NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

YERA, INC. Appellant v. TRAVELERS CASUALTY INSURANCE COMPANY OF AMERICA Appellee	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1398 EDA 2013

Appeal from the Order April 30, 2013
In the Court of Common Pleas of Philadelphia County
Civil Division at No(s): 002141

BEFORE: FORD ELLIOTT, P.J.E., OTT, J., and STRASSBURGER, J.*

MEMORANDUM BY OTT, J.: **FILED APRIL 22, 2014**

Yera, Inc.[1] (Yera) appeals from the order entered April 30, 2013, in the Court of Common Pleas of Philadelphia County, granting summary judgment in favor of defendant, Travelers Casualty Insurance Company of America (Travelers). Yera claims the trial court erred in granting summary judgment because (1) the Travelers' policy's Protective Safeguard Endorsement (PSE) is ambiguous and therefore unenforceable; (2) Travelers is prevented from enforcing the PSE pursuant to the doctrine of equitable estoppel; (3) Travelers has failed to show it was prejudiced by Yera's failure

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* Retired Senior Judge assigned to the Superior Court.

[1] In its appellant's brief, Yera, Inc. uses all capital letters. However, in its complaint both upper and lower case letters are used. We are using the spelling found in the complaint.

to meet the conditions of the PSE; and (4) Travelers actions were sufficient to support Yera's claim of bad faith.[2] Following a thorough review of the submissions by the parties, relevant law and the certified record, we affirm.

The trial court has provided the following salient information:

> Yera is the owner of an eleven unit apartment building located at 2001-03 South 4th Street, Philadelphia, PA ("the Property"). Travelers issued to Yera its initial policy of property insurance for the Property with effective dates August 8, 2008 to August 8, 2009. The initial policy was renewed for the

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[2] These issues are in the Argument section of Yera's brief. The Statement Question Involved Yera's brief list different questions, specifically:

> (1) Did the Trial Court commit reversible error by granting Summary Judgment and holding that the insurance policy at issue was clear and free of doubt where:
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> > (a) the policy mistakenly contained an endorsement requiring the "maintenance" of a sprinkler system that did not exist;
> > (b) The mistake was not a result of fraud;
> > (c) The insurer would have insured the property without a sprinkler system;
> > (d) the insured paid premiums for three policy years prior to the loss.
>
> (2) Was the entry of summary judgment by the Trial Court error where there were material issues of fact to show delay and denial of the plaintiff's insurance claim from which the finder of fact could find bad faith to exist.

Appellant's Brief, at 2.

The claims presented in the first issue were not developed in Yera's brief and will not be addressed.

subsequent policy periods of August 8, 2009 to August 8, 2010, and again for the period August 8, 2010 to August 8, 2011.

On October 7, 2010, the [P]roperty was destroyed by fire. Yera provided Travelers with timely notice of the loss and made a claim for coverage of its loss under its renewal policy. Travelers denied Yera's claim for loss by letter dated April 2, 2011. Travelers denied the claim on the basis that there was no automatic sprinkler system at the property at the time of the fire loss, in direct contravention of the Protective Safeguard Endorsement contained in the policy.

* * *

Travelers initially issued to Yera policy no. I-680-4977M955-ACJ-08 with effective dates August 8 [2008] to August 8, 2009. Yera applied for the policy through Cohen-Seltzer, a professional insurance agency in Jenkintown, PA. Lisa Bender, an employee of Yera, completed the "Property Facility Underwriting Worksheet" (or "COPE Worksheet") on behalf of Yera, and submitted it to Cohen-Seltzer on July 2, 2008. Eli Alon, president of Yera, stated at his deposition that Lisa Bender was authorized to sign documents such as commercial insurance application forms. Bender further confirmed that she agreed that her understanding of her responsibilities within Yera included that she was authorized to sign commercial insurance application forms.

