Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNT

Present: Hon. Rudolph E. Greco, Jr. IA Part 32
Justice

RICHARD O'CONNOR,

Plaintiff,

- against -

GOVERNMENT EMPLOYEES INSURANCE COMPANY,

Defendant.

Index No. 701784/2014

Motion Date: November 14, 2014
Motion Seq. No. 1
Motion Cal. No. 66

ORIGINAL

The following papers numbered 1 to 7 read on this motion by defendant for summary judgment and to dismiss plaintiff's second and third causes of action pursuant to CPLR 3212(2), or alternatively staying such claims pending the resolution of plaintiff's first claim, and for an ordering striking plaintiff's demand for discovery dated June 13, 2014 or alternatively staying such discovery pending similar resolution of the first claim.

	Papers Numbered
Notice of Motion, Affirmation, Exhibits,.....	1-3
Opposition, Exhibits.....	4-6
Reply.....	7

FILED
JAN 22 2015
COUNTY CLERK
QUEENS COUNTY

Upon the foregoing papers it is ordered that this motion is determined as follows:

This action stems from a motor vehicle accident that occurred on September 28, 2011 at approximately 12:00 p.m. at the intersection of Morris Park Avenue and White Plains Road, Bronx, New York when plaintiff, a pedestrian was struck by a vehicle driven by non-party Jose Colon allegedly causing serious injuries. Jose Colon insured by State Farm Insurance Company tendered the $25,000 policy limit to plaintiff with defendant's permission. Plaintiff thereafter made a claim pursuant to his supplemental uninsured/underinsured motorist benefits ("SUM") under his GEICO policy, the limit of which is $300,000.00.

To that effect, he provided detailed medical records demonstrating the injuries he alleges resulted from the accident and demanded $275,000.00, the policy limit less the State Farm coverage. Following review of the records GEICO offered to settle the claim for $10,00.00 as indicated by Tom Tyrrell, ("Tyrrell"), the claims representative assigned to plaintiff's case. This offer was rejected by plaintiff who countered at $180,000.00. It seems that arbitration was considered but ultimately plaintiff commenced this action via summons and complaint filed on

March 17, 2014 alleging three causes of action: 1) failure to pay SUM benefits; 2) bad faith in refusing payment of benefits; and 3) breach of contract. Defendant answered and raised various affirmative defenses including plaintiff's failure to sustain a serious injury as defined under Insurance Law §5102(d).

Dismissal Issue

Defendant now seeks to dismiss the latter two causes of action or alternatively, stay them pending resolution of the first. The Court addresses the breach of contract claim first since upholding same *may* sustain the bad faith claim, (as related to damages, [*see e.g.* Acquista v New York Life Ins. Co., 285 AD2d 73, 81 {1st Dept. 2001}]), but dismissing the breach claim would render moot the bad faith claim as the former necessitates the latter.

A breach requires the existence of a contract, plaintiff's performance along with defendant's breach of its obligations thereunder and damages, (*see* Canzona v Atanasio, 118 AD3d 841, 842-43 [2nd Dept. 2014], Dee v Rakower, 112 AD3d 204, 208-09 [2nd Dept. 2013], JP Morgan Chase v JH Elec. of NY Inc., 69 AD3d 802, 803 [2nd Dept. 2010]). Here, plaintiff has failed to establish defendant's breach. There is no evidence to suggest that defendant denied coverage or disclaimed as to plaintiff's SUM benefits. Conversely, GEICO admits they are obligated to honor the terms of the SUM endorsement and acknowledges plaintiff's entitlement to such benefits as an undisputed fact. They clarify that instead the dispute between the parties focuses on the amount to which plaintiff is entitled since efforts to negotiate failed. As such, a determination of the amount must be rendered either through arbitration or legal action, (*see* Insurance Law §3420[f][1]; *see also* Russell v New York Cent. Mut. Fire Ins. Co., 11 AD3d 668, 669-70 [2nd Dept. 2004]), subject to the plaintiff's choice.

