CASE NUMBER: NNH-CV19-6126992-S

MEMORANDUM OF DECISION

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CASE NAME

THE PUBLIC'S ADJUSTER, LLC v. MARC GOTTESDIENER & CO., INC.

DOCUMENT FILED DATE

Nov. 6th, 2024

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Oct. 21st, 2019

COUNTY

New haven county, CT

JUDGE

Jon C. Blue

CATEGORY

C40 - Contracts - Collections

NNH CV19-6126992 S	:	SUPERIOR COURT
THE PUBLIC'S ADJUSTER, LLC	: :	JUDICIAL DISTRICT OF NEW HAVEN
V.	:	AT NEW HAVEN
MARC GOTTESDIENER & CO., ET AL	:	NOVEMBER 6, 2024

MEMORANDUM OF DECISION

I. INTRODUCTION.

This breach of contract case, involving a fee dispute between an insured person and a public adjuster, has been tried to the court. Although the claimed damages are modest, the calculation of the fee presents a legal issue with potentially significant ramifications for the public adjuster industry in Connecticut. There are also counterclaims, premised on various theories, including breach of contract. For reasons set forth below, judgment on liability must enter for the first-party plaintiff and for the counterclaim defendant. The issues involving the calculation of the fee are discussed below.

As mentioned, the case arises out of a dispute between the plaintiff, a public adjuster, and the insured defendants. The defendants, Marc Gottesdiener & Co. and Marc Gottesdiener (Collectively referred to as "Gottesdiener") owned an apartment building in New Britain. On October 27, 2016, the building was substantially damaged by a fire. The building was insured by Quincy Mutual Group ("Qunicy"). Gottesdiener was the insured. On November 21, 2016, Gottesdiener signed a Public Adjuster Employment Contract ("Contract") with the plaintiff, The Public's Adjuster, LLC ("Adjuster"). (Ex. 1.) The purpose of the Contract was to

authorize Adjuster to negotiate the reimbursable damages with Quincy on Gottesdiener's behalf. (The fee provision of the Contract will be discussed in detail below.)

Because of the extent of the fire damage to the apartment building, the work of negotiating a settlement with Quincy proved to be extremely complex. Adjuster meticulously prepared several detailed written estimates to be submitted to Quincy. These estimates (all of them in evidence) total several hundred pages in length.

Unhappily, the relationship between Adjuster and Gottesdiener deteriorated in the years following the signing of the Contract. Gottesdiener's issues appear to involve both an alleged lack of communication between the parties and Quincy's refusal to pay for certain "improvements" Gotesdiener made to the subject property following the fire. Nevertheless, Gottesdiener ultimately received checks totaling over $600,000 from Quincy as a result of Adjuster's effort. The last such check was received on December 21, 2018. (Ex. 5.)

Gottesdiener paid Adjuster its claimed feed for a little over a year. A Customer Balance Detail in evidence (Ex. 44) shows that Gottesdiener had fully paid Adjuster's bills as of September 15, 2017. After that, a conflict between the parties developed. Gottesdiener made one payment of $565 to Adjuster on December 15, 2017, and made no payments thereafter. Ultimately, Gottesdiener paid Adjuster a total of $37,604 in fees. (Ex 44.) Adjuster claims in its Amended Complaint that it is owed an additional amount of $18, 311.73.

The present case was commenced by service of process on October 16, 2019. Adjuster is the sole plaintiff. Gottesdiener (collectively) is the sole defendant.

The Amended Complaint consists of two counts. Count One claims breach of contract. Count Two claims unjust enrichment.

Gottesdiener alleges two special defenses. The First Special Defense alleges breach of contract. The Second Special Defense alleges bad faith and unclean hands.

Gottesdiener has alleged three counterclaims. The First Counterclaim alleges breach of contract. The Second Counterclaim alleges breach of the covenant of good faith and fair dealing. The Third Counterclaim alleges bad faith violations of the Connecticut Unfair Insurance Practices Act, Conn. Gen. Stat. § 38a-815, et seq. ("CUIPA"), and the Connecticut Unfair Trade Practices Act, Conn. Gen. Stat. § 42-110b, et seq. ("CUTPA").

Adjuster has asserted a special defense to the Third Counterclaim that, "The statute of limitations has expired for the CUTPA claim. See Conn. Gen. Stat. § 42-110g(f)."

The case was tried to the court over a period of three days from July 17, 2024 to July 19, 2024. Following post-trial briefing, the case was argued on November 6, 2024.

II. DISCUSSION.

The counts in the Amended Complaint and the Counterclaims will be discussed in order.

A. The Amended Complaint.

1. Count One - Breach of Contract.

Count One alleges breach of contract. The Contract is in evidence. (Ex. 1.) The Amended Complaint claims that unpaid amount of $18,311.73 is due under the Contract. As will be seen, the calculation of this claimed balance is unclear. The question that must first be considered, however, is whether the fee provision of the Contract is valid in the first place. For reasons about to be discussed, it is not.

The basic problem is that the ostensibly controlling regulations have long been outdated by statutory amendment. Conn. Agencies Regs. § 38a-788-8 (effective September 25, 1992) provides that, "No public adjuster shall receive compensation in excess of 10% of the actual or final settlement of a loss covered by the employment contract." Consequently, Conn. Agencies Regs. § 38a-788-6 (also effective September 25, 1992) mandates that all public adjuster contracts contain the following language: "We cannot charge you a fee greater than ten percent (10%) of the actual or final settlement of the loss covered by this contract...."

The regulatory language just quoted was construed by the Appellate Court in *Executive Services, Inc.* v. *Karwowski*, 80 Conn. App. 124, 832 A.2d 1212 (2003), *cert. denied*, 268 Conn. 908, 845 A.2d 411 (2004). The question in *Executive Services* was whether the "loss" on which the public adjuster's percentage fee is based "is the *gross* amount of the insured's recovery or the *net* amount after an insured has paid attorney's fees and mortgage debts." *Id*., at 125. (Emphasis in original.) The Appellate Court determined that "the adjuster was entitled to recover a percentage of the gross amount." *Id.*

The effect of the 1992 regulation, as construed by *Executive Services*, can be illustrated by a simple hypothetical. Suppose that your house is covered by insurance and is damaged by a fire. You hire a public adjuster to negotiate with the insurance company. The insurer determines that your loss is $100,000. The public adjuster's fee is 10% of that amount, or $10,000. But suppose that your house is heavily mortgaged, and the mortgagor takes $50,000 of the insurance proceeds, leaving you with actual receipts of $50,000. Had *Executive Services* gone the other way, the public adjuster's fee would be limited to $5,000. In the battle between public adjusters and their clients, the public adjusters prevailed.

Fast forward to 2012. In apparent reaction to insurance disputes arising in the aftermath of Hurricane Irene in 2011; 55 H. Proc. 1751 (2012) (remarks of Rep. Megna); the legislature passed P.A. 12-162. Sec. 4 of that act amended Conn. Gen. Stat. § 38a-726 to contain a new subsection, now codified as Conn. Gen. Stat. § 38a-726(b). That subsection (effective July 1, 2012) provides that, "Any fee charged to an insured by a public adjuster shall be based only on the amount of the insurance settlement proceeds *actually received* by the insured and shall be collected by such public adjuster *after* the insured has received such proceeds from the insurer." (Emphasis added.)

The effect of this statutory amendment is profound. Consider the hypothetical just used to illustrate the effect of *Executive Services*. The "loss" in that case was $100,000, so under *Executive Services*, the public adjuster's fee was $10,000. But the amount "actually received" by the insured - after the mortgagor took its share - was $50,000. Under the statute as amended, the public adjuster's fee is consequently limited to $5,000.

The amended statute also affects the way that public adjusters are allowed to collect their fees. *Executive Services* allows public adjusters to use contracts in which their clients assign the public adjuster's fees to the public adjuster to be paid off the top from money paid by the insurance company. Thus, in our now-familiar hypothetical, the insurance company would, prior to the statutory amendment, write a check for $100,000 payable to the insured and the adjuster. The adjuster would, pursuant to an assignment, take its fee of $10,000 off the top and send $90,000 to the client (assuming there was no lienholder to further divide the pie). Under Conn. Gen Stat. § 38a-726(b), that practice can no longer be followed. The public adjuster can collect its fee only "after the insured has received such proceeds from the insurer."

Amazingly, it turns out that Conn. Gen. Stat. § 38a-726(b) has been entirely ignored by both the Insurance Commissioner and the public adjuster industry for twelve years and counting. The mandated contractual language of the 1992 regulation has never changed, and the public adjuster industry - to its considerable profit - continues to merrily follow the regulation. The Contract in question in this very case, executed on November 21, 2016, uses a variation of the mandated regulatory language, assigning the adjuster "a sum equivalent to 8 ½% of the amount of the loss when adjusted with the Insurance Companies or otherwise recovered."

Apart from the obvious fact that the language of Conn. Agencies Regs. §§ 38a-788-6 & 8 is completely inconsistent with the language of Conn. Gen. Stat. § 38a-726(b), judicial deference to the regulation in question is not required under Connecticut law. "The traditional deference accorded to an agency's interpretation of a statutory term is unwarranted when the construction of a statute ... has not previously been subjected to judicial scrutiny." *Indian Spring Land Co.* v. *Inland Wetlands & Watercourses Agency*, 322 Conn. 1, 16 n. 8, 145 A.3d 851 (2016). (Internal quotation marks and citation omitted.) The construction of Conn. Gen. Stat. § 38a-726(b) has not previously been subjected to judicial scrutiny. In any event, the regulation in question does not even purport to interpret the 2012 statutory amendment since the regulation was enacted in 1992. We have, instead, an outdated regulation that is completely inconsistent with a subsequently enacted statute. Because of this inconsistency, the statute must plainly prevail. The fee provisions of Conn. Agencies Regs. §§ 38a-788-6 & 8 are consequently void and invalid.

It follows that the fee provisions of the Contract are similarly void and invalid. Adjuster cannot collect on the Contract. Judgment must enter for the defendant on Count One.

2. Count Two - Unjust Enrichment.

Count Two alleges unjust enrichment. "A plaintiff may recover for unjust enrichment when a contract remedy is unavailable, to the extent that the defendant has unjustly profited at the plaintiff's expense .... Plaintiffs seeking recovery ... must prove (1) that the defendants were benefitted, (2) that the defendants unjustly did not pay the plaintiffs for the benefits, and (3) that the failure of payment was to the plaintiffs' detriment." *Geriatrics, Inc.* v. *McGee*, 332 Conn. 1, 24-25, 208 A.3d 1197 (2019).

The first and third prongs of the *Geriatrics* test are easily met in this case. Gottesdiener plainly benefitted from Adjuster's labors, and the failure of payment - assuming, for purposes of argument, that additional moneys were owed - was to Adjuster's detriment.

The more difficult question is whether Gottesdiener's failure to pay for the benefits was "unjust." The decision as to whether this failure was "unjust" necessarily involves a juristic calculus. "We do not sit like a kadi under a tree dispensing justice according to considerations of individual expediency." *Terminiello* v. *City of Chicago*, 337 U.S. 1, 11 (1949). (*Frankfurter, J.*, dissenting.) Although the fee provision of the Contract here is incompatible with statutory law, the provision in question is merely *malum prohibitum* rather than *malum in se*. Under these circumstances, "refusing any remedy to a plaintiff who has rendered a valuable performance will result in the unjust enrichment of the defendant." Restatement (Third) of Restitution and Unjust Enrichment § 32 cmt. e (Am. Law Inst. 2011). Sec. 32(2) of the Third Restatement provides that, "Restitution will ... be allowed, as necessary to prevent unjust enrichment, if the allowance of restitution will not defeat or frustrate the policy of the underlying prohibition."

Sec. 32(2) of the Third Restatement points the way here. The plaintiff rendered a valuable performance to the defendant. Refusing the plaintiff any remedy would result in the unjust enrichment of the defendant. Allowing the plaintiff a fee permitted by statute would not defeat or frustrate the policy of the statute.

The formula for calculating the amount of unjust enrichment received by the defendant is relatively simple. Given the controlling statute, Conn. Gen. Stat. § 38a-726(b), together with the percentage fee negotiated by the parties and stated in the Contract, the plaintiff is entitled to 8 ½% of the insurance proceeds *actually received* by the defendant.

Unhappily, judicial determination of the insurance proceeds actually received by the defendant here is not the easy calculation that might be expected. The reason is that the plaintiff, while meticulous in compiling the defendant's losses, kept shockingly poor records concerning the ultimate disposition of the insurance proceeds. This failure was compounded by the apparently poor memory of the plaintiff's principal witness, Todd Moler, and his repeated inability to answer straightforward questions from counsel and the court as to how much money the defendant actually received from the insurance company.

We have some guidance from the evidence. Ex. 5 is a compilation of twelve checks ultimately written by the insurance company. These checks total $600,149.41. However, none of these checks are payable to the defendant alone. Rather, each of them is payable to the defendant plus at least one other payee. (The co-payees include Moler and two lienholders.) It is clear that the defendant did not actually receive the full amount of these checks. But what did the defendant actually receive? Moler's testimony was of little help on this issue. He could only point to a series of "notes" that he had previously made with respect to some of the transactions in question. (Ex. 31.)

The plaintiff's "notes" expressly state that two insurance checks were mailed directly to the defendant. These checks were a December 13, 2016 check for $10,000, and an August 8, 2017 check for $46,073.69. These checks total $56,073.69. Although the defendant undoubtedly received more insurance proceeds than these, there is no way to determine such added amount from the evidence. It must be emphasized that it is the plaintiff's burden to prove its damages. The plaintiff's sloppy records and the poor memory of its witness are not the fault of the defendant.

The plaintiff's damages in unjust enrichment are thus 8 ½% of $56,073.69, or $4,766.37.

This calculation is based on transactions occurring prior to September 15, 2017, at which point, as mentioned, Gottesdiener had fully paid Adjuster's bills. Although an argument could consequently be made that Gottesdiener owes Adjuster no additional money under the circumstances, Gottesdiener admitted at argument that at least some additional money was due to Adjuster on a theory of unjust enrichment. Under these unusual circumstances, the Court's calculation of damages is consistent with the principles of equity.

Gottesdiener's special defenses are unpersuasive. The First Special Defense is breach of contract. There is no persuasive evidence that Adjuster breached the Contract. The evidence is that Adjuster duly performed its duties under the Contract and recovered over $600,000 of insurance proceeds. The Second Special Defense is bad faith and unclean hands. There is no evidence of any such misconduct in the record.

Judgment on Count Two shall consequently enter for the plaintiff in the amount of $4,766.37.

B. The Counterclaims.

As mentioned, Gottesdiener has filed three counterclaims. These can be dealt with swiftly.

1. First Counterclaim.

The First Counterclaim alleges breach of contract. Gottesdiener claims in his brief that, "The evidence fails to show that the Plaintiff advised or assisted the Defendant in any way." Defendant's Brief, at 10. As discussed *supra*, this allegation has no factual support. Adjuster provided substantial assistance to Gottesdiener. More specifically, Adjuster recovered over $600,000 in insurance proceeds.

The Second Counterclaim alleges a breach of the covenant of good faith and fair dealing. No credible evidence of such a breach has been submitted.

The Third Counterclaim alleges violations of CUIPA and CUTPA. This claim has not been briefed and is deemed abandoned.

Judgment must consequently enter for the counterclaim defendant on all three counterclaims.

III. CONCLUSION.

Judgment shall enter for the defendant on Count One of the Amended Complaint.

Judgment shall enter for the plaintiff in the amount of $4,766.37 on Count Two of the Amended Complaint.

Judgment shall enter for the counterclaim defendant on all three counterclaims.

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Jon C. Blue

Judge Trial Referee
Juris No. 080110