IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

DIANE ANNESTELLA,	:	
	:	C.A. No. K13C-11-027 WLW
Plaintiff,	:	
	:	
v.	:	
	:	
GEICO GENERAL INSURANCE COMPANY, a Foreign Corporation, NATIONWIDE MUTUAL INS. CO., a Foreign Corporation,	:	
	:	
Defendants.	:	

Submitted: July 11, 2014
Decided: August 18, 2014

ORDER

Upon Defendant GEICO General Insurance Company's Motion for Summary Judgment.
Denied.

William D. Fletcher, Jr., Esquire of Schmittinger & Rodriguez, P.A., Dover, Delaware; attorney for Plaintiff.

Michael K. DeSantis, Esquire of the Law Office of Dawn L. Becker, Wilmington, Delaware; attorney for Defendant GEICO.

Sean A. Dolan, Esquire of the Law Office of Cynthia Beam, Newark, Delaware; attorney for Defendant Nationwide.

WITHAM, R.J.

INTRODUCTION

Defendant GEICO General Insurance Company (hereinafter "GEICO") has moved for summary judgment against Plaintiff Diane Annestella (hereinafter "Plaintiff") based on Plaintiff's acknowledged failure to timely notify GEICO of a settlement agreement with the underlying tortfeasor. GEICO argues that Maryland law applies to this case, and under Maryland law, as well as the language of Plaintiff's policy, the failure to provide timely notice of the settlement to GEICO precludes Plaintiff from recovering underinsured motorist (hereinafter "UIM") benefits under her policy with GEICO.

Plaintiff argues that Delaware law should apply to this case, and that summary judgment would be premature in the absence of further discovery. Plaintiff also argues that GEICO has waived its lack of notice argument by failing to plead it in its answer, and contends that under the language of the release in the settlement agreement, GEICO's subrogation rights have been preserved.

Following the Court's careful consideration of the parties' arguments and submissions, and for the reasons set forth herein, Defendant's motion for summary judgment is denied without prejudice. The Court concurs with Plaintiff that further discovery is needed before a thorough choice of law analysis can be conducted. The Court also finds it necessary to address Plaintiff's waiver argument, as these proceedings have focused entirely on an affirmative defense that appears nowhere in GEICO's answer and GEICO has yet to amend its answer despite ample time to do so.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff was involved in a car accident with Michael J. Haxton (hereinafter "Haxton"), a Delaware resident, in Delaware on November 23, 2009. Plaintiff owned a Nissan automobile at the time, which was insured by GEICO. However, Plaintiff was not driving that vehicle at the time of the accident. Instead, she was driving another vehicle with the permission of its owner. That vehicle was insured by Defendant Nationwide Mutual Insurance Company (hereinafter "Nationwide"), who has not taken a position on the instant motion.

On September 19, 2012, Plaintiff entered into a settlement agreement with Haxton under which Plaintiff recovered Haxton's policy limits of $15,000 from Haxton's insurance carrier. The agreement included a 'general release of all claims' which states in pertinent part:

> Notwithstanding any of the above, this release does not have any effect on or application to any underinsured motorists claim that [Plaintiff] may have against any insurance company or any insurance policy. [Plaintiff] hereby specifically reserves any and all underinsured claims. No one is released to the extent that it would adversely effect or bar [Plaintiff] from recovering any underinsured motorist benefits.

Plaintiff did not provide notice to GEICO prior to executing the agreement. Plaintiff's GEICO policy provides for $100,000/$300,000 in UIM coverage; the policy was issued in Maryland. Declarations in the policy indicate that Plaintiff's original residence was Parkville, Maryland, but subsequent declarations indicate that Plaintiff's residence was Delaware. These subsequent declarations are dated after

November 23, 2009–the time of the accident. Each declaration indicates that the policy was rated as a Maryland policy. Page 17 of the policy contains a choice of law provision, which states that Maryland law applies to interpretation of the policy.

On November 25, 2013, Plaintiff filed a complaint against GEICO for UIM benefits; on December 30, 2013 Plaintiff amended her complaint to include Nationwide as a defendant, because Nationwide insured the vehicle Plaintiff was operating with the permission of the vehicle's owner at the time of the accident. GEICO filed its answer on January 9, 2014 and on April 14, 2014 GEICO filed the instant motion for summary judgment. Plaintiff filed her response to GEICO's motion on April 28, 2014. This Court has since issued a scheduling order on June 4, 2014; under the scheduling order, the deadline for motions to amend is February 2, 2015 and the deadline for discovery completion is February 24, 2015.

