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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-997

Filed: 5 September 2017

Forsyth County, No. 14 CVS 7263

THOMAS JACKSON and KORLETTER HORNE JACKSON, Plaintiffs,

v.

CENTURY MUTUAL INSURANCE COMPANY, Defendant.

Appeal by Plaintiffs from order entered 3 June 2016 by Judge Susan E. Bray in Forsyth County Superior Court. Heard in the Court of Appeals 9 March 2017.

Botros Law, PLLC, by Tony S. Botros, for Plaintiffs-Appellants.

Cranfill Sumner & Hartzog LLP, by Susan K. Burkhart, for Defendant-Appellee.

DILLON, Judge.

This matter concerns a dispute between homeowners Thomas Jackson and Korletter Horne Jackson (collectively “Homeowners”) and their property insurance company, Century Mutual Insurance Company (“Insurer”).

I. Background

In December 2011, Homeowners' home was severely damaged by a fire. Homeowners filed a claim with Insurer for the loss of their home and certain personal property. Homeowners were not satisfied with the amount paid out by the Insurer or the way Insurer handled certain aspects of their claim. Accordingly, Homeowners filed this action against Insurer. Judge Bray granted Insurer summary judgment, and Homeowners appeal. We affirm Judge Bray's order.

II. Standard of Review

"Summary judgment is proper where 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 and that any party is entitled to a judgment as a matter of law." *Branch Banking & Trust Co. v. Peacock Farm, Inc.*, ___ N.C. App. ___, ___, 772 S.E.2d 495, 503 (citations and quotation marks omitted), *aff'd per curiam*, 368 N.C. 478, 780 S.E.2d 553 (2015). "On an appeal from an order granting summary judgment, this Court reviews the trial court's decision *de novo*." *Premier, Inc. v. Peterson*, 232 N.C. App. 601, 605, 755 S.E.2d 56, 59 (2014).

III. Analysis

Homeowners sought three types of benefits under the Policy: (1) "dwelling coverage," that is, the cost to replace the home itself; (2) "loss of use coverage," to cover Homeowners' living expenses while the damaged home was rebuilt; and (3) "contents coverage" for personal items that were lost. Homeowners alleged a number

of claims with respect to Insurer's handling of the claim. We address each argument in turn.

A. Unfair or Deceptive Trade Practice Claims

Homeowners alleged claims against Insurer under N.C. Gen. Stat. § 75-1.1 for certain actions by Insurer in adjusting Homeowners' claim. Specifically, Homeowners contend that Insurer engaged in actions which constitute "unfair claim settlement practices" pursuant to N.C. Gen. Stat. § 58-63-15(11). While the violation of G.S. 58-63-15(11) does not create a cause of action in favor of a policyholder *per se*¹, our Supreme Court has held that such activities may give rise to a claim under G.S. 75-1.1:

We agree with the practice of looking to N.C.G.S. § 58-63-15(11) for examples of conduct to support a finding of unfair or deceptive acts or practices. Although N.C.G.S. § 58-63-15(11) does regulate settlement claims in the insurance industry, insurance companies are not immune to the general principles and provisions of N.C.G.S. § 75-1.1.

Gray v. N.C. Ins. Underwriting Ass'n, 352 N.C. 61, 71, 529 S.E.2d 676, 683 (2000).

To establish a prima facie unfair or deceptive trade practice ("UDTP") claim under G.S. 75-1.1, a claimant must show: (1) an unfair or deceptive act; (2) in or affecting commerce; (3) which proximately caused actual injury to the claimant.

Dalton v. Camp, 353 N.C. 647, 656, 548 S.E.2d 704, 711 (2001). Here, while the

¹ N.C. Gen. Stat. § 58-63-15(11) provides that "no violation of this subsection shall of itself create any cause of action in favor of any person other than the Commissioner [of Insurance.]"

evidence in the light most favorable to Homeowners may show that Insurer committed some of the acts prohibited by G.S. 58-63-15(11) in handling certain aspects of the claim, there is no evidence that Homeowners have suffered any damage.

