IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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NBI, INC.,

Plaintiff,

v.

GULF INSURANCE COMPANY,

Defendant.

OPINION AND ORDER

03-C-0265-C

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In this civil action for monetary relief, plaintiff NBI, Inc. sued defendant Gulf Insurance Company for breach of contract, alleging that defendant had wrongfully refused to defend a suit filed by David Bruce Westrate against plaintiff in December 2000. Plaintiff sought recovery for the legal expenses it incurred defending the Westrate litigation and pursuing the present suit. On December 16, 2003, I entered an order granting plaintiff's motion for summary judgment, denying defendant's motion to dismiss, denying plaintiff's motion for an award of costs and fees incurred in this action and granting plaintiff's motion for an award of fees and costs incurred in the Westrate action. Because defendant had not had an opportunity to conduct discovery regarding plaintiff's alleged expenses or to respond to plaintiff's request for prejudgment interest, I gave defendant until January 30, 2004, to

file objections. Plaintiff had until February 17, 2004 to respond.

Presently before the court are motions by both plaintiff and defendant for reconsideration of the December 16 order. Plaintiff moves for reconsideration of the decision denying the award of attorney fees and costs incurred in this action. Defendant moves for reconsideration of the decision granting plaintiff's motion for summary judgment, arguing that material questions of fact exist about whether defendant had a duty to defend plaintiff in the Westrate action under the terms of the insurance policy. In addition, both parties have responded to plaintiff's request for prejudgment interest and $243,981.58 in attorney fees and costs incurred in the Westrate action.

A. Motions to Reconsider

In the December 16 opinion and order, I concluded that defendant had a duty to defend plaintiff in the Westrate action because it was fairly debatable that the action fell within the scope of the policy's exclusionary language. In making this decision, I looked solely within the four corners of the complaint in the Westrate action. Fireman's Fund Ins. Co. v. Bradley Corp., 2003 WI 33 ¶ 19, 261 Wis. 2d 4, 18, 660 N.W.2d 666 ("[T]he duty to defend is based solely on the allegations 'contained within the four corners of the complaint,' without resort to extrinsic facts or evidence.").

In addition, I determined that plaintiff was not entitled to attorney fees and costs

incurred in this litigation because it waived them in an October 2002 letter of agreement. The agreement stated that "[i]n order to avoid the necessity for either of our clients to engage in coverage litigation with each other prior to the final resolution of the Westrate Litigation . . . [plaintiff] waive[s] any claims for bad faith against Gulf as well as any claims, whether in contract, tort, or any other theory, for extra-contractual relief beyond the terms, provisions, and limits of liability of the Gulf policy." The language of the letter of agreement is unambiguous on its face, thereby precluding a need to look at extrinsic evidence to help interpret the contract. Wisconsin courts do not look outside the four corners of contracts that are unambiguous on their face. Energy Complexes, Inc. v. Eau Claire County, 152 Wis. 2d 453, 467-68, 449 N.W.2d 35 (1989).

Defendant argues that the court erred in granting plaintiff's motion for summary judgment because: 1) the court did not give adequate consideration to the "notice letter," which plaintiff's controller sent to defendant in January 2001, notifying defendant of the Westrate action and its relationship to a previous lawsuit; 2) the court failed to consider the letter from plaintiff's counsel, Michael Auen, even though that letter was part of the record; and 3) defendant had not obtained any discovery to show the relatedness of the Westrate action and the previous divorce action. Defendant's argument is unavailing. As I stated in the December 16, 2003, opinion and order, I am bound by the four-corners rule. The contents of the notice letter and Auen's letter as well as any additional discovery is extrinsic

evidence that Wisconsin law prohibits courts from considering when determining whether defendant had a duty to defend. Furthermore, although the Auen letter was part of the record, defendant failed to cite that letter as part of its proposed findings of fact. As explained in this court's Procedures for Summary Judgment Motions, "[T]he statement of proposed findings of fact shall include ALL factual propositions the moving party considers necessary for judgment in the party's favor." See Procedure I(B)(3).

As to plaintiff's motion for reconsideration, plaintiff is convinced that under principles of equity and the Wisconsin policy of protecting insureds, Wisconsin state courts would grant insureds attorney fees and costs incurred when establishing coverage as part of the insurance contract. Therefore, the attorney fees and costs in the present action are not extra-contractual and should be covered despite the October 2002 letter of agreement. I disagree. In the December 16 opinion and order I concluded that the insurance policy does not provide an explicit remedy for the breach of the duty to defend. The October 2002 letter of agreement unambiguously states that plaintiff waives extra-contractual relief in exchange for defendant's forfeiture of the opportunity to seek declaratory judgment on its duty to defend plaintiff in the Westrate action. Therefore, plaintiff waived its right to seek attorney fees and costs incurred in establishing defendant's duty to defend it in the Westrate action. What the Supreme Court of Wisconsin might do in other cases is of no import; plaintiff contractually waived any benefit to obtaining attorney fees and costs in this action.

