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FROM THE COMMITTEE ON OPINIONS

EXCLUSIVE AUTO COLLISION CENTER;

Plaintiffs,

v.

ALLSTATE INSURANCE COMPANY a/k/a ALLSTATE NEW JERSEY INSURANCE COMPANY, ENCOMPASS INSURANCE;

Defendants.

-and-

ENCOMPASS INSURANCE COMPANY OF NEW JERSEY and ENCOMPASS PROPERTY AND CASUALTY INSURANCE COMPANY OF NEW JERSEY

Third Party Plaintiffs,

TONY LAKE, ROBYN LAKE, JOHN DOE (said name being fictitious representing one or more persons whose identities are known) and JOHN DOE, INC. (said name being fictitious representing one or more business entities whose identities are unknown),

Third Party Defendants.

ALLSTATE INDEMNITY COMPANY, ALLSTATE INSURANCE COMPANY, ALLSTATE NEW JERSEY INSURANCE COMPANY, ALLSTATE NEW JERSEY PROPERTY AND CASUALTY INSURANCE COMPANY, ALLSTATE PROPERTY AND CASUALTY INSURANCE COMPANY, ENCOMPASS INSURANCE COMPANY OF NEW JERSEY, and ENCOMPASS PROPERTY AND CASUALTY INSURANCE COMPANY OF NEW JERSEY,

Plaintiffs,

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION – BERGEN COUNTY

DOCKET NO. **BER-L-1784-20**

Civil Action

OPINION

-and-

MARLENE CARIDE, COMMISSIONER, NEW JERSEY DEPARTMENT OF BANKING & INSURANCE,

Plaintiff-Intervenor,

v.

EXCLUSIVE AUTO COLLISSION CENTER, INC. ANTHONY LAKE, ROBYN LAKE, JOHN DOE (said name being fictitious representing one or more persons whose identities are unknown), and JOHN DOE, INC., (said name being fictitious representing one or more business entities whose identities are unknown),

Defendants.

Argued: January 7, 2022
Decided: January 12, 2022

THE HONORABLE ROBERT C. WILSON, J.S.C.

David D'Aloia, Esq. appearing on behalf of Allstate New Jersey Insurance Company and Encompass Insurance Company of New Jersey (from Saiber LLC)

James E. Mackevich, Esq. appearing on behalf of Plaintiff Exclusive Auto Collision Center, Inc. (from Mackevich, Burke & Stanicki)

FACTUAL BACKGROUND

THE INSTANT MATTER arises out of claims of an auto vehicle insurance contract and subsequent claims of breach and tort. Allstate New Jersey Insurance Company and Encompass Insurance Company of New Jersey ("Allstate") are companies licensed to conduct insurance business in the State of New Jersey. Exclusive Auto Collision Center, Inc. ("Exclusive") is an auto body repair facility.

Breach of Contract Claims

Allstate maintains a network of repair shops called Good Hands Repair Network (Allstate's "network shops"). The network shops repair vehicles at the price set forth in Allstate's approved estimates of repairs with no out-of-pocket cost to the insured other than the policy deductible. Insureds are not required to use a network shop and have the right to select the repair facility of their choice.

Exclusive is not a network shop. Exclusive performed repairs on the 167 vehicles involved in this litigation. Exclusive had the vehicle owners execute an assignment to Exclusive of their right to receive payment of insurance benefits so that Exclusive could receive direct payment from Allstate. Under Allstate's policy with its insureds, it is obligated to pay for the cost to repair or replace the vehicle to its condition at the time of loss subject to state laws and regulations.

For each claim, an Allstate adjuster performed an initial inspection of the vehicle and prepared an estimate for the price of the vehicle repair for the damage that was visible during the inspection. If additional damage to a vehicle was discovered during a repair Exclusive would request a supplement to the initial repair estimate to allow for the newly discovered damage to be repaired. After the request an Allstate adjuster performed a re-inspection of the vehicle to view the additional damage that was uncovered during the repair and would prepare a supplement to account for the additional repair work necessary to repair the vehicle. This process was repeated until all damages were discovered, and the final price estimate was prepared.

