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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JOAN M. KENNEY
Justice

PART 8

Index Number : 109668/2006
GMAC MOTORS ACCEPTANCE
vs.
NEW YORK CENTRAL MUTUAL FIRE
SEQUENCE NUMBER : 004
SUMMARY JUDGMENT

INDEX NO. 109668/06
MOTION DATE 5/17/13
MOTION SEQ. NO. 004

The following papers, numbered 1 to 80, were read on this motion to/for SJ motions

Notice of Motion/Order to Show Cause — Affidavits — Exhibits | No(s). 1-72
Answering Affidavits — Exhibits | No(s). 73-77
Replying Affidavits | No(s). 78-80

Upon the foregoing papers, it is ordered that this motion is

MOTION IS DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM DECISION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 8/13/13

JOAN M. KENNEY, J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 8

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GENERAL MOTORS ACCEPTANCE CORPORATION
and AMERICAN AUTOMOBILE INSURANCE COMPANY,

Plaintiffs,

-against-

NEW YORK CENTRAL MUTUAL FIRE INSURANCE COMPANY,

Defendant.

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DECISION & ORDER

Index No. 109668/2006

Joan M. Kenney, J.

Defendant New York Central Mutual Fire Insurance Company (NYCM) moves for an order restoring its prior summary judgment motion and, upon restoration, for an order, pursuant to CPLR 3212, granting summary judgment in its favor, and dismissing the complaint with prejudice. Plaintiffs General Motors Acceptance Corporation (GMAC) and American Automobile Insurance Company (AAIC) cross-move for an order granting summary judgment on the complaint in their favor.

NYCM originally moved for summary judgment by motion submitted on October 29, 2010. This court initially held the motion in abeyance, and, later, by order dated September 27, 2012, dismissed the motion without prejudice to restore upon a final determination of the appeal of this court's conditional preclusion order entered July 14, 2011 (2011 preclusion order). In the 2011 preclusion order, the court, among other things, granted plaintiffs' motion for a conditional order of preclusion. By order dated March 19, 2013, the Appellate Division, First Department unanimously modified the 2011 preclusion order by limiting preclusion to the documents identified in the order as either missing or not disclosed, and otherwise affirmed the order. The condition precedent to restoration having occurred, that branch of this motion to restore NYCM's prior summary judgment

motion is granted.

In this action for bad-faith failure to settle within the primary insurance policy limits, GMAC and AAIC, a unit of Fireman's Fund Insurance Company and the excess insurance carrier, seek to recover monies that they paid toward settlement of the underlying action, *Julia Sette v Lesly J. Appleby, Jaime Stevenson, Mariann Clayton, & GMAC Financial Services* (Sup Ct, NY County, index No. 124072/1994) (the *Sette* action). The *Sette* action plaintiff (Sette) alleged that she sustained serious personal injuries on April 24, 1994, as the result of a two-car collision. Sette alleged that the accident occurred while she was a passenger in a 1989 Honda operated by Lesly J. Appleby and leased by Sette's father, Edward J. Sette, from GMAC.

The Honda in which Sette was riding was covered by a personal automobile policy having limits of $300,000 per occurrence issued by NYCM to Edward Sette, and an excess liability policy issued by AAIC to GMAC having a deductible of $1 million per occurrence for each of the leased vehicles in its fleet. The second motor vehicle involved in the accident, a 1990 Dodge, was driven by Jaime Stevenson, owned by Mariann Clayton, and insured by a GEICO policy having limits of $10,000 per person and $20,000 per occurrence.

Sette was taken by ambulance from the scene of the accident to Westchester County Medical Center, where she complained of pain to her neck, left shoulder, left arm, and ribs, and denied any loss of consciousness, dizziness, tinnitus, or vomiting. Sette was treated for soft tissue injuries, and released in stable condition, with instructions to take Motrin or Tylenol, as needed. In the eight years following the accident, Sette consulted with a variety of medical specialists, including an orthopedist, a neurologist, a neuropsychiatrist, an opthalmologist, and a psychologist. She also underwent a variety of objective tests, including magnetic resonance imaging (MRI), electroencephalogram

(EEG), brainstem auditory evoked response (BAER), and visual evoked response (VER). In the bill of particulars, Sette alleges that she sustained a severed olfactory nerve, severed brainstem dysfunction causing cognitive impairment, bilateral carpal tunnel syndrome, cerebral concussion, and lumbar strain. Sette, who had been employed as an administrative assistant prior to the accident, did not return to any employment after the accident and prior to resolution of the *Sette* action.

The *Sette* action trial was bifurcated, and the liability issue was tried to verdict before the Honorable Harold Tompkins. On December 6, 2000, after trial, the jury returned a verdict, finding each of the *Sette* action defendants liable. The jury apportioned the percentage of fault equally between the defendants associated with each of the two vehicles involved in the accident, finding Appleby and GMAC 50% liable and Stevenson and Clayton 50% liable (*see Sette v Appleby*, Sup Ct, NY County, index No. 124072/1994, Dec. 6, 2000 verdict sheet).