In this instance, plaintiff chose legal action and now argues that GEICO must pay what is demanded or a figure closer to his approximation of the value of his injuries to avoid breach and bad faith. This position is without merit and support. His submission of medical records demonstrating injury alone is insufficient to meet the requirements for payment, (although payment itself is not disputed rather the amount is), especially when a showing of serious injury pursuant to Insurance Law §5102(d) is a prerequisite to collecting benefits, (*see* Raffellini v State Farm Mut. Auto. Ins. Co., 9 NY3d 196 [2007]).

As plaintiff has failed to demonstrate breach it follows that he cannot demonstrate bad faith. Moreover, under New York law it has been held that there is no separate tort for bad faith refusal to comply with an insurance contract, (*see* Johnson v Allstate Ins. Co., 33 AD3d 665, 666 [2nd Dept. 2006], Zawahir v Berkshire Life Ins. Co., 22 AD3d 841, 842 [2nd Dept. 2005]; *see also* Acquista at 81; *see e.g.* Orient v Overseas Associates v XL Ins. America, Inc., 2014 WL 840416 [Sup Ct, New York County 2014] *cf.* Orman v Geico Gen. Ins. Co., 37 Misc3d 1227(A) [Sup Ct, Kings County 2012]). Accordingly, defendant's motion to dismiss plaintiff's second and third causes of action is granted, and their request to stay same is moot.

Discovery Issue

Defendant requests to strike those portions of plaintiff's demand for discovery dated June 13, 2014 seeking production of defendant's entire claim file, and documents relative to plaintiff's prior claims and injuries/claim for damages. They argue there is a prior Court Order precluding disclosure (*see Preliminary Conference Order, July 7, 2014*), and that the requested materials are subject to privilege, i.e. that they were created in anticipation of litigation , as well as being overly broad and irrelevant.

As to the first argument, the Court finds same unpersuasive as a complete mischaracterization of the Order to which defendant refers; the preliminary conference order. Specifically, the language that they rely on was handwritten in the margin of the Order, and is illegible. However, from what can be discerned there is no preclusion language based on the speculative nature of documents. Rather, certain documents were not to be referenced as doing so would be speculative. Plaintiff clarifies that defendant was to be given an opportunity to produce documents within the claims file that were not in dispute, but such documents were not to be referenced in the Order. Furthermore, pursuant to paragraph 6(d) of such Order defendant was directed to respond to the very demand they allege was precluded thereby.

The substantive issue relative to the demand for the entire file revolves around the privilege surrounding documents prepared in anticipation of litigation, (*see* CPLR §3101[d][2]); specifically in litigation regarding SUM benefits which appears to be a novel question. Defendant movant takes the position that they anticipated litigation once they were put on notice of the SUM benefits claim, i.e. from the outset, (October 26, 2011), and all information requested was in preparation to defend against such claim. Hence, the entire file is subject to the privilege. Conversely, plaintiff asserts that litigation could only be anticipated at claim rejection, and they offer that the moment of rejection occurred when the demand for the policy limit less the underlying coverage was denied, (January 21, 2013). However, they acknowledge that negotiations regarding an acceptable amount of payment remained opened thereafter. Thus, plaintiff believes some of the file may be privileged while some is discoverable, and is requesting an *in camera* inspection for a determination between the two as to documents contain therein.

The defendant's argument appears extreme especially in light of their statement that plaintiff is undisputedly entitled to SUM benefits and the only issue in this case is the amount of same. Additionally, the case law offered in support of their contention is inapposite as wholly unrelated to SUM benefits and is not controlling on this Court, (*see e.g.* Primeau v Town of Amherst, 303 AD2d 1035, 1037 [4th Dept. 2003], Corcoran v Peat, Marwick, Mitchell and Co., 151 AD2d 445 [1st Dept. 1989], Friedman v White Lake Hotel & Cottage Inc., 97 AD2d 387 [1st Dept. 1983], Kandel v Tocher, 22 AD2d 513 [1st Dept. 1695]). Plaintiff's argument is flawed as well, since negotiation does not does not constitute rejection. Also, his case law is likewise irrelevant and uncontrolling, (*see e.g.* Landmark Ins. Co. v Beau Rivage Rest., 121 AD2d 98 [2nd Dept. 1986], E.Cuker, Inc. v N.Y. Prop. Ins. Underwriting Assn., 98 AD2d 621 [1st Dept. 1983]).

