

NA 06-0149-C h/h Spicer v Liberty Mutual
Judge David F. Hamilton

Signed on 6/27/07

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
NEW ALBANY DIVISION

EDWARD DALE SPICER,)	
ANITA SPICER,)	
)	
Plaintiffs,)	
vs.)	NO. 4:06-cv-00149-DFH-WGH
)	
LIBERTY MUTUAL FIRE INSURANCE)	
COMPANY,)	
)	
Defendant.)	

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
NEW ALBANY DIVISION

EDWARD DALE SPICER and)	
ANITA SPICER,)	
)	
Plaintiffs,)	
)	
v.)	CASE NO. 4:06-cv-0149-DFH-WGH
)	
LIBERTY MUTUAL FIRE INSURANCE)	
COMPANY,)	
)	
Defendant.)	

ENTRY ON DEFENDANT’S MOTION FOR PARTIAL SUMMARY JUDGMENT

On November 20, 2005, fire destroyed the residence of plaintiffs Edward and Anita Spicer in Austin, Indiana. The Spicers filed a property damage claim under their homeowners insurance policy issued by defendant Liberty Mutual Fire Insurance Company. Liberty Mutual denied the claim because it believed the Spicers had deliberately caused the fire. The Spicers filed this lawsuit in state court alleging that the denial breached the insurance contract and that Liberty Mutual acted in bad faith in its investigation and handling of their claim. Liberty Mutual removed the case to this court based on diversity jurisdiction. Liberty Mutual has filed a motion for partial summary judgment on the Spicers’ bad faith claim, leaving the breach of contract claim for trial. As explained below, Liberty Mutual’s motion for partial summary judgment must be granted. Plaintiffs

concede that Liberty Mutual had ample reason to deny coverage. Instead, plaintiffs rely on the unprecedented and unsupported theory that Liberty Mutual acted in bad faith by failing to deny their claim sooner.

Standard of Review

Summary judgment must be granted “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c). The motion should be granted if no rational fact finder could return a verdict in favor of the non-moving parties. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A court’s ruling on a motion for summary judgment is akin to that on a directed verdict. The essential question for the court on both is “whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.” *Id.* at 251-52. When ruling on the motion, the court must construe the evidence in the light most favorable to the non-moving parties and draw all reasonable inferences in those parties’ favor. *Id.* at 255. If the non-moving parties bear the burden of proof on an issue at trial, those parties “must set forth specific facts showing that there is a genuine issue for trial.” Fed. R. Civ. P. 56(e); see also *Silk v. City of Chicago*, 194 F.3d 788, 798 (7th Cir.1999). The moving party need not positively disprove

the opponents' case; rather, it may prevail by establishing the lack of evidentiary support for that case. See *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986).

Undisputed Facts

The following facts are undisputed or reflect the evidence in the light reasonably most favorable to the plaintiffs. Liberty Mutual insured the Spicers' home at 42 Wilbur Avenue in Austin, Indiana. A fire destroyed the home on November 20, 2005. The claim was reported to Liberty Mutual that same day by Anita Spicer. The telephone call she made to report the loss was recorded. After obtaining some basic information on the loss, the Liberty Mutual representative on the telephone provided Mrs. Spicer with a claim number and promised a local representative would be in touch by the following day. The following morning, a Liberty Mutual representative met with the Spicers at the scene of the fire and gave them a check for \$5,000 as an advance on policy proceeds.

Liberty Mutual assigned Robert Fredrickson to the claim file and assigned Ronald Zielke as the primary senior claims adjuster on the file. Liberty Mutual also contracted with Donan Engineering to investigate the cause and origin of the fire. A Donan Engineering investigator visited the scene on November 21st and November 23rd. State Fire Marshal Investigator Andy Long also performed his inspection on November 23rd. Both Donan Engineering and the State Fire

Marshal ultimately concluded that the fire had started in the Spicers' bedroom and had been set deliberately.

Liberty Mutual's further investigation also revealed that the Spicers had owned the home for twelve years and that it was listed for sale at the time of the fire. They were asking \$80,000 for the home but had yet to receive an offer on it. Edward Spicer gave a statement indicating that he had purchased the property for \$32,000 in 1992, but he had a mortgage balance of approximately \$52,000 and a second mortgage of approximately \$15,000. A review of the Spicers' credit history informed Zielke that the couple had other unpaid debts of over \$13,000. Edward Spicer cleared approximately \$406 per week from his weekly paycheck. Anita Spicer was not employed. Edward's daughter had lived with the couple through October 2005, but had left a few weeks before the fire to live with her aunt, taking with her the \$500 per month in Social Security benefits that had been paid previously to her father on her behalf. With fixed monthly bills running in excess of \$1,200 and unpaid medical bills in the thousands of dollars, the Spicers had little income left to purchase food, gas, and other items. Edward had recently taken out a cash advance on his credit card to cover expenses.

By December 28, 2005, Liberty Mutual had received the State Fire Marshal's investigative report and the report of Donan Engineering, both of which ruled out accidental causes and opined that there were irregular burn patterns and multiple points of origin, all consistent with the intentional use of an ignitable fluid. On

January 5, 2006 Liberty Mutual informed the Spicers that their claim was still under investigation and that they would need to submit to an examination under oath pursuant to policy provisions. The attorney retained by Liberty Mutual to conduct the examination did not contact the Spicers until the last day of January. The examinations were conducted on February 20, 2006.

When the Spicers gave their statements under oath, they indicated that they awoke from the sound of the smoke alarm and found smoke filling the room from a fire in the closet. Edward said the room was full of black smoke; Anita described the smoke as white. Edward said he fell asleep watching television in the bedroom; Anita said that the television had been left on in the living room, not the bedroom. They both were able to grab their car keys on the way out of the home. Contrary to her usual practice, Anita had left her purse with her cell phone in the car, so she was able to notify the insurance company promptly. During the course of the investigation, she gave inconsistent statements regarding how she was able to obtain the insurance company's telephone number. Once she said the number was on a receipt in her purse. Another time she said she called an operator. Edward, in addition to confirming that he had pled guilty to a criminal charge of arson five or six years earlier, provided some inconsistent information regarding his attempts to contact emergency personnel through 911. His testimony also raised questions about Anita's testimony regarding where they kept the insurance policy information.

On April 17, 2006 Liberty Mutual notified the Spicers that their claim was being denied because the policy excludes coverage for fire damage resulting from fires set by or at the direction of the insureds. Additional facts are noted below as needed, keeping in mind the standard for summary judgment.

Discussion

The Spicers concede that Liberty Mutual had evidence indicating that the Spicers probably committed arson and that the Spicers therefore lack evidence sufficient to support a finding that Liberty Mutual acted in bad faith in denying coverage. See Pl. Br. at 5, 7. Instead, the Spicers argue that Liberty Mutual should have denied their claim even earlier, sometime near the end of December, when the company had information regarding their financial situation and after both fire investigation reports found that the fire was intentionally set. The Spicers argue that Liberty Mutual was merely preparing for litigation after that point, in particular by obtaining sworn testimony from the Spicers before they had any reason to retain legal counsel.

Apparently, the Spicers believe that they would have been better off if their claim had been denied more quickly. Such a quick denial would have simply left Liberty Mutual in a vulnerable position for having arguably denied the claim too quickly. By charging their insurer with undue delay in *denying* their claim, the Spicers offer a unique argument, one designed to force insurers looking at dubious claims to worry about the prospect punitive damages both for denying claims too quickly and for denying them too slowly. Plaintiffs offer this argument without providing legal authority that directly supports their position and little if any precedent from which one might find the potential for acceptance of such a theory by Indiana courts under these circumstances. Plaintiffs cite the

benchmark Indiana Supreme Court case that recognized the duty of an insurer to deal in good faith with an insured, see *Erie Ins. Co. v. Hickman*, 622 N.E.2d 515 (Ind. 1993), but they make no real effort to apply its analysis to the facts of this case.

In this diversity case, this court's role is to apply state law as it believes it would be applied by the highest court in that state. *State Farm Mut. Auto. Ins. Co. v. Pate*, 275 F.3d 666, 669 (7th Cir. 2001). In their brief, the Spicers make the accurate but very broad statement that in Indiana, an insurer's duty to act in good faith encompasses more than the act of denying coverage. See *Monroe Guaranty Ins. Co. v. Magwerks Corp.*, 829 N.E.2d 968, 976 (Ind. 2005). The general obligation of an insurer to act in good faith was recognized by the Indiana Supreme Court in *Erie Ins. Co. v. Hickman*, 622 N.E.2d 515 (Ind. 1993). In *Monroe Guaranty* the Indiana Supreme Court reaffirmed, without expanding, its earlier statements in *Hickman* regarding the general obligations of insurers:

In *Hickman* we specifically declined to determine the precise extent of an insurer's duty to deal in good faith. Instead we made a few general observations as follows:

The obligation of good faith and fair dealing with respect to the discharge of the insurer's contractual obligation includes the obligation to refrain from (1) making an unfounded refusal to pay policy proceeds; (2) causing an unfounded delay in making payment; (3) deceiving the insured; and (4) exercising any unfair advantage to pressure an insured into a settlement of his claim.

Monroe Guaranty, 829 N.E.2d at 976.

While it is clear that the Indiana Supreme Court did not intend the four examples listed in *Hickman* to be the exclusive list of bad faith actions that an insurer can take, it is also clear that the focus of the decision was its interpretation of the law in a manner that discourages insurers from adopting a default denial mode or some other deceptive claims processing methodology. In this case, there is no evidence of deception or an ulterior motive on the part of Liberty Mutual. The Spicers have not cited, and this court has not found, a decision by any court finding that an insurer acted in bad faith by being as certain as possible that it was doing the right thing by denying a claim.

The Spicers want the court and a jury to infer that they were prejudiced in this litigation by having to provide sworn responses to questions put to them regarding the fire and their life circumstances as a part of the ongoing investigation. They complain that they did not have an attorney at the time they gave the statements. They offer no suggestion of how that actually damaged them here. The oath required them to give truthful responses, regardless of whether or not they were represented by counsel. If there were questions that should not have been asked or answered, the Spicers have not made the court aware of any. Nor have they identified any answer they gave that has prejudiced them in any fashion and or that they would not have given if they had been represented by counsel. Further, it would require naiveté beyond that afflicting most jurists for a court to conclude that a quick claim denial by Liberty would have made the

Spicers happy and no bad faith claim would have accompanied their assertion of contract breach in this lawsuit.

Perhaps one might imagine a situation where an insured could be prejudiced because the insurer kept a claims investigation open longer rather than denying the claim as soon as it suspected that the claim should be denied, but this is not that situation. The court assumes for purposes of summary judgment that Liberty Mutual thought it was likely to deny the claim after learning that the two fire investigators believed the fire was set deliberately and that the Spicers' credit report suggested a potential financial motive for arson. However, nothing in the law requires an insurer to alert its insureds when it starts to have some doubts about the honesty of any claim being made.¹ The insurer is required only to exercise good faith in going about its business of processing the claim.

The undisputed evidence here shows that Liberty Mutual took extra steps to ensure that it was not prematurely denying the Spicers' claim. Liberty Mutual hired independent counsel to conduct the examinations under oath of the Spicers and to make a recommendation based on that examination. Liberty Mutual

¹The Spicers complain that they did not learn until after their claim was denied that the Fire Marshal and Donan Engineering had issued fire investigation reports. This complaint rings hollow where the undisputed facts show that the Spicers were aware of and spoke with both of the investigators and understood their roles when they were on the scene. The Fire Marshal's report is a public record and was equally available to the Spicers. And, while public record laws would not have allowed the Spicers to obtain the report from Donan Engineering, the court is aware of no law that requires an insurer to turn over immediately to an insured any private investigative report.

avoided an automatic assumption, likely made by many, that an insured who previously had pled guilty to arson probably repeated the crime when his financial situation left him with few options and when two investigations showed that the fire had been set deliberately. In short, by taking extra steps to assure that it was correct when denying a claim on the basis of suspected arson by its own insured, Liberty Mutual was understandably operating in a cautious mode. Based on the undisputed facts, that was prudent, not tortious, conduct. No reasonable jury could find that Liberty Mutual acted in bad faith by not denying the claim earlier.

Conclusion

The Spicers' unique theory that Liberty Mutual acted in bad faith by not denying their claim sooner is not supported by legal precedent, the evidence, or common sense. It is founded on a purely speculative theory that Liberty Mutual waited to deny the claim to obtain an advantage during continued fact gathering, which it used because it anticipated litigation over the denial of the claim. Defendant's Motion for Partial Summary Judgment (Docket No. 29) is granted. At the close of this matter judgment will be entered in favor of the defendant and against the plaintiffs on the bad faith claim in the complaint. Plaintiffs' claim of breach of insurance contract shall proceed in accordance with the dates and deadlines established in the case management plan.

So ordered.

Date: June 27, 2007

DAVID F. HAMILTON, JUDGE
United States District Court
Southern District of Indiana

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