IN THE COURT OF COMMON PLEAS FOR THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY

KENNETH PONZO,)
Plaintiff,)
v.) C.A. No. CPU4-12-003747
NATIONWIDE MUTUAL INSURANCE COMPANY, d/b/a Victoria Insurance Co.,)))
Defendant.)

Submitted: June 4, 2013 Decided: July 30, 2013

Richard A. DiLiberto, Jr., Esquire YOUNG CONAWAY STARGATT & TAYLOR, LLP 1000 North King Street Wilmington, DE 19899 Attorney for Plaintiff Sean A. Dolan, Esquire LAW OFFICE OF CYNTHIA G. BEAM 131 Continental Drive, Suite 407 Newark, DE 19713 Attorney for Defendant

DECISION ON CLAIM FOR ATTORNEY FEES

On October 17, 2012, Plaintiff Kenneth Ponzo ("Ponzo") brought this action against Defendant Nationwide Mutual Insurance Company, d/b/a Victoria Insurance Co. ("Nationwide"), seeking; payment for personal injury protection ("PIP") benefits, including medical expenses; general damages including pain and suffering; punitive damages; attorney's fees; costs; and interest.

On December 27, 2012, the Clerk of the Court entered a default judgment in the amount of \$9,771.19 against Nationwide, pursuant to Court of Common Pleas Civil Rule 55(b)(1), for want of a responsive pleading.¹

On February 27, 2013, Nationwide filed a Motion seeking to vacate the default judgment. A hearing on the motion was held on March 22, 2013, and the Court heard oral argument from both parties. At this hearing, Nationwide did not provide any facts to justify why it did not file a responsive pleading. In addition, it could not substantiate its position of excusable neglect. Following presentation from both parties, the Court denied Nationwide's Motion and ordered an inquisition hearing on the claim for attorney's fees.²

The hearing on the claim for attorney's fees was held on June 4 2013. The Court heard testimony from Ponzo, as well as oral argument from both parties. Ponzo submitted two documents into evidence.³ It is Ponzo's position that an award of attorney's fees is appropriate under 21 *Del. C.* 2118B, because Nationwide acted in bad faith when it denied Ponzo's PIP benefits claim. Ponzo argues that blatant errors in the Saltzman Report should have put Nationwide on notice of the document's unreliability. It is Nationwide's position that, based on the assessment in the Saltzman Report, the decision to refuse payments was reasonably justified and not made in bad faith; thus, an award for attorney's fees is not warranted.

¹ The total judgment enter represents the sum of the principal amount of \$3,003.19, plus prejudgment interest of \$129.00, Filing fees of \$134.00, and attorney fees of \$6,505.00.

² Prior to the hearing, on May 22, 2013, Ponzo submitted a brief in support of attorney's fees, in which Ponzo sets forth the legal basis upon which he seeks to recover attorney's fees. Ponzo included an invoice from counsel in support of the amount sought.

³ Plaintiff's Exhibit 1 and Plaintiff's Exhibit 2 were submitted.

At the conclusion of the hearing, the Court reserved decision. This is the Court's decision after consideration of the documents submitted and oral argument.

Facts

Ponzo obtained insurance for his 2004 Ford Explorer X from Nationwide, doing business as Victoria Insurance, for a period effective November 12, 2010 through May 12, 2011. The insurance policy provided PIP benefits in the amount of \$15,000 per person/\$30,000 per accident, with a \$1,000.00 deductible.

On November 14, 2010, Ponzo was involved in an automobile accident where his vehicle was struck in the rear on Interstate 95; his vehicle was totaled, and Ponzo was hospitalized as a result of injuries. As a result of the accident, Ponzo was unable to work for three months.

At Nationwide's direction, Ponzo visited Dr. Donald Saltzman, M.D., for a medical exam and evaluation. Dr. Saltzman prepared a Medical Evaluation Report (the "Saltzman Report"), in which Dr. Saltzman discussed Ponzo's medical condition and rendered an opinion based on his "clinical assessment, patient history, examination findings, review of available documentation, professional standards of medical treatment and, if applicable, disability guidelines." Dr. Saltzman noted that Ponzo complained of pain in his neck and lower back. Dr. Saltzman stated that he did not review records or x-rays from Christiana Hospital. Dr. Saltzman opined that "it is clear that [Ponzo] has not gotten significant relief from his chiropractic treatment and five months of therapy is excessive." Dr. Saltzman concluded that "[Ponzo] has returned to pre-injury status."

There were a number of factual inconsistencies in the Saltzman Report.

Specifically, Ponzo is first identified in the report as "a 50-year old black female," then later as a "60-year old, black male." In fact, Ponzo is a black male, and he was 50-years old at the time he visited Dr. Saltzman. Furthermore, Dr. Saltzman first stated "[Ponzo] is not on any currently not on any medications"; however, on the same page, Dr. Saltzman indicates that Ponzo was on two different medications.

On May 4, 2011, Nationwide notified Ponzo that, based on the Saltzman Report, it would not pay for further medical treatment; however, Ponzo continued to seek treatment from chiropractor Dr. Robert C. South, D.C.

On January 6, 2012, Dr. South prepared a report regarding Ponzo's injuries and condition (the "South Report"). The South Report was sent to Nationwide on January 9, 2012. The South Report differs significantly from the Saltzman Report. According to Dr. South, Ponzo was first seen for the injuries sustained from the accident on November 14, 2010. His pain was severe in the neck with radiation into shoulders bilaterally, severe headaches, mid-back pain, and lower-back pain with radiation into the right thigh and knee . . . His most recent progress examination on May 13, 2011 . . . he had not reached maximum improvement at that time. Dr. South stated that, as a result of the car accident, Ponzo has permanent neck and lower back injuries, which require chiropractic treatment twice a month.

Ponzo testified he continued to seek treatment from Dr. South through November 2011, resulting in additional medical expense in the amount of \$3,003.19. Ponzo testified that he had difficulty paying for these additional medical expenses, which Nationwide

refused to cover, and the outstanding bills were ultimately sent to a collection agency. These collection actions were brought to the attention of his mother-in-law who was employed by Dr. South.

Discussion

Under 21 *Del. C.* 2118B, attorney's fees may be awarded where an insurer, acting in bad faith, refuses to pay benefits to its insured.⁴ Section 2118B(d) provides, in relevant part:

Any judgment entered for a claimant in a civil action or arbitration proceeding brought under this section shall include . . . an award for the costs of the action and the prosecution of the action, including reasonable attorney's fees; provided, however, that the costs of the action and the prosecution of the action, including reasonable attorney's fees shall only be awarded if it is found that the insurer acted in bad faith. The burden of proving that the insurer acted in bad faith shall be on the claimant.

Not every refusal to pay a claim constitutes bad faith.⁵ Where an insurer fails to investigate or process a claim or delays payment in bad faith, it is in breach of the implied obligations of good faith and fair dealing underlying all contractual obligations."⁶ A lack of good faith, or the presence of bad faith, is actionable where the insured can show that the insurer's denial of benefits was 'clearly without any reasonable justification."⁷

The Court finds that Nationwide acted in bad faith when it failed to investigate Ponzo's claim after it received the South Report on January 9, 2012. The South Report called into question the opinions contained in the Saltzman Report. Furthermore, the

⁴ Davidson t. Travelers Home and Marine Ins.Co., 201 WL 7063521, at *2 (Del. Super. Sept. 8, 2011) (citation omitted).

⁵ Davidson, 2011 WL 7063521, at *2 (Del. Super. Sept. 8, 2011).

⁶ Tackett v. State Farm Fire and Cas. Ins. Co., 653 A.2d 254, at 264 (Del. 1995) (citing Merrill v. Crothall-American, Inc., 606 A.2d 96, 101 (Del. Super. 1982)).

⁷ Id. (citing *Casson v. Nationwide Ins. Co.*, 455 A.2d 361, 369 (Del. Super. 1982)).

multiple inaccuracies in the Saltzman Report should have put Nationwide on notice of the document's potential unreliability. The Court does not suggest that either report is more correct than the other. Rather, in light of the facts and circumstances surrounding the conflicting reports, Nationwide's failure to investigate the validity of Ponzo's claim was clearly without justification.

The Court notes that the amount Ponzo seeks to recover for attorney's fees -\$15,585.00 – is over five times the \$3,003.19 awarded for actual loss. However, the bulk
of the attorney's fees are directly attributable to Nationwide's failure to respond to the
Complaint and their subsequent attempts to have the judgment vacated. The exhibit
submitted in support of the claim for legal fees is well documented and reasonable.
Counsel for plaintiff devoted enormous amounts of time and resources pursuing this
matter. Nationwide could have limited the cost of litigation by timely responding to the
Complaint.⁸ Additionally, after reading the Saltzman Report, any reasonable person
would have raised questions regarding its reliability given the glaring factual errors with
reference to gender, medication, and failure to review the x-ray reports from Christiana
Hospital. How anyone can deny a claim on such a report is beyond any reasonable
business practice except to engage is neglect.

The Court finds that Nationwide acted in bad faith when it failed to investigate Ponzo's claim after it was in receipt of the South Report. Accordingly, Ponzo is entitled to attorney's fees incurred after May 4, 2011.

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⁸ See Santillo v. Nationwide Mutual Ins. Co., 1992 WL 1364260, at *1 (Del. Super. April 22, 1992)

AND NOW, THEREFORE, this 30th day of July 2013, IT IS HEREBY ORDERED; attorney's fees in the amount of \$15,250.00 are AWARDED, with post judgment interest at the legal rate until paid.

SO ORDERED this 30th day of July 2013

Alex J. Smalls
Chief Judge