The COPE Worksheet submitted by Bender on Yera's behalf stated that the Property was "100%" sprinklered. Bender also submitted to Cohen-Seltzer a "Commercial Insurance Application" that was submitted by Yera to its prior insurance agent, Friedman Associates, in connection with a previous application for insurance for the Property immediately preceding the Travelers policy. This prior Commercial Insurance Application was signed by Bender, on behalf of Yera, and stated the Property was 100% sprinklered.[3]

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[3] This Application was dated "8/6/07" and provided effective coverage dates from "08/06/07" to "08/06/08". ***See*** Travelers' Motion for Summary Judgment, Exhibit E.

Cohen-Seltzer used these documents provided by Yera to prepare an "ACORD application". Cohen-Seltzer thereafter submitted an application to Travelers through its agent, Lauren Brando. Brando stated that in her area of work, in her specific unit, for an online rating application, it does not require a signature by the insured or being sent to the company.

Travelers issued the initial policy, based on the representation that the property [was] 100% sprinklered, and discounted the cost of the policy premiums by approximately 40% because of said representations. The initial policy was issued containing an endorsement titled "PROTECTIVE SAFEGUARDS ENDORSEMENTS FOR SPRINKLERED LOCAT[IO]NS AND RESTAURANTS". The policy's Protective Safeguard Endorsement states, in relevant part:

> a. As a condition of this insurance, you are required to maintain the protective devices or services listed in the Schedule above [including P-1]
>
> b. The protective safeguards to which this endorsement applies are identified by the following symbols:
>
> "P-1" Automatic Sprinkler System, including related supervisory services.
>
> Automatic Sprinkler System means:
>
> (1) Any automatic fire protective or extinguishing systems, including connected:
>
> a. Sprinklers and discharge nozzles:
>
> ***
>
> The following is added to the EXCLUSION section of:
>
> BUSINESSOWNERS PROPERTY COVERAGE SPECIAL FORM

> BUSINESSOWNERS PROPERTY COVERAGE STANDARD FORM
>
> We will not pay for loss or damage caused by or resulting from fire if, prior to the fire, you:
>
> a. Knew of any suspension or impairment in any protective safeguard listed in the Schedule above and failed to notify us of that fact; or
>
> b. Failed to maintain any protective safeguard listed in the Schedule above, and over which you had control, in complete working order.
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> Each renewal policy contains the same Protective Safeguard Endorsement.
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> During its investigation of the October 7, 2010 fire, Travelers learned that the building did not have a sprinkler system. As such, Travelers denied Yera's claim due to the plain words of the Protective Safeguards Endorsement.

Trial Court Opinion, 4/30/2013, at 1-5 (footnotes omitted).

In addition to the above quoted facts, we note that Exhibit I to Travelers' motion for summary judgment is a cover letter dated August 18, 2008. The letter is addressed to Yera and states, in relevant part:

> We are pleased to enclose the above captioned policy which has been checked for accuracy. Kindly take a few minutes to review policy coverages, terms and conditions, and exclusions.
>
> ***Please note that there is a warranty on the policy for sprinkler protection. If at anytime you shut down the sprinkler system for a long period of time you must notify us or the carrier so that if a loss were to occur during this shut off you will have coverage. If you do not notify the company if you shut down the sprinkler system and a loss were to occur you would not have coverage for the loss.***

Letter to Yera, 8/18/2008, Motion for Summary Judgment, Exhibit I (emphasis in original).

Based upon these facts, the trial court determined that because the insured building did not have any sprinkler system, much less a sprinkler system in complete working order, as was required by the insurance policy, Travelers was not required to cover the fire loss.

Preliminarily, we note our scope and standard of review of an order granting summary judgment:

> We view the record in the light most favorable to the nonmoving party, and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party. Only where there is no genuine issue as to any material fact and it is clear that the moving party is entitled to a judgment as a matter of law will summary judgment be entered. Our scope of review of a trial court's order granting or denying summary judgment is plenary, and our standard of review is clear: the trial court's order will be reversed only where it is established that the court committed an error of law or abused its discretion.

Indalex, Inc. v. National Union Fire Ins. Co. of Pittsburgh, PA, 83 A.3d 418, 420 (Pa. Super. 2013) (citation omitted).

