

VERMONT SUPERIOR COURT
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CIVIL DIVISION
Case No. 20-CV-00692

Stacey Freda v. Union Mutual Fire Insurance Company d/b/a Union Mutual

ENTRY REGARDING MOTION

Title: Motion to Reconsider (Motion: 13)
Filer: Harry R. Ryan, III
Filed Date: April 07, 2023

The motion is DENIED.

Ruling on Ms. Freda's Motion for Reconsideration

On March 22, 2023, the court granted Union Mutual's partial summary judgment motion. The effect of the decision was to eliminate Ms. Freda's fraud and bad faith claims, leaving only her breach of insurance contract claim. In other words, it winnowed this case down to an ordinary insurance coverage dispute. Ms. Freda then filed a motion to reconsider that decision. She claims that new evidence demonstrates that the court should have denied Union Mutual's motion, and that she continues to need more discovery as to these claims. The asserted new evidence is deposition testimony from two of Union Mutual's experts, Mr. McCuin and Mr. Beck.¹ Union Mutual opposes Ms. Freda's motion both procedurally and substantively.

¹ Ms. Freda claims that still more new evidence is available from her "potential experts," but she declines to reveal who they are or what they might have to say ostensibly because the deadline to disclose experts has not yet come to pass. Intentionally declining to present evidence that a party opposing summary judgment claims to possess, and that supposedly would demonstrate a triable issue, is no doubt an unusual tactic; it is wholly unpersuasive one as well. The summary judgment process depends on the presentation of evidence, not its intentional concealment. See V.R.C.P 56(c) (procedures for supporting factual positions). Ms. Freda has the burden of proof in this case. She only withholds favorable evidence to her own detriment.

To the extent that Union Mutual argues that Ms. Freda's motion is improper procedurally, the court disagrees. The court has plenary authority to reconsider its interlocutory decisions prior to final judgment. "In the absence of [a partial final judgment], any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, *and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.*" V.R.C.P 54(b) (emphasis added). When a party asks the court to do so, the request is simply called a motion for reconsideration. See *Cho v. State*, 168 P.3d 17, 27 (Haw. 2007).

That is not to say that courts will happily do everything more than once. Reconsideration motions are seriously scrutinized and seldom warrant relief. They are not a vehicle to relitigate matters previously adjudicated by the court or to consider matters not initially raised by the moving party. See *Keene Corp. v. Int'l Fid. Ins. Co.*, 561 F. Supp. 656, 665 (N.D. Ill. 1982). "The standard for granting [a motion to reconsider] is strict, and reconsideration will generally be denied unless the moving party can point to controlling decisions or data that the court overlooked—matters, in other words, that might reasonably be expected to alter the conclusion reached by the court." *Shrader v. CSX Transp., Inc.*, 70 F.3d 255, 257 (2d Cir. 1995)).

Nor is a party permitted to raise new arguments, new evidence, or new legal theories that should have been presented initially in a motion to reconsider. See *Campbell v. Stafford*, 189 Vt. 567, 571 (2011); *Mays v. U.S. Postal Service*, 122 F.3d 43, 46 (11th Cir. 1997) ("motion to reconsider should not be used by the parties to set forth new theories of law"); *Rossi v. Troy State Univ.*, 330 F. Supp. 2d 1240, 1249 (M.D. Ala. 2002) ("Additional facts and arguments that should have been raised in the first instance are not appropriate grounds for a motion for reconsideration."). A party may not wait for reconsideration to "wheel out all its artillery." *Caisse Nationale de Credit Agricole v. CBI Industries, Inc.*, 90 F.3d 1264, 1270 (7th Cir. 1996) (quoting *Employers Ins. of Wausau v. Bodi Wachs Aviation Ins. Agency*, 846 F. Supp. 677, 685 (N.D. Ill. 1994)).

The court accurately described the standards applicable to Ms. Freda's bad faith claim in the summary judgment decision as follows.

Bad faith, in this context, is extra-contractual; it does not necessarily rise and fall with the correctness of the coverage determination:

To establish bad faith, the plaintiff must show that: “(1) the insurance company had no reasonable basis to deny benefits of the policy, and (2) the company knew or recklessly disregarded the fact that no reasonable basis existed for denying the claim.” Where a claim is “fairly debatable,” the insurer is not guilty of bad faith even if it is ultimately determined to have been mistaken.

