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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2005-005498 06/18/2007

HON. CAREY SNYDER HYATT

CLERK OF THE COURT
C.I. Miller
Deputy

LOREN HEFLING, et al.

DANIEL B TREON
RICHARD T TREON

v.

ALL AMERICA INSURANCE COMPANY, et al.

WILLIAM M DEMLONG

STEPHEN E SILVERMAN

RULING MINUTE ENTRY

The Court, having taken this matter under advisement and now having again reviewed and considered the Defendant All America's Amended Motion for Summary Judgment Re: Heflings; Defendant's Amended Motion for Summary Judgment re: Plaintiffs James O'Toole & James F. O'Toole Company; the Hefling Plaintiffs' Response; Plaintiff O'Toole's Response; Defendant All America's Replies to both; all of the parties' Statements of Facts and Controverting Statements of Fact along with the information presented in Oral Argument, makes the following findings and conclusions.

Preliminarily, the Court notes that the parties agreed that the issues raised in the previous Motions and Cross-Motions for Partial Summary Judgment dating back to April of 2006 are all contained within the current pleadings. The Court also notes that at Oral Argument, Plaintiffs Hefling moved to dismiss Counts One, Three, and Six of the Complaint, leaving Counts Two (Bad Faith) and Seven (Punitive Damages). Plaintiffs O'Toole and the O'Toole Company moved to dismiss Counts One and Two of the Complaint, leaving Counts Three (Intentional Infliction of Emotional Distress), Four (Holding Up to a False Light), Five (Interference with Contract), Six (Conspiracy), Seven (Punitive Damages).

Under Rule 56 of the Arizona Rules of Civil Procedure, a movant must carry the burden of producing uncontroverted prima facie evidence in support of its motion. Once the movant establishes a prima facie case entitling it to summary judgment, the other party has the burden of showing available, competent evidence that would justify a trial. A party cannot rely solely upon unsupported contentions that a dispute exists to create a factual issue that would defeat summary judgment. Summary judgment should not be used as a substitute for jury trials, however, a motion for summary judgment should not be denied "simply on the speculation that some slight doubt…, some scintilla of evidence, or some dispute over irrelevant or immaterial facts might blossom into a real controversy in the midst of trial." *Orme School v. Reeves*, 166 Ariz. 301, 310, 802 P.2d 1000, 1009 (1990).

As narrowed at the time of oral argument, the focus of Plaintiff Heflings' bad faith claim in Count Two is that Defendant All America did not pay what it considered the amount of "undisputed damages" promptly upon determining that some damages were owed. During the Appraisal process, Defendant's appraiser estimated that there were some minor soot deposits that would require cleanup costs of approximately $2,200. At some point thereafter, Defendant made an offer to settle Plaintiffs' claim, which Plaintiffs refused, but requested in the form of undisputed damages. There appears to exist some conflicting evidence to whether Defendant had changed its position that the claim was worth nothing and that there were at least some minor cleanup damages that they were obligated to pay and therefore, acted in bad faith by refusing to tender that payment promptly upon discovering these facts. Therefore, summary judgment as to Count Two regarding the Heflings is not appropriate.

However, as to the Heflings' punitive damages claim (Count Seven) relative to the actions complained of in the bad faith claim (Count Two), the record reveals nothing more than the facts showing a prima facie case of bad faith that would allow a jury to find that Defendant acted reprehensively and with an evil mind. *See Linthicum v. Nationwide Life Ins. Co.,* 150 Ariz. 326, 332, 723 P.2d 675, 681 (1986)(punitive damages are not awardable unless there is something more than the conduct required to establish the tort). Therefore, summary judgment is appropriate as to the dismissal of Count Seven as it relates to the Heflings' claims against Defendant All America.

Central to all of the counts in the complaint relative to Plaintiffs O'Toole and O'Toole Company is the allegation that Defendant wrongfully made a referral to the Department of Insurance pursuant to A.R.S. § 20-466 (G), which ***requires*** an insurer to submit a report to the Director of the Department of Insurance if it ***believes*** "a fraudulent claim has been or is being made." Once such a referral is made, the Director of the Department of Insurance makes the initial determination whether further investigation is required. A.R.S. § 20-466(G). Pursuant to subsection (K) of the statute, any person, officer, employee, or agent of the insurer acting in the

scope of employment who in good faith files a report or provides other information to the Department is immune from civil or criminal liability for doing so.

The existence of "good faith" generally requires an inquiry into the person's motive, purpose and intent. *See Snow v. Western Savings*, 152 Ariz. 27, 36, 703 P.2d 204, 213 (1986). The record contains evidence that a supervisory employee of Defendant (Mr. Brothers) filed the referral to the Department of Insurance after receiving two appraisals at the time of the claim that stated that there was no indication of smoke damage in Plaintiff Heflings' home. [Defendant's Statement of Facts ("DSOF"), Exhibits 8 and 9]. In spite of Plaintiffs O'Tooles' attempt to show contrary evidence in the form of adjuster Chapman's deposition testimony that she did not believe that the claim was fraudulent, that same testimony reveals that she never communicated this opinion to Mr. Brothers, her supervisor. [DSOF, Exhibit 26 at p. 62, 116]. Nor does the evidence reveal the basis of her opinion at the time.

Additionally, Plaintiffs make much of the subsequent appraisal obtained by All America nearly a year AFTER the 20-466 referral was made to the Department of Insurance as a part of the Appraisal procedure invoked by the Insured. However, that subsequent appraisal does not undermine Defendant All America's evidence of a belief that a fraudulent claim had been submitted by Plaintiffs at *the time of the referral.* In fact, in spite of Plaintiffs' attempts to mischaracterize this report as having indicated the presence of smoke damage during the deposition of Ms. Chapman, the report actually supported Defendant All America's belief that there was no smoke damage and that the claim was fraudulent. [DSOF, Exhibit 17 at p. 1 and then at p. 5 of Act Environmental Report].

There is simply no issue of fact on the issue of Defendant's actual belief that Plaintiffs had submitted a fraudulent estimate for smoke damages at the time of the Defendant's referral to the Department of Insurance.

Since all of Plaintiffs O'Toole and O'Toole Company claims stem from this allegation and no genuine issue of material fact exists to defeat Defendant's immunity under A.R.S. § 20-466(K), Defendant is entitled to summary judgment as to all counts in the complaint relative to Plaintiffs O'Toole and O'Toole Company.

Based upon all of the foregoing,

IT IS ORDERED granting Defendant All America's Amended Motion for Summary Judgment Re: Heflings as to Count Seven and denying the motion as to Count Two.

IT IS FURTHER ORDERED granting Defendant All America's Amended Motion for Summary Judgment Re: Plaintiffs James O'Toole & James F. O'Toole Company as to all counts remaining in the complaint (Counts Three through Seven).