

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS

BOSTON MUNICIPAL COURT
DORCHESTER DIVISION
C.A. NO: 2006 CV 1126

ARELIS BEATO, Plaintiff

V.

COMMERCE INSURANCE COMPANY, Defendant

FINDINGS OF FACT AND RULINGS OF LAW

Based upon the evidence presented and the reasonable inferences drawn therefrom, I find the following:

The plaintiff, Arelis Beato was insured by the defendant, Commerce Insurance Company on December 14, 2003 when the car that she was driving was hit from behind. She was drinking hot coffee, which spilled, and she hit her head and sternum on her steering wheel; she was taken by ambulance to the emergency room at Carney Hospital. The records from the Carney Hospital are hard to read, but they indicate that the plaintiff presented after a motor vehicle accident and complained that she had spilled hot coffee and hit her sternum and head. The diagnosis was sternal contusion.

Thereafter, the plaintiff received treatment at the Bowdoin Street Health Center. Those records indicate that, four days later, "she does have nausea associated with persisting

headaches. She struck her left forehead quite hard....

ASSESSMENT AND PLAN: Post-concussive headaches syndrome impacting ability to focus contributing to nausea as well and some dizziness." She was given ibuprofen for pain in the sternum and icepacks for contusion." Six days after that visit, on December 28, 2003, under assessment and plan, the doctor at Bowdoin Street wrote, "1. Postconcussive headache syndrome. Mentioned with contusion and residual mild ecchymosis over the left forehead. I believe this is the cause of her nausea and difficulty concentrating forward/forgetfulness, as well as headaches.... [He then prescribed certain medication.] 2. Costochondritis, sternal contusion.... 3. Whiplash with left neck trapezius muscle pain mostly. We will begin physical therapy and follow up in 1 week."

The plaintiff also received chiropractic treatment at Dorchester Chiropractic. Her last medical appointment was April 4, 2004.

The plaintiff notified the defendant about the accident the day afterwards, on December 15, 2003, and her completed PIP application was in the defendant's file by December 23, 2003. She appeared without a lawyer for her deposition in July, 2004.

Susan Testa Szolusha, a senior official testified that Commerce's concern about the claim arose because the other driver, Daniel Nguyen, had said in his deposition that the accident occurred when he was driving at a very low speed; that

there was "low impact" and, also, that Mr. Nguyen didn't understand that anyone had been injured in the collision. Ms. Szolusha admitted that, in fact, Mr. Nguyen testified that he had been travelling at between 10 and 20 miles per hour and had slid on ice and snow before hitting the plaintiff from behind.

Doreen O'Rourke was a supervisor at Commerce and a former claims adjuster. She testified that the case had been referred to an independent investigator because "there had been prior claims on the policy."¹

The defendant also contacted Safety Insurance Company, Mr. Nguyen's insurer. Safety had opened an investigation into the collision and had photos of the cars. Specifically, Safety retained Dennis Burgess, a former police officer and traffic accident reconstructionist to perform a "mutual damage analysis." Mr. Burgess did not speak to either driver or examine the cars. He did look at the photographs and examine the reports. He concluded that a collision could have occurred, but that it was a low speed, low impact event. He said that studies of comparable incidents showed no injuries to either party. In the end, Safety Insurance Co. paid the plaintiff approximately \$300 for damage to her car.

¹It is undisputed that the prior claims related to hit and run incidents, for with the plaintiff was not insured, because she did not have collision insurance, and for which Commerce paid nothing. There was also some indication that Ms. O'Rourke was suspicious because Mr. Nguyen and Ms. Beato lived within two miles of each other in Dorchester.

The defendant, however, denied the plaintiff's claim, because the collision had been a low impact accident; there had been a small amount of damage to the plaintiff's car; there had been no damage to the other operator's car and defendant's decision makers didn't believe that the plaintiff's injuries were consistent with those facts. In addition, representatives from Commerce testified that they had other concerns about the credibility of reports of damage to the plaintiff's car and the extent of her injuries.

Commerce sent the plaintiff a letter denying her claim on May 8, 2005; they then closed the file. It is undisputed that, when Commerce denied the claim, they had not received or examined emergency room records from the Carney Hospital.

Thereafter, in November, 2006, plaintiff filed the present case alleging breach of contract (Count I); violation of G.L. c. 90, s. 34M (Count II); violation of G.L. c. 176D (Count III); and violation of G.L. c. 93A (Count IV.) Eventually, trial was scheduled for October 30, 2007 and, one month before that, Commerce tendered payment in the amount of the original PIP claim, sending the billed amount to two of the three providers and a check for the balance to plaintiff's attorney (that check was never cashed).

Commerce later described this payment as a "business decision," based upon the fact its representatives believed that

they would lose the litigation and didn't want to be "on the hook" for attorneys' fees and costs. The only new development in the meantime had been the fact that the plaintiff had won a \$15,000.00 arbitration award of her underlying bodily injury claim against the other driver, Mr. Nguyen.

