IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ROSEMARY AND PAUL CONWAY, Plaintiffs,	:	CIVIL ACTION
v.	:	NO. 98-6295
STATE FARM FIRE & CASUALTY COMPANY, Defendants.	:	

MEMORANDUM

R.F. KELLY, J. JULY , 1999

This action was brought by Rosemary and Paul Conway ("Plaintiffs") against their insurer, State Farm Fire & Casualty Company ("State Farm"), to recover for damages to their home after a wind and hail storm. Presently before the Court are Cross-Motions for Summary Judgment filed by both State Farm and Plaintiffs. For the reasons that follow, Plaintiffs' Motion is denied and State Farm's Motion is granted in part and denied in part.

I. FACTS.

On May 1, 1997, a portion of the vinyl siding on Plaintiffs' home was damaged in a wind and hail storm. At that time, Plaintiffs were insured under a State Farm Homeowners Policy. Plaintiffs promptly notified State Farm of their loss and Robert Reeves, ("Reeves"), senior claims representative, was assigned to Plaintiffs' claim. After a June 3, 1997 on-site inspection, Reeves compiled a June 21, 1997 itemized summary of

repair and replacement costs totaling $3,140.03 for Plaintiffs' home and sun room which suffered water damage. Along with correspondence dated June 20, 1997, Reeves issued a draft in the amount of $2,739.68 to the Plaintiffs "represent[ing] payment of the building loss on an actual cash value (ACV) basis." This June 20 letter also advised Plaintiffs they could make an additional claim "within 180 days after loss for the full cost of repair and replacement . . . when the repairs [were] fully completed," and specifically advised Plaintiffs of the one-year suit limitation clause in the policy.

Plaintiffs retained a public adjuster, Wheeler Adjustment Service, Inc. ("Wheeler"), which estimated repair and replacement costs at $6,860.75. A second estimate, for the "cash price of the job," was $7,500.00, and a third estimate for the roof damage prepared by a general contractor stated "the siding on this house is Alcoa vinyl. This panel has been discontinued. . .the color is not a match in the new panel." A handwritten note, "Alcoa Heritage Gray," by Reeves at the bottom of this page indicates an equivalent color for a replacement panel was available.

Reeves reinspected the property after receipt of these three estimates, and in a September 17, 1997 letter to Plaintiffs, Reeves confirmed a telephone conversation between them on August 10, 1997, the focus of which was the

unavailability of matching replacement siding. In the September 17 letter, Reeves stated "Unfortunately, the policy does not provide coverage for matching," and again directed Plaintiffs' attention to the policy provision on Loss Settlement. The provision allows for actual cash value up to the policy limit, "not to exceed the replacement cost of the damaged part of the building for equivalent construction and used on the same premise[s]." Reeves concluded that the siding could be repaired with equivalent construction, therefore no additional payment could be made at that time, and again advised of the one-year suit limitation clause of the policy.

Plaintiffs sent a November 5, 1997 letter to Reeves, in which Mrs. Conway stated "I totally disagree with your settlement offer." Plaintiffs enclosed a form "Agreement for Submission to Appraisal" wherein Wheeler was appointed as their appraiser. Reeves responded with a November 26, 1997 letter in which he acknowledged receipt of the November 5 correspondence. Reeves advised, however, that State Farm could not agree to appraise any areas of the home which did not sustain accidental direct physical loss in the storm. Reeves assured Plaintiffs that State Farm would appraise the following damage: "left upper elevation of siding, fascia on the right elevation, gutters and downspout on the front and rear of the home and the roof on the rear of the home." The final piece of correspondence between the parties is

a January 22, 1998 letter to Reeves from Wheeler stating, "the siding and roof are what the insured's [sic] are submitting to appraisal, as they do not agree with your method of repair."

There is no further evidence of contact between the parties until Plaintiffs filed suit in Philadelphia Municipal Court on May 1, 1998. Judgment in the amount of $3,364.89 was entered by the Municipal Court against State Farm. State Farm appealed and all parties agreed to transfer the case to the Delaware County Court of Common Pleas. Plaintiff filed a Complaint in that Court of Common Pleas on October 19, 1998. State Farm removed the action to this Court on December 3, 1998.