Allstate's estimates and supplements always use the labor rates paid to its network shops. Allstate used the CCC One Database, a repair estimating software approved by the Department of Banking and Insurance ("DOBI"), to provide the appropriate amount of labor time for a particular repair task. As Exclusive repaired the vehicle it prepared its own estimate setting forth the scope

of repairs and the time it claimed was necessary to perform the repairs. Exclusive presented its damage analysis to Allstate's appraiser during the re-inspection process.

In addition to its claims for higher labor rates, which were previously dismissed, Exclusive's estimates and supplements exceeded the price of Allstate's estimates and supplements in three primary ways: (1) additional labor time in excess of the time provided for by the DOBI approved CCC One estimating system as set forth in Allstate's estimate; (2) reimbursement for other procedures that all relate to painting and refinishing the vehicle; and (3) ancillary procedures that are not approved by Allstate in its estimate. None of the charges demanded by Exclusive in this litigation were approved in Allstate's estimates. Exclusive submitted approximately twenty complaints to the DOBI regarding Allstate's reimbursement rates. DOBI has rejected all these complaints.

Exclusive's Tort Claims and Allstate's Insurance Fraud Investigation

Allstate began investigating Exclusive for insurance fraud in approximately 2011 after an insured was involved in an accident and chose Exclusive for repairs. During the repair, Allstate adjusters reported questionable items on Exclusive's repair estimate. Allstate retained an engineer to inspect the vehicle who determined that Exclusive charged for repairs that it did not perform.

On May 10, 2010, Exclusive filed litigation against Allstate for additional compensation for vehicle repairs in the Superior Court of New Jersey, Law Division. Later, on May 30, 2012, Exclusive began filing similar litigation against Allstate in the Superior Court of New Jersey, Law Division, Special Civil Part. Each Special Civil Part lawsuit involved a separate vehicle. Exclusive's fourteen Special Civil Part cases were consolidated and transferred to the Law Division on January 28, 2013. On February 17, 2013, Allstate instituted an action against

Exclusive for violation of the New Jersey Insurance Fraud Prevent Act. Allstate's insurance fraud litigation was consolidated with Exclusive's litigation for additional compensation for repairs.

In June 2013, Exclusive filed an Amended Complaint asserting claims for defamation and tortious interference. The Complaint alleges that Allstate representatives made defamatory statements about Exclusive to several individuals, and that Allstate placed Exclusive on the National Insurance Crime Bureau website. Exclusive produced signed statements drafted for the individuals, however, none were sworn under oath or include a certification. None of the individuals testified to any defamatory statement made by an Allstate representative. Two of the individuals testified that the adjust stated Exclusive was a fraudulent shop. In answers to interrogatories, Exclusive noted that it has no evidence of actual damages in connection with the alleged defamation.

For the reasons below, Allstate's Motion for Summary Judgment is **GRANTED** in its entirety.

SUMMARY JUDGMENT STANDARD

The New Jersey procedural rules state that a court shall grant summary judgment "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2(c). In Brill v. Guardian Life Insurance Co., 142 N.J. 520 (1995), the Supreme Court set forth a standard for courts to apply when determining whether a genuine issue of material fact exists that requires a case to proceed to trial. Justice Coleman, writing for the Court, explained that a motion for summary judgment under R. 4:46-2 requires essentially the same analysis as in the case of a directed verdict based on R. 4:37-2(b) or R. 4:40-1, or a judgment notwithstanding the verdict

under R. 4:40-2. Id. at 535-536. If, after analyzing the evidence in the light most favorable to the non-moving party, the motion court determines that "there exists a single unavoidable resolution of the alleged dispute of fact, that issue should be considered insufficient to constitute a 'genuine' issue of material fact for purposes of R. 4:46-2." Id. at 540.

RULE OF LAW AND DECISION

I. Exclusive's Claims for Payment in Excess of Allstate's Final Estimates

In the First (Breach of Contract), Second (Unjust Enrichment), Third (Quantum Meruit), and Fourth (Failure to Negotiate) Counts of the Complaint, Exclusive seeks to compel Allstate to pay additional amounts above the final estimates for each of the repairs at issue in the litigation. This Court previously recognized the flaw in Exclusive's claims for compensation in excess of Allstate's repair estimates on August 27, 2021. The hearing on that date was on Allstate's motion for partial summary judgment on labor rates. This Court reasoned that Exclusive, as assignee of the insured, can only get that which the insured agreed to by the contract with the insurer, which was what the insured was going to receive based on the adjusted costs.

Allstate adjusted each motor vehicle claim and paid Exclusive the amount of the final estimate, after full inspection of the vehicle. The final estimates were in accordance with the DOBI approved CCC One estimating software (see N.J.A.C. 11:3-10.4(a)(3)) and the labor rates paid to its network shops. Exclusive accepted Allstate's payments and released its customers from payment for the amount in excess of the estimate. Allstate paid the amount it was obligated to pay under the policy, and Exclusive has no other contractual relationship with Allstate. If Exclusive had any claim for additional payment for the repairs, that claim would be against its customer, rather than Allstate.

A. Section 64 of AICRA Bars Exclusive's Contract Claims

Section 64 of AICRA bars any claim by Exclusive for recovery above the amount of Allstate's approved estimate. The Act permits an insured to go to an auto repair shop that does not have an arrangement with the insurer "provided that such auto body repair shop or other repair facility selected by the person accepts the same terms and conditions from the insurer, including, but not limited to, price, as the shop, facility, or network with which the insurer has the most generous arrangement." N.J.S.A. 17:33B-36.1. Allstate's network shops will perform the repairs of a vehicle for the amount of Allstate's estimate and any supplement. That is the amount that Allstate paid to Exclusive for the repairs in this litigation. Section 64 bars claims for more compensation under the insured's policies.

To establish a breach of contract claim, Exclusive must show (1) that a valid contract exists; (2) that Allstate breached that contract; and (3) resulting damages. See Coyle v. Englander's, 199 N.J. Super 212, 223 (App. Div. 1985). Exclusive fails as they have no independent contract with Allstate under which it could assert a claim for additional payment. An assignee's rights can rise no higher than the rights of the assignor. See Selective Ins. Co. of Am. v. Hudson E. Pain Mgmt. Osteopathic Med., 210 N.J. 597, 607 (2012). The only contractual right Exclusive has against Allstate is based on the insured's assignment of the right to receive payment from Allstate. The amount of that payment is set forth in Allstate's total final estimate of repairs pursuant to Section 64, which limits reimbursement to the price Allstate would pay to its network shops.

Exclusive's breach of contract claims seek additional payments in excess of Allstate's estimate in three categories detailed above. Exclusive asserts that Allstate's failure to pay the proper amount constitutes a breach of contract. However, Section 64 states that Allstate is obligated to pay an independent shop, like Exclusive, no more than the "price" it would pay a shop in its network. See N.J.S.A. 17:33B-36.1. That amount is the final adjusted amount in Allstate's

estimates. Through the adjustment and estimate process, Allstate honors its policy obligations to its insureds to pay for their vehicles to be repaired for the price that its network shops would accept pursuant to Section 64. That price is the limit for Exclusive's claims against Allstate. Any separate contract Exclusive has with its customers to pay a higher rate is between Exclusive and its customers and cannot be enforced against Allstate.

B. Exclusive's Quasi-Contract Claims

Exclusive asserts quasi-contract claims for unjust enrichment and quantum meruit that seek to recover money in excess of Allstate's estimates. "The doctrine of unjust enrichment rests on the equitable principle that a person shall not be allowed to enrich himself unjustly at the expense of another." Callano v. Oakwood Park Homes Corp., 91 N.J. Super. 105, 108 (App. Div. 1966). "A cause of action for unjust enrichment requires proof that 'defendant[s] received a benefit and that retention of that benefit without payment would be unjust.'" County of Essex v. First Union Nat. Bank, 373 N.J. Super. 543, 549-50 (App. Div. 2004) (quoting VRG Corp. v. GKN Realty Corp., 134 N.J. 530, 554 (1994)), aff'd, remanded by 186 N.J. 46 (2006).

As previously noted, Section 64 bars any claim for payment over the amount of the estimate. The quasi-contract theories of unjust enrichment and quantum meruit are premised on the notion that a plaintiff did not receive as much as it otherwise deserved from a defendant. See, e.g., Kas v. Oriental Rugs, Inc. v. Ellman, 394 N.J. Super. 278, 286 (App. Div. 2007); VRG Corp. v. GKN Realty Corp., 135 N.J. 539, 554 (1994). Section 64 limits Allstate's obligation to pay to the price that would be accepted by one of its network shops. Thus, Exclusive has no legal basis to claim that it should be entitled to more payment from Allstate.