On May 7, 2008, a judge of this Court allowed the defendant's motion for summary judgment on Count II only, because the PIP claim had been paid. He ordered the other counts to proceed to trial.

Thereafter, on May 27, 2008, the plaintiff sent a new demand letter for relief under G.L. c. 93A, s. 9, arguing that forcing the plaintiff to file a law suit to collect the PIP amounts constituted an unfair business practice. He demanded attorney's fees plus three times the original PIP claim.² The complaint was amended on October 23, 2008.

Kevin McCullough testified, credibly, as an expert who has qualified as such several times in Superior and District Court; he is a lawyer who previously worked for Electric Insurance and has practiced law doing insurance defense work and as a prosecutor. His practice now focuses on "PIP litigation and bad faith." He testified that Commerce's conduct was not within industry standards. Specifically, he testified that the

²It is agreed that an earlier letter, sent by plaintiff's counsel before the original complaint, did not constitute a proper demand letter as required by c. 93A.

defendant Commerce Insurance didn't use any of the tools available to it. Despite the fact that the issue was whether there was a credible injury, Commerce neither gathered all of the medical records, nor asked for an independent medical examination or a record review. They based their decision on information provided by a third party - the other operator - to his own insurance company. They did not interview Mr. Nguyen or examine either car. Mr. McCullough testified that "getting the information from the third party and using it against their own first party was not the industry standard."

Mr. McCullough testified that he had never seen such a case before. He described this case as one where it was undisputed that a collision had occurred, where there had been immediate emergency room treatment, and where the claim had been denied without first obtaining the emergency room records, without having a separate evaluation or record review, and then "relying on the accident reconstruction to deny the claim." I credit McCullough's opinion that the defendant's conduct was not to industry standard.

Finally, the plaintiff submitted an "Affidavit of Counsel Regarding Detailed Summary of Attorney Hours and Expenses."

DISCUSSION

"General Laws c. 93A, § 2 (a), states that 'unfair methods of competition and unfair or deceptive acts or practices in the

conduct of any trade or commerce are hereby declared unlawful.' General Laws c. 176D, § 3, in turn, prohibits 'unfair or deceptive acts or practices in the business of insurance,' including, in subsection (9) (f), the failure 'to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear.' [The Supreme Judicial Court has] ... stated that 'the former statute incorporates the latter, and [accordingly] an insurer that has violated G. L. c. 176D, § 3 (9) (f), by failing to "effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear," by definition, has violated the prohibition in G. L. c. 93A, § 2, against the commission of unfair or deceptive acts or practices.' Hopkins v. Liberty Mut. Ins. Co., 434 Mass. 556, 564 (2001). Together, the statutes require an insurer, ... 'promptly to put a fair and reasonable offer on the table when liability and damages become clear, either within the thirty-day period set forth in G. L. c. 93A, § 9 (3), or as soon thereafter as liability and damages make themselves apparent.' Id. at 566. The standard for examining the adequacy of an insurer's response to a demand for relief under G. L. c. 93A, § 9 (3) is 'whether, in the circumstances, and in light of the complainant's demands, the offer is reasonable.' Clegg v. Butler, 424 Mass. 413, 420, 676 N.E.2d 1134 (1997), quoting Calimlim v. Foreign Car Center, Inc., 392 Mass. 228, 234 (1984)." Bobick v. United States

Fidelity & Guarantee Co., 439 Mass. 652, 659 (2003).

In this case, it is undisputed that a motor vehicle accident occurred; that the plaintiff was struck from behind by another driver; and that the plaintiff received treatment immediately afterwards in the emergency room of the Carney Hospital and, soon after that, at the Bowdoin Street Health Center. The defendant has never disputed the fact that the accident occurred; rather, Commerce based its denial of the plaintiff's claim on its view that the injuries were not consistent with the described accident. Nothing in the record supports that opinion.

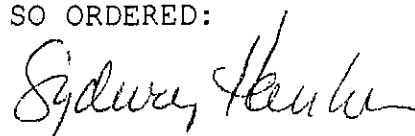
It is agreed that, once the plaintiff's deposition was completed in July, 2004, Commerce had notice of all of the plaintiff's relevant medical treatment. Accordingly, it was obligated to pay the PIP claim within thirty days or a reasonable time thereafter. *Id.* In fact, Commerce paid the PIP claim in September, 2007, immediately prior to a scheduled trial date. This cannot be said to be a reasonable amount of time, and Commerce offers no reason for the delay.

ORDER FOR JUDGMENT

For the foregoing reasons, I find for the plaintiff on Counts I, III and IV. The defendant is ordered to pay to the plaintiff \$25.00 in damages for the violation of G.L. c. 93A, and attorney's fees are assessed in the amount of \$20,000.00 for Counts III and IV. In addition, the defendant is ordered to pay

\$3,108.37 for costs.

SO ORDERED:



SYDNEY HANLON

April 28, 2009

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