SUPERIOR COURT
OF THE
STATE OF DELAWARE

E. SCOTT BRADLEY
JUDGE

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December 13, 2013

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RE: William Bennett & Debra Bennett v. USAA Casualty Ins. Co.
C.A. No: S10C-02-010

Dear Counsel:

This is my decision on Defendant USAA Casualty Insurance Company's Motion for Partial Summary Judgment against Plaintiffs William and Debra Bennett. The Bennetts own a condominium unit at the Plantations East Condominium Complex in Lewes, Delaware. Their unit sustained water damage when a toilet inside it broke, allowing water to run throughout the unit. This occurred on February 12, 2009. The Plantations East Condominium Complex was governed by the Plantations East Condominium Association, Inc., which in turn had hired Wilgus Associates, Inc., to manage the complex. Wilgus obtained an insurance policy covering certain matters regarding the complex from the Philadelphia Indemnity Insurance Company.

The Bennetts had an insurance policy with USAA, covering both the real and personal property in their unit.

Upon receiving notice of the leak at the Bennetts' unit, USAA retained ServPro to go to the Bennetts' unit and perform water remediation services, including removing damaged flooring and drywall and providing drying services. ServPro also went to the Bennetts' unit a number of times afterwards to make sure that it was free of moisture. Once this was done, USAA repeatedly asked the Bennetts to provide an inventory of their personal property that was damaged and living expenses. The Bennetts finally provided their inventory of personal property to USAA on October 23, 2009. USAA then began to evaluate the Bennetts' claims.

However, everything changed on January 29, 2010. On that day, USAA told the Bennetts that their policy was secondary to the condominium association's policy and that if the condominium association's insurance carrier had issued a letter denying coverage, then they should forward that letter to it for review. USAA also told the Bennetts that it could not pay their claim and pursue subrogation against the condominium association's insurance carrier because the Bennetts were "insureds" under that policy. Unable to get anyone to pay their claims, the Bennetts filed lawsuits against USAA, Wilgus Associates, Inc., the Plantations East Condominium Association, and the Philadelphia Indemnity Insurance Company. The Bennetts

argued (1) that the condominium association had an obligation under the condominium documents to obtain an insurance policy that would have covered their claims and had failed to do so, (2) that the insurance policy that the condominium association did obtain from Philadelphia Indemnity covered their claims, and (3) that the USAA policy covered their claims as well. The USAA policy had a provision providing that "if, at the time of the loss, there is other insurance in the name of a corporation or association of property owners covering the same property covered by this policy, this insurance will be in excess over the amount recoverable under such insurance." USAA had, as I noted earlier, determined that the condominium association's policy covered the Bennetts' claims and was "primary." The condominium association denied that it had an obligation under the condominium documents to obtain an insurance policy covering the Bennetts' claims. I rendered a decision agreeing with the condominium association. Philadelphia Indemnity argued that its policy did not cover the Bennetts' claims. I rendered a decision agreeing with Philadelphia Indemnity. Thus, the dispute is now between the Bennetts and USAA.

DISCUSSION

USAA now argues that the Bennetts' claims for damages due to mold and loss

of use of their condominium are limited by certain policy provisions.[1] The Bennetts do not contest USAA's interpretation of the policy. They instead argue that the policy limitations are irrelevant because USAA acted in bad faith when it determined that the Bennetts' claims were covered by the condominium association's insurance policy and that its policy was secondary to the policy obtained by the condominium association. The Bennetts argue further that USAA had nothing more than a hope that there was other insurance covering their claims. Thus, according to the Bennetts, USAA took a gamble and lost. USAA argues that there was a bona-fide dispute between the parties as to which insurance policy was primary.

In order to establish "bad-faith" the plaintiff must show that the insurer's refusal to honor its contractual obligation was clearly without any reasonable justification.[2] The standard of reasonableness tests the judgment of the insurer's agent in deciding to contest the insurer's liability in the face of a claim. The ultimate question is whether at the time the insurer denied liability, there existed a set of facts or circumstances known to the insurer which created a bona-fide dispute and

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[1] The policy limits damages caused by mold to (a) $2,500 for property damages, and (b) $2,000 for loss of use. The policy further addresses broader loss of use and lost rental income claims by limiting the loss period to the time required to repair the damaged unit, which period of time shall not exceed 12 months.

[2] *Nobel v. National American Life Ins. Co.,* App., 128 Ariz. 196, 624 P.2d 874 (1979), vacated, 128 Ariz. 188, 624 P.2d 866 (1981); 3 Appleman, *Insurance Law and Practice*, §1612, at 367-372. (Revised ed., 1967).

therefore a meritorious defense to the insurer's liability.[3] Where the issue to be tried is one of disputed fact, the question of bad faith refusal to pay should not be submitted to the jury unless it appears that the insurer did not have reasonable grounds for relying upon its defense to liability.[4]

The problem for me is that the parties' arguments have not adequately addressed the issue of bad faith, leaving me without enough information to make a decision. What is essential to a decision on this issue is knowledge of the facts upon which USAA relied and the analysis it conducted when it concluded that the condominium association's policy covered the Bennetts' claims and was primary to its policy. Those facts and that analysis are not discussed in the parties' letter memorandums, making it impossible for me to decide the issue.[5]

CONCLUSION

Given this, and the parties' respective positions on the policy provisions, I will

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[3] Compare, *Wolf v. Mutual Benefit Health and Accident Ass'n.,* 188 Kan. 694, 366 P.2d 219 (1961) and, generally 3 Appleman , *Insurance Law and Practice*, Ch. 86, "Damages for Refusal of Payment;" Ch. 87 "Justification of Delay or Nonpayment," (each discussing good faith in regard to imposition of statutory penalties on insurers).

[4] Compare, *Coleman v. Metropolitan Life Ins. Co.,* Mo. App., 127 S.W.2d 764 (1936) (statutory penalty); *Allen v. National Liberty Life Ins. Co.,* 153 Ga. App. 579, 266 S.E. 2d 269 (1980).

[5] "If material issues of fact exist or if a court determines that it does not have sufficient facts to enable it to apply the law to the facts before it, then summary judgment is inappropriate." *Motorola, Inc. v. Amkor Technology, Inc*., 849 A.2d 931, 935 (Del. 2004).

deny USAA's Motion for Partial Summary Judgment. However, since the Bennetts do not contest USAA's interpretation of the policy provisions, USAA's interpretation shall govern, subject to the Bennetts' claim of bad faith denial of coverage, which must be proven at trial in order to trump USAA's interpretation of the policy provisions.

IT IS SO ORDERED.

/s/ E. *Scott Bradley*
E. Scott Bradley

cc: Prothonotary