Furthermore, there can be no unjust enrichment or quantum meruit claim against Allstate as a matter of law because an express contract exists concerning the identical subject matter,

namely the assignment between the insured and Exclusive, which automatically defeats any quasi-contract claim. When "an express contract exists concerning the identical subject matter" there can be no claim for unjust enrichment. See Suburban Transfer Serv., Inc. v. Beech Holdings, Inc., 716 F. 2d 220, 226 (3d Cir. 1983); St. Paul Fire & Marine Ins. Co. v. Indemnity Ins. Co. of North America, 32 N.J. 17, 22-23 (1960). The same holds true for quantum meruit. See Kas Oriental Rugs, Inc., 394 N.J. Super. at 286. Unjust enrichment may not proceed separately from breach of contract because it "is not an independent theory of liability but is the basis for a claim of quasi-contractual liability." Nat'l Amusements, Inc. v. New Jersey Tpk. Auth., 261 N.J. Super. 468, 478 (Law Div. 1992), aff'd, 275 N.J. Super. 134 (App. Div.), certify. denied, 138 N.J. 269 (1994). Thus, Exclusive cannot assert any quasi-contract claim because of the presence of the express contract concerning the identical subject matter.

C. Exclusive's Claim for Failure to Negotiate

Exclusive alleges that Allstate is liable for a purported refusal to negotiate. The claim is premised on the auto collision repair regulation that states that "[n]egotiations [between the insurer and auto body repair shop] must be conducted in good faith." See N.J.A.C. 11:3-10.3(b). However, Section 64 does not obligate Allstate to negotiate its labor rates. Furthermore, there is no cognizable cause of action for refusal to negotiate.

The subject regulations do not provide for a private cause of action to enforce a perceived refusal to negotiate, and there is no independent statutory cause of action for refusal to negotiate. N.J.A.C. 11:3-10.3(b) requires negotiations to be done in "good faith," but does not define "good faith" as requiring an agreement on price. Also, no corresponding statute or regulation exists to enforce N.J.A.C. 11:3-10.3(b) outside of complaints to the New Jersey DOBI.

There is also no common law cause of action for refusal to negotiate. In Wexco Indus. v. ADM21 Co., 04-5244 (JLL), 2008 U.S. Dist. LEXIS 104766, at *12-15 (D.N.J. Dec. 30, 2008), a company entered into an agreement to supply wiper blades to Shell. After the agreement was terminated both parties attempted to negotiate a new supply agreement. When the negotiations were unsuccessful the manufacturer sued Shell alleging failure to negotiate in good faith. The court rejected the claim noting that "there is no independent cause of action for failure to negotiate in good faith." Id. at *33. The court, citing the Restatement of Contract, §295, comment (c) (1981), noted that the duty of good faith only arises when the parties have reached an agreement and does not apply to earlier negotiations. Id.

The Wexco reasoning applies directly here to bar Exclusive's claim. Allstate and Exclusive negotiated the scope of repairs through an initial inspection, and those negotiations are often extended through a re-inspection and repair supplement prepared by Allstate. The additional items in excess of the estimate, about which Exclusive complains, were never agreed to by Allstate. The common law duty of good faith applies only when an agreement is reached. Exclusive cannot show that it reached an agreement with Allstate to pay more than its final estimate, and therefore it cannot show any breach of good faith.

II. Exclusive's Tort Claims

In the Fifth and Sixth Counts of its Complaint, Exclusive asserts nebulous defamation and tortious interference claims against Allstate. Exclusive alleges that Allstate made defamatory statements to Exclusive customers and other Allstate insureds to wit: (1) Exclusive committed insurance fraud and (2) Allstate interfered with Exclusive's relationship with its customers by failing to negotiate the price of repairs.

