SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0365-20

BRYAN NEWTON and NEWTON ENVIRONMENTAL d/b/a WASTE AWAY CARTING LLC,

Plaintiffs-Appellants,

v.

JOSEPH T. CUTRUZZULA, JR., MARIO CUTRUZZULA, and MARIO'S CARTING, NEW JERSEY TRUCK SERVICES,

Defendants,

and

THE ANDOVER COMPANIES, and MERRIMACK MUTUAL FIRE INSURANCE CO.,

Defendants-Respondents,

Argued February 7, 2022 – Decided April 11, 2022

Before Judges Currier and DeAlmeida.

On appeal from the Superior Court of New Jersey, Law Division, Bergen County, Docket No. L-5773-18.

Gwyneth K. Murray-Nolan argued the cause for appellants (Murray-Nolan Berutti, LLC, attorneys; Gwyneth K. Murray-Nolan, of counsel and on the briefs; Rachel E. Smith, on the briefs).

Richard A. Nelke argued the cause for respondents (Methfessel & Werbel, attorneys; Richard A. Nelke, of counsel and on the brief; Christian R. Baillie, on the brief).

PER CURIAM

Plaintiffs appeal from the trial court's order granting summary judgment to defendants, The Andover Companies and Merrimack Mutual Fire Insurance Company.[1] We affirm.

In June 2016, plaintiffs purchased an excavator that was subsequently transported from Long Island to East Rutherford, New Jersey, where it was stored in a lot owned by Mario Cutruzzula. The excavator was to stay on the lot until plaintiffs paid Joseph Cutruzzula, Jr. for the transportation costs. Plaintiff Bryan Newton recalled seeing the excavator on the lot on August 13, 2016. Video surveillance of the lot showed the excavator on the property on August 23, 2016.

However, when one of plaintiffs' employees went to the lot on September 8, 2016, the excavator was missing. Newton reported the theft to the East

[1] Plaintiffs settled their claims with the remaining defendants.

Rutherford Police Department that day. After speaking with Joseph Cutruzzula, Jr. and Newton, the police prepared an incident report. Cutruzzula stated he had last seen the excavator on September 1, 2016. He told police the surveillance camera system had stopped working approximately three weeks earlier. Plaintiffs still owed money to the Cutruzzulas for the transportation costs.

Defendants issued a Commercial Island Marine Insurance policy providing coverage for the excavator, effective August 2, 2016. On September 12, Newton told defendants the excavator was missing. Defendants assigned the claim to Decker Associates, an independent adjusting firm. On September 13, Decker contacted plaintiffs requesting an inspection of plaintiffs' business, a recorded statement from Newton, and certain documentation.

Decker took a recorded statement from Newton on September 14. The following day, Decker reiterated its request for documents. Decker also contacted the East Rutherford police.

Decker made several phone calls to Newton requesting additional information. In an October 5 letter, Decker informed plaintiffs their claim was not finalized and again asked for additional information, including the bill of sale for the remaining balance due for the excavator, contact information for all parties involved in the transportation and storage of the excavator, photographs

of the machine, and cancelled checks for any payments made in connection with the purchase of the excavator.

On November 21, Newton provided a bill of sale stating the purchase price for the excavator was $50,000. The document noted Newton paid $16,000 to the seller and still owed $34,000. Although Newton told Decker he paid the balance due after the excavator was delivered to the Cutruzzula's lot, he did could not provide any proofs of the payment and could not recall whether he issued a check for the balance.

In an October 5 status report to defendants, Decker recommended the transfer of the case to counsel to obtain an examination under oath (EUO) from Newton. Defense counsel contacted Newton on October 26 requesting certain documentation and scheduling an EUO for November 10. After Newton retained counsel, he requested an adjournment of the EUO in order to meet with counsel and gather documents. The EUO was rescheduled to December 21.

At the request of plaintiffs' counsel, the EUO was again rescheduled—to February 2, 2017. Although the parties appeared on February 2, there was a miscommunication with the court reporter requiring a new date to be set—now February 17.

Plaintiffs' counsel later adjourned the February 17 EUO and all parties agreed upon March 27 for the proceeding. Although the EUO took place on that

date, it was not completed. On March 31, defendants reiterated, in writing, their requests for documents made during the March 27 EUO, including tax records, invoices, and involved parties' contact information.

On April 4, 2017, East Rutherford police received an anonymous tip advising that the missing excavator was located in Lake Ariel, Pennsylvania. After the Pennsylvania state police later found the excavator at the location, they notified the East Rutherford police who informed plaintiffs of the discovery.

Plaintiffs requested defendants pay for the transportation costs to return the machine to New Jersey. Defense counsel responded that transportation costs were not covered under the policy.

On April 24, 2017, defendants denied plaintiffs' claim for the loss of the excavator and the request for transportation and recovery costs. Defendants denied the claim for the loss of the excavator because the "policy excludes coverage for the unexplained disappearance of property." As to the denial of recovery costs, defendants stated, "The 'Recovered Property' section of the policy . . . concerns the recovery of property after the company had already made payment. Since the Company has not made any loss payments, . . . you are not entitled to recovery expenses."

Plaintiffs instituted suit, alleging defendants had breached the parties' contract to provide coverage for the loss and recovery of the excavator.

Plaintiffs also alleged defendants acted in bad faith in delaying and denying the claim. Plaintiffs sought damages under a bad faith claim for their loss of business revenue during the period of time the excavator was missing.

Defendants moved for partial summary judgment on the bad faith claims, stating there was no longer a valid insurance claim because the excavator was recovered. And the recovery costs were denied because they were not covered under the policy. Plaintiffs opposed the motion, contending defendants denied the claim before the investigation was complete. Plaintiffs also asserted the motion was premature because discovery was not yet complete.

In a detailed oral decision, the judge granted defendants' motion for partial summary judgment on the bad faith claims. The court discussed the timeline and actions taken by defendants during the seven months between the report of the loss and the excavator's recovery. This included the adjuster's multiple requests for documents, the adjuster's contact with police and the attorney who executed the excavator's bill of sale, and the delay in obtaining Newton's EUO. The judge also noted plaintiffs' argument that defendants did not obtain certain documents, such as Pennsylvania state police reports and police officer depositions, prior to the denial of the claim; however, those documents did not

exist until after the excavator was found.[2] Defendants' investigation concluded upon the recovery of the excavator.

In reviewing defendants' reasons for the denial of coverage, the court also noted the provision in the policy stating, "[I]f either you or we recover any property after a loss settlement, that party must give the other prompt notice [.] [At] your option . . . [the] property will be returned to you. You must, then, return the amount we paid to you for the property." The court granted defendants partial summary judgment on the bad faith claims and extracontractual damages on March 13, 2020.

Shortly thereafter, defendants moved for summary judgment on the remaining breach of contract claims. Plaintiffs cross-moved for reconsideration of the court's March 13, 2020 order. Plaintiffs served an expert report with the cross-motion in which the expert opined on defendants' bad faith actions.

After extensive oral argument on the motions, the court stated it was unable to determine whether the expert report was net opinion. The court noted that, despite the issuance of a twenty-eight-page report, the expert had not

[2] The reports prepared by Pennsylvania and New York state police in late 2017 and 2018 indicate investigators suspected Joseph Cutruzzula, Jr. as having sold the excavator in September 2016. The reports do not indicate Cutruzzula was charged with any crime. The reports were not provided to defendants until November 2018.

specifically articulated the applicable standard of care and whether defendants deviated from it in handling the claim. The court told the parties to take the expert's deposition to flesh out the expert's opinions. Although initially the court stated it would deny the motion for reconsideration, the parties requested the court to hold any decision on the motion pending the deposition and supplemental briefing.

After the completion of the expert's deposition, the parties again convened for oral argument. Plaintiffs contended their expert opined that defendants acted in bad faith because they should have paid Newton for the loss immediately after receiving the police report and the initial recorded statement. Defendants asserted in response that the policy required Newton to cooperate and provide an EUO. The EUO had not been completed when the excavator was recovered. And once the excavator was recovered, there was no longer a need for further investigation. Finally, defendants emphasized that the expert agreed that it was clear under the policy there would be no payment for recovery costs if a payment for a loss was not made prior to the recovery of the property.

Defendants further advised the court that the expert never referenced the seminal New Jersey case on bad faith—Pickett v. Lloyd's[3]—and did not analyze

[3] 131 N.J. 457 (1993).

these circumstances in light of Pickett. Therefore, defendants contended the expert report was net opinion.

In a comprehensive written opinion and accompanying order dated August 28, 2020, the motion judge denied plaintiffs' motion for reconsideration and granted defendants summary judgment on the remaining claims. In her decision, the judge established a timeline of the actions and inactions taken by plaintiffs and defendants regarding the excavator. The court then evaluated the validity of plaintiffs' bad faith claims against the principles espoused in Pickett.

The judge also noted that Pickett required she only consider the actions taken by defendants based upon the information available to them during the applicable timeframe—September 12, 2016 through April 24, 2017. Plaintiffs' expert's opinion relied on several individuals' deposition testimony conducted "years after the excavator was recovered and the claims for recovery costs were denied." The court stated that any new information revealed in those depositions was not relevant to defendants' state of mind during the applicable time period.

The court went through the expert's opinions. Initially, the court noted that the expert's opinion that defendants should have known Joseph Cutruzzula was responsible for stealing the excavator was net opinion because he was never charged with any crime and no investigative authority ever made that determination.

Plaintiffs contended it was standard practice in the insurance industry to pay a claim of stolen property even if there were doubts as to the viability of the claim. However, their expert did not support that proposition. Instead, he proffered options defendants had regarding the handling of the claim.

Moreover, the court stated, the expert did not analyze the circumstances under the bad faith standard set forth in Pickett. To the contrary, the expert was not familiar with Pickett or its holding. Therefore, the court concluded the report was inadmissible net opinion and it denied plaintiffs' motion for reconsideration.

In addressing and granting defendants' motion for summary judgment on the breach of contract claim, the court found the language of the insurance policy was clear. An insured was only entitled to reimbursement of recovery costs if a loss settlement was made. Here, defendants did not settle the claim with plaintiffs prior to the recovery of the excavator. Therefore, they were not entitled to recovery costs.

On appeal, plaintiffs contend the court erred in granting summary judgment because discovery was ongoing and genuine issues of material fact existed regarding the bad faith claims.

Our review of a trial court's grant or denial of a motion for summary judgment is de novo. Branch v. Cream-O-Land Dairy, 244 N.J. 567, 582 (2021).

We apply the same standard as the motion judge and consider "whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995). See Rozenblit v. Lyles, 245 N.J. 105, 121 (2021).

We reject plaintiffs' contention that the grant of summary judgment was premature. The discovery end date was September 30, 2020. The court denied the motion for reconsideration of its order for summary judgment on the bad faith claims and granted summary judgment on the remaining claims on August 28, 2020.

A motion for summary judgment is "not premature merely because discovery has not been completed," Badiali v. N.J. Mfrs. Ins. Grp., 220 N.J. 544, 555 (2012), but a plaintiff must "demonstrate with some degree of particularity the likelihood that further discovery will supply the missing elements of the cause of action." Wellington v. Estate of Wellington, 359 N.J. Super. 484, 496 (App. Div. 2003) (quoting Auster v. Kinoian, 153 N.J. Super. 52, 56 (App. Div. 1977)). Plaintiffs did not satisfy that burden.

In her March 13, 2020 decision, the judge found that additional discovery would not change the facts that (1) defendants investigated the circumstances of

the missing excavator; (2) the excavator was found prior to the creation of most of the documents and testimony that plaintiffs relied on; and (3) the recovery costs claim was denied based on unambiguous policy provisions that "had nothing to do with whether the vehicle was stolen as opposed to it disappearing."

We are satisfied that the grant of summary judgment was not premature. To establish an insurer acted in bad faith in denying or delaying an insured's first party claim, the plaintiff must show that "no debatable reasons existed for denial of the benefits." Badiali, 220 N.J. at 554 (quoting Pickett, 131 N.J. at 473). Simple negligence is not enough for a finding of bad faith. Pickett, 131 N.J. at 481. There were sufficient facts for defendants to make their coverage decision. In analyzing an application for summary judgment on a bad faith claim, a court considers only what information defendants knew or was available to them at the time of the investigation. All of the discovery plaintiffs proffer they still needed was created after the recovery of the excavator. It was not error for the court to consider the summary judgment motion.

We are also satisfied there was no error in granting summary judgment on the bad faith claim. The trial court thoroughly outlined defendants' actions taken throughout the seven months of the investigation. Much of the delay in the investigation arose from plaintiffs' failure to timely cooperate with defendants and their adjuster. Newton failed to provide requested documents on several

occasions. He was unable to provide proof that the excavator was fully paid and could not remember if he paid the balance due with a check. The EUO was delayed for four months primarily due to adjournments by plaintiffs' counsel. The EUO was not completed and there were outstanding requests for documents when the excavator was found. It is well-established that an insurer has the right to investigate whether a claim is covered under the applicable policy. Griggs v. Bertram, 88 N.J. 347, 357 (1982).

In addition, plaintiffs were accorded the opportunity to bolster their expert report with deposition testimony to support their allegations of bad faith. But the expert report and subsequent deposition contained nothing but net opinions. The expert's conclusions were not based upon the information available to defendants during the period of investigation, and the expert was unaware of and did not refer to the bad faith standard enunciated in Pickett. The expert also failed to state the applicable standard of care. His opinion, providing options defendants could have taken regarding the claim, is not equivalent to opining what the standard of practice is in the industry regarding a payment of a theft claim.

Under the presented circumstances, there was a fairly debatable reason for the delay in handling the claim. Therefore, plaintiffs could not demonstrate any bad faith on defendants' part in handling and investigating the claim and finally denying it. There was no error in denying reconsideration.

We also affirm the August 28, 2020 order granting defendants summary judgment on the breach of contract claims. In construing an insurance policy, we give its words "their ordinary meaning." Longobardi v. Chubb Ins. Co., 121 N.J. 530, 537 (1990). Plaintiffs sought their costs of recovery after the excavator was found. However, under the clear reading of the policy, they were not entitled to the recovery costs because there was no loss settlement payment. Here, the excavator was found prior to the payment for its loss.

Affirmed.