In their Complaint, Plaintiffs allege that State Farm breached its insurance contract (Count I) and acted in bad faith by underestimating the amount of Plaintiffs' loss and refusing to resolve the amount of loss through the appraisal process in violation of 42 Pa.C.S.A. § 8371 (Count II). State Farm moves for Summary Judgment on both Counts of Plaintiffs' Complaint and Plaintiffs also move for Summary Judgment.

II. STANDARD.

Summary Judgment is proper "if there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(C); Anderson v. Liberty Lobby Inc., 477 U.S. 242, 247 (1986). State Farm, as the moving party, has the initial burden of identifying those

portions of the record that demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986). Then, the nonmoving party must go beyond the pleadings and present "specific facts showing that there is a genuine issue for trial." FED. R. CIV. P. 56(C). If the court, in viewing all reasonable inferences in favor of the nonmoving party, determines that there is no genuine issue of material fact, then summary judgment is proper. Celotex, 477 U.S. at 322; Wisniewski v. Johns-Manville Corp., 812 F.2d 81,83 (3d Cir. 1987).

III. DISCUSSION.

State Farm moves for Summary Judgment on Count I of the Complaint based on the one-year suit limitation clause contained in the insurance policy issued to Plaintiffs. The State Farm Homeowners policy provides:

> **Suit Against Us.** No action shall be brought unless there has been compliance with the policy provisions. The action must be started within one year after the date of the loss or damage.

(App. to Def.'s Mot. for Summ. J., Ex. 1 at 13, ¶ 8.)

State Farm contends that because this action was filed more than one year after Plaintiffs sustained their loss, their claim is time-barred. Plaintiffs argue that State Farm "clearly violated the policy by refusing to go to appraisal regarding the amount of loss at issue." (Pls.' Resp. to Def.'s Mot. for Summ.

J. at 3.) Plaintiffs concede, however, that State Farm accepted coverage for the loss, forwarded a check to Plaintiffs to resolve the claim and acknowledged that it would not match the siding. (Id.) Plaintiffs contend that this conduct amounts to a waiver or estoppel of the limitations period in the policy.

The one-year suit limitation clause at issue is mandated by Pennsylvania law. 40 Pa.C.S.A. § 636. As such, the limitation is valid and reasonable. Schreiber v. Pa. Lumberman's Mut. Ins. Co., 498 Pa. 21, 24, 444 A.2d 647, 649 (1982). The year begins to run on the date of the destructive event, regardless of the date the loss is actually discovered. Gen. State Auth. v. Planet Ins. Co., 464 Pa. 162, 166-67, 346 A.2d 265, 267-68 (1975). The limitation is disregarded only "when the conduct of insurer constitutes a waiver or estoppel." Petraglia v. Am. Motorists Ins. Co., 284 Pa. Super. 1, 8, 424 A.2d 1360, 1364 (1981)(citations omitted), aff'd mem., 498 Pa. 32, 444 A.2d 653 (1982). Both parties agree that May 1, 1997, is the date of Plaintiffs' loss. Both parties also agree that suit was brought in Philadelphia Municipal Court on May 1, 1998. As such, Plaintiffs' claim is time-barred. The issue presented, then, is whether State Farm's conduct amounts to a waiver or estoppel of the limitations period.

Waiver and estoppel are distinct concepts. "Waiver is an express decision by the insurer not to rely on the suit

limitation clause." Jackson v. Chubb Group of Ins. Cos., No. 85-3466, 1987 WL 8556, at *3 (E.D. Pa. Mar. 26, 1987). "Estoppel, on the other hand, refers to acts by the insurer which excuse the insured's failure to act timely." Id. There is no evidence that an express waiver of the limitations period occurred, therefore, Plaintiffs claims are timely only if State Farm's conduct is sufficient to estop their reliance on the limitations period.

