon the issue, cases from other jurisdictions generally hold that arson is an affirmative defense to be established by proof by a preponderance of the evidence that the insured participated in the burning of the property to obtain the insurance proceeds either by personally setting the fire or having someone else set it for him. Such may be proved by circumstantial evidence showing that the fire was of incendiary origin, that the insured has a motive to burn the property to obtain the insurance proceeds and that the insured had the opportunity to participate in the arson; however, almost all the cases indicate that mere proof of incendiary origin and motive is insufficient.

Caserta v. Allstate Ins. Co., 14 Ohio App.3d 167, 169 (1983). *See also Attallah v. Midwestern Indem. Co.*, 49 Ohio App.3d 146, 147 (1988). The insured is not entitled to a "presumption of innocence" as if he had been charged with the crimes of arson or insurance fraud. *Rainer v. Century Sur. Ins. So.*, 1990 WL 85207 at *4 (Ohio App. June 22, 1990).

However, it is not clear under what circumstances summary judgment can appropriately be granted on this defense. In *Moss v. Nationwide Mut. Ins. Co.*, 24

Ohio App.3d 145 (1985), an Ohio appellate court held that the following jury instruction erroneously added a fourth element to the defense:

> If you find that the defendant, Nationwide, has failed to prove by a preponderance of the evidence the three elements *and that Robert Moss caused the fire*, then you must find in favor of the plaintiffs' breach of contract claim unless defendant has properly established its other affirmative defense of fraud.

Id. at 147 (emphasis in opinion). However, the *Moss* court was later criticized by another appellate court in another case involving essentially the same jury instruction. In *Hazelwood v. Grange Mut. Cas. Co.*, 2004 WL 3235775 at *2 (Ohio App. March 14, 2004), the court explicitly rejected the concept that:

> [U]pon the jury merely finding incendiary origin, motive and opportunity, the defense is conclusively established, without the jury having ever made the actual determination that the plaintiff participated in the fire – and, in fact, it is reversible error for the trial court to instruct them to do so.

Instead, the *Hazelwood* court opined:

> As set forth earlier, *Caserta* establishes at the outset that the very thing to be proved in the arson defense is "that the insured participated in the burning of the property to obtain the insurance proceeds either by personally setting the fire or having someone else set it for him." *Id.* at 171, 470 N.E.2d 430. We fail to see how the fact that the *Caserta* court goes on to suggest three elements of proof which could combine to circumstantially allow the jury to conclude that the insured committed the arson, would somehow eliminate the need for the jury to still conclude that the insured committed the arson or had it done. Moreover, we would further observe that if a showing of financial difficulty and the opportunity were all that was required in a case of incendiary origin, it would be hard to envision a circumstance where the arson defense could not be established against a policy holder.
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> Accordingly, we would categorically reject the notion that incendiary origin, motive and opportunity are alone sufficient to conclusively

> establish the plaintiff's participation in the arson without the jury making that ultimate determination. Because the trial court in this instance followed the law as reflected in the *Caserta* decision, we find no error in the jury instruction before us and the appellant's first assignment of error is without merit.

Id. The Court notes that even the *Moss* decision was in the context of an instruction to the finder of fact to follow in weighing the evidence, not a request that the court find that no genuine issue of material fact even existed as to the question of whether the insured participated in the fire. The Court will therefore examine in depth what it can, and cannot, determine as a matter of law.

Incendiary origin. State Farm states that it has proved by a preponderance of the evidence that the fire was of incendiary nature (that is, that it was intentionally set). It points chiefly to Dolence's report, and its conclusions that all of the items in the vicinity of the space heater, including the heater itself and its extension cord, were found not to have been the cause of the fire. State Farm notes its experts' conclusions that an electrical fire typically is slow and smoldering, producing smoke or fumes which Smith could not have helped but notice as he was on his way through the living room and out the door. It argues that "Plaintiff placed himself inside the house just seven minutes before smoke was so pervasive outside the house that a passerby called 911", and that even if Plaintiff had been reasonably mistaken as to what time he left, it was impossible for him not to have noticed the smoke and smell of an electrical fire.

Plaintiff argues, conversely, that genuine issues of material fact exist as to whether he intentionally set the fire. He claims:

> First of all, there is no clear evidence that there was a seven-minute time lapse. In its first report, Dolence notes that a neighbor, Charles Vance, last saw Smith's car in the driveway at 12:45, when Vance went to his basement. The car was gone when Vance came back upstairs. The source of this information is unclear, since Vance, in his recorded interview with State Farm's investigator, said he went downstairs at 12:40.

(Doc. 22 at 5-6 (citations omitted).) Further, argues Plaintiff, Dolence offered no evidence in support of its conclusion that the minimal time between when Smith left and the fire was noticed was inconsistent with an accidental fire cause, because home fires can break out quickly, and Dolence had no evidence that the fire which destroyed Smith's home had actually smoldered before ignition.[5] Finally, Plaintiff pointed out that Dolence's report had simply ruled out a failure of the heater or extension cord, not actually found an incendiary origin to the fire, and that the laboratory testing Dolence requested found no evidence of accelerants.

The Court finds that, given the conflicting evidence here, genuine issues of material fact exist as to whether the fire was of incendiary origin, and that summary judgment cannot therefore be appropriately granted on this point.[6]

Motive. Plaintiff argues that he did not consider himself to be in any major

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[5] Plaintiff attached, to his memorandum contra, a document which he identifies as an expert report from Timothy M. Wilhelm, a certified fire investigator. (Doc. 21-1.) Defendant has moved to strike this exhibit as an expert witness report not previously disclosed. The Court will not address this motion to strike here, and does not base its present analysis upon Mr. Wilhelm's purported expert report.

[6] The Court notes its earlier decision in *Cody v. Allstate Indem. Co.*, 2007 WL 4460616 (S. D. Ohio December 14, 2007), which denied summary judgment on similar facts as to the incendiary nature of a purported electrical fire.

financial distress, and that his total debts were only $5,266, which could not lead a reasonable finder of fact to find that he had a motive to burn down his house. However, the evidence is unrefuted that Smith's expenses exceeded his income by what was – for him – a substantial margin, that the burden of keeping up the house had been so excessive that he had missed mortgage payments and been threatened with foreclosure, and that he had recently attempted to sell the house to get out of the mortgage, with no success. A reasonable juror could conclude by a preponderance of the evidence that Plaintiff had the motive to rid himself of a house he could not maintain and resolve his financial troubles with an insurance windfall.

Opportunity. That Smith had the opportunity to start the fire which destroyed his home does not appear to be disputed. Although the parties dispute the precise timetable involved, Smith certainly was in the house within a few minutes of when a passer-by noticed that it was on fire. There therefore exists no genuine issue of material fact as to the element of opportunity.

Conclusion as to defense of arson. Genuine issues of material fact exist as to whether the fire which destroyed Plaintiff's house was of incendiary origin. State Farm is therefore not entitled to summary judgment on its affirmative defense of arson. Likewise, as it has not proved that the fire had an incendiary origin, or that Smith must have noticed it as he left his house, State Farm is also not entitled to summary judgment on the question of whether Smith violated the fraud or neglect clauses in his insurance policy, or whether the loss was excluded as not accidental. However, the Court does find that there is no genuine issue of material fact as to

Plaintiff's motive or opportunity to set the fire.

Bad faith and punitive damages.

Under Ohio law, "[m]ere refusal to pay insurance is not, in itself, conclusive of bad faith." *Hoskins v. Aetna Life Ins. Co.*, 6 Ohio St.3d 272, 277 (1983). There is no tort of breach of contract. Instead, an insurer has a duty to act in good faith in the handling and payment of the claims of its insured, due to the special relationship between the two parties, and a breach of this duty will give rise to a cause of action. *Id.* at 276. The insurer's belief that there is no coverage of a claim "may not be an arbitrary and capricious one. The conduct of the insurer must be based on circumstances that furnish reasonable justification therefor." *Id.* at 277, quoting *Hart v. Republic Mut. Ins. Co.*, 152 Ohio St. 185 (1949). *See also Zoppo v. Homestead Ins. Co.*, 71 Ohio St.3d 552, syllabus at 1 (1994). Moreover, a plaintiff is entitled to punitive damages only where he can show that a defendant insurer acted with "oppression, fraud, or malice". *Staff Builders, Inc. v. Armstrong*, 31 Ohio St.3d 298, 304 (1988), *overruled on other grounds by Zoppo*, *supra*, quoting *Silberg v. California Life Ins. Co.*, 11 Cal.3d 452, 462-63 (1974). Actual malice can be described as "extremely reckless behavior revealing a conscious disregard for a great and obvious harm". *Id.*, quoting *Preston v. Murty*, 32 Ohio St.3d 335, 335 (1987).

Plaintiff argues that State Farm should have been more diligent in its questioning of witnesses, and that it appeared from its conduct more interested in exploring the matter of whether Plaintiff had set fire to his house than performing

actual forensic research on the burnt house. However, given the evidence State Farm has adduced concerning Plaintiff's presence in the house soon before the fire broke out, his financial troubles, and the mysterious origin of the fire, no reasonable finder of fact could determine that Defendant's denial of the claim was arbitrary, capricious, or malicious, even if it could find that denial was erroneous, incorrect, or mistaken. A reasonable person – or insurer – could certainly conclude that Plaintiff deliberately set the fire, without basing his conclusion on malice or caprice. Defendant is entitled to judgment as a matter of law on this claim. *Helmick v. Republic Franklin Ins. Co.*, 39 Ohio St.3d 71, 76 (1988). Furthermore, Plaintiff is not entitled to punitive damages.

Conclusions. For the foregoing reasons, the Court finds that Defendant is not entitled to summary judgment on its affirmative defense of arson. However, it does find that no genuine issues of material fact exist with respect to the questions of whether Plaintiff had motive or opportunity to set the fire. Furthermore, it finds that, as a matter of law, Defendant's denial of Plaintiff's insurance claim was not in bad faith and Defendant did not act with malice such that punitive damages can be awarded against it. Consequently, Defendant's motion for summary judgment (Doc. 21) is **GRANTED IN PART AND DENIED IN PART**, as set forth above.

s/Mark R. Abel
United States Magistrate Judge