

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2001-016847

10/20/2003

HON. JONATHAN H. SCHWARTZ

CLERK OF THE COURT
D. Glab
Deputy

FILED: 10/23/2003

MIKE HURTADO, et al.

THOMAS B DIXON

v.

FOREMOST INSURANCE COMPANY, et al.

ROBERT NMI MACKENZIE

JAMES W EVANS

MINUTE ENTRY

2:15 p.m. This is the time set for oral argument on various motions. Plaintiff is represented by counsel, Thomas B. Dixon. Defendant Foremost is represented by counsel, Robert NMI MacKenzie. Defendant Steamatic is represented by counsel, James W. Evans.

A record of the proceeding is made by CD/videotape in lieu of a court reporter.

A discussion is held.

Plaintiff's Motion for Partial Summary judgment regarding Steamatic's Violation of A.R.S. Section 32-1151 is argued.

IT IS ORDERED granting Plaintiff's Motion for Partial Summary Judgment regarding the limited issue of whether Steamatic needed a contractor's license to remove sections of drywall at Plaintiff's mobile home on the date in question. The Court determines as a matter of law with the facts available to date that Steamatic did need to have a contractor's license to perform the drywall work in question. Steamatic does not qualify for the exception under A.R.S. Section 32-1121(A)(14) because Steamatic's advertising does not disclose that Steamatic is unlicensed. The Court does conclude however, that the exception for work under \$750 would have applied to the drywall work done by Steamatic because the Court concludes that the total amount of future work possibly to be done should not be considered. The specific act of tearing out drywall is demolishing a part of the Plaintiff's mobile home. A.R.S. Section 32-1101(a) and Section 32-1101(4) and Attorney General Opinion 62-5-L.

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Mr. Evans leaves the courtroom.

Plaintiff's Motion for Partial Summary Judgment regarding Foremost's Breach of the Appraisal Clause is argued.

IT IS ORDERED granting in part and denying in part Plaintiff's Motion for Partial Summary Judgment Re: Foremost's Breach of the Appraisal Clause. The Court concludes that there is no dispute of fact that the ruptured pipe under the Plaintiff's kitchen sink was covered under the policy. Foremost breached the appraisal clause by not submitting that issue only to the appraisal process even though Plaintiff's public adjustor was requesting that all claims (even disputed coverage claims) be submitted to the appraisal process. The Court finds that the issue of coverage was not for the appraisal process and that the appraisal clause did not require the dollar amount of the claims that were disputed as to coverage to be appraised. Therefore, on one of the claims the clause was breached, but on the other two claims it was not breached.

Plaintiff's Motion for Partial Summary Judgment Re: Three Legally Invalid Liability Theories is argued.

IT IS ORDERED granting in part and denying in part Defendant's Motion for Partial Summary Judgment Re: Three Legally Invalid Liability Theories. The Court finds that Plaintiff will be precluded from using the Arizona Unfair Claim Settlement Practices Act to support a claim for insurance bad faith. The Court finds that Defendant cannot be held vicariously liable for Steamatic. However, if Plaintiff proved that Steamatic caused a loss to Plaintiff's property that was covered under the insurance policy with Foremost, then Foremost would be liable as an insurer. Summary Judgment is granted on the breach of contract claim regarding the appraisal clause as it relates to two claims over which coverage was disputed. Summary Judgment is denied on the breach of contract claim as to the pipe under the kitchen sink. Summary Judgment is granted on the use of the appraisal clause to support a bad faith claim. Reasonable jurors could not conclude from this record that Foremost's state of mind on the appraisal clause issue amounted to bad faith conduct. Whether the appraisal clause applied at all is a very close issue that is certainly fairly debatable.

Defendant's Motion for Summary Judgment on Bad Faith and Breach of Contract Claims is argued to the Court.

IT IS ORDERED denying Defendant's Motion for Summary Judgment on Bad Faith and Breach of Contract Claims. The Court determines that a question of fact exists as to the Defendant's state of mind when processing this claim that a jury should decide. Zilisch v. State Farm, 196 Ariz. 234, 237 (2000).

The Defendant's attorney in a letter of July 9, 2001 put the issue of the Defendant's request for the Plaintiff to be examined under oath "on hold" so that the parties could meet and

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discuss the claim. Therefore, this case is distinguishable from Warrilow v. Superior Court, 142 Ariz. 250, 252-53 (App. 1984). Defendant did not reurge the examination under oath question. Defendant had already taken a tape recorded statement of Mrs. Hurtado. Therefore, the Court concludes that the principles of Warrilow do not apply in this unique fact situation.

Defendant's Motion for Partial Summary Judgment Re: Plaintiff's Unsupported Damages Claims is argued.

IT IS ORDERED granting in part and denying in part Defendant's Motion for Partial Summary Judgment Re: Plaintiff's Unsupported Damages Claims. The Court grants the motion as to any Plaintiff claims for property damage occurring before October 19, 1999, as to Plaintiff's claims for financial and other consequential damages for which no disclosure has been made, and as to Plaintiff's claims for personal injuries. The motion is denied as to property damage resulting from intrusion of rain, for additional living expenses beyond those already paid and as to punitive damages. Property damage before October 19, 1999 is not covered under the terms of the policy in question. Issues of fact are in dispute as to the reason for intrusion of rain. Whether additional living expenses were paid for an appropriate time period will depend on a jury question whether Foremost offered to make a "reasonable" settlement on the claims Plaintiff submitted in November 2000. The Plaintiff has not provided a medical expert on causation for personal injuries. Plaintiff has not disclosed bases for financial and other consequential damages claims. Lastly, reasonable minds could differ on whether Defendant consciously disregarded the risk that Plaintiff would be unjustly deprived coverage under these circumstances.

Plaintiff's Motion to Strike Counsel's Inadmissible Settlement Letter and Motion in Limine to Preclude Admission of Settlement Letter at Trial is argued.

IT IS ORDERED denying in part Plaintiff's Motion to Strike Counsel's Settlement Letter and denying in part Plaintiff's Motion in Limine to Preclude the Letter. All portions of the letter that do not refer to the description of the home as "a total loss" may be redacted. However, the Court finds that Plaintiff's counsel was acting as an agent of the Plaintiff's when he attempted to settle with the previous insurance carrier, American Modern Home. Counsel's statement in the letter that his clients believed the home was "a total loss" is not either a confession of liability or a confession of a weak case that should be excluded pursuant to Rule 408 of the Rules of Evidence. The statement was made in the letter about settlement not with Foremost, the party to this case. The Rule 403 analysis recognizes that counsel's statement may impeach his own clients. This does not amount to unfair prejudice because counsel's statements are deemed to be the statements of his clients. Garn v. Garn, 155 Ariz. 156 (App. 1987). However, if counsel can arrive at a stipulation that would obviate the need for any reference to this letter, the Court would be disposed to approve that stipulation in place of the letter.

A discussion is held regarding a settlement conference being held in this matter.

4:37 p.m. Hearing concludes.