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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-627

Filed: 16 April 2019

Pamlico County, No. 15 CVS 32

BARBARA C. LYON, Individually and as Trustee of the Donald F. and Barbara C. Lyon Revocable Living Trust, Plaintiff,

v.

SERVICE TEAM OF PROFESSIONALS (EASTERN CAROLINA), LLC d/b/a 24/RESTORE and UNITED SERVICES AUTOMOBILE ASSOCIATION, Defendants,

v.

SERVICE TEAM OF PROFESSIONALS (EASTERN CAROLINA), LLC d/b/a 24/STORE, Third Party Plaintiff,

v.

COASTAL RESTORATION SERVICE, INC. d/b/a SERVPRO OF PITT/GREENE & CRAVEN/PAMLICO COUNTIES, Third-Party Defendant.

Appeal by plaintiff from order entered 22 November 2017 by Judge Benjamin G. Alford in Pamlico County Superior Court. Heard in the Court of Appeals 27 February 2019.

Ward, Smith & Norris, P.A., by William F. Ward, III, for plaintiff-appellant.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Kimberly M. Marston and Reid L. Phillips, for defendant-appellee United Services Automobile Association.

ARROWOOD, Judge.

Barbara C. Lyon, Individually and as Trustee of the Donald F. and Barbara Lyon Revocable Living Trust, (“plaintiff”) appeals from an order granting summary judgment in favor of United Services Automobile Association (“defendant USAA” or “USAA”) on all of plaintiff’s claims against USAA. For the reasons stated herein, we affirm the trial court’s order.

I. Background

On 12 August 2013, the Donald F. and Barbara Lyon Revocable Living Trust owned a house in Arapahoe that plaintiff and her family used as a second home (“the house”). That day, plaintiff’s husband, Donald F. Lyon (“Mr. Lyon”),¹ and their daughter, Lori Stone (“Ms. Stone”), discovered a water leak that caused extensive water damage and mold growth in the house. Ms. Stone contacted USAA, the insurer of the property, to report the leak and resulting damage.² Plaintiff’s insurance policy with USAA (“the policy”) included, *inter alia*: (1) coverage for damage to the structure of the dwelling (“dwelling coverage”), (2) coverage for the replacement of personal property (“personal property coverage”), and (3) coverage for alternative living expenses (“alternative living expenses coverage”).

¹ Mr. Lyon died in July 2014.

² Ms. Stone was authorized to speak to USAA on plaintiff’s behalf.

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Plaintiff elected to participate in USAA's Property Direct Repair Program ("PDRP") to restore the house. When an insured participates in PDRP, USAA recommends a contractor to assist with repairs. The insured is under no obligation to hire the recommended contractor, and may hire a contractor of their own choosing instead. If the insured selects the recommended contractor, USAA reviews and approves that contractor's estimate, and then mails a check to the contractor as the claims payment. Significantly, this check requires the insured's endorsement to release the funds to the contractor, and the insured is not required to endorse the check until the work is completed to his or her satisfaction.

On 12 August 2013, USAA assigned Servpro to respond to the house for emergency water mitigation, and 24/Restore for reconstruction. Ms. Stone authorized Servpro to perform services that same day, and authorized 24/Restore to perform services on 13 August 2013. USAA accepted the claim, subject to a \$5,000.00 mold limitation specified in the policy, on 30 August 2013. In addition to 24/Restore's authorized loss claim work, plaintiff contracted with 24/Restore to provide upgrades for the house. These upgrades were not covered by the policy.

USAA sent Servpro checks totaling \$8,960.56 for mitigation and \$3,511.96 for mold remediation on behalf of plaintiff. On 1 October 2013, USAA sent 24/Restore a check for \$29,860.42 for its estimated repairs, on behalf of plaintiff. In accordance with the PDRP's guidelines, the checks were written out to both the contractors and

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Donald and Barbara Lyon, who did not have to endorse the check until they were satisfied with the work.

Ms. Stone contacted USAA in December 2013 and January 2014, expressing concerns with 24/Restore's workmanship and the payments plaintiff made to 24/Restore. USAA agreed to assist with disputes related to the covered repairs.

On 20 February 2014, USAA spoke with plaintiff and Ms. Stone, who told USAA they no longer wanted to work with 24/Restore. An independent adjuster inspected the house and determined 24/Restore should reimburse plaintiff \$8,446.71 for work that was either incomplete or incorrect.