However, *Bombard v Amica Mut. Ins. Co.* (11 Ad3d 647 [2nd Dept. 2004]), a case he

employs, is instructive as it involves an insured who sued his insurance company as in this matter. Therein an order was affirmed directing the defendant insurance company to comply with plaintiff's request for the production of material prepared prior to rejection of his claim, (*id* at 649). Moreover, a blanket privilege as to an insurer's file, (*see* Kandel at 515, Finegold v Lewis, 22 AD2d 447, 448 [2nd Dept. 1965]), has been rejected in cases such as the one at bar, (*see generally* Patrick M. Connors, Practice Commentary, McKinney's Cons Laws of NY, CPLR C3101:32). Accordingly, plaintiff's position as to discoverability of documents as it relates to rejection of the claim is more on point and will be adopted herein.

With this in mind, and since plaintiff's claim has not affirmatively been rejected, it would seem to this Court that litigation could have rightfully been anticipated upon complete failure of negotiation. The point at which that date is fixed should be concrete and measurable to promote certainty, as in the date arbitration was demanded or the date the summons and complaint were filed. While the latter would be plaintiff's preference, in this instance such date would not be reflective of the actual time of negotiation's failure; nor can the arbitration demand date be employed as same was never demanded. However, pursuant to the Tyrrell affidavit arbitration as to the amount to be tendered was first discussed in March 2013 following rejection of plaintiff's counteroffer. To that effect, any documents contained in the file prior to this date should be discoverable, (*see* Bombard at 648; *see also* Melworm v Encompass Indem. Co., 112 AD3d 794, 795 [2nd Dept. 2013]).

To the extent defendant continues to argue that specific documents in the file prior to March 2013 were prepared in anticipation of litigation they bear the burden of demonstrating such material's immunity, (*see generally* Koump v Smith, 25 NY2d 287, 294 [1969]; *see also* Agovino v Taco Bell 5083, 225 AD2d 569, 571 [2nd Dept. 1996], Zimmerman v Nassau Hosp., 76 AD2d 921 [2nd Dept. 1980]). However, as to documents dated after "rejection" plaintiff would have to demonstrate a substantial need therefor and undue hardship in obtaining the substantial equivalent, (*see* CPLR §3101[d][2]; *see also* Davila v Envtl. Products & Svcs Inc., 270 AD2d 224 [2nd Dept. 2000], Volpicelli v Westchester County, 102 AD2d 853 [2nd Dept. 1984]).

As to the plaintiff's demands for documents relative to plaintiff's prior claims and injuries/claim for damages the Court opines that same are subsumed within the request for the entire file, (*discussed above*), with an aside that the former is overboard, and immaterial and unnecessary to this matter, (*see* CPLR §3101[a]). Nevertheless, the defendant's claim file as well as documents relative to the remaining two demands defendant seeks to strike shall be produced for an *in camera* inspection so that a determination can be made as to which documents shall be disclosed and which shall be withheld in accordance with the findings of this decision.

The *in camera* inspection shall take place at the Supreme Court located at 25-10 Court Square, Rm. G40, Long Island City, New York on Tues. Mar. 3, 2015 at 10:00 AM., and all parties are required to appear.

The defendant's motion to dismiss plaintiff's second and third cause of action is granted,

and as to striking plaintiff's discovery demand, denied to the extent that an *in camera* inspection shall be had.

A copy of this order with notice of entry shall be served on all parties within twenty (20) days of the date of entry hereof. [1]

Dated: January 20 2015

Rudolph E. Greco, Jr.
J.S.C.

FILED
JAN 22 2015
COUNTY CLERK
QUEENS COUNTY

[1]A courtesy copy of this order has been sent via facsimile to all parties.