STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
)
COUNTY OF BEAUFORT) FOURTEENTH JUDICIAL CIRCUIT

BRUCE R. HOFFMAN,) CASE NO. 2012-CP-07-01352

PLAINTIFF,

vs.

SENECA SPECIALTY INSURANCE COMPANY; CRC INSURANCE SERVICES, INC. D/B/A SOUTHERN CROSS UNDERWRITERS OF SUMTER; AYDLETTE SERVICES OF LOWCOUNTRY, INC.; AND CAPSTONE ISG, INC,

DEFENDANTS.

ORDER

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JERRI ANN ROSENEAU
BEAUFORT COUNTY, S.C.
CLERK OF COURT

This matter is before me on Defendants Seneca Specialty Insurance Company and Capstone ISG, Inc.'s Motion for Summary Judgment. Having read and considered the motion, memoranda of law and submissions from all counsel, and having heard oral arguments by all counsel on October 2, 2013, I hereby grant Defendants Seneca Specialty Insurance Company and Capstone ISG, Inc.'s Motion for Summary Judgment for the following reasons:

FACTS / PROCEDURAL HISTORY

This case arises out of an insurance claim involving the Plaintiff's property located at 574 Sea Island Parkway, Saint Helena Island, South Carolina. On February 3, 2012, Plaintiff reported a loss to his property. The damage was reportedly caused by an infestation of raccoons and possibly other animals in the attic, HVAC system and work spaces of Plaintiff's office building. On February 8, 2012, in response to the Plaintiff's notice of claim, a representative of Defendant Capstone ISG, Inc., Robert Dodd, on behalf of Seneca Specialty Insurance Company,

D CB p. 10 11

personally inspected Plaintiff's office. Dodd Aff. ¶ 3. Through his investigation and conversations with the Plaintiff, Mr. Dodd determined that the damage to Plaintiff's office was, in fact, caused by infestation, waste products and secretions of animals in the duct work of the HVAC system and elsewhere on the Plaintiff's property. Dodd Aff. ¶ 4. Additionally, Mr. Dodd observed animal droppings beneath the office HVAC ducts. Dodd Aff. ¶ 4.

Plaintiff's insurance policy contains the following exclusions:

> B. Exclusions
>
> 2. We will not pay for loss or damages caused by or resulting from any of the following:
>
>   d.(5) Nesting or infestation, or discharge or release of waste products or secretions, by insects, birds, rodents or other animals.
>
> 3. We will not pay for loss or damage caused by or resulting from any of the following, 3.a through 3.c. But if an excluded cause of loss that is listed in 3.a through 3.c results in a Covered Cause of Loss, we will pay for the loss or damage caused by the Covered Cause of Loss.
>
>   c. Faulty, inadequate or defective:
>
>   (4) Maintenance;
>
>   of part of all of any property on or off the described premises.

Seneca Specialty Insurance Company determined that the loss sustained to the Plaintiff's property was caused by animal infestation, which was excluded from coverage under the Plaintiff's insurance policy, and it denied Plaintiff's claim for coverage under the policy on March 15, 2012.

Plaintiff filed this lawsuit on April 3, 2012 alleging causes of action against all Defendants for 1) Breach of Contract; 2) Bad Faith Refusal to Pay Insurance Claim; 3) Declaratory Judgment; and 4) Violations of the S.C. Unfair Trade Practices Act (S.C. Code § 39-5-10 *et seq.*) ("SCUTPA"). Plaintiff moved for summary adjudication on the issue of coverage

DCB
p.2 11

on or around May 4, 2012. Judge Dukes denied Plaintiff's Motion for Summary Judgment/Adjudication on May 30, 2012 finding that the policy language at issue was not ambiguous. *See* Dukes Order p. 4. Plaintiff moved for summary judgment on all causes of action on March 25, 2013, which was denied by Judge Mullen on April 15, 2013. Defendants filed this Motion for Summary Judgment on April 25, 2013.[1]

SUMMARY JUDGMENT LEGAL STANDARD

Summary judgment is appropriate "if 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 the moving party is entitled to a judgment as a matter of law." South Carolina Rules of Civil Procedure (SCRCP) 56(c). Under Rule 56(c), the party seeking summary judgment must clearly establish by the record the absence of a triable issue of fact. *Baughman v. American Tel. & Tel. Co.*, 410 S.E.2d 537, 545 (1991).

To determine whether any triable issues of fact exist, the evidence and all reasonable inferences therefrom must be viewed in the light most favorable to the non-moving party. *Osborne v. Adams*, 550 S.E.2d 319, 320 (2001). After the moving party has met this initial burden, the non-moving party must set forth or point to specific facts showing there is a genuine issue of material fact. *Thomas v. Waters*, 445 S.E.2d 654, 660 (S.C. Ct. App. 1994). The construction and enforcement of an unambiguous contract is a question of law for the court, and thus can be properly disposed of at summary judgment. *Middleborough Horizontal Prop. Regime Council of Co-Owners v. Montedison S.p.A.*, 320 S.C. 470, 477, 465 S.E.2d 765, 770 (Ct. App. 1995).

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[1] As an initial matter, Plaintiff challenges this Court's power to hear this motion due to the fact that he has appealed the granting of Defendant CRC Insurance Services d/b/a Southern Cross Underwriters of Sumter's Motion for Summary Judgment. Under the guidance of S.C. Appellate Court Rule 205 and *Metts v. Mims*, 384 S.C. 491, 682

PCB p. 37 11

LAW / ANALYSIS

Defendants Seneca and Capstone are entitled to summary judgment on all causes of action in the Plaintiff's Complaint for the following reasons: 1) The policy exclusion at issue in this case is clear and unambiguous per the May 30, 2012 Order of Judge Dukes; 2) Plaintiff's reported loss is unambiguously excluded under terms of the Seneca insurance policy, and there is no evidence in the record of bad faith on the part of the Defendants; 3) Plaintiff has failed to prove essential elements of its Unfair Trade Practices Act claim, which is also barred by S.C. Code § 39-5-40; 4) All claims against Defendant Capstone ISG, Inc. fail as a matter of law due to the fact that Capstone is not a party to the underlying insurance contract; and 5) Plaintiff failed to properly answer Defendants' 4/12/2013 Requests to Admit, and therefore, those requests are deemed admitted.

I. The animal exclusion at issue in this case is clear and unambiguous.

An insurance contract is subject to the general rules of contract construction. *Hansen ex rel. Hansen v. United Services Auto. Ass'n*, 350 S.C. 62, 68, 565 S.E.2d 114, 116 - 117 (Ct. App. 2002). "The construction of a contract of insurance, as of other contracts, is the determination of the meaning attached to the words and clauses of the contract." 2 Couch on Ins. § 21:11. "However, it is a well-settled rule that the question of construction can only arise where the language of a policy is susceptible to more than one meaning, and that clear and unambiguous clauses must be accepted as the expression of the intent of the parties, and enforced by the courts as written." 2 Couch on Ins. § 21:11. An ambiguity is required as a prerequisite to construction; however, the rule of ambiguity does not require that the court search for an ambiguity when the meaning of the policy is clear. 2 Couch on Ins. § 21:18. "The purpose of all rules of construction

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S.E.2d 813 (2009), I disagree with Plaintiff's argument. This Court maintains jurisdiction over matters unaffected by the pending appeal.

DCB 1-4-11

is to ascertain the intention of the parties to the contract." *Hansen*, at 116. Where the terms of a contract are clear and unambiguous, its construction is for the court; but where the terms are ambiguous, the question of the parties' intent must be submitted to the jury. *Id.* "A contract is ambiguous when it is capable of more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement and who is cognizant of the customs, practices, usages and terminology as generally understood in the particular trade or business." *Id.* at 117. Furthermore, "[a] contract is ambiguous only when it may fairly and reasonably be understood in more ways than one." *Id.* at 117.

Insurance policies are subject to the general rules of contract construction. *Century Indem. Co. v. Golden Hills Builders, Inc.*, 348 S.C. 559, 565, 561 S.E.2d 355, 358 (2002). "Courts must enforce, not write, contracts of insurance...." *USAA Prop. & Cas. Ins. Co. v. Clegg,* 377 S.C. 643, 655, 661 S.E.2d 791, 797 (2008) (quoting *Sloan Constr. Co. v. Central Nat'l Ins. Co.*, 269 S.C. 183, 185, 236 S.E.2d 818, 819 (1977)). The cardinal rule of contract interpretation is to ascertain and give legal effect to the parties' intentions as determined by the contract language. *Schulmeyer v. State Farm Fire & Cas. Co.,* 353 S.C. 491, 495, 579 S.E.2d 132, 134 (2003). If a contract's language is clear and unambiguous, the language alone, understood in its plain, ordinary, and popular sense, determines the contract's force and effect. *Beaufort Cnty. Sch. Dist. v. United Nat. Ins. Co.*, 392 S.C. 506, 512, 709 S.E.2d 85, 88 (Ct. App. 2011), reh'g denied (May 25, 2011), cert. dismissed (Dec. 20, 2011).

In the present case, there is only one reasonable way to interpret the language of the insurance contract. Plaintiff's insurance policy clearly states that the insurer will not pay for loss or damages caused by or resulting from the "nesting or infestation, or discharge or release of waste products or secretions, by insects, birds, rodents **or other animals.**" In Judge Dukes'

Order Denying Plaintiff's Motion for Summary Judgment dated May 30, 2012, he specifically determined that the word "animal", while broad, is clearly defined, commonly used and well-understood, and he also made the specific reference that these types of exclusions are commonly referred to by many courts as "animal exclusions." *See* Dukes Order p. 4. Judge Dukes further stated and found that the words "other animals" contained in the policy exclusion were not ambiguous. *See* Dukes Order p. 4.

Although Judge Dukes has previously ruled that the applicable exclusion is unambiguous, I also find that the word "animal", while broad, is clearly defined and reasonably understood, and the words "other animals" contained in the insurance policy exclusion at issue in the case are not ambiguous. I further find that the Plaintiff's claim seeks to recover the cost of repairing damage caused by infestation of raccoons, mice and possibly a snake which shed its skin in an HVAC duct's grill. The damages Plaintiff seeks are excluded under his insurance policy.

II. There is no evidence of unreasonableness or bad faith on the part of Defendants Seneca and Capstone.

The evidence in this case establishes that Defendants Seneca Specialty Insurance Company and Capstone ISG, Inc. promptly and fully investigated Plaintiff's claim, and Seneca Specialty Insurance Company's denial of the Plaintiff's claim was appropriate. In *Nichols v. State Farm Mut. Automobile Ins. Co.,* 279 S.C. 336, 306 S.E.2d 616 (1983), the South Carolina Supreme Court recognized an action for bad-faith refusal to pay benefits under an insurance policy. The Court held in *Nichols* that "if an insured can demonstrate bad faith or unreasonable action by the insurer in processing a claim under their mutually binding insurance contract, he can recover consequential damages in a tort action." *Id.,* 306 S.E.2d at 619. Bad faith is defined as "a knowing failure on the part of the insurer to exercise an honest and informed judgment in processing a claim." *Am. Fire & Cas. Co. v. Johnson*, 332 S.C. 307, 311, 504 S.E.2d 356, 358

 PCB p.6 of 11

(Ct. App. 1998). "An insurer acts in bad faith where there is no reasonable basis to support the insurer's decision." *Id.*, 504 S.E.2d at 358. On the other hand, if there is a reasonable basis for denial of the insured's claim, there can be no bad faith. *Crossley v. State Farm Mut. Auto. Ins. Co.*, 307 S.C. 354, 359-60, 415 S.E.2d 393, 396-97 (1992).

In the present case, Defendants Seneca Specialty Insurance Company and Capstone ISG, Inc. fully investigated Plaintiff's claim, and Seneca Specialty Insurance Company's denial of the Plaintiff's claim was appropriate and supported by the investigation of Capstone ISG, Inc. and the surrounding factual circumstances. On the basis of Mr. Dodd's on-site investigation, the representations made by the Plaintiff, himself, as well as personnel from Critter Management that were hired by the Plaintiff, it is uncontroverted that animal infestation was the cause of the damage to the property. Seneca acted appropriately and reasonably in evaluating the Plaintiff's claim. There is no evidence in the record to indicate bad faith on the part of Defendants Seneca and Capstone, and therefore, Defendants' Motion for Summary Judgment should be granted as to those claims in the Plaintiff's Complaint.

III. Plaintiff's Unfair Trade Practices Act claim is barred by the application of S.C. Code § 39-5-40 and also fails for lack of proof of essential elements of a SCUTPA claim.

Under South Carolina's Unfair Trade Practices Act, a plaintiff may only recover when the plaintiff has suffered "any ascertainable loss of money or property . . . as a result of the use or employment by another person of an unfair or deceptive method, act or practice." S.C. Code § 39-5-140(a). However, certain practices and transactions are exempt from the Act. Section 39-5-40 states, in relevant part:

> Nothing in this article shall apply to:
>
> (a) Actions or transactions permitted under laws administered by any regulatory body or officer acting under statutory authority of this State or

DCB 1-19-11

> the United States or actions or transactions permitted by any other South Carolina State law.
>
> . . .
>
> (c) This article does not supersede or apply to unfair trade practices covered and regulated under Title 38, Chapter 57, §§ 38-57-10 through 38-55-320.

S.C. Code Ann. §§ 39-5-40 (a) & (c).

The South Carolina insurance industry is one of the most heavily regulated fields of law and has its own regulatory body to govern the insurance industry. Moreover, the S.C. Legislature has passed unfair practices legislation specifically regulating claims handling by the insurance industry. Recognizing that specific statutory provisions govern the fairness of insurance claims practices, our legislature has exempted those practices from the more general provisions of the SCUTPA. *See Trs. of Grace Reformed Episcopal Church v. Charleston Ins. Co.*, 868 F. Supp. 128, 131 (D.S.C. 1994). The Plaintiff has failed to produce any evidence to establish that the Defendants' actions were in any manner unfair or deceptive, and the Plaintiff did not plead a violation of any South Carolina insurance-related unfair trade or claims practice statute in his Complaint. *See* S.C. Code § 38-57-30 et seq. and S.C. Code § 38-59-20 *et seq.*

Furthermore, even if the Plaintiff was able to establish a breach of contract on the part of the Defendants, a breach of contract between private parties is not enough in order to support a UTPA claim. *Noack Enterprises, Inc. v. Country Corner Interiors*, 290 S.C. 475, 479, 351 S.E.2d 347, 350 (Ct. App.1986) (holding an unfair or deceptive act or practice that affects only the parties to a commercial transaction is beyond the SCUPTA's embrace); *Ardis v. Cox*, 314 S.C. 512, 518-19, 431 S.E.2d, 267, 271 (Ct. App. 1993) (holding a mere breach of contract, even one that is intentional and deliberate, does not constitute a violation of the SCUTPA).

DCB p. 8 / 11

The Plaintiff has also failed to produce any evidence to establish the essential element of impact upon the public interest. The statute is not available to redress a private wrong where the public interest is unaffected. Absent proof of that element, Plaintiff's SCUTPA claim fails as a matter of law. *See Taylor v. Medenica*, 324 S.C. 200, 479 S.E.2d 35 (1996); *Daisy Outdoor Advertising Co. v. Abbott*, 322 S.C. 489, 473 S.E.2d 47 (1996).

For these reasons, Plaintiff's SCUTPA claim fails as a matter of law, and the Defendants' Motion for Summary Judgment should be granted, accordingly.

IV. Plaintiff's claims against Defendant Capstone ISG, Inc. fail as a matter of law because Capstone is not a party to the underlying insurance contract.

It is well established in South Carolina that the duties arising out of an insurance contract do not extend to an such as Capstone ISG, Inc., an independent adjuster hired by Defendant Seneca Specialty Insurance Company, who is not a party to the contract. *See Charleston Dry Cleaners & Laundry, Inc. v. Zurich American Ins. Co.*, 355 S.C. 614, 618, 586 S.E.2d 586, 588 (2003) (independent adjusters are not parties to the contract and therefore cannot be held liable for a breach or bad faith); *Carter v. American Mut. Fire Ins. Co.*, 279 S.C. 368, 307 S.E.2d 227 (1983) (a cause of action does not extend to a person who is not a party to or a named insured under the insurance contract); *Carolina Bank and Trust Co. v. St. Paul Fire and Marine Co.*, 279 S.C. 576, 310 S.E.2d 163 (Ct. App. 1983) (the duty of good faith in the performance of obligations based on or arising under the contract does not extend to a person who is not a party to the insurance contract, affirming dismissal of bad faith claim).

Accordingly, the Defendant Capstone ISG, Inc. cannot be held liable for bad faith refusal to pay benefits, as it is not a party to the insurance contract with the Plaintiff, and therefore, summary judgment is appropriate as to all causes of action alleged in the Plaintiff's Complaint against Defendant Capstone ISG, Inc.

DCB
p. 9 of 11

V. Plaintiff failed to properly answer Defendants' Requests to Admit, and therefore, those matters are deemed admitted.

On April 12, 2013, Defendants Seneca Specialty Insurance Company and Capstone ISG, Inc. served the following Requests to Admit to the Plaintiff, pursuant to Rule 36 of the South Carolina Rules of Civil Procedure.

REQUESTS TO ADMIT

1. Admit that a raccoon is an animal.
2. Admit that raccoons or other animals caused damage to the subject property.
3. Admit that on February 3, 2012, Plaintiff made a claim for damages to the subject property to Defendant Seneca Specialty Insurance Company.
4. Admit that on February 8, 2012, Robert Dodd of Capstone ISG, Inc. personally inspected the Plaintiff's property on behalf of Seneca Special Insurance Company.
5. Admit that the attached photographs of the subject property were taken by Robert Dodd during his inspection on February 8, 2012.
6. Admit that the photographs depict damage to the subject property caused by animals.
7. Admit that the photographs depict damage to the subject property caused by animal infestation.
8. Admit that the photographs depict damage to the subject property caused by animal waste products and/or secretions.

Defendants Requests to Admit, 4/12/2013, Ex. I.

The only response to these requests from the Plaintiff was included in a letter dated May 16, 2013, addressed to Cheri L Young, a court reporter, to which all counsel was copied, wherein the Plaintiff was ordering a transcript in connection with his appeal of the order granting summary judgment in favor of Defendant CRC Insurances Services Inc. At the end of the letter Plaintiff included the following statement: "BPS: As to Requests to Admit served by Seneca and Capstone on 4/12/2013, they are all denied given the present circumstances of this case." The letter was signed by the Plaintiff's office staff, not the Plaintiff, and, as mentioned above, the appeal of the order granting summary judgment in favor of Defendant CRC Insurances Services

Pit p. 10 of 11

Inc. did not affect the Plaintiff's claims against the remaining defendants, and the appeal did not obviate the need for the Plaintiff to admit or deny each request, which he has failed to do.

This response fails to comport with the requirements of Rule 36 of South Carolina Rules of Civil Procedure, and thus, Defendants' Requests should be deemed admitted. Not only did this document fail to separately answer each of the Defendants' Request to Admit, as required by SCRCP 36, it also was not signed by the "party or his attorney", as it was clearly only signed and sent from Hoffman's office staff. *See* SCRCP 36(a). As such, Plaintiff's failure to properly answer Defendants Requests to Admit renders all matters included in those requests conclusively admitted. *Scott v. Greenville Housing Authority*, 353 S.C. 639, 645-46, 579 S.E.2d 151, 154 (Ct. App. 2003).

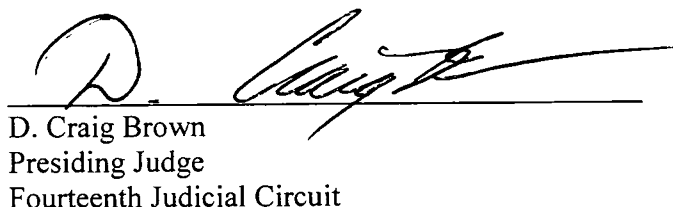
Consequently, there are no genuine issues of material fact for a jury to decide in this case, and the grant summary judgment in favor of Defendants Seneca Specialty Insurance Company and Capstone ISG, Inc. is appropriate.

CONCLUSION

For the foregoing reasons, I hereby **GRANT** Defendants Seneca Specialty Insurance Company and Capstone ISG, Inc.'s Motion for Summary Judgment on all causes of action contained in the Plaintiff's Complaint.

IT IS SO ORDERED.

10-24, 2013



D. Craig Brown
Presiding Judge
Fourteenth Judicial Circuit

DCB p. 11 of 11