Because 24/Restore's work included storing the personal property from the house, plaintiff requested that this property be transferred to Servpro's care. Servpro retrieved the property from 24/Restore on 14 March 2014. In addition to paying \$2,777.70 to move the personal property, USAA paid more than \$12,800.00 to replace property that was lost or damaged. USAA also authorized plaintiff to use the remaining funds in the mold coverage to test the property for mold. Servpro sorted the property, and submitted estimates to USAA for its storage, cleaning, and return. USAA approved the estimate, but plaintiff wanted to view the property before the cleaning began. USAA cashed out plaintiff's personal property coverage so that plaintiff could proceed with viewing the property before the cleaning began.

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Ms. Stone asked Pamlico Home Builders & Supplies, Inc. (“Pamlico Home Builders”) to prepare an estimate for the repairs and upgrades to the house that 24/Restore was unable to complete to plaintiff’s satisfaction. She submitted the Pamlico Home Builders’ estimate, for \$13,377.81, to USAA. However USAA told Ms. Stone that it could not proceed with Pamlico Home Builders’ estimate because it was not itemized. USAA explained it needed an itemized estimate to enable it to determine whether it owed additional funds for Pamlico Home Builders’ work. Ms. Stone never submitted an itemized version of the estimate, or the final invoice from Pamlico Home Builders, to USAA, even though she knew USAA needed this information to process the claim.

In October 2014, plaintiff tested the house for mold, which revealed mold spores in the air, and surface mold in some air ducts. Plaintiff hired Servpro to remove the personal property and to perform a mold remediation in early 2015, but never notified USAA of the mold.

On 20 March 2015, plaintiff filed a complaint and issuance of a summons against Service Team of Professionals (Eastern Carolina), LLC d/b/a 24/Restore and USAA (collectively, “defendants”). The complaint alleged five causes of action against 24/Restore. Three causes of action were filed against USAA: (1) breach of contract, (2) bad faith, and (3) unfair claims settlement practices. Defendants answered the complaint on 15 June 2015.

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Subsequently, with leave of court, plaintiff amended her complaint, alleging a fourth cause of action against USAA, negligent hiring. USAA, also with leave of court, amended its answer, and asserted cross-claims against 24/Restore. 24/Restore filed an amended answer and brought a third-party complaint against Coastal Restoration Service, Inc., d/b/a Servpro of Pitt/Greene and Craven/Pamlico Counties, seeking contribution for any liability based on mold remediation. Servpro answered the complaint, and filed affirmative defenses.

USAA moved for summary judgment on all four of plaintiff's claims on 16 October 2017. The motion came on for hearing on 23 October 2017 in Pamlico County Superior Court, the Honorable Benjamin G. Alford presiding. On 22 November 2017, the trial court granted summary judgment in USAA's favor on all of plaintiff's claims.

On 30 November 2017, plaintiff moved for the trial court to certify the appeal of its summary judgment order pursuant to Rule 54(b) of the North Carolina Rules of Civil Procedure. On 15 December 2017, the trial court heard the motion and entered an amended order, certifying the ruling for immediate appeal.

Plaintiff appeals.

II. Discussion

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Plaintiff argues the trial court erred by granting USAA's motion for summary judgment on all four of plaintiff's claims: (1) breach of contract, (2) bad faith, (3) unfair claims settlement practices, and (4) negligent hiring. We disagree.

"Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows 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.'" *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (quoting *Forbis v. Neal*, 361 N.C. 519, 523-24, 649 S.E.2d 382, 385 (2007)).

A. Breach of Contract

Plaintiff argues the trial court erred by granting summary judgment on her breach of contract claim because there are material issues of fact relating to the proper compensation under each coverage afforded by the policy: (1) dwelling coverage, (2) personal property coverage, and (3) alternative living expenses coverage. We address each type of coverage in turn.

i. Dwelling Coverage

First, plaintiff contends USAA failed to meet its obligations under the dwelling coverage because: (1) USAA did not pay for Pamlico Home Builders' work, (2) USAA did not compensate plaintiff for the subsequently discovered mold contamination and remediation, and (3) USAA failed to compensate for work 24/Restore erroneously labeled as an "upgrade" instead of a "repair." We disagree.

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USAA did not violate the terms of the policy by failing to pay Pamlico Home Builders' quote. Upon receipt of the quote, USAA requested an itemization of the repairs and upgrades so that it could determine the amount, if any, it owed plaintiff under the policy. Plaintiff never provided this information, or a final invoice for the work performed. This inaction is in clear violation of the policy, which provides that USAA does not have a duty to cover a loss when a policyholder fails to comply with the following duties, and that failure prejudices USAA: (1) promptly notify USAA of a loss, (2) cooperate in an investigation of a claim by USAA, (3) prepare an inventory of damaged personal property, and (4) show the property and provide records and documents as long as USAA reasonably requires. Therefore, USAA did not fail to meet its obligations under the dwelling coverage by failing to pay Pamlico Home Builders.

Similarly, plaintiff never reported the subsequent mold damage to USAA. Therefore, USAA did not violate the terms of the dwelling coverage for failing to reimburse plaintiff for this damage. Moreover, even if USAA accepted this damage as a continuation of the damage from August 2013, as plaintiff requests on appeal, USAA has already paid the limit for mold-related damage under the terms of the policy. Accordingly, no material issue of fact exists as to whether the subsequently discovered mold contamination and remediation was compensable; USAA did not

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violate the policy by failing to compensate plaintiffs for losses associated with this damage.

Last, plaintiff argues 24/Restore designated certain work as “upgrades” that plaintiff contends were compensable under the policy as “repairs.” However, the policy excludes coverage for “faulty, inadequate, or defective . . . [d]esign, specifications, workmanship, repair, construction, renovation, remodeling, grading, [or] compaction[.]” Therefore, by the express terms of the policy, USAA is not responsible for negligence or poor workmanship by 24/Restore.

Accordingly, there is no genuine issue of material fact under the policy that USAA failed to provide adequate remediation for plaintiff’s dwelling coverage.

ii. Personal Property Coverage

Next, we consider the personal property coverage. First, plaintiff argues USAA denied plaintiff the opportunity to personally inventory, inspect, attempt to salvage, or discard the property because 24/Restore assumed possession and control of the personal property. However, again, we note that the policy excludes coverage for “faulty, inadequate, or defective . . . [d]esign, specifications, workmanship, repair, construction, renovation, remodeling, grading, [or] compaction[.]” Thus, because this allegation is based on 24/Restore’s actions, this argument is without merit as a matter of law.

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Plaintiff also makes a general argument that she “provided lists of items of personal property to USAA for which they were not compensated[.]” Notably, plaintiff fails to specify which lists she is referring to submitting. Further, she never submitted an inventory of items discarded from personal property deemed salvageable by Servpro to enable the personal property claim to move forward. Therefore, plaintiff has failed to establish an issue of material fact that USAA failed to meet its obligation to reimburse plaintiff under this provision of the policy.

iii. Alternative Living Expenses

Finally, we consider plaintiff’s alternative living expenses coverage. Plaintiff argues that whether she is entitled to payment for alternative living expenses is a triable issue of fact because it is undisputed that USAA never tendered payment under this provision of the policy. We disagree. Although USAA’s claims logs show plaintiff inquired about this provision, plaintiff never submitted a claim for, or produced documentation to support, reimbursement for alternative living expenses. Thus, USAA was unaware of any losses related to alternative living expenses, or a claim for them, until this litigation. Because USAA is not required to make payments when a plaintiff fails to submit a claim for reimbursement, this argument is without merit.

B. Bad Faith

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Next, plaintiff argues the trial court erred by granting summary judgment on her claim that USAA acted in bad faith.

“In order to recover punitive damages for the tort of an insurance company’s bad faith refusal to settle, the plaintiff must prove (1) a refusal to pay after recognition of a valid claim, (2) bad faith, and (3) aggravating or outrageous conduct.” *Lovell v. Nationwide Mut. Ins. Co.*, 108 N.C. App. 416, 420, 424 S.E.2d 181, 184, *aff’d*, 334 N.C. 682, 435 S.E.2d 71 (1993) (citations omitted).

Plaintiff claims USAA refused to pay after a recognition of a valid claim for the same reasons plaintiff argues there is a valid breach of contract claim against USAA. However, as discussed *supra*, the compensation plaintiff seeks is either outside the policy’s coverage, or plaintiff did not meet policy requirements, like reporting a claim, notifying USAA, or providing reasonable documentation. Thus, because plaintiff cannot demonstrate an issue of material fact that USAA refused to pay after recognition of a valid claim, plaintiff cannot recover punitive damages for the tort of an insurance company’s bad faith refusal to settle as a matter of law. For this reason, the trial court did not err by granting summary judgment on this cause of action.

C. Unfair and Deceptive Trade Practices

Plaintiff also argues the trial court erred by granting summary judgment on her claim for unfair and deceptive trade practices.

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“To prevail on a claim for unfair and deceptive trade practices, a claimant must demonstrate the existence of three factors: (1) an unfair or deceptive act or practice, or unfair method of competition, (2) in or affecting commerce, and (3) which proximately caused actual injury to the plaintiff or his business.” *Murray v. Nationwide Mut. Ins. Co.*, 123 N.C. App. 1, 9, 472 S.E.2d 358, 362 (1996) (citations and internal quotation marks omitted). Our Court has interpreted the term “unfair” as “a practice which offends established public policy, and which can be characterized by one or more of the following terms: immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers.” *Id.* (citation and internal quotation marks omitted).