1. Dwelling Coverage

In their brief, Homeowners make no argument that Insurer committed an act constituting an UDTP in handling Homeowners' claim for "dwelling coverage." Indeed, the uncontradicted evidence shows that Insurer paid out the policy limit of \$162,000.00 on this claim.

2. Loss of Use Coverage

In their brief, Homeowners contend that Insurer committed various UDTP acts in the handling of their claim for "loss of use" of their home while it was being rebuilt. For instance, Homeowners argue that Insurer's adjuster misrepresented to them that the "loss of use" coverage provision in the Policy (which pays for Homeowners' living expenses while the home is being rebuilt) only provided coverage for "the shortest time" required to replace the damaged home and that "ten months" was a sufficient amount of time. However, assuming that these statements were unfair or deceptive, Homeowners failed to point to any evidence before Judge Bray showing that they were damaged by these statements. That is, Homeowners failed to point to evidence showing that Insurer failed to provide them all they were entitled to under the

Policy's "loss of use" provision. Rather, the uncontradicted evidence shows that Insurer pre-paid Homeowners' covered loss-of-use expenses bi-monthly for twelve months, and that Homeowners conceded in a deposition that the amount paid was reasonable. Therefore, we affirm Judge Bray's order as to this claim.

3. Contents Coverage

Homeowners argue that Insurer committed a number of UDTP acts in handling their claim for the personal property they lost. While there is evidence that Homeowners and Insurer disagreed regarding the amount Homeowners were entitled to under the Policy, we conclude that Judge Bray correctly ruled that Insurer was entitled to summary judgment on Homeowners' UDTP claim.

Homeowners presented a schedule of items they lost in the fire, valuing those items at over \$240,000 and claiming most of the items were purchased by them within two years of the fire. Homeowners, however, did not provide Insurer with receipts, pictures, or other evidence to document the items they claimed they lost, though Homeowners were contractually obligated by the Policy language to provide documentation. Insurer was skeptical of the Homeowners' inventory list. Indeed, Homeowners' tax returns show that their combined income for the three years preceding the fire was less than \$110,000, all while raising three children. Insurer hired an adjuster to review Homeowners' list, who adjusted Homeowners' loss at \$40,000, stating as follows:

MURPHY, J., concurring in part and dissenting in part.

In summary the inventory appears to be inflated and many of the items are undocumented. Based on experience a family of 5 living in a 1900 sf home would have an average replacement inventory of \$75-80,000. If we applied 40-50% depreciation this would make and [sic] actual cash value of \$40,000.

Based on its adjuster's report, Insurer paid Homeowners \$40,000, in addition to \$5,000 it had already paid, for their loss of contents. Months later, Insurer offered an additional \$20,000 in an effort to settle the claim.

Also, Homeowners made a claim for property they claim was stolen from a storage shed next to their home days after the fire. They provided a list of these items to Insurer, which included large air conditioning units and similar items, and valued these items at \$17,000. Insurer's adjuster determined that the items were not held for personal use but for use in Homeowner Mr. Jackson's home repair *business* and that, therefore, coverage for the theft was capped at \$2,500 under the Policy. (The Policy limited coverage for business property to \$2,500.) Insurer paid out \$2,500 on this claim. About a month later, Homeowners sent a written notice to Insurer disputing the amount paid. Insurer's adjuster responded to Homeowners, stating, "I have reviewed the letter sent to you in regards to the theft loss. [Defendant] has concluded that *all* your property involved in the theft loss is business personal property and thus limited to \$2500 in coverage." (Emphasis added).

Insurer notified Homeowners of their right under the Policy to exercise the "appraisal-process" clause if they disagreed with the Insurer's determination as to

the amount of Homeowners' loss. Under this clause, the amount of the loss would be contractually settled by a majority of three people, consisting of two appraisers (one chosen by Homeowners and one chosen by Insurer) and one umpire (chosen by the two appraisers). Homeowners eventually notified Insurer of their desire to exercise the "appraisal-process" clause contained in the Policy. Insurer's appraiser and the umpire agreed that Homeowners were entitled to award of \$81,000 actual cash value and up to \$135,000 replacement value, subject to the policy limit. Homeowners did not submit any proof that they had replaced any of the items; so, accordingly, Insurer paid Homeowners an additional \$36,000 (over the \$45,000 already paid) to meet its contractual obligations based on the \$81,000 award.

We conclude that the evidence before Judge Bray did not create a genuine issue of fact that Insurer engaged in any UDTP acts which damaged Homeowners. Rather, the uncontradicted evidence shows that Insurer acknowledged liability almost immediately and merely disagreed with Homeowners' unsubstantiated valuation of their loss. Based on the lack of evidence presented by Homeowners or otherwise available to Insurer, we conclude that there was no evidence that Insurer acted unreasonably. Regarding the itemized list of items which were stolen, it was not unreasonable for Insurer to classify said items as business property, as they included items that would be used in a home repair business. We, therefore, conclude that there was no genuine issue of material fact as to Homeowners' UDTP claims and that

Judge Bray correctly ruled that Insurer was entitled to summary judgment on these claims.

B. Breach of Contract

In their brief, Homeowners make a one-sentence argument concerning their “breach of contract” claim, stating as follows: “The discussion regarding each violation of N.C. Gen. Stat. § 58-63-15(11), bad faith, and use of an interested appraiser demonstrates a breach of conduct [sic] especially when viewed in the light most favorable to Plaintiffs.” In their brief, Homeowners do not dispute that they received all they were entitled to receive under the Policy for “dwelling coverage,” as Insurer paid out the policy limits to rebuild their home. And Homeowners do not dispute that they received all they were entitled to receive under the Policy for “loss of use” coverage to pay their expenses while their home was being rebuilt.

Rather, it appears that the only damage claimed by Homeowners for breach of the Policy contract is that they did not receive all they were entitled to for their “contents” loss. Indeed, there was conflicting evidence before the trial court as to the *amount* of damage suffered by Homeowners due to loss of personal property. However, Judge Bray correctly concluded that there was no genuine issue of material fact on this issue because Homeowners were contractually obligated to accept the amount determined by the umpire through the “appraisal-process,” which they had requested to resolve the dispute.

We note that Homeowners argue for the first time on appeal that there is an issue as to whether the award was ever signed by the umpire, which is required to make it binding under the Policy. Indeed, no copy of the award *signed by the umpire* appears in the record. Rather, the copy of the award was signed only by Insurer's appraiser.

Notwithstanding this fact, we conclude that the absence of a fully executed award in the record does not create a genuine issue of material fact as to whether Insurer has met its obligations regarding Homeowners' contents loss claim. Specifically, Insurer offered the affidavit of its president to support the award's validity, and the Homeowners did not offer any evidence to rebut the affidavit. And, further, Homeowners' attorney made no argument at the summary judgment hearing that the award was not binding. Rather, their attorney effectively conceded the validity of the award on a number of occasions and only argued that Homeowners may be entitled to *more than* \$81,000 pursuant to the award if they replaced some of their items. (The award determined that Homeowners were entitled to more than \$81,000 if Homeowners replaced items that were lost.) However, Homeowners point to no evidence documenting that they did, in fact, replace any of the items they lost which would have entitled them to more than the \$81,000 already paid out. As such, Homeowners cannot now argue to this Court on appeal that the award had not been signed by the umpire. *See Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934)

(holding that an appellant metaphorically may not “swap horses between courts in order to get a better mount”).²

C. Bad Faith

Homeowners argue that Judge Bray erred in granting summary judgment to Insurer on their bad faith claim. The elements of a bad faith claim against an insurance company are set forth in *Lovell v. Nationwide*, 108 N.C. App. 416, 420-24, 424 S.E.2d 181, 184-86 (1993). Importantly, bad faith does not arise where there is an “honest disagreement” regarding the value of a claim. *Id.* at 421, 424 S.E.2d at 185.

Here we conclude that Judge Bray ruled correctly in determining that no genuine issue of material fact exists on Homeowners’ bad faith claim. Rather, the evidence shows that Insurer properly handled the claim, properly conceded coverage, properly communicated with Homeowners when it disagreed with Homeowners’ valuation of their claim, that Insurer’s disagreements were reasonable, and that Insurer paid all amounts due under the Policy in a timely fashion. We have reviewed the evidence that was before Judge Bray and the transcript of the arguments made

² We note that there is conflicting evidence as to the amount of coverage Homeowners were entitled to for the items allegedly stolen from Homeowners’ shed, based on whether said items were actually used in Homeowners’ business. (The Policy caps recovery for business property at \$2,500). But according to the insurer’s affidavit, which Homeowners have not disputed, “plaintiffs demanded appraisal to resolve the remaining disputed theft and contents claim,” and the appraisal award includes both the claims for the items destroyed by fire and lost to the theft. Homeowners make no argument in their brief concerning this issue, and any argument that could have been raised is deemed waived. N.C. R. App. P., Rule 28.

by counsel at the hearing. Based on our review, we affirm Judge Bray’s order on this issue.

D. Infliction of Mental and Emotional Distress

Finally, we address whether the trial court erred in granting summary judgment in Insurer’s favor as to Homeowners’ cause of action for infliction of mental and emotional distress. We conclude that the trial court properly granted summary judgment for Insurer on this claim.

[A] plaintiff does not have a remedy for garden variety anxiety or concern, but only for *severe* distress. The North Carolina Supreme Court has discussed the legal meaning of the term severe emotional distress:

A claim for emotional distress applies only where the emotional distress has in fact resulted, and where it is severe. Emotional distress passes under various names, such as mental suffering, mental anguish, mental or nervous shock, or the like. It is only where it is extreme that the liability arises. The law intervenes only where the distress inflicted is so severe that no reasonable man could be expected to endure it. The intensity and the duration of the distress are factors to be considered in determining its severity. It is for the court to determine whether on the evidence severe emotional distress can be found.

Pacheco v. Rogers & Breece, Inc., 157 N.C. App. 445, 449, 579 S.E.2d 505, 508 (2003)

(internal marks and citations omitted).

Here, Homeowners’ evidence that they suffered mental and emotional distress is limited to Thomas’ statement in an email to Lewis that “[t]his entire claim process has been a 2nd nightmare so far” and that his family was experiencing “major

distress.” This limited evidence, without more, cannot serve to defeat a motion for summary judgment. Instead it is simply the type of “garden variety anxiety or concern” that this Court has expressly rejected in the context of a claim for mental and emotional distress. *Id.* Therefore, the trial court’s grant of Insurer’s motion for summary judgment as to this claim is affirmed.

IV. Conclusion

We have carefully reviewed the evidence that was before Judge Bray and the transcript of the parties’ arguments. Based on our review and for the reasons stated above, we affirm Judge Bray’s order granting summary judgment for Insurer.

AFFIRMED.

Judge STROUD concurs.

Judge MURPHY concurring in part and dissenting in part by separate opinion.

Report per Rule30(e).

No. COA16-997 number – *Jackson v. Century Mut. Ins. Co.*

MURPHY, Judge, concurring in part and dissenting in part.

I concur in the portion of the Majority’s opinion finding that the trial court properly granted summary judgment in favor of Insurer on the claim of infliction of mental and emotional distress. However, I respectfully dissent in regard to its determination that there existed no genuine dispute of material fact in regard to Homeowners’ UDTP, breach of contract, and bad faith claims.

Following Homeowners’ fire, Insurer hired Fred Lewis (“Lewis”), an “independent” adjuster, to investigate Homeowners’ insurance claim. As part of the claims process, Homeowners compiled a 64-page document itemizing the property they lost in the fire and calculating an aggregate replacement cost of \$248,143.85.

Upon reviewing Homeowners’ itemized list of personal property destroyed by the fire, Lewis submitted a report to Insurer stating the following:

In summary the inventory appears to be inflated and many of the items are undocumented. Based on experience a family of 5 living in a 1900 sf [sic] home would have an average replacement inventory of \$75-80,000. If we applied 40-50% depreciation this would make and [sic] actual cash value of \$40,000.

Based on Lewis’ guestimates, Insurer rejected Homeowners’ inventory of personal property losses and issued them a \$40,000 check on top of the \$5,000 advance it provided them on 6 December 2011. On 10 April 2013, Insurer offered Homeowners an additional \$20,000 on top of its original \$45,000 offer to settle the

claim, which Thomas rejected via email. In this email, Thomas also notified Insurer of his desire to exercise the appraisal-process clause of the Policy.

On 16 January 2012, Homeowners also prepared an itemized list of property that was stolen from a shed in their backyard shortly after the fire, and they designated each item on the list as being either for personal or business use and noted its replacement value. In total, the value of these items was in excess of \$17,000, and half of the items were classified as being for Homeowners' personal use.

Lewis claimed that Homeowners' reported theft losses — over \$13,000 of personal use property — were in reality property used for business purposes. As a result of Lewis' claim, Homeowners averred that recovery under the Policy was effectively limited to the \$2,500 cap limit for damaged or stolen business-use property, and Insurer sent a check for that amount to Homeowners on 18 June 2012. On 25 July 2012, Homeowners objected to Lewis' classification of the property via email, to which Lewis replied that "I have reviewed the letter sent to you in regards to the theft loss. [Insurer] has concluded that *all* your property involved in the theft loss is business personal property and thus limited to \$2[,]500 in coverage." (Emphasis added).

i. UDTP

First, the Majority "conclude[s] that the evidence before Judge Bray did not create a genuine issue of fact that Insurer engaged in any UDTP acts which damaged

Homeowners.” Although I agree with the Majority’s holding in so far as it addresses “Dwelling Coverage” and “Loss of Use Coverage,” I disagree with its assessment of “Contents Coverage.”

Our Supreme Court has affirmatively stated that:

We agree with the practice of looking to N.C.G.S. § 58-63-15(11) for examples of conduct to support a finding of unfair or deceptive acts or practices. Although N.C.G.S. § 58-63-15(11) does regulate settlement claims in the insurance industry, insurance companies are not immune to the general principles and provisions of N.C.G.S. § 75-1.1.

Gray v. N.C. Ins. Underwriting Ass’n, 352 N.C. 61, 71, 529 S.E.2d 676, 683 (2000).

Thus, Homeowners are entitled to advance their claim past the summary judgment stage if they can produce evidence tending to show that Insurer violated one or more of the provisions of N.C.G.S. § 58-63-15(11). That statute provides, in pertinent part, that:

The following are hereby defined as unfair methods of competition and unfair and deceptive acts or practices in the business of insurance:

.....

- (11) **Unfair Claim Settlement Practices.**—
Committing or performing with such frequency as to indicate a general business practice of any of the following: Provided, however, that no violation of this subsection shall of itself create any cause of action in favor of any person other than the Commissioner:

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- a. Misrepresenting pertinent facts or insurance policy provisions relating to coverages at issue;

. . . .

- f. Not attempting in good faith to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear;

. . . .

- h. Attempting to settle a claim for less than the amount to which a reasonable man would have believed he was entitled[.]

N.C.G.S. § 58-63-15(11).

I am satisfied that there are factual disputes in the record sufficient to establish a violation of these subsections of N.C.G.S. § 58-63-15, and, in turn, a viable UDTP claim.³ Specifically, Homeowners' evidence in the form of Lewis' reports creates an issue as to whether Insurer vastly undervalued their claims, especially in the initial \$45,000 offer to settle their claim, and is therefore sufficient to create a jury question under subdivision (11)(f) and (h) such that summary judgment was inappropriate. Moreover, Lewis' characterization of the stolen items as being purely for business use, despite Homeowners' evidence to the contrary, creates a genuine

³ I note that the provisions of N.C.G.S. § 58-63-15(11) are examples of UDTP violations and not an exhaustive list of potential violations against an insurance company such as Insurer.

issue of material fact under subdivision (11)(a).⁴ Consequently, we hold the trial court erred in granting summary judgment for Insurer on Homeowners’ N.C.G.S. § 58-63-15(11) and UDTP claims as well. Whether these claims will ultimately be resolved in Homeowners’ or Insurer’s favor is a factual inquiry for a jury.

ii. Breach of Contract

Next, the Majority holds that the trial court properly granted summary judgment in favor of the Insurer on Homeowners’ breach of contract claim. In particular, the Majority states, “we conclude that the absence of a fully-executed award in the record does not create a genuine issue of material fact as to whether Insurer has met its obligations regarding Homeowners’ contents loss claim[,]” and that “the Homeowners did not offer any evidence to rebut the affidavit. I disagree.

Pursuant to the Policy’s appraisal clause, Insurer and Homeowners each selected an appraiser and those appraisers in turn selected an umpire. The Policy provided that an award agreed to *and signed by two of these individuals* would be binding on the parties. As a result of this process, a proposed award of \$81,000 actual cash value and \$135,000 replacement cash value was ultimately presented to and signed by Lewis as the appraiser for Insurer “of said property on the 4th day of

⁴ I am careful to note that Homeowners may have a meritorious claim for other violations of subdivision (11), and it is not my intention to foreclose their right to pursue those arguments before a jury. However, this section merely recognizes that there is enough of a genuine dispute of material fact that Homeowners’ claim for UDTP pursuant to violations of N.C.G.S. § 58-63-15(11) should survive summary judgment.

December 2011 and the amount of loss thereto by Mr. and Mrs. Thomas Jackson on that day[.]” (Emphasis added). However, the record is unclear as to whether the umpire also signed off on the proposed award, which would thereby make the award binding.

Although Robert Peterson’s affidavit avers that “[t]he Umpire determined that Homeowners were entitled to an award in the sum of \$81,000 for actual cash value and \$135,000 for replacement cost[, and a]n appraisal award was entered on October 7, 2014[.]” the appraisal award in the record before this Court, also dated 7 October 2014, only bears the signature of Fred Lewis, Insurer’s appraiser. If only Lewis signed the award, then that award is not contractually binding.

Furthermore, as the award states that it is for the loss of property that occurred on 4 December 2011, the date of the fire, it did not resolve the disputed valuation of the stolen personal property because that theft occurred sometime after the date of the fire. Ultimately, Insurer made a final offer to Homeowners of \$81,000, which Homeowners rejected.

As it is unclear as to whether Insurer in fact met its obligation under its contents loss claim in that there is a discrepancy as to whether a binding award was reached, this issue must be left to the jury to determine.

iii. Bad Faith

Homeowners' claim for breach of covenant of good faith and fair dealing is also sufficiently established such that the entry of summary judgment in favor of Insurer was erroneous. "In every contract there is an implied covenant of good faith and fair dealing that neither party will do anything which injures the right of the other to receive the benefits of the agreement." *Williams v. Craft Dev., LLC*, 199 N.C. App. 500, 506, 682 S.E.2d 719, 723 (2009) (citations and quotation marks omitted), *disc. review denied*, 363 N.C. 859, 695 S.E.2d 452 (2010). Here, as I just explained, there is a genuine issue of material fact as to whether Insurer failed to provide the benefits to which Homeowners are entitled under the contract because: (1) the record evidence conflicts in regard to whether the proposed award was ever signed and made binding on the parties; and (2) the record evidence suggests that Homeowners' claim for recovery under the Policy on the basis of the stolen property has never been resolved. Therefore, Homeowners are entitled to move forward beyond the summary judgment stage on this claim as well.

For all of these reasons, I respectfully dissent as to Majority's conclusion regarding Homeowners' UDTP, breach of contract, and bad faith claims, and I would conclude that summary judgment was inappropriate as genuine issues of material fact existed for the jury to determine.