STATE OF RHODE ISLAND

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: March 17, 2021)

CLUTCH CITY SPORTS & ENTERTAINMENT, L.P. (d/b/a TOYOTA CENTER) and ROCKET BALL, LTD.,	:	
Plaintiffs,	:	
	:	
v.	:	**C.A. No. PC-2020-05137**
	:	
AFFILIATED FM INSURANCE COMPANY,	:	
Defendant.	:	

DECISION

STERN, J. Before the Court is Defendant Affiliated FM Insurance Company's Motion to Sever and Stay Discovery on Plaintiffs' Bad Faith Claims, pursuant to Rule 42(b) of the Superior Court Rules of Civil Procedure. Plaintiffs object to the motion. Jurisdiction is pursuant to G.L. 1956 § 8-2-14.

I

Facts and Travel

Plaintiffs operate the Toyota Center in downtown Houston, Texas, where they host fans and guests for various events. (Compl. ¶¶ 8-9.) Plaintiffs purchased an insurance policy (Policy) from Defendant Affiliated FM Insurance Company (AFMI) with coverage for property against "all risks of physical loss or damage, except as . . . [otherwise] excluded [in the Policy]." (Compl. ¶ 10; Compl. Ex. A (Policy), at Page 1 of 44.) The Policy included "Business Interruption Coverage[.]" (Policy, at Page 19 of 44.)

When the presence of Covid-19 was discovered in the United States, federal, state, and local governments issued various orders restricting businesses, and by March 24, 2020, Toyota Center was closed to the public. (Compl. ¶¶ 25, 40-52.) Plaintiffs filed a claim with AFMI for business interruption coverage and alleged that Covid-19 caused physical loss and physical damage to their property. *Id.* ¶¶ 67, 70. After AFMI denied the claim, Plaintiffs filed this action alleging that AFMI breached various provisions of the Policy and the covenant of good faith and fair dealing and violated various laws by denying coverage. *Id.* ¶¶ 123-179.

AFMI filed the instant motion requesting a severance of and stay of discovery on Plaintiffs' bad-faith claims. (Def.'s Mem. Supp. (Def. Mem.) 1 (Feb. 1, 2021).) Specifically, AFMI seeks to sever the following counts: (1) Count V, breach of the covenant of good faith and fair dealing; (2) Count VI, violation of the Texas Unfair Claim Settlement Practices Act, codified in Tex. Ins. Code §§ 541 and 542.001; and (3) Count VII, bad faith, codified in G.L. 1956 § 9-1-33. *Id.* at 2.

II

Standard of Review

"'Rule 42(b) of the Superior Court Rules of Civil Procedure grants a trial justice broad discretion to separate the issues at trial.'" *Mello v. DaLomba*, 798 A.2d 405, 408 (R.I. 2002) (quoting *DiLuglio v. Providence Auto Body, Inc.*, 755 A.2d 757, 776 (R.I. 2000)). "The purpose of the rule is to preserve judicial economy . . . [or to avoid] confusion or unfair prejudice." *Id.* (citing *Corrente v. Fitchburg Mutual Fire Insurance Co.*, 557 A.2d 859, 861-62 (R.I. 1989)) (requiring that the trial justice bifurcate bad-faith claim from contract claim to prevent unfair prejudice to defendant).

In addition, the Superior Court has broad discretion to regulate how and when discovery occurs, and thus, a stay of discovery is left to the court's discretion and its decision accorded deference. *See Shelter Harbor Conservation Society, Inc. v. Rogers*, 21 A.3d 337, 343 (R.I. 2011).

III

Analysis

AFMI argues that the Court should sever Plaintiffs' bad-faith claims from the breach of contract claims and stay discovery on the bad-faith claims in the interest of judicial economy and to avoid unfair prejudice to AFMI. (Def. Mem. at 1.) Plaintiffs contend that the Court should not automatically sever the claims and stay discovery but should rather weigh judicial economy against potential prejudice prior to severance and allow discovery to continue on all claims. (Pls.' Mem. Opp'n (Pl. Obj.) 2-3 (Feb. 23, 2021).) Plaintiffs also assert that because Rule 42 allows for separate trials on claims but is silent as to staying discovery, bifurcation may be all that is warranted here. *Id.*

Pursuant to Rule 42(b), "the court in furtherance of convenience or to avoid prejudice or when separate trials will be conducive to expedition and economy, may order a separate trial . . . of any claim[.]" Super. R. Civ. P. 42(b). Our Supreme Court has recently reiterated its long-established principle that a bad-faith claim must be severed from a breach of contract claim in an insurance dispute. *See Summit Insurance Company v. Stricklett*, 199 A.3d 523, 530 n.15 (R.I. 2019) (citing *Skaling v. Aetna Insurance Co.*, 799 A.2d 997, 1002 (R.I. 2002)); *see also Bartlett v. John Hancock Mutual Life Insurance Co.*, 538 A.2d 997, 1001 (R.I. 1988). The Court has determined that:

> "[T]he most practical resolution of discovery and prejudice problems when a bad-faith claim is combined in a single action with a breach-of-contract claim on the policy is that 'trial justices, or motion-calendar judges who encounter this situation, exercise their

> authority pursuant to Rule 42(b) to sever the contract claim from the bad-faith claim and limit discovery to the contract claim until that claim is resolved in plaintiff's favor.'" *Corrente*, 557 A.2d at 861 (quoting *Bartlett*, 538 A.2d at 1002).