Murphy v. Patriot Ins. Co., 2014 VT 96, ¶ 17, 197 Vt. 438 (quoting *Bushey v. Allstate Ins. Co.*, 164 Vt. 399, 402 (1995)); see 14A Steven Plitt, et al., *Couch on Ins.* § 204:28 (fairly debatable means “open to dispute or question”). “[I]f a realistic question of liability exists, an insurer may withhold payment.” *Bushey*, 164 Vt. at 403; accord *Cohan v. Provident Life & Acc. Ins. Co.*, 140 F.Supp.3d 1063, 1073–74 (D. Nev. 2015) (“At issue is not whether the insured was covered under the policy, but only whether a reasonable and legitimate dispute exists as to that coverage.”), quoted in *Litig. & Prev. Ins. Bad Faith* § 11:17 (3rd ed.). Perfection is not required; “[i]t is enough that the legal or factual basis for denial was ‘neither strained nor fanciful, regardless of whether it is correct.’” *Litig. & Prev. Ins. Bad Faith* § 11:17 (3rd ed.) (citation omitted). If the insurer’s determination is reasonable as a matter of law, even if possibly wrong, summary judgment is appropriate. See *Bushey*, 164 Vt. at 403; see also *Town of Ira v. VLCT Property and Casualty Intermunicipal Fund, Inc.*, 2014 VT 115, ¶ 22, 198 Vt. 12, 24 (fact that legal issue had not yet been decided in Vermont weighs in favor of reasonableness of insurer’s action). As to the reasonableness of the basis for denial, the inquiry is objective. *Bad Faith Actions Liability & Damages* § 5:2 (2d ed.).

To the extent that Ms. Freda now asks the court to reassess the evidence then in the record under these standards in hopes that it will arrive at a different result, the court declines to do so. That is simply more argument as to something that has already been decided; it is not a proper use of a reconsideration motion.

Part of Ms. Freda's motion, however, focuses on testimony from depositions the transcripts for which were not in the summary judgment record. She describes, "In this case, new evidence was obtained through discovery after the filings on Defendant's partial motion for summary judgment were complete. The depositions of Defendant's experts Curt McCuin and Matthew Beck were taken and show that the court was incorrectly informed by those reports." The court notes that the depositions were taken on November 22, 2022, and January 5, 2023. By the time of the November deposition, the parties were at the tail end of briefing the summary judgment motion, which had concluded by the time of the January deposition. However, the summary judgment *decision* was not rendered until March 22, 2023. If either deposition revealed any sort of smoking gun evidence, as Ms. Freda now suggests, she certainly should have taken steps to get it in front of the court before it decided the motion. Waiting to see what that decision would be and then coming forward with it is a highly questionable practice.

In the summary judgment decision, the court essentially ruled that hiring an independent expert, GRIP, that did not conclude that there was hail damage to the shingles, and with no evidence whatsoever that Union Mutual nevertheless knew or recklessly disregarded that there was no reasonable basis to deny the claim, is insufficient to demonstrate a triable issue. The reports of Mr. McCuin and Mr. Beck, which were in the record, were generated several years later *and were inconclusive*.²

Ms. Freda has submitted with her reconsideration motion some very brief excerpts from both experts' depositions. Even those curated segments of their testimony continue to evince their opinions as reflected in their reports: *whether hail damaged the shingles is inconclusive*.

Neither during the summary judgment procedure nor now has Ms. Freda demonstrated a triable issue as to bad faith. An insurance company can be liable for incorrectly denying a claim without having done so in bad faith. Ms. Freda may well be able to prove her coverage claim. But her insistence that if only Union Mutual had investigated better or in some other way that it would have been clearer that it should

² The court notes that the tone of Ms. Freda's briefing—both in opposition to summary judgment and in support of reconsideration—implies that she believes that the investigations undertaken by GRIP, Mr. McCuin, and Mr. Beck were shams, and Union Mutual knew it. The court simply observes that Ms. Freda has the burden of proof in this case, and she has not come forward with sufficient evidence of this theory of the case to demonstrate a triable issue.

not have denied the claim is unavailing. Union Mutual hired GRIP, an independent expert, and Ms. Freda has not developed any evidence that Union Mutual was unreasonable in relying on GRIP's report, even if that report had shortcomings. "Sloppy or negligent claims handling does not rise to the level of bad faith." *Chateau Chamberay Homeowners Ass'n v. Associated Int'l Ins. Co.*, 90 Cal. App. 4th 335, 351 (2001), as modified on denial of reh'g (July 30, 2001), quoted in *Murphy v. Patriot Ins. Co.*, 2014 VT 96, ¶ 24, 197 Vt. 438.

A remaining nuance in this case is whether the evidence of *cosmetic* damage to portions of the roof—dings and dents to flashings on the roof and reported to the carrier by GRIP—was sufficient to trigger an obligation in the insurer to offer some compensation. Ms. Freda has not demonstrated that this damage was covered by the policy, much less that the denial that encompassed it was in bad faith. At best, failing to tease out this possible subcomponent of the claim, if viable at all, falls under the category of sloppy claims handling, not bad faith.

To the extent that Ms. Freda wants more time for discovery, the court properly denied her request to delay in its original decision, and it declines to reconsider that now.


The coverage claim (Count 2) remains to be determined.

ORDER

For the foregoing reasons, Ms. Freda's motion for reconsideration is denied.

Electronically signed on 8/21/2023 1:22 PM,

pursuant to V.R.E.F. 9(d)



Robert R. Bent,
Judge