Estoppel requires "an affirmative act by the insurer by which the insured was misled and prejudiced." Jackson, 1987 WL 8556, at *3 (citation omitted). Plaintiffs contend that State Farm violated the appraisal provision of the policy. This is not sufficient to estop State Farm.

On September 17, 1997, State Farm denied Plaintiffs' claim for additional damages to "match" the damaged siding. This letter unequivocally stated that the policy did not provide coverage for matching and "the vinyl siding can be repaired with equivalent construction, therefore, no additional payment can be made at this time." (App. to Def.'s Mot. for Summ. J., Ex. 7.) Plaintiffs responded by sending State Farm an "Agreement for Submission to Arbitration" and a statement from Mrs. Conway that she totally disagreed with the settlement offer. This correspondence was followed by a November 26, 1997 letter from State Farm to Plaintiffs in which Reeves again states that the

policy:

> provides coverage on accidental direct physical losses . . . .Since the siding on the left upper elevation is the only area which sustained accidental direct physical loss, therefore, this is the only area of siding for which we have accepted coverage. We cannot agree to appraise areas of the home which have not sustained accidental direct physical loss. Specifically, we can not agree to appraise siding on the front, rear or right elevation of the home.

(App. to Def.'s Mot. for Summ. J., Ex. 9.) Plaintiffs were advised that if they agreed with this statement, then they should advise State Farm immediately and State Farm would name an appraiser to evaluate this work.

After receiving the November 26, 1997 letter from State Farm, Plaintiffs had reason to know that their claim regarding the siding was being denied and had sufficient time to file suit within the limitations period. Williams Studio of Photography by Tallas, Inc. v. Nationwide Mut. Fire Ins. Co., 380 Pa. Super. 1, 550 A.2d 1333 (1988), appeal denied, 527 Pa. 588, 588 A.2d 510 (1990)(upholding one year suit limitation); O'Connor v. Allemannia Fire Ins. Co. of Pittsburgh, 128 Pa. Super. 336, 346-47, 194 A. 217, 221 (1937)(holding that between six weeks and two months is sufficient time to file suit); Toledo v. State Farm Fire & Cas. Co., 810 F. Supp. 156, 161 (E.D. Pa. 1992)(holding that six months is sufficient time to file suit); Pini v. Allstate Ins. Co., 499 F. Supp. 1003, 1005 (E.D. Pa.

1980)(holding that between one and five weeks is sufficient time to file suit), aff'd, 659 F.2d 1070 (3d Cir. 1981). Plaintiffs' failure to timely file suit requires that Summary Judgment be granted as to Count I of the Complaint.

In Count II, Plaintiffs allege that State Farm acted in bad faith in denying their claim. 42 Pa.C.S.A. § 8371. To succeed on this claim, Plaintiffs must show, by clear and convincing evidence, that State Farm (1) lacked a reasonable basis for denying the claim, and (2) knew or recklessly disregarded its lack of a reasonable basis. Kosierowski v. Allstate Ins. Co., No. 98-5221, 1999 WL 388215, *2 (E.D. Pa. June 4, 1999)(citing Klinger v. State Farm Mut. Auto. Ins. Co., 115 F.3d 230, 233 (3d Cir. 1997)).

State Farm argues that Count II of the Complaint must be dismissed because there was a reasonable basis for denying Plaintiffs' claim for additional damage repairs. Plaintiffs contend that State Farm's denial was unreasonable. These arguments create a genuine issue of material fact, thus, State Farm's Motion for Summary Judgment as to Count II is denied.

An Order follows.

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ORDER

AND NOW, this day of July, 1999, upon consideration of the Cross-Motions for Summary Judgment filed by both parties and the Responses thereto, it is hereby ORDERED that Plaintiffs' Motion is DENIED and Defendant's Motion is GRANTED as to Count I of Plaintiffs' Complaint and DENIED as to Count II of Plaintiffs' Complaint. It is further ORDERED that Count I of Plaintiffs' Complaint is DISMISSED with prejudice.

BY THE COURT:

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Robert F. Kelly, J.