Particularly, in *Bartlett*, the Court found that severance was appropriate because in order for the "plaintiff to make out a prima facie case of bad faith refusal to pay an insurance claim, the proof offered must show that plaintiff is entitled to a directed verdict on the contract claim and, thus, entitled to recover on the contract claim as a matter of law." *Bartlett*, 538 A.2d at 1002. Thereafter, the Court in *Corrente* further determined that because this "burden of proof on a bad-faith claim is so formidable"—whether or not a discovery issue is involved—it is prejudicial for the trial court to decline to sever the bad-faith claim from the contract claim.[1] *Corrente*, 557 A.2d at 861-62.

At first, the idea of severing claims was based on our Supreme Court's determination that in order to maintain a bad-faith claim, there must have been a breach of the insurance contract in the first place. *See Corrente*, 557 A.2d at 861; *see also Bartlett*, 538 A.2d at 1002. Therefore, although the plaintiff had a need for the information in the claim file, the right of the insurer to defend against the breach of contract claim outweighed the plaintiff's need, and the Court determined that the bad-faith claim could not be maintained until plaintiff proved that the insurer breached the contract. *Corrente*, 557 A.2d at 861-62.

[1] In *Bartlett*, however, the Court was concerned about encroaching on an insurer's rights to claim privilege of certain materials in the claim file in relation to the breach of contract claim that may otherwise be discoverable as non-privileged information with regard to the bad-faith claim. *See Bartlett*, 538 A.2d at 999-1000. For instance, "statements taken by a claim agent immediately after an accident are taken in anticipation of litigation" and are, thus, protected by the work product doctrine in relation to a breach of contract claim. *Id.* at 999. However, because the work product doctrine is a qualified privilege, a litigant may obtain those documents upon a showing that denial of production would result in injustice or undue hardship in relation to a bad faith denial claim. *Id.* at 999-1000. Therefore, allowing both claims to be simultaneously maintained may infringe on an insurer's privilege protections.

However, *Skaling* modified *Corrente* and *Bartlett* insofar as a plaintiff was required to establish its entitlement to a directed verdict on the contract claim in order to make out a prima facie case for a bad-faith claim. *Skaling*, 799 A.2d at 1010. Specifically, the Court in *Skaling* held that "bad faith is established when the proof demonstrates that the insurer denied coverage or refused payment without a reasonable basis in fact or law for the denial." *Id.* Thus, in order "to litigate his or her bad faith claim, [the plaintiff need not] establish entitlement to a [judgment as a matter of law] on the breach-of-contract claim." *Id.* Although the Court in *Skaling* suggested that "in an appropriate case, a bifurcated trial may be a useful alternative approach," the Court, nevertheless, reiterated the practice of severing bad-faith claims from breach of contract claims, stayed discovery for the bad-faith claims, and refused disclosure of the claim file. *Id.* at 1010 n.7; *see also Imperial Casualty & Indemnity Co. v. Bellini*, 746 A.2d 130, 135 (R.I. 2000) (severing claims and limiting discovery to non-privileged information that was not relevant to bad-faith claims).

Plaintiffs assert that fairly recent precedent from our federal sister courts suggests that the severance of claims and stay of discovery is not automatic. *See Wolf v. Geico Insurance Co.*, 682 F. Supp. 2d 197, 199 (D.R.I. 2010). Indeed, the District Court for the District of Rhode Island, in assessing whether to bifurcate and stay discovery on a bad-faith claim, determined that the court should first "weigh the risk of prejudice to the defendant . . . against the possible efficiency to be gained[.]" *Glocester Country Club v. Scottsdale Indemnity Co.*, No. 20-184 WES, 2020 WL 6945937, *1 (D.R.I. Nov. 25, 2020) (quotation omitted). However, although these cases share much of the same ideology as our state court precedent, they are only instructive where our Supreme Court has not articulated a standard that would allow this Court to abandon the unwavering sever and stay practice.

In the instant case, AFMI asserts that it would be unfairly prejudiced if it were required to disclose sensitive and privileged claims information in its claim file. (Def. Mem. at 7.) AFMI points to Plaintiffs' document request seeking documents concerning the "analysis," "investigation," "evaluation of," and "decision-making process" for "any claim for insurance coverage." *Id.* at 8. While this information may be discoverable for a bad-faith claim, it is likely prejudicial and privileged and, therefore, likely not discoverable in relation to a breach of contract claim. The Court finds that prejudice to AFMI's ability to claim its right to privilege and to defend itself in relation to the breach of contract claims is imminent, and severance of the claims and issuance of a stay of discovery, relative to the bad-faith claims, is—at this time—warranted.