A claim for defamation must include: "(1) the assertion of a false and defamatory statement concerning another; (2) the unprivileged publication of that statement to a third party; and (3) fault amounting at least to negligence by the publisher." DeAngelis v. Hill, 180 N.J. 1, 12-13, 847, A.2d 1261 (2004). A claim for tortious interference with contract or a prospective economic advantage must include: (1) the party asserting the claim has some protectable right either in the form of a contract or some "reasonable expectation of economic advantage;" (2) the interference was done intentionally and with malice; (3) the interference caused the loss of prospective gain; and (4) the injury caused damage. Printing Mart-Morristown v. Sharp Elec. Corp., 116 N.J. 739, 751-52 (1989).

A. Exclusive's Tort Claims are Barred by the Litigation Privilege

In New Jersey, the litigation privilege is an absolute privilege that shields a litigant from tort actions based on "any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have some connection or logical relation to the action." Hawkins v. Harris, 141 N.J. 207, 216 (1995). The purpose of the privilege is to encourage "open channels of communication and the presentation of evidence" in judicial proceedings. Id. at 217. The privilege is not limited to in-court statements; "it extends to all statements or communications in connection with the judicial proceeding." Id. at 216. The privilege ensures that "[s]tatements by attorneys, parties and their representatives made in the course of judicial or quasi-judicial proceedings are absolutely privileged and immune from liability." Peterson v. Ballard, 292 N.J. Super. 575, 679 (App. Div. 1996).

The Hawkins elements are plainly satisfied in this matter. First, Exclusive filed its initial litigation against Allstate for additional compensation on May 17, 2010, in the Law Division.

Allstate began investigating Exclusive for insurance fraud in 2011. Later, on May 30, 3012, Exclusive instituted its first Special Civil Part lawsuit against Allstate. The parties have been in litigation against one another consistently since that time. Second, all the allegedly defamatory statements were made by Allstate adjusters. Third, all the statements were made to achieve the object of the ongoing litigation between Exclusive and Allstate, namely its obligation to deter insurance fraud under the Insurance Fraud Protection Act, protect its insureds and defend against Exclusive's improper attempt to subvert Section 64. (See N.J.S.A. 17A:33-15.1(a) (Requiring insurers in the State to submit plans to prevent fraud)). Fourth, all the statements are related directly to the operation of Exclusive.

B. No Evidence of Actual Damages in Connection with Defamation Claims

Exclusive has failed to prove any actual damages resulting from the alleged defamatory statements. A party may not assert generalized actual damages without underlying support. Sylvan Dental, P.A., & Dong Hyun Lee v. Chen, 2021 N.J. Super. Unpub. LEXIS 1766, No. A-4544-18 (App. Div. Aug. 19, 2021). Exclusive complains that Allstate made allegedly false statements that it was committing insurance fraud. However, Exclusive may not allege its damages generally. It must support its damages with particularity, and admitted in discovery that it cannot do so.

Nor can Exclusive sustain a claim for punitive damages, which "may be awarded only if compensatory damages have been awarded . . . . An award of nominal damages cannot support an award of punitive damages." Scaccia v. J.M., 2016 N.J. Super. Unpub. LEXIS 2128, at *14 (App. Div. Sep. 22, 2016) (citing Longo v. Pleasure Productions, Inc., 215 N.J. 48, 58 (2013).

C. Exclusive's Claim for Tortious Interference

Exclusive's tortious interference is dismissed for the same reason as the defamation claim; namely Allstate's statements are absolutely privileged, the statements of opinions are not actionable, and Exclusive has no damages.

Proof of actual damages is a necessary element of a tortious interference claim. See Printing Mart-Morristown, 116 N.J. at 760. Tortious interference cannot proceed on a theory of presumed damages. Thus, a failure to produce evidence of actual damages is fatal to a tortious interference claim.

Furthermore, it is essential that a party cannot interfere with its own contract. See Id. at 753. The contract at issue is Allstate's policy with its insured. The insureds assigned the right to direct payment of their insurance benefits to Exclusive. Exclusive alleges that Allstate's alleged failure to negotiate constitutes tortious interference with that contract. "Where a person interferes with the performance of his or her own contract, the liability is governed by principles of contract law." Id. No tortious interference claim can lie against Allstate as a party to the contract with its insured.

CONCLUSION

As such, and for the reasons set forth at length in this decision, Allstate's Motion for Summary Judgment is **GRANTED**.