

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2004-005358

07/23/2008

HONORABLE J. KENNETH MANGUM

CLERK OF THE COURT
D. Glab
Deputy

LOREN HEFLING, et al.

DANIEL B TREON

v.

COLORADO CASUALTY INSURANCE
COMPANY, et al.

STEVEN PLITT

MARK E GOVE
PHILIP A OVERCASH
RICHARD T TREON

RULING

This matter having been under advisement, the following constitutes the Court's ruling.

PROCEDURAL BACKGROUND

Defendant, licensed public adjuster, James F. O'Toole [hereinafter "O'Toole"], brought two claims against Plaintiff, Colorado Casualty Insurance Company [hereinafter "Colorado"]. Both claims were for "holding up to false light." More specifically, one claim regards O'Toole's estimate of damage incurred by TNT Hardware from the Rodeo-Chediski fire and the other claim regards O'Toole's estimate of damage incurred by Horizon Heating from the same fire.

On September 9, 2005, Judge Davis dismissed all claims against Colorado. O'Toole appealed and the Court of Appeals affirmed all dismissals, except the claim involving TNT Hardware, which was remanded.

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Now Colorado is requesting summary judgment against O'Toole. Because all other claims have been dismissed, only O'Toole's claim of false light in regards to TNT Hardware is at issue.

FACTUAL BACKGROUND OF THE CLAIM

In the summer of 2002, the Rodeo-Chedeski Fire caused damage to 468,000 acres of land, which stretched over 22 communities.

The fire allegedly caused damage to TNT Hardware and the owners of TNT Hardware hired O'Toole for assistance with their insurance claim.

Shortly after the fire, the owners of TNT hardware hired O'Toole to determine the value of damages to the building. On July 8, 2002, TNT Hardware submitted a claim for \$126,700 to Colorado.

Colorado representative Jon Peterson inspected the property for damages in late August 2002. Also present for the inspection were Frontier Adjusters' representative Ken Wood and O'Toole's colleague, Len Rougemont.

In an affidavit submitted with O'Toole's previous motion for summary judgment, Rougemont stated that during the visit he saw smoke damage to TNT Hardware's exterior and interior, with soot and ash covering the store's contents, shelving, floor, and ceiling. Rougemont also claims there were soot-saturated cobwebs hanging from the ceilings and the presence of a strong smoke odor within the property. According to Rougemont, Peterson told Wood the building's insulation was dark from smoke.

On or about August 28, 2002, Peterson sent an intra-company email stating "there is the possibility of some very minor smoke residue in the interior of the building." On September 4, 2008, Peterson sent another intra-company email stating "We walked through the hardware store, and although the 'smoke damage' is possibly there, extremely slight almost indistinguishable [sic] from dust, [O'Toole's] estimate is inflated to the point of almost being fraudulent." Still, Peterson estimated damages to the building to be valued at \$100,000.

O'Toole submitted an additional \$152,878.19 claim for damage to TNT Hardware on September 17, 2002.

Shortly after O'Toole's claim for the additional \$152,878.19, Duane Jones of hero Cleaning and Emergency Services told O'Toole that, based upon his own inspection, the clean-up of TNT Hardware would cost \$126,700.

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Because of the disparity between Colorado's estimate of damages and O'Toole's estimate of damages, Frontier representative Kenny E. Overholt and Donnie Neff conducted another inspection of TNT Hardware on October 18, 2002.

Neff testified that he was unable to find "the heavy smoke damage that the insured was talking about" and observed only "light" smoke damage to the store. Neff further testified that there was a great deal of dust inside the store, but attributed the dust to the gravel parking lot outside of the store. According to Neff, there was a small amount of smoke damage on the ceiling of the main retail store, but he attributed the damage to what he believed was a wood stove near the damaged area (a witness later identified the stove inside the store as a gas-burning stove).

Colorado's fraud investigator, Barbara Mazur, filled out a fraud referral form regarding O'Toole's estimates of damage incurred by TNT Hardware three days after the investigation by Overholt and Neff (October 21, 2002). The form against O'Toole alleged fraud as to both "extent of damages" and "whether or not there is smoke damages."

Colorado hired expert IHI Environmental, which inspected TNT Hardware on December 20, 2002. IHI issued a report on January 29, 2003, which documented smoke damage, but attributed it in part to the "wood burning" stove. O'Toole then hired his own expert, who vigorously disputed IHI's report.

On March 24, 2003, Colorado denied TNT's claim. Notably, on October 16, 2003, Grocers Insurance returned an appraisal award to Overgaard Market of \$75,803.91 for smoke damage to its building and an award of \$73,140.40 for smoke damage to contents inside the building.

The following chart illustrates the different TNT Hardware damage estimates and the actual award to Overgaard Market.

Neff & Overholt's Estimate of Damages to TNT	Peterson's Estimate of Damages to TNT	O'Toole's Estimate of Damages to TNT	Overgaard's Award for Damages
\$12,553.59	\$100,000	\$279,578.19	\$148,944.31

RELEVANT LAW & ITS APPLICATION

The pertinent statutes and legal principles are as follows:

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A.R.S. § 20-466(G):

An insurer who believes a fraudulent claim has been or is being made shall send to the director, on a form prescribed by the director, information relative to the claim including identity of parties claiming loss or damage as a result of an accident and any other information the fraud unit may require.

A.R.S. § 20-466(K):

A person, or an officer, employee or agent of the person acting within the scope of employment or agency of that officer, employee or agent, who *in good faith* files a report or provides other information to the fraud unit pursuant to this section is not subject to civil or criminal liability for reporting that information to the fraud unit. (emphasis added)

Blacks Law Dictionary, 7th ed. 1999, defines good faith as:

A state of mind consisting in

- (1) honesty in belief or purpose,
- (2) faithfulness to one's duty or obligation, . . . or
- (4) absence of intent to defraud or to seek unconscionable advantage

Colorado filed a department fraud referral form in regards to O'Toole's estimates, claiming fraud in regards to both "extent of damages" and "whether or not there is smoke damage." While the Court of Appeals affirmed dismissal of O'Toole's fraud claim involving "extent of damages," it remanded the fraud claim for "whether or not there is smoke damage."

As shown on the previous chart, the inspection which estimated the lowest amount of damage to TNT Hardware (the inspection performed by Neff and Overholt) still believed there to be *some* amount of damage. Specifically, the estimate of damages from that inspection was \$12,553.59. Colorado was aware of this inspection and all other inspections of TNT Hardware. Arguably, there was more than sufficient evidence for Colorado to believe that there was some damage. Importantly, there is no evidence suggesting Colorado has reason to believe that the fire caused *no* damage to TNT Hardware.

Accordingly, there is a genuine issue of material fact as to whether Colorado acted in good faith when it filed its department fraud claim for "whether or not there is smoke damage."

HOLDING

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IT IS ORDERED denying Colorado Casualty's motion for summary judgment.