Zurich Am. Ins. Co. v Ins. Co. of the State of Pa.
2021 NY Slip Op 31732(U)
May 19, 2021
Supreme Court, New York County
Docket Number: 650113/2018
Judge: Shawn T. Kelly
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART IAS MOTION 57

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ZURICH AMERICAN INSURANCE COMPANY

Plaintiff,

- v -

THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA,

Defendant.

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INDEX NO. 650113/2018

MOTION DATE 01/25/2021

MOTION SEQ. NO. 002, 003

DECISION + ORDER ON MOTION

HON. SHAWN TIMOTHY KELLY:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 79, 94, 95, 100, 103
were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER).

The following e-filed documents, listed by NYSCEF document number (Motion 003) 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 101, 102, 104, 105, 106
were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, it is

In motion sequence 002, Plaintiff Zurich American Insurance Company ("Zurich") moves for an order pursuant to CPLR § 3212 granting it summary judgment against Defendant The Insurance Company of the State of Pennsylvania ("ISOP") alleging that ISOP breached the duty of good faith and fair dealing it owed to Zurich in failing to settle the underlying Eberle Action for an amount within its primary policy limits at a time when defendants conceded liability and plaintiff Eberle's settlement demand was well within limits. In motion sequence 003, Defendant ISOP moves pursuant to CPLR § 3212 seeking summary judgment dismissing Plaintiff's complaint in its entirety. The motions are consolidated for decision.

In the underlying action, plaintiff, Rachel Eberle, sought damages in excess of $8 million against Skanska USA Inc. ("Skansa") and Skanska employee, Robert J. Boeschl ("Boeschl") for an accident that occurred when she was crossing a street and was hit by a CAT excavator operated by Boeschl. ISOP was the primary insurance carrier for Skanska with Zurich being the excess carrier. Zurich alleges that ISOP had multiple opportunities to settle the Eberle Action within its $2 million policy limits, but that ISOP never offered more than $500,000. The present action is based upon Zurich's allegations that as a result of ISOP's gross disregard for Zurich's interests as the excess insurer, the jury awarded Eberle $6,263,500, which was ultimately reduced to $3.4 million for settlement. Zurich contends that ISOP is responsible for the amount that Zurich contributed in excess of ISOP's $2 million limits.

In response, ISOP contends that it acted in good faith in defending the Eberle action. ISOP argues that though the plaintiff was likely to succeed on liability, there were considerable questions about causation and the true extent of her alleged damages. Further, ISOP argues that together with defense counsel, ISOP thoroughly investigated the insured Skanska's liability, causation, and potential exposure, providing Zurich with a comprehensive report four months before trial. Zurich failed to raise a single question about ISOP's defense or settlement strategy until the evening before summations.

ISOP states that during trial it made several attempts to settle, gradually increasing its offer from $125,000 to $500,000. In response, the plaintiff dropped her demand from $2.5 million to $900,000, and defense counsel inferred that she might be willing to go even lower. ISOP alleges that these corresponding offers and demands demonstrate that no one, not even the plaintiff, expected the verdict to exceed ISOP's $2 million limit.

However, Zurich states that though the verdict may have been unexpected, ISOP failed to appreciate the magnitude of potential damages based upon potential verdict values in similar cases, and instead incorrectly focused their analysis on settlement values.

Analysis

"'The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case'" (*Santiago v Filstein*, 35 AD3d 184, 185-186 [1st Dept 2006], *quoting Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006], *citing Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *see also DeRosa v City of New York*, 30 AD3d 323, 325 [1st Dept 2006]). The evidence presented in a summary judgment motion must be examined in the "light most favorable to the party opposing the motion" (*Udoh v Inwood Gardens, Inc.*, 70 AD3d 563 1st Dept 2010]) and bare allegations or conclusory assertions are insufficient to create genuine issues of fact (*Rotuba Extruders v Ceppos,* 46 NY2d 223, 231 [1978]).

It is "well settled that an insurer may be held liable for damages to its insured for the bad faith refusal of a settlement offer" (*Smith v General Accident Insurance Co*, 91 NY2d 648, 652 [1998]). "When confronted with a settlement offer within the policy limits, an inherent conflict arises between the insurer's desire to settle the claim for as little as possible, and the insured's desire to avoid personal liability in excess of the policy limits" (*Id* at 653). To establish a *prima facie* case of bad faith in failing to settle a claim, the insured must show that the "insurer's conduct constituted a 'gross disregard' of the insured's interests - that is, a deliberate or reckless

failure to place on equal footing the interests of its insured with its own interests when considering a settlement offer" (*see Pavia v State Farm Mutual Automobile Insurance Co*, 82 NY2d 445, 453 [1993]). "In other words, a bad-faith plaintiff must establish that the defendant insurer engaged in a pattern of behavior evincing a conscious or knowing indifference to the probability that an insured would be held personally accountable for a large judgment if a settlement offer within the policy limits were not accepted" (*Id* at 453-454; *see also Jacal Hacking Corp. v American Transit Ins. Co.*, No. 154248/12, 2017 WL 87170, at *2 [NY Sup Ct 2017]).

Although proof that a demand for settlement was made is a prerequisite to a bad-faith action for failure to settle, evidence that a settlement offer was made and rejected "is not dispositive of the insurer's bad faith," as an insurer "cannot be compelled to concede liability and settle a questionable claim." (*Pavia,* 82 NY2d 445 at 454). Rather, in a bad-faith action, plaintiff must show that it "lost an actual opportunity to settle the claim at a time when all serious doubts about the insured's liability were removed" (internal citations and quotations omitted). (*Id*).

Under *Pavia*, it is clear that a court must include consideration of all of the facts and circumstances relating to whether the insurer's investigatory efforts prevented it from making an informed evaluation of the risks of refusing settlement. (*Id*). Specifically, a court must assess the likelihood of plaintiff's success on the issue of liability in the underlying action, the "potential magnitude" of damages, each party's potential financial exposure as a result of the insurer's refusal to settle, whether the insurer failed to conduct a proper investigation of the claim and any potential defenses, the information available to the insurer when the demand for settlement was made, and "any other evidence which tends to establish or negate the insurer's bad faith in refusing to settle." (*Id*). In addition, an insurer's failure to communicate with the insured and

keep it informed of the status of settlement offers and negotiations can constitute some evidence of bad faith. (*see Smith*, 91 NY2d 648, 652 [1998]; *Transcare New York. Inc v Finkelstein, Levin & Gittlesohn & Partners*, 23 AD3d 250 [1st Dept 2005]).

Under the relevant standard, ISOP's bad faith cannot be resolved as a matter of law. Contrary to Zurich's assertion, the record does not clearly and conclusively establish bad faith.

As ISOP concedes, though the Eberle plaintiff was likely to succeed on liability, there were considerable questions about causation and the true extent of the alleged damages. Further, ISOP investigated the insured Skanska's liability, causation, and potential exposure, providing Zurich with a comprehensive report four months before trial. Zurich does not dispute that it reviewed that report and received daily updates during trial. Zurich did not question the defense or settlement strategy until the evening before summations when it demanded that ISOP increase its offer from $400,000 or negotiate a "high–low" agreement. Although the plaintiff had not yet responded to its last offer, ISOP responded to Zurich's letter immediately, increasing its offer to $500,000 and proposing a "high– low" with a range of $250,000 to $1.25 million. In response, the plaintiff dropped her demand from $2.5 million to $900,000, and defense counsel inferred that she might be willing to go even lower. The jury verdict in excess of the $2 million ISOP policy was clearly unexpected by both parties. The record does not clearly and conclusively establish bad faith.

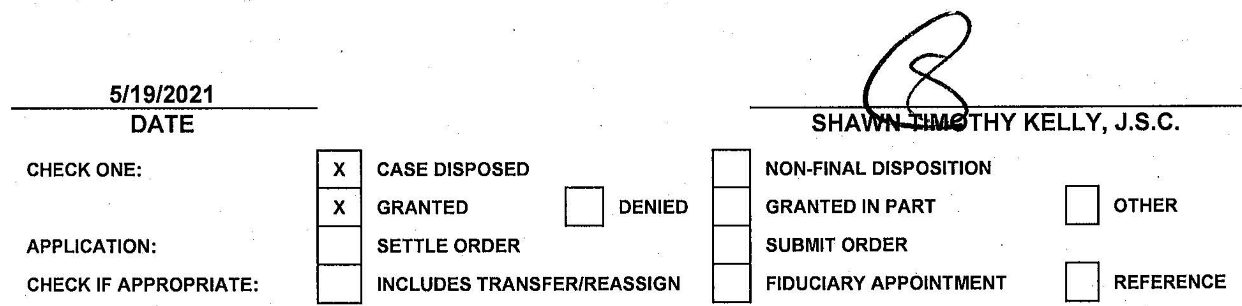
Based on the foregoing, Zurich's motion for summary judgment is denied. Further, ISOP has met its burden by demonstrating that it acted without reckless disregard in its attempts to settle the Eberle action. In response, Zurich has not raised any issues of material fact as to ISOP's alleged bad faith. Accordingly, ISOP's motion for summary judgment is granted and the complaint is dismissed.

It is hereby,

ORDERED that plaintiff Zurich's motion for summary judgment is denied; and it is further

ORDERED that defendant ISOP's motion for summary judgment is granted and the complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.



5/19/2021				
DATE			SHAWN TIMOTHY KELLY, J.S.C.	
CHECK ONE:	X CASE DISPOSED		NON-FINAL DISPOSITION	
	X GRANTED	DENIED	GRANTED IN PART	OTHER
APPLICATION:	SETTLE ORDER		SUBMIT ORDER	
CHECK IF APPROPRIATE:	INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT	REFERENCE