The parties dispute whether staying discovery would be judicially efficient. Pursuant to Rule 42(b), the Court may sever claims when it is conducive to expedition and judicial economy. Super. R. Civ. P. 42(b). On the one hand, AFMI argues that if Plaintiffs do not prevail on their breach of contract claims by showing that they are entitled to and were denied coverage under the Policy, they have no viable bad-faith claim making irrelevant any discovery on bad faith. On the other hand, Plaintiffs contend that a stay of discovery would not be expeditious, in part because a bad-faith claim may be viable apart from an unsuccessful breach of contract claim. (Pl. Obj. at 4 (suggesting that bad-faith claims can be established if denial of "coverage was done with or without a reasonable basis in fact of law or an intentional or reckless failure to [properly] investigate the claim").)

It is true that in relation to a claim for breach of duty of good faith and fair dealing, "a plaintiff first must show that he or she is entitled to recover on the contract before he or she can prove that the insurer dealt with him or her in bad faith." *Zarrella v. Minnesota Mutual Life Insurance Co.*, 824 A.2d 1249, 1261 (R.I. 2003). However, in relation to Plaintiffs' claim under

§ 9-1-33, the statute sets forth that bad faith includes an insurer's actions in relation to refusing to settle a claim and whether those actions were also conducted in bad faith. Section 9-1-33(a) ("the question of whether or not an insurer has acted in bad faith in refusing to settle a claim shall be a question to be determined by the trier of fact"). In addition, the Court in *Skaling* determined that "bad faith is established when the proof demonstrates that the insurer denied coverage or refused payment without a reasonable basis in fact or law for the denial." *Skaling*, 799 A.2d at 1010.

There is also some support for the proposition that an insured need not always show that it is entitled to coverage in order to prevail on a bad-faith claim. *See id.* at 1011 ("[A]n intentional failure on the part of the insurer to determine whether there is a lawful basis to deny the claim, standing alone, is bad faith"; "[t]he insurer's failure to conduct an appropriate and timely investigation may subject the insurer to bad faith liability notwithstanding the merits of the claim."). Texas law suggests a similar outcome. *See Southland Lloyds Insurance Co. v. Cantu*, 399 S.W.3d 558, 569 (Tex. App. 2011) (Interpreting Texas Insurance Code §§ 541 and 542: "In reviewing the evidence, we must distinguish between the evidence supporting the contract issue and the tort issue. The issue of bad faith does not focus on whether the claim was valid.").

Plaintiffs further assert that the disputed facts and subject matter of discovery between the contract and bad-faith claims significantly overlap, and, thus, if discovery is stayed, Plaintiffs would likely be required to duplicate discovery efforts, such as depose the same corporate designee twice, which is contrary to judicial economy. (Pl. Obj. at 4, 6.) Plaintiffs point to federal court precedent, recognizing that "[j]oint discovery can create efficiency" by avoiding: (1) discovery disputes relating to which documents are relevant to which claims; (2) duplicative discovery; and (3) the need to recommence discovery and wait for a second trial, depending on the outcome of the trial on the breach of contract claims. *Wolf*, 682 F. Supp. 2d at 199. For instance, the court in

Wolf determined that efficiency depends on the amount of overlap in discovery—evidence and witnesses—between the two claims; whereas the more overlap that exists, the more duplicative the discovery and the less efficient to stay discovery on a matter. *Id.* at 200. On the other hand, where there is little overlap, staying discovery would serve judicial economy. *Id.*

Although Plaintiffs may have viable claims apart from breach of contract and although there may be some duplicative discovery, nevertheless, Plaintiffs are seeking broad sweeping discovery. For instance, Plaintiffs' document request seeks all claim files related to Plaintiffs' claim, underwriting files related to the Policy, and documents related to AFMI's claims-handling policies and procedures. (Def. Mem. at 2-3.) The concerns over prejudice to AFMI are too great for this Court to depart from the unfailing practice of severing and staying discovery on the bad-faith claims. Notwithstanding this ruling, Plaintiffs may return to the Court with a request to vacate the stay if it becomes appropriate for them to do so.

IV

Conclusion

Based on the foregoing, the Court grants AFMI's motion to sever and stay discovery on Plaintiffs' bad-faith claims set forth in Plaintiffs' Counts V, VI, and VII. Counsel for Defendant shall prepare the appropriate order.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	**Clutch City Sports & Entertainment, L.P. (d/b/a Toyota Center) and Rocket Ball, Ltd. V. Affiliated FM Insurance Company**
CASE NO:	**PC-2020-05137**
COURT:	**Providence County Superior Court**
DATE DECISION FILED:	**March 17, 2021**
JUSTICE/MAGISTRATE:	**Stern, J.**
ATTORNEYS:	
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