Judge Tompkins then remanded the trial on damages to Civil Court, pursuant to CPLR 325 (d), finding that "there is, in the opinion of this Court, a serious question as to whether the plaintiff can meet the threshold of a serious injury. In light of this, the Court feels that the amount of potential damages would not exceed the jurisdiction of the Civil Court" (*see Sette v Appleby*, Sup Ct, NY County, index No. 124072/1994, Dec. 6, 2000 verdict proceedings tr at 9 [14-23]).

On April 9, 2003, after trial on damages before the Honorable Eileen A. Rakower, the jury returned a verdict, finding that Sette had satisfied the No-Fault Law serious injury threshold in both the 90/180-day impairment and the partial loss of use of a body organ or system categories (*see* Ins. Law § 5102 [d]), and that she was entitled to a total of $1.5 million, plus future lost earnings to be awarded over a period of eight years (*see Sette v Appleby*, Civ Ct, NY County, index No. 000146TSN2001, Apr. 9, 2003 verdict sheet). Subsequently, Sette agreed to accept $1.5 million in

full settlement of her claims. To fund the settlement, NYCM paid over the $300,000 primary policy limits, and AAIC paid the remaining $1.2 million. Subsequently, AAIC recovered $1 million from GMAC.

Plaintiffs then commenced this action by service and filing of a summons and complaint. In this action, plaintiffs allege that NYCM acted in bad faith during discovery and during the bifurcated trial of the *Sette* action by significantly undervaluing the *Sette* action claims, and by refusing to enter into settlement negotiations with Sette, although Sette's attorneys attempted to settle the action, prior to the jury verdict on damages. Plaintiffs further allege that NYCM's conduct constitutes a gross disregard of their interests, and a deliberate failure to place plaintiffs' interests on an equal footing with NYCM's own interests. On these allegations, plaintiffs seek to recover $1.75 million, together with interest, and costs and disbursements incurred in this action.

In the answer, NYCM denies all allegations of wrongdoing, and asserts 11 affirmative defenses, including one arising out of allegations that NYCM failed to settle the *Sette* action, even though GMAC and AAIC had agreed to contribute to such settlement. NYCM also asserts two counterclaims against plaintiffs for breach of the duties of good faith and fair dealing they owed to NYCM.

NYCM now seeks summary judgment in its favor on the complaint, contending that the undisputed record demonstrates that its belief that Sette had not sustained a causally-related serious injury sufficient to meet the No-Fault Law threshold was reasonable, given Sette's medical history, and that, at no point during the pendency of the *Sette* action, did a real opportunity to settle exist, given Sette's refusal to settle for a reasonable amount.

In opposition, plaintiffs contend that NYCM improperly: failed to acknowledge that Sette

met the No-Fault Law serious injury threshold prior to the damages trial; failed to properly investigate and evaluate Sette's claim; failed to authorize any offer of settlement; repeatedly ignored plaintiffs' demands to settle the *Sette* action; and failed to recognize the potential magnitude of damages and financial exposure to the defendant-insureds in the *Sette* action. Plaintiffs also contend that, among other things, triable issues exist regarding whether NYCM acted within its discretion in not offering to pay the $300,000 policy limits prior to the damages trial verdict, and whether NYCM reasonably believed that Sette could not prove that she had sustained causally-related serious injuries sufficient to satisfy the threshold requirements of the No-Fault Law.

A primary insurance carrier owes a duty of good faith arising out of the insurance contract to its insured and to the excess insurance carrier, if any, to negotiate a settlement, and to protect their interests and avoid exposing them to liability by settling within the primary policy limits, if possible (*Pavia v State Farm Mut. Auto. Ins. Co.*, 82 NY2d 445, 452 [1993]; *see Zurich Ins. Co. v State Farm Mut. Auto. Ins. Co.*, 137 AD2d 401, 402 [1st Dept 1988]). An insurer will be held liable for bad faith only when it refuses an actual offer to settle within the primary policy limits (*United States Fid. & Guar. Co. v Copfer*, 48 NY2d 871, 873 [1979]; *Pavia v State Farm Mut. Auto. Ins. Co.*, 82 NY2d at 452). Significantly, courts are reluctant "to expose insurance carriers to liability far beyond the bargained-for policy limits for conduct amounting to a mere mistake in judgment" (*Pavia v State Farm Mut. Auto. Ins. Co.*, 82 NY2d at 453).

Bad faith is generally proven by circumstantial evidence, and involves many factors and considerations (*Roldan v Allstate Ins. Co.*, 149 AD2d 20, 37 [2d Dept 1989]; *see Hartford Ins. Co. v Methodist Hosp.*, 785 F Supp 38, 41 [ED NY 1992]). Therefore, whether an insurer acted in bad faith is a question properly reserved for the jury (*see Redcross v Aetna Cas. & Sur. Co.*, 260 AD2d

908, 914 [3d Dept 1999]; *Di Sicurta v Medical Malpractice Ins. Assn.*, 237 AD2d 140, 140 [1st Dept 1997]).

