IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Daniel D. Domenico

Civil Action No. 1:21-cv-01532-DDD-JPO

EL DUENO, LLC

Plaintiff,

v.

MID-CENTURY INSURANCE COMPANY,

Defendant.

ORDER ON MOTION FOR SUMMARY JUDGMENT

Plaintiff El Dueno, LLC owns a commercial property at 2319 8th Avenue, Greeley, Colorado 80631.[1] On July 29, 2018, the roof of the property was impacted by a hailstorm. The property was covered by an insurance policy issued by Defendant Mid-Century Insurance Company, which included coverage for direct physical loss or damage caused by hail.

After the hailstorm, El Dueno submitted a claim for property damage to Mid-Century pursuant to its insurance policy. In response, Mid-Century assigned a claims adjuster, Maggie Fields, to investigate the roof. Ms. Fields found hail damage to certain roof surfaces, which she estimated amounted to approximately $22,000 of damage. Mid-Century paid this amount, less the policy's deductible and depreciation, to El

[1] All facts are taken from the undisputed facts provided by the parties in Docs. 46 at 2–8, 53 at 5–12, and 56 at 2–6, unless otherwise noted.

Dueno. Mid-Century also paid El Dueno $2,500 based on an estimate to repair rooftop HVAC machinery.

El Dueno's contractor, CJ Restoration, soon thereafter provided a far greater estimate, $343,000, to replace almost the entire roof. Mid-Century then transferred the claim to a different adjuster, Patrick McCourt, who hired Rimkus Engineering to perform an additional inspection. Rimkus had an engineer, William Templeton, inspect the roof. He reported that "[t]he roof coverings, including the granule-surfaced modified bitumen membrane and the concrete roof tiles, were not damaged by hailstone impacts." Doc. 46-3 at 3. He also found that any damage to the roof was pre-existing or resulted from other causes. His report was peer-reviewed by another licensed engineer, who concurred with its findings. The Rimkus report did not address the previous inspection by Ms. Fields.

After receiving the Rimkus report, Mid-Century notified El Dueno that the roof repairs were not covered under the insurance policy, but that Mid-Century would not seek to recoup the payments it had already made towards the repairs. Unsatisfied with this result, El Dueno filed this suit, claiming that Mid-Century unreasonably denied benefits in violation of Colo. Rev. Stat. §§ 10-3-1115–16. Mid-Century now seeks summary judgment on that claim.

LEGAL STANDARDS

Summary judgment is appropriate if there is no genuine dispute of material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Adamson v. Multi Cmty. Diversified Servs., Inc.*, 514 F.3d 1136, 1145 (10th Cir. 2008). A fact is material if it could affect the outcome of the suit under the governing law; a dispute of fact is genuine if a rational jury could find for the nonmoving party on the evidence presented. *Id.* If a reasonable juror could not return a verdict for the

nonmoving party, summary judgment is proper, and there is no need for a trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). On a motion for summary judgment, the moving party bears the burden of demonstrating no genuine issue of material fact exists. *Adamson*, 514 F.3d at 1145.

In deciding whether the moving party has carried its burden, a court does not weigh the evidence and instead must view it and draw all reasonable inferences from it in the light most favorable to the nonmoving party. *Adamson*, 514 F.3d at 1145. But neither unsupported conclusory allegations nor mere traces of evidence are sufficient to demonstrate a genuine dispute of material fact on summary judgment. *Maxey v. Rest. Concepts II, LLC*, 654 F. Supp. 2d 1284, 1291 (D. Colo. 2009). And if "a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c), the court may . . . consider the fact undisputed for purposes of the motion." Fed. R. Civ. P. 56(e)(2).

DISCUSSION

Mid-Century, like all insurance providers in Colorado, is required by statute to act in good faith if it delays or denies coverage under an insurance policy. Colo. Rev. Stat. § 10-3-1115. To prove that Mid-Century violated this statutory duty, El Dueno must show that the denial of coverage was without a reasonable basis. *Skillett v. Allstate Fire & Cas. Ins. Co.*, 505 P.3d 664, 667 (Colo. 2022); Colo. Rev. Stat. § 10-3-1115(2). Statutory bad faith claims fail, conversely, when an insurer has a reasonable basis for its denial. *See Am. Family Mut. Ins. Co. v. Hansen*, 375 P.3d 115, 122 (Colo. 2016). "An insurer's decision to deny benefits to its insured must be evaluated based on the information before the insurer at the time of that decision." *State Farm Mut. Auto. Ins. v. Reyher*, 266 P.3d 383, 390 (Colo. 2011). And "the reasonableness of an insurer's conduct

is measured objectively based on industry standards." *Zolman v. Pinnacol Assurance*, 261 P.3d 490, 496 (Colo. App. 2011).

Multiple courts have held that reliance on an engineering report, prepared by qualified professionals according to established and reliable methods, is reasonable as a matter of law, and cannot be the basis for a bad faith claim. *See Musel Master, LLC v. Am. Fam. Mut. Ins.*, No. 18-cv-2725-RBJ, 2019 WL 9244886 at *3 (D. Colo. June 24, 2019); *Avalon Condominium Ass'n, Inc. v. Secura Insurance*, No. 14-cv-00200-CMA-KMT, 2015 WL 5666628, at * 4 (D. Colo. Sept. 25, 2015); *Bell Advisors, LLC v. American Family,* No. 16CA2081, 2018 WL 549962 at *12-13 (Colo. App. Jan. 25, 2018). El Dueno's attempts to distinguish these cases are unavailing. In each of these cases, the insurer, like Mid-Century, retained an engineering firm that ultimately found insurance benefits were not warranted—in *Musel Master*, also like in this case, the engineering report contradicted an earlier claim adjuster's opinion. The plaintiffs in those cases similarly alleged statutory faith. But the courts in each case found that reliance on a qualified engineer's report finding no covered damage was reasonable basis to deny insurance benefits.

Here, Mid-Century deferred to the findings of a qualified engineer, Mr. Templeton, whose opinion was reviewed by another qualified engineer—over the opinion of Ms. Fields, who was not an engineer and had less experience inspecting roofs and assessing hail damage. While El Dueno has retained an expert in this suit to opine on methodological flaws in the Rimkus report, Mid-Century's denial "must be evaluated based on the information before the insurer at the time of that decision." *Reyher*, 266 P.3d at 390. El Dueno has not shown that, based on the information available to it at the time, Mid-Century's reliance on the Rimkus report was unreasonable or violated industry standards. *See Zolman*, 261 P.3d at 496.

The response devotes substantial effort to demonstrating alleged flaws and inconsistencies in the Rimkus report as evidence of bad faith. If true, these allegations might suffice to determine that Rimkus and Mid-Century were wrong, and that the roof was indeed damaged by hail. But El-Dueno has not brought a claim for breach of contract, which could entitle it to damages if Mid-Century denied coverage where it was warranted. El-Dueno's only claim is brought under statutory bad faith. That means its allegations must show that Mid-Century was not only wrong, but unreasonably so. "[M]ere disagreement of this sort is insufficient for Plaintiff to sustain its bad faith claim." *Avalon*, 2015 WL 5666628, at * 4 (citing *Packer v. Travelers Indem. Co.*, 881 S.W.2d 172, 176 (Tex. App. 1994) ("A bona fide controversy concerning an insurer's liability is sufficient reason for an insurer to fail to pay a claimant, and will not rise to the level of bad faith. This is particularly true if this controversy concerning liability is sparked by reliance on expert reports.")). El-Dueno's attempts to argue that reliance on the Rimkus reports was unreasonable ultimately amount only to disputes with the outcome of the Rimkus report, and Mid-Century's reliance on that second opinion over the initial inspection of its adjuster, Ms. Fields.[2]

El-Dueno does not cite a single case supporting its position that favoring a more qualified engineer's opinion as opposed to an inexperienced claim adjuster is unreasonable. *Cf. Musel Master,* 2019 WL 9244886 at *3 (finding reliance on engineering report was reasonable even though insurance adjuster had previously affirmed coverage). Nor is that position logical. The purpose of retaining an engineering firm for a second opinion is to assess the cause of damage more reliably. If it were

[2] El-Dueno's response lists twelve actions that are allegedly evidence of Mid-Century's bad faith. Doc. 53 at 15–16. Most of these are conclusory statements that Mid-Century acted unreasonably. The rest are limited to reliance on the allegedly defective Rimkus report.

unreasonable for an insurance company to change its coverage position based on an engineer's second opinion, it would render the second opinion useless. Ungrounded claims that reliance on the engineering report was unreasonable do not prevent summary judgment.

CONCLUSION

It is **ORDERED** that:

Defendant Mid-Century Insurance Company's Motion for Summary Judgment, **Doc. 46**, is **GRANTED**. Plaintiff's claim is dismissed, and the Clerk of Court is directed to close this case.

DATED: February 23, 2024

BY THE COURT:

Daniel D. Domenico
United States District Judge