“Violation of any form of conduct listed in [N.C. Gen. Stat.] § 58-63-15(11) operates as a *per se* instance of unfair and deceptive trade practice under N.C. Gen. Stat. § 75-1.1.” *Id.* at 10, 472 S.E.2d at 363 (citation omitted). These “[u]nfair [c]laim [s]ettlement [p]ractices” must be committed or performed “with such frequency as to indicate a general business practice[.]” N.C. Gen. Stat. § 58-63-15(11) (2017).

Plaintiff alleges there are issues of material fact as to whether USAA committed the following conduct listed in N.C. Gen. Stat. § 58-63-15(11):

- c. Failing to adopt and implement reasonable standards for the prompt investigation of claims arising under insurance policies;
- d. Refusing to pay claims without conducting a reasonable investigation based upon all available information;

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. . . .

- f. Not attempting in good faith to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear;
- g. Compelling [the] insured to institute litigation to recover amounts due under an insurance policy by offering substantially less than the amounts ultimately recovered in actions brought by such insured;
- h. Attempting to settle a claim for less than the amount to which a reasonable man would have believed he was entitled;

. . . .

- m. Failing to promptly settle claims where liability has become reasonably clear, under one portion of the insurance policy coverage in order to influence settlements under other portions of the insurance policy coverage

N.C. Gen. Stat. § 58-63-15(11).

At the outset, we note there is no evidence that the payments made by USAA were not fair and equitable, including USAA's failure to pay Pamlico Home Builders and costs related to the second mold remediation, as discussed *supra* with regard to plaintiff's breach of contract claim. However, plaintiff also contends: (1) USAA did not properly investigate and adjust the claims because it did not use independent licensed adjusters to evaluate the initial damage and necessary repairs to the house,

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and (2) USAA closed the claims file after attempting to “cash out” plaintiff’s claims in bad faith. We disagree.

i. Reasonable Standards for the Prompt Investigation of Claims

Plaintiff’s allegation that USAA did not properly investigate and adjust the claims because it did not use qualified and independent licensed adjusters to evaluate the damage and necessary repairs is without merit. There is no support in case law or statute for this allegation, and, further, no evidence in the record that USAA has otherwise failed to adopt or implement reasonable standards for the prompt investigation of claims.

ii. Closure of the Claims File

There is also no evidence that USAA closed the claims file after attempting to “cash out” plaintiff’s claims. Ms. Stone testified she regarded USAA’s decision to cash out the cleaning of the personal property as a decision to close the claim and make no further payments. However, the record does not show that USAA ever notified plaintiff the claim was closed or that it would not consider making additional payments. Instead, it shows that no further payments were made because plaintiff stopped communicating with USAA, never notified USAA of additional losses or expenses, and did not provide information reasonably necessary to resolve the claim. As there is no genuine issue of material of fact as to whether USAA closed the claim

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file, plaintiff's factual allegation is without merit and the trial court properly granted summary judgment on plaintiff's cause of action for unfair trade practices.

D. Negligent Hiring

Last, plaintiff argues the trial court erred by granting summary judgment on her claim for negligent hiring because there are issues of material fact to preclude summary judgment on this claim. We disagree.

The elements of a negligent hiring claim in a case involving an independent contractor are: (1) the employer owed the plaintiff a legal duty, (2) the independent contractor acted negligently, (3) the independent contractor “was incompetent at the time of the hiring, as manifested either by inherent unfitness or previous specific acts of negligence[,]” (4) the employer had notice of the incompetence, and (5) “the plaintiff's injury was the proximate result of this incompetence.” *Little v. Omega Meats I, Inc.*, 171 N.C. App. 583, 586-87, 615 S.E.2d 45, 48 (citation and internal quotation marks omitted), *aff'd*, 360 N.C. 164, 622 S.E.2d 494 (2005).

Plaintiff cannot proceed on this claim because USAA did not employ 24/Restore. USAA only recommended the business as a “preferred contractor.” As the work authorizations for the repairs explicitly show, the decision to hire both 24/Restore and Servpro belonged to plaintiff. Thus, USAA did not hire 24/Restore as an independent contractor or otherwise, and summary judgment was proper on this claim.

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III. Conclusion

For the forgoing reasons, we affirm the trial court's order granting summary judgment in USAA's favor on all of plaintiff's causes of action.

AFFIRM.

Judges STROUD and TYSON concur.

Report per Rule 30(e).