> "[I]n order to establish a prima facie case of bad faith, the plaintiff must establish that the insurer's conduct constituted a 'gross disregard' of the insured's interests--that is, a deliberate or reckless failure to place on equal footing the interests of its insured with its own interests when considering a settlement offer. In other words, a bad-faith plaintiff must establish that the defendant insurer engaged in a pattern of behavior evincing a conscious or knowing indifference to the probability that an insured would be held personally accountable for a large judgment if a settlement offer within the policy limits were not accepted"

(*Pavia v State Farm Mut. Auto. Ins. Co.*, 82 NY2d at 453-454 [internal citation and quotation marks omitted]).

The trier of fact should consider:

> "all of the facts and circumstances relating to whether the insurer's investigatory efforts prevented it from making an informed evaluation of the risks of refusing settlement . . . must assess the plaintiff's likelihood of success on liability issue in the underlying action, the potential magnitude of damages and the financial burden each party may be exposed to as a result of the insurer's refusal to settle. Additional considerations include the insurer's failure to properly investigate the claim and any potential defenses thereto, the information available to the insurer at the time the demand for settlement is made, and any other evidence which tends to establish or negate the insurer's bad faith in refusing to settle"

(*id.* at 454-455).

These factors are not exclusive, and no single factor is dispositive (*see Smith v General Acc. Ins. Co.*, 91 NY2d 648, 654 [1998]).

The motion for summary judgment is denied on the ground that numerous genuine issues of material fact exist regarding whether NYCM's decision not to offer the primary policy limits to settle

the *Sette* action was the result of a gross disregard of the interests of GMAC and AAIC. Where genuine triable issues of material fact or triable issues requiring credibility determinations exist, summary judgment is not appropriate (*Zuckerman v City of New York*, 49 NY2d 557, 561 [1980]; *S.J. Capelin Assoc. v Globe Mfg. Corp.*, 34 NY2d 338, 341 [1974]; *see* CPLR 3212).

The record demonstrates that, over the course of eight years, Sette was examined by numerous medical professionals in numerous medical specialities and underwent numerous tests. The reports generated by the professionals and the test results include evidence that may be held to demonstrate that NYCM had a prudent and reasonable basis upon which to conclude that Sette's medical complaints were related merely to soft tissue injuries, were exaggerated, or were preexisting conditions unrelated to the underlying motor vehicle accident.

Immediately following the accident, Sette was examined by the medical personnel at the emergency room at Westchester County Medical Center. That examination revealed tenderness on Sette's left side, an x-ray of Sette's cervical spine suggested muscle spasm and revealed underlying disc disease, and an x-ray of Sette's left shoulder demonstrated that the shoulder was normal. Westchester County Medical Center did not admit Sette, but, instead, discharged her after two hours.

Three days after the accident, on April 27, 1994, Sette was examined at the Greater Metropolitan Medical Services in Brooklyn. Although Sette complained of headaches, dizziness, blurred vision, neck pain radiating to her shoulder and pain in her low back radiating to her legs, Leonard G. Schuchman, D.O., Greater Metropolitan's medical director, confirmed that her mental status, gait, range of motion, power, sensation, reflexes, cranial nerves and cerebella function were all within normal limits (*see* Greater Metropolitan Medical Services May 9, 1994 report). Dr.

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Schuchman ordered further tests, including an EEG, BAER, VER, x-rays of her skull and an MRI of her brain. The results of these tests were normal, with two exceptions. The BAER test revealed an abnormality consisting of a partial conduction delay along the left auditory pathways (*see* Irving Friedman, M.D. Apr. 28, 1994 BAER report). The VER test revealed a lesion involving both anterior optic pathways (*see* Irving Friedman, M.D. Apr. 28, 1994 VER report).

On December 14, 1995, Robert A. Kersh, M.D., performed an MRI of Sette's brain. Dr. Kersh concluded that the MRI showed no intracranial abnormalities, no evidence of midline shift or mass effect, and no orbital mass lesions, and that the brainstem and cerebellar hemispheres were unremarkable (*see* Paul D. Ostrovsky, M.D., P.C. Dec. 15, 1995 report by Robert Kersh).

In March 2001, Sette was examined by William Barr, PhD., ABPP, a neuropsychologist at NYU Comprehensive Epilepsy Center, who concluded that Sette was "functioning at a very superior level on a general measure of cognition . . . . All cognitive functions appear intact, except for verbal memory in particular. However, it is not clear how this finding correlates to the injuries she reports having sustained in 1994" (NYU-Mount Sinai Comprehensive Epilepsy Ctr. Mar. 12, 2001 report).

However, the record also includes