In their first issue, Yera argues the PSE is ambiguous and therefore unenforceable. According to Yera, the ambiguity is found in the use of the word "maintain" which means both to "keep in existence" and to "keep in a

condition of good repair."[4] The policy itself provided no definition for the word. Yera has cited ***Breton***, ***supra***; ***Five Stars Hotels, LLC v. Ins. Co. of Greater New York***, U.S. Dist. LEXIS 31313 (S.D. N.Y. March 24, 2011); and ***French King Realty v. Interstate Fire and Casualty Company***, 79 Mass. App. Ct. 653 (2011), all of which found similar language to be ambiguous, to support its argument.

Initially, none of the cases cited by Yera is from Pennsylvania and so they are not binding on us. In addition, we believe that within the context of the policy, the meaning of "maintain" is clear. Under the terms of the PSE, the insured is required to have a safeguard device in place. In the instant matter, the safeguard device was an automatic sprinkler system. In the exclusion section, the insured is required to keep the required safeguard system in complete working order. Here, the policy used the word "maintain" in two instances and the specific context of each use leaves the meaning of "maintain" clear. Therefore, we disagree with Yera that the use of "maintain" in this circumstance is ambiguous.

However, even if we had determined the use of the word "maintain" was ambiguous, Yera would still not be entitled to relief. By Yera's own admission, the policy required it to either have an automatic sprinkler

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[4] Yera's brief at 15, *citing* ***Breton, LLC v. Graphic Arts Mut. Ins. Co.***, U.S.Dist.Ct., No. 1:09cv60 (E.D.Va. 2009).

system in place or to have an automatic sprinkler system in place and fully operational. There is no dispute that Yera fulfilled neither contractual requirement. As such, we do not see how Yera could benefit from the alleged ambiguity.

Next, Yera claims that the doctrine of equitable estoppel prevents Travelers from enforcing the exclusion.

> Whether equitable estoppel exists in a given case is a question of law for the court to decide. ***Nesbitt v. Erie Coach Company***, 416 Pa. 89, 96, 204 A.2d 473, 476 (1964). When reviewing questions of law, the trial court's conclusions of law are not binding on this court, whose duty is to determine whether there was a proper application of the law to the facts by the trial court. ***Thatcher's Drug Store v. Consolidated Supermarkets, Inc.***, 535 Pa. 469, 477 636 A.2d 156, 160 (1994). [FN3]. "Equitable estoppel, a doctrine sounding in equity, acts to preclude one from doing an act differently than the manner in which another was induced by word or deed to expect." ***Zitelli v. Dermatology Educ. & Res.***, 534 Pa. 360, 370, 633 A.2d 134, 138 (1993). It may be applied:
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> > where the party asserting estoppel established by clear, precise and unequivocal evidence (1) that the party against whom the doctrine is sought to be asserted intentionally or negligently misrepresented a material fact, knowing or with reason to know that the other party would justifiably rely on the misrepresentation, (2) that the other party acted to his or her detriment by justifiably relying on the misrepresentation, and (3) that there was no duty of inquiry on the party seeking to assert estoppel.
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> ***Homart Development Co. v. Sgrenci***, 443 Pa. Super. 538, 554, 662 A.2d 1092, 1099-1100 (1995) (*en banc*). The doctrine is one of "fundamental fairness" and its application will depend on the facts in each case. ***Id***. at 554, 662 A.2d at 1100 (citation omitted).

> FN3. Though ***Thatcher's Drug Store v. Consolidated Supermarkets, Inc.***, 535 Pa. 469, 636 A.2d 156 (1994) involved an issue of promissory, not equitable estoppel, the standard of review for questions of law is applicable to both kinds of estoppel.

Stonehedge Square Ltd. Partnership v. Movie Merchants, Inc., 685 A.2d 1019, 1023-24 (Pa. Super. 1996).

Yera has failed to identify any negligent or intentional misrepresentation by Travelers. There is no indication anywhere in the record that Travelers induced Yera into falsely claiming such a sprinkler system was in place. Rather, the record demonstrates that, intentionally or not, Yera informed Travelers that the building to be insured was 100% sprinklered. Yera also provided Travelers with the application form for the insurance policy in place immediately prior to the Travelers policy. That application form also affirmatively stated that the building was 100% sprinklered. Travelers issued a fire insurance policy based upon the information provided to it from Yera. The facts do not support a claim of equitable estoppel against Travelers. Therefore, Yera is not entitled to relief on this issue.

In its third issue, Yera argues the trial court erred in granting summary judgment in Travelers' favor because Travelers failed to demonstrate any prejudice due to the absence of a sprinkler system at the

Property. Yera argues that the Pennsylvania Supreme Court cases of ***Brakeman v. Potomac***, 371 A.2d 193 (Pa. 1977) and ***Vanderhoff v. Harleysville Ins. Co***., 997 A.2d 328 (Pa. 2010), require an insurer to prove prejudice before it is allowed to deny a claim based on an exclusion. Those cases do not stand for such a broad rule of law; rather, ***Brakeman*** and ***Vanderhoff*** address situations in which a claimant has failed to report a phantom vehicle uninsured motorist claim in a timely manner.[5] Yera has provided no insight why this rule should be expanded to cover the instant matter. Because this case does not concern an uninsured motorist claim and there is no issue of late notice, Yera's reliance on the prejudice requirement of these cases is misplaced.

In Yera's final issue, it claims Travelers acted in bad faith by waiting "six (6) months from the date of the fire to deny the claim." Appellant's Brief at 27.

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[5] The Motor Vehicle Code defines an uninsured vehicle, in relevant part, as:

> (3) An unidentified motor vehicle that causes an accident resulting in injury provided the accident is reported to the police or proper governmental authority and the claimant notifies his insurer within 30 days, or as soon as practicable thereafter, that the claimant or his legal representative has a legal action arising out of the accident.

75 Pa.C.S. § 1702. The purpose of the timely notification requirement is to allow for an adequate investigation of the circumstances of the accident. ***See Brakeman***, 371 A.2d at 197.

Bad faith is generally defined as the denial of a claim without a reasonable basis when the insurer knew or recklessly disregarded the lack of reasonable basis to deny the claim. ***See Condio v. Erie Ins. Exchange***, 899 A.2d 1136 (Pa. Super. 2006). The definition of bad faith has been expanded to include those instances in which an insurer's investigative practices caused an improper delay in the payment of a claim. ***Id***. Travelers did not improperly deny the claim, therefore the general definition of bad faith cannot be met.

Furthermore, Travelers' investigative practices did not improperly delay the payment of the claim because no payment was due.

Yera appears to argue that the delay itself was evidence of bad faith and is actionable absent the *improper* denial of the claim. To support this argument, Yera cites the deposition testimony of Travelers' adjuster, Donald Giordano, who expressed "disgust" with the length of time it took to deny the claim. ***See*** Giordano Deposition, 7/12/2012, at 100. Additionally, an email from the underwriting department of Travelers to Giordano read in part, "I think I got you a lot more ammo at least." Appellant's Brief at 28. Yera claims this statement demonstrated an improper desire to "shoot down plaintiff's claim." ***Id***.

As noted above, bad faith has always been defined in terms of either an improper attempt to avoid the payment of a claim or to delay the

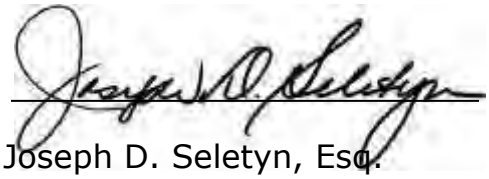
payment of claim. In either event, bad faith is predicated upon the fact the claimant is ultimately determined to be entitled to payment. Had there been a determination that Travelers improperly denied the claim, then the investigative practices and the evidence cited by Yera would be relevant to show bad faith. However, no payment is due to Yera. We see no compelling reason to expand the definition of bad faith to include an analysis of an insurer's investigative practices in properly denying a claim. Accordingly, Yera's final claim is without merit.

In light of the foregoing, we find the trial court has neither abused its discretion nor committed an error of law in granting summary judgment in favor of Travelers.

Order granting summary judgment is affirmed.

Strassburger, J., files a concurring and dissenting memorandum.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 4/22/2014