In its motion, GEICO argues that under choice of law principles, Maryland law applies because Plaintiff entered into the GEICO policy in Maryland, and the policy continued to be rated as a Maryland policy at the time of the accident. GEICO further contends that under Maryland law, an insured must provide notice to the insurer of settlements with tortfeasors for the limits of the tortfeasor's coverage, in order to secure the insurer's consent to settlement before it is finalized. GEICO argues that by not providing notice of the settlement with Haxton, Plaintiff has forfeited her right to UIM benefits under the policy. GEICO states in its motion that "the only fact reasonably in dispute here is whether or not the Plaintiff was a Delaware or Maryland resident at the time of the accident."

In support of its motion, GEICO has also submitted the affidavit of Paul Messa (hereinafter "Messa"), a GEICO claims examiner. Messa's affidavit does not state that it is based on Messa's personal knowledge. Rather, Messa states that based on his "investigation and familiarity with GEICO's record-keeping practices when notified of a potential claim," Messa is "certain" GEICO was never given notice of the settlement with Haxton. Messa further affirms that after investigating Plaintiff's claim, Messa learned that Plaintiff notified GEICO of her change of residency from Maryland to Delaware "at some point either before or after November 23, 2009." Messa goes on to state that after "further investigation" he "learned that the policy in question continued to be rated in Maryland even after the policyholder's address changed," because Plaintiff had represented to GEICO that "her son would be the primary driver of the vehicle, and that the vehicle would continue to be primarily driven in Maryland and not in Delaware." GEICO claims that because of this, Plaintiff's residency at the time of the accident is not material to the Court's choice of law analysis.

Plaintiff contends that under Delaware law, GEICO would have no subrogation rights against Haxton, and that the relevant contacts in this case favor application of Delaware law. Plaintiff further argues that the broad language of the release in the settlement agreement preserves GEICO's subrogation rights in any event, thus GEICO did not suffer any actual prejudice as a result of Plaintiff's failure to give notice of the settlement. Plaintiff also argues that summary judgment is premature because little to no discovery has been conducted. Finally, Plaintiff also argues that

GEICO failed to plead an affirmative defense of avoidance in its answer, and thus has waived the defense.

Oral arguments were held on July 11, 2014. Despite the time that had passed since Plaintiff raised her waiver argument in her response to the motion, GEICO had not yet amended its answer to raise avoidance under Maryland law as a defense. When questioned by the Court, counsel for GEICO indicated that it still had time to amend its answer under the scheduling order (which had since been issued) and under Delaware law, pleadings could be amended so long as done in a timely fashion without prejudice to the other party. Counsel provided no explanation as to why the answer had not yet been amended. Further, despite stating in GEICO's motion that Plaintiff's residency was an issue of fact, counsel for GEICO stated that he was *not* disputing that Plaintiff was a Delaware resident at the time of the accident for purposes of summary judgment. GEICO provided the Court with citations to recent Maryland cases which hold that under Maryland law, where an insured has failed to provide notice of a settlement to the insurer, the insurer need not prove actual prejudice in order to be relieved of its obligations under the policy.

Plaintiff's counsel at oral arguments did not specifically raise the waiver argument, but reserved all arguments raised in Plaintiff's response. Plaintiff argued that she moved to Delaware before the accident occurred. Plaintiff argued that the policy should be characterized as a Delaware policy, because Plaintiff notified GEICO of her change of residency before the accident. Plaintiff further contended that GEICO, as a matter of public policy, should not be permitted to force an insured

who is a Delaware resident to be bound to a Maryland policy. Finally, Plaintiff argued that summary judgment was premature, because further discovery needed to be conducted before a full choice of law analysis could take place. Plaintiff's counsel stated that such discovery included deposing Messa and obtaining files from GEICO pertaining to Plaintiff's change of residency and the characterization of her policy after that change of residency.

Neither party brought up the policy's choice of law provision at oral arguments. Over a month after this Court heard oral arguments, GEICO inexplicably still has yet to amend its answer to include its affirmative defense of avoidance under Maryland law.

STANDARD OF REVIEW

Summary judgment will be granted when, viewing all of the evidence in the light most favorable to the nonmoving party, the moving party demonstrates that "there are no material issues of fact in dispute and that the moving party is entitled to judgment as a matter of law."[1] This Court shall consider the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any" in deciding the motion.[2] The moving party bears the initial burden of demonstrating the nonexistence of material issues of fact; the burden then shifts

[1] *Burkhart v. Davies*, 602 A.2d 56, 59 (Del. 1991 (citing *Benge v. Davis*, 553 A.2d 1180, 1182 (Del. 1989)); *see also* Del. Super. Ct. Civ. R. 56(c).

[2] Del. Super. Ct. Civ. R. 56(c).

to the nonmoving party to show that there are material issues of fact in dispute.[3] The Court views the record in the light most favorable to the nonmoving party.[4] When material facts are in dispute, or "it seems desirable to inquire more thoroughly into the facts, to clarify the application of the law to the circumstances," summary judgment will not be appropriate.[5] However, when the facts permit a reasonable person to draw but one inference, the question becomes one for decision as a matter of law.[6] Summary judgment may be denied without prejudice if "discovery is in its nascent stage" and summary judgment would be premature.[7]

Affidavits may be submitted in support of or in opposition to summary judgment, but such affidavits "shall be made on personal knowledge, shall set forth facts as would be admissible in evidence and shall show affirmatively that the affiant is competent to testify to the matters stated therein."[8] Affidavits which are not based

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[3] *Fauconier v. USAA Cas. Ins. Co.*, 2010 WL 847289, at *2 (Del. Super. Mar. 1, 2010) (citing *Moore v. Sizemoore*, 405 A.2d 679, 680 (Del. 1979)).

[4] *Id.* (citing *Brzoska v. Olson*, 668 A.2d 1355, 1364 (Del. 1995)).

[5] *Ebersole v. Lowengrub,* 180 A.2d 467, 468-69 (Del. 1962) (citing *Knapp v. Kinsey*, 249 F.2d 797 (6th Cir. 1957)).

[6] *Wootten v. Kiger*, 226 A.2d 238, 239 (Del. 1967).

[7] *Bracken-Bova v. Liberty Mut. Fire Ins. Co.*, 2011 WL 5316600, at *1 (Del. Super. Oct. 7, 2011) (citing *Hampton v. Warren-Wolfe Assocs., Inc.*, 2004 WL 838847, at *2 (Del. Super. Mar. 25, 2004)).

[8] Del. Super. Ct. Civ. R. 56(e).

on the affiant's personal knowledge may be properly excluded.[9] An affiant's failure to aver that the statements in the affidavit are based on the affiant's personal knowledge is a "formal defect [that] may be waived absent a motion to strike or other objection."[10]

DISCUSSION

Plaintiff's waiver argument

Under Superior Court Civil Rule 8(c), a responsive pleading "shall set forth affirmatively" any matter "constituting an avoidance or affirmative defense."[11] The policy behind this rule "is to notify the plaintiff if the defendant intends to pursue a defense in the nature of an avoidance."[12] Failure to raise an affirmative defense waives it if the defense "is not raised in a timely fashion."[13] However, under Superior Court Civil Rule 15, amendments to pleadings are to be liberally granted when justice so requires, and in "the absence of prejudice to another party, the trial court is required to exercise its discretion in favor of granting leave to amend."[14]

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[9] *See Lundeen v. Pricewaterhouse Coopers*, 919 A.2d 561, 2007 WL 646205, at *3 (Del. Mar. 5, 2007) (TABLE).

[10] *Lynch v. Athey Prods. Corp.*, 505 A.2d 42, 44 (Del. Super. 1985).

[11] Del. Super. Ct. Civ. R. 8(c).

[12] *Ratcliffe v. Fletcher*, 690 A.2d 466, 1996 WL 773003, at *3 (Del. Dec. 24, 1996) (citing *Johnson v. Cullen*, 925 F. Supp. 244, 247 n.2 (D.Del. 1996)).

[13] *Id.* (citing *Cannelongo v. Fidelity Am. Small Bus. Inv. Co.*, 540 A.2d 435, 440 (Del. 1988)).

[14] *Abdi v. NVR, Inc.*, 945 A.2d 1167, 2008 WL 787564, at *1 (Del. Mar. 25, 2008) (citing *Mullen v. Alarmguard of Delmarva, Inc.*, 625 A.2d 258, 263 (Del. 1993)) (original emphasis not

Were the facts different in the instant case, the Court would be inclined to find that GEICO has waived the defense of avoidance. More than three months passed between the filing of GEICO's answer, which makes no mention of this defense, and GEICO's motion, which raises the defense for the first time. Plaintiff's response to the motion filed on April 28, 2014 put GEICO on notice that Plaintiff was raising a waiver argument against GEICO. Despite this, GEICO made no effort whatsoever to amend its answer before oral arguments on July 11, 2014–nearly another three months since GEICO first had notice of Plaintiff's waiver argument. While it is true that the scheduling order's deadline for motions to amend is not until February 2, 2015, that scheduling order was not issued until June 4, 2014. Thus, GEICO cannot simply say that the scheduling order's deadline excuses its delay in amending its answer, when a large part of that delay accrued before the scheduling order was even issued. Even more perplexing to the Court is that the Court questioned GEICO's counsel at oral argument as to why GEICO had not yet amended its answer, and counsel provided no explanation whatsoever except that there was still time to amend under the scheduling order. As of the writing of this order, GEICO *still* has yet to amend its answer. More than a reasonable time has passed for GEICO to amend its answer to include its defense yet it inexplicably, if not obstinately, has refused to do so.

However, GEICO's unreasonable delay does not warrant precluding GEICO from raising the defense, because it cannot be said that Plaintiff has somehow

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included) .

suffered unfair surprise or prejudice due to GEICO's dilatory behavior. Indeed, Plaintiff has fully briefed a response to GEICO's motion, and Plaintiff's counsel fully defended against the motion at oral arguments. Further, besides a general reservation of arguments raised in the written response, Plaintiff's counsel did not specifically address the issue of waiver at oral argument. Had Plaintiff somehow established that she has suffered prejudice as a result of GEICO's failure to amend its answer, the Court would likely have found that GEICO had waived the defense.

Because Plaintiff is on notice of GEICO's defense that Plaintiff's failure to provide notice of the settlement agreement excuses GEICO from providing UIM benefits, and because Plaintiff cannot show prejudice resulting from the delay, the Court finds that GEICO has not waived the defense. However, the Court shall consider the imposition of some lesser form of sanction, such as precluding GEICO from recovering costs incurred in this litigation, unless GEICO promptly files a motion to amend its answer within 20 days from the issuance of this decision. Fully briefing and arguing an affirmative defense without amending the answer to include it, despite reasonable opportunity to do so and being put on notice both by the opposing party and by the Court that such omission is improper, falls far short of best practices in this Court's view.

Choice of law

This case presents a choice of law question between Delaware law and Maryland law. In Delaware, where an insured secures a settlement or judgment from a tortfeasor for the amount of his liability insurance coverage, the insurer has no right

of subrogation against that tortfeasor if he carries the legally required minimum amounts of insurance.[15] In Maryland , an insured is statutorily required to provide a copy of a settlement offer to the insurer in order to obtain the insurer's consent to settlement, where the settlement would exhaust the tortfeasor's liability coverage.[16] Maryland cases have interpreted this requirement as being a condition precedent to UIM coverage, that protects the insurer's subrogation rights (which are recognized in Maryland under these circumstances), and can be waived only by the insurer.[17] Thus, under Maryland law, an insurer can disclaim coverage if the insured does not comply with the above notice requirement without showing actual prejudice resulted from the lack of notice.[18]

Delaware follows the Restatement (Second) Conflict of Laws's (hereinafter "the Restatement") "most significant relationship" test when resolving choice of law issues.[19] Choice of law issues involving insurance coverage are resolved by analyzing the relevant contacts set forth in sections 188 (dealing with general contractual issues) and 193 (dealing specifically with fire, surety, and casualty

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[15] *Bryant v. Kemper*, 542 A.2d 347, 350 (Del. Super. 1988).

[16] MD. CODE. ANN., INS. § 19-511(a) (West 2014).

[17] *See Woznicki v. GEICO Gen. Ins. Co.*, 90 A.3d 498, 511-12 (Md. Ct. Spec. App. Apr. 29, 2014).

[18] *Morse v. Erie Ins. Exchange*, 90 A.3d 512, 518 (Md. Ct. Spec. Spec. App. Apr. 29, 2014).

[19] *Liggett Group Inc. v. Affiliated FM Ins. Co.*, 788 A.2d 134, 137 (Del. 2001) (citing *Hoechst Celanese Corp. v. Nat'l Union Fire Ins. Co.*, 1994 WL 721651, at *3-4 (Del. Super. Mar. 28, 1994)).

insurance contracts) of the Restatement.[20] These contacts must also be evaluated in light of the principles set forth in section 6 of the Restatement[21]; one such principle is the relevant policies of the forum state.[22] Delaware will not apply another state's law if doing so "would be clearly repugnant to the public policy of Delaware."[23] One such policy is disfavoring forfeiture of insurance coverage when the insurer does not show prejudice resulting from the insured's actions or omissions.[24]

The record is insufficient as to allow for a full choice of law analysis; accordingly, summary judgment at this stage in the proceedings would be premature. While some of the contacts relevant to a choice of law analysis appear undisputed, such as the location of the accident (Delaware), residency of the tortfeasor (Delaware), and where the insurance policy was entered into (Maryland), there are two key contacts that are disputed. The first is whether Plaintiff was a resident of Maryland or Delaware at the time of the accident. Despite acknowledging that Plaintiff's residency was "reasonably in dispute" in its motion, GEICO, through counsel at oral argument, attempted to concede that Plaintiff was a Delaware resident at the time of the accident. However, the declarations in the GEICO policy do not

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[20] *Id.*

[21] *Id.*

[22] Restatement (Second) of Conflict of Laws § 6(2)(b).

[23] *See J.S. Alberici Const. Co., Inc. v. Mid-West Conveyor Co.*, 750 A.2d 518, 521 (Del. 2000).

[24] *See State Farm Mut. Auto. Ins. Co. v. Johnson*, 320 A.2d 345, 347 (Del. 1974).

reveal when Plaintiff changed her residency to Delaware, or when Plaintiff notified GEICO of this change. Further, Messa states in his affidavit that Plaintiff changed her residency from Maryland to Delaware "at some point either before or after November 23, 2009." Even when viewing the record in the light most favorable to Plaintiff, the Court cannot conclude that Plaintiff was a Delaware resident at the time of the accident.

The second relevant contact that is disputed is the nature of the GEICO policy–*i.e.*, whether it was a Maryland policy or Delaware policy. The policy states that it is rated as a Maryland policy, and the policy's choice of law provision–which, inexplicably, was not mentioned by either party at oral arguments–states that Maryland law applies. However, at some point, Plaintiff notified GEICO of her change of residency from Maryland to Delaware. It is unclear whether that had the effect of rendering the policy a Delaware policy, or if the policy remained a Maryland policy. Messa states in his affidavit that the policy continued to be rated as Maryland because the vehicle insured under the GEICO policy would be primarily driven in Maryland. However, this fact was not confirmed at oral arguments. Further, the Court finds the validity of Messa's affidavit questionable–it does not state that it is based on Messa's personal knowledge, and Messa indicates that his affidavit is based "on his investigation and his familiarity with GEICO's record keeping practices . . . ." This indicates that portions of Messa's affidavit may not be based on his personal knowledge. Plaintiff's counsel indicated as much when questioned at oral arguments. This Court cannot make any assumptions about the facts. Thus, the Court does not

accept Messa's affidavit. Messa's deposition has already been noticed, and could shed significant light on these questions. Finally, there is still ample time left for discovery; discovery is not scheduled to be completed until February 24, 2015. Because discovery is still in its nascent stages and further discovery would allow for a more thorough choice of law analysis, the Court agrees with Plaintiff that summary judgment is premature. GEICO shall have leave to file another motion for summary judgment at a later stage in the proceedings, once further discovery has been completed.

While the Court does not resolve the choice of law question at the present time, it is worth observing that even if Maryland law is favored in a choice of law analysis, it may ultimately not apply because of Delaware's public policy against forfeitures of insurance contracts in the absence of prejudice. Maryland law indicates that its statutory notice requirement is a bright-line all or nothing rule; failure to provide notice to the insurer results in wholesale forfeiture of coverage, even if there is no prejudice to the insurer. This seems harshly draconian to the Court and repugnant to Delaware public policy, particularly given the fact that the settlement release with Haxton is broadly worded as to potentially preserve any subrogation rights GEICO might have in Maryland. The Court makes this observation now, because counsel at oral arguments did not fully address this issue at oral arguments, and it will have to be addressed should GEICO choose to refile for summary judgment at a later stage in these proceedings.

CONCLUSION

GEICO's motion for summary judgment is **DENIED** without prejudice. GEICO is further instructed to amend its answer within 20 days from the issuance of this decision to add its affirmative defense of avoidance, or risk sanctions for its delay.

IT IS SO ORDERED.

William L. Witham, Jr.
Resident Judge

WLW/dmh