Moreover, an award of attorney fees and costs under principles of equity would be "extra-contractual," which would contradict plaintiff's argument that its request for fees and costs in this action are not extra-contractual.

As a result, I am not persuaded that the December 16, 2003 order contained errors in law or fact. In addition, the parties have not raised new issues of fact to justify a different decision. Rothwell Cotton Co. v. Rosenthal & Co., 827 F.2d 246, 251 (7th Cir. 1987) (motions for reconsideration serve limited function: to correct manifest errors of law or fact or present newly discovered evidence). This court gave considered attention to the matters addressed in the December 16, 2003, order before rendering its decision. I do not intend to revisit the matters again. If the parties believe this court erred in its decision, they are free to raise the matter on appeal when the case is complete. Accordingly, I will deny the motions for reconsideration submitted by plaintiff and defendant.

B. Prejudgment Interest and Attorney Fees and Costs in Westrate Action

Wis. Stat. § 628.46 requires insurers that fail to pay a claim within 30 days to pay 12% interest on that claim. Plaintiff contends that it is entitled to such prejudgment interest. Defendant argues that prejudgment interest is extra-contractual and therefore subject to plaintiff's waiver of extra-contractual damages.

I conclude that, as with the attorney fees and costs for this action, plaintiff's request

for prejudgment interest is extra-contractual. Therefore, plaintiff waived its entitlement to such interest in the October 2002 letter of agreement.

An insurer owes a general duty of settling or compromising a claim made against an insured. Mowry v. Badger State Mutual Casualty Co., 129 Wis. 2d 496, 510, 385 N.W.2d 171, 178 (1986). In addition, an insurer has a duty to protect itself to the extent of its liability. Howard v. State Farm Mutual Automobile Ins. Co., 60 Wis. 2d 224, 227, 208 N.W.2d 442, 443 (1973) (insurer has duty not only to protect itself to extent of its liability but must act in good faith to protect interest of its insured). Defendant acted reasonably in August 2002 when it stated that it would seek a declaratory judgment regarding coverage. Plaintiff did not want defendant to take such action while the Westrate action was pending in the Circuit Court for Eau Claire County. Plaintiff and defendant entered into a letter of agreement in which each side gave up a duty or right. Had defendant proceeded with the declaratory judgment, at the very least, it would have been liable for less prejudgment interest. Plaintiff vowed not to pursue such extra-contractual relief in exchange for defendant's giving up its duty to protect itself to the extent of its liability.

The insurance contract does entitle plaintiff to recoup attorney fees and costs incurred in defending the Westrate action. Of the requested $243,981.58 in attorney fees and costs, defendant asks the court to deduct $10,155.00 because that amount represents attorney fees for activities unrelated to the Westrate action. Defendant contends that plaintiff failed to

state the purpose for another $296.20 in costs associated with Lexis, photocopies and postage and therefore, the court should deduct that amount from the final award. In response, plaintiff argues that all of its fees and costs relate to the Westrate action, except that the court may deduct $110 from the requested amount because plaintiff is unsure of the purpose for that charge.

After reviewing plaintiff's explanation of the disputed charges, I agree that most of the charges relate to reasonable fees and costs that plaintiff incurred in the Westrate litigation. However, in addition to the $110 charge, plaintiff fails to explain the purpose of two charges by Richard Burnham: one relating to "work on insurance issues" on June 17, 2002, and another for "research insurance coverage issues" on June 19, 2002. The amount of these two charges totals $550. As the fee applicants, plaintiff "bears the burden of establishing entitlement to an award and documenting the appropriate hours expended and hourly rates." Hensley v. Eckerhart, 461 U.S. 424, 437 (1983). Because plaintiff failed to explain those two charges and it agreed to deduct $110 from the total award, I will deduct $660 from plaintiff's request for attorney fees and costs incurred in the Westrate action. Accordingly, plaintiffs are entitled to an award of attorney fees and costs in the amount of $243,321.58 ($243,981.58-$660.00).

ORDER

IT IS ORDERED that

1. Plaintiff NBI, Inc.'s motion for reconsideration of the December 16, 2003 decision denying the award of attorney fees and costs incurred in this action is DENIED;

2. Defendant Gulf Insurance Company's motion for reconsideration of the December 16, 2003 decision granting plaintiff's motion for summary judgment is DENIED;

3. Plaintiff's request for attorney fees and costs incurred in the Westrate action is GRANTED in part and DENIED in part; plaintiff is awarded $243,321.58 in attorney fees and costs.

4. The clerk of court is directed to enter judgment for the plaintiff and close this case.

Entered this 23rd day of February, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge