NO. COA06-15

NORTH CAROLINA COURT OF APPEALS

Filed: 19 December 2006

HELEN I. COLTRANE

v. Guilford County
No. 04 CVS 11141

CLARA H. MITTELMAN and STATE FARM MUTUAL INSURANCE COMPANY

Appeal by plaintiff from judgment entered 7 September 2005 by Judge Henry E. Frye, Jr. in Guilford County Superior Court. Heard in the Court of Appeals 13 September 2006.

Crumley & Associates, P.C., by Adrienne S. Blocker and Marshall Hurley, PLLC, by Marshall Hurley, for plaintiff-appellant.

Patterson, Dilthey, Clay, Bryson & Anderson, L.L.P., by Ellen J. Persechini, for defendant-appellee.

CALABRIA, Judge.

Helen I. Coltrane ("Coltrane"), plaintiff, appeals from summary judgment entered in favor of defendant, State Farm Mutual Insurance Company ("State Farm"), on the issues of bad faith and unfair and deceptive trade practices in an underinsured motorist claim. We affirm.

On 30 May 2003, Coltrane was a passenger in a vehicle driven by Nathan B. Lenna ("Lenna") when the vehicle was struck by another vehicle driven by Clara H. Mittelman ("Mittelman"). On the date of

the accident, Lenna was insured by State Farm. Subsequently, Coltrane demanded payment under Lenna's insurance policy claiming Lenna's policy included underinsured motorist coverage ("UIM"). State Farm denied Lenna's policy included UIM coverage based upon a selection/rejection form signed by Lenna in which UIM coverage was rejected.

The validity of the selection/rejection form is the source of Coltrane's contentions. The selection/rejection form listed the name Joseph Lenna, Jr., Lenna's father, as "A Named Insured." Also, two policy numbers appeared on the form - a typewritten number that corresponded with Joseph Lenna, Jr.'s policy number and a handwritten number that was Lenna's policy number. More importantly, an "X" was marked next to the option that states, "I choose to reject Combined Uninsured/Underinsured Motorists Coverage and select Uninsured Motorists Coverage at limits of: Bodily Injury 50/100; Property Damage 50."

State Farm investigated the validity of the selection/rejection form and concluded that Lenna validly rejected UIM coverage. Based on the investigation, State Farm denied Coltrane's request for UIM coverage. On 15 October 2004, Coltrane filed a complaint alleging negligence against Mittleman and alleging bad faith and unfair and deceptive trade practices against State Farm.

During discovery, State Farm submitted Lenna's sworn affidavits. Specifically, Lenna affirmed both the signature on the selection/rejection form was his signature and his intention in

signing the form was to decline the UIM coverage. Lenna verified the date that he signed the selection/rejection form was the date the policy was issued. State Farm filed a motion for summary judgment on 3 June 2005. The trial court granted the motion on 7 September 2005. Plaintiff appeals.

We review the grant of a motion for summary judgment *de novo*. *Stafford v. County of Bladen*, 163 N.C. App. 149, 151, 592 S.E.2d 711, 713 (2004), *review denied*, 358 N.C. 545 (2004). In so doing, we must consider whether the evidence viewed in the light most favorable to the non-moving party shows any genuine issue of material fact and whether the movant is entitled to judgment as a matter of law. *Bruce-Terminix Co. v. Zurich Ins. Co.*, 130 N.C. App. 729, 733, 504 S.E.2d 574, 577 (1998). "The showing required for summary judgment may be accomplished . . . by showing through discovery that the opposing party cannot produce evidence to support an essential element of her claim." *Dobson v. Harris*, 352 N.C. 77, 83, 530 S.E.2d 829, 835 (2000)(citations omitted). "Evidence properly considered on a motion for summary judgment includes admissions in the pleadings, depositions on file . . . affidavits, and any other material which would be admissible in evidence or of which judicial notice may properly be taken." *Murray v. Nationwide Mut. Ins. Co.*, 123 N.C. App. 1, 8, 472 S.E.2d 358, 362 (1996) (citations omitted).

Unfair Settlement Practices (Bad Faith)

Initially, Coltrane argues that the trial court erred by granting State Farm's motion for summary judgment because State

Farm acted in bad faith by relying upon the selection/rejection form signed by Lenna. The elements of an unfair settlement practice claim, also known as a bad faith claim, are: "(1) a refusal to pay after recognition of a valid claim, (2) bad faith, and (3)aggravating or outrageous conduct." *Lovell v. Nationwide Mut. Ins. Co.*, 108 N.C. App. 416, 420, 424 S.E.2d 181, 184 (1993).

As to the first element, plaintiff offered no evidence that defendant ever recognized plaintiff's claim as valid. After plaintiff notified defendant of a potential claim under Lenna's policy, the defendant informed plaintiff that Lenna had rejected UIM coverage under his policy. Defendant then conducted an investigation regarding the selection/rejection form. Defendant concluded not only that the form was valid but also that Lenna had properly rejected UIM coverage. Defendant never indicated that plaintiff had a valid claim for UIM coverage under Lenna's policy. The evidence viewed in the light most favorable to the plaintiff fails to establish a genuine issue of material fact that defendant refused to pay after recognition of a *valid* claim.

Plaintiff also failed to offer any evidence that defendant's reliance upon the selection/rejection form was in bad faith. "[B]ad faith means not based on honest disagreement or innocent mistake." *Lovell*, 108 N.C. App. at 421, 424 S.E.2d at 185 (citations omitted). Plaintiff contends that the selection/rejection form was facially ambiguous and thus Lenna did not validly reject UIM coverage. Plaintiff relies upon *Hendrickson v. Lee*, 119 N.C. App. 444, 459 S.E.2d 275 (1995), as the basis for

this proposition. However, plaintiff's reliance is misplaced for two reasons: First, in *Hendrickson*, the plaintiff's action was for declaratory relief against the defendant and not based upon a claim of bad faith. *See*, *id.*, 119 N.C. App. at 447, 459 S.E.2d at 277. Therefore, the issue before the court in *Hendrickson* was the validity of the selection/rejection form and not whether the defendant's reliance upon it constituted bad faith on the defendant's part. Second, the disputed selection/rejection form was found to be invalid and did not conform with the Rate Bureau's form. Specifically, the selection/rejection form did not allow for the rejection of *both* uninsured and underinusured motorist coverage. *Id.*, 119 N.C. App. at 452, 459 S.E.2d at 280. The structure of the selection/rejection form in *Hendrickson* was such that it created an ambiguity as to whether the insured intended to reject or select underinsured motorist coverage. *Id.*

In the case *sub judice*, plaintiff does not contest whether the form itself conformed with the Rate Bureau's selection/rejection form. Plaintiff contends that the manner in which the form was signed did not reject UIM coverage. Plaintiff's argument, however, fails to show defendant's denial of UIM coverage was "not based on an honest disagreement." This issue would have been appropriate for the jury to decide if the plaintiff had appropriately asserted it in her complaint. Instead, plaintiff chose to rely exclusively on the claims of bad faith and unfair and deceptive trade practices. We are thus constrained to hold that the evidence viewed in the light most favorable to the plaintiff does not

establish a genuine issue of material fact regarding whether defendant's reliance upon the selection/rejection form was an honest disagreement. *See Olive v. Great American Ins. Co.*, 76 N.C. App. 180, 333 S.E.2d 41 (1985) (affirming dismissal of insured's bad faith claim because no evidence insurer's denial of claim was not an "honest disagreement" or "innocent mistake"); *see also, Blis Day Spa, LLC v. Hartford Ins. Group*, 427 F. Supp. 2d 621 (W.D. N.C. 2006).

Finally, plaintiff produced no evidence of defendant's aggravated conduct. "[A]ggravated conduct has long been defined to include 'fraud, malice, gross negligence, insult, . . . wilfully, or under circumstances of rudeness or oppression, or in a manner which evinces a reckless and wanton disregard of the plaintiff's rights.'" *Dailey v. Integon Ins. Corp.*, 75 N.C. App. 387, 394, 331 S.E.2d 148, 154 (1985) (quoting *Baker v. Winslow*, 184 N.C. 1, 5, 113 S.E. 570, 572 (1922)). In *Dailey*, while the plaintiff and his wife were on vacation, their house was destroyed by fire. After the plaintiff-insured submitted a claim, the defendant delayed processing the claim by sending the plaintiff improper forms and twice rejecting the plaintiff's proof of loss form. During investigation of the plaintiff's claims, the defendant's agent interviewed the plaintiff's neighbors and accused the plaintiff of deliberately setting the fire. Also, the defendant hired an unlicensed professional to estimate the cost of repairs for the plaintiff's home and the estimate was substantially lower than the five estimates the plaintiff had procured. Based on these facts,

this Court found that defendant's conduct was aggravated and oppressive. *Id.*, 75 N.C. App. at 397, 331 S.E.2d at 155.

Unlike the plaintiff in *Dailey*, the plaintiff *sub judice* offered no evidence to prove defendant's actions constituted fraud, malice, gross negligence, insult or were wilful, or under circumstances of rudeness or oppression. After careful review of the record, and viewing the evidence in the light most favorable to plaintiff, we find no evidence that defendant's actions constituted aggravated conduct. Defendant was entitled to summary judgment as a matter of law.

Unfair and Deceptive Trade Practices

Plaintiff contends defendant's reliance upon the selection/rejection form signed by Lenna violated N.C. Gen. Stat. § 75.1 by "offend[ing] established public policy." Alternatively, plaintiff argues defendant's reliance upon the selection/rejection form violated N.C. Gen. Stat. § 58-63-15(11)(f)(2005) because it was not an "[attempt] in good faith to effectuate [a] prompt, fair and equitable settlement of claims in which liability has become reasonably clear" and thus violated N.C. Gen. Stat. § 75-1.1 as a matter of law.

To prevail on a claim of unfair and deceptive trade practices under N.C. Gen. Stat. § 75-1.1 (2005), the plaintiff must show: "1) an unfair or deceptive act or practice, or an unfair method of competition, 2) in or affecting commerce, and 3) which proximately caused actual injury to the plaintiff or his business." *Murray*, 123 N.C. App. at 9, 472 S.E.2d at 362. "'A [trade] practice is

unfair when it offends established public policy as well as when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers.'" *Walker v. Sloan*, 137 N.C. App. 387, 395, 529 S.E.2d 236, 243 (2000) (quoting *Opsahl v. Pinehurst*, Inc., 81 N.C. App. 56, 69, 344 S.E.2d 68, 76 (1986)). "Furthermore, a party is guilty of an unfair act or practice when it engages in conduct which amounts to an inequitable assertion of its power or position." *Id.* (internal quotations omitted). Good faith or lack of intent are not defenses to an unfair and deceptive trade practice action. *Miller v. Nationwide Mut. Ins. Co.*, 112 N.C. App. 295, 301-02, 435 S.E.2d 537, 542 (1993). "The determination of whether an act or practice is an unfair or deceptive practice that violates § 75-1.1 is a question of law for the court." *Gray v. N.C. Ins. Underwriting Ass'n*, 352 N.C. 61, 68, 529 S.E.2d 676, 681 (2000).

Plaintiff's sole argument that defendant's conduct violated § 75-1.1 is that defendant relied upon the rejection/selection form signed by Lenna. However, plaintiff produced no evidence that defendant's reliance "offended established social policy" or was in any other way unfair or deceptive. We find, after viewing the evidence in the light most favorable to plaintiff, no evidence exists to substantiate an unfair or deceptive trade practice claim under N.C. Gen. Stat. § 75-1.1.

"Unfair or deceptive trade practices in the insurance industry are governed by [N.C. Gen. Stat.] § 58-63-15." *Miller*, 112 N.C. App. at 302, 435 S.E.2d at 542. "A violation of [N.C. Gen. Stat.]

§ 58-63-15 constitutes an unfair and deceptive trade practice in violation of G.S. § 75-1.1 as a matter of law." *Id.* "The relationship between the insurance statute and the more general unfair or deceptive trade practices statutes is that the latter provide[s] a remedy in the nature of a private action for the former." *Kron Medical Corp. v. Collier Cobb & Assoc.*, 107 N.C. App. 331, 335, 420 S.E.2d 192, 194 (1992).

Plaintiff argues defendant's reliance upon the selection/rejection form was not an attempt "in good faith to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear." N.C. Gen. Stat. § 58-63-15(11)(f) (2005). We do not find plaintiff's argument persuasive. Upon receipt of plaintiff's claim, defendant immediately researched the validity of the claim and notified plaintiff that Lenna did not have UIM coverage. Defendant conducted a thorough investigation regarding the validity of the selection/rejection form and determined that the form was valid. Defendant also contacted Lenna, who swore in a signed affidavit that it was his signature on the form and he intended to reject UIM coverage. Viewing the evidence in the light most favorable to the plaintiff, we hold there was no genuine issue of material fact as to whether defendant handled plaintiff's claim promptly and fairly in accordance with N.C. Gen. Stat. § 58-63-15(11)(f) and defendant was entitled to summary judgment as a matter of law.

In conclusion, we do not determine the validity of the UIM selection/rejection form. Our holding focuses solely on whether

genuine issues of material fact exist in plaintiff's claims of bad faith and unfair and deceptive trade practices.

For the reasons stated herein, we affirm the order of the trial court.

Affirmed.

Judges TYSON and GEER concur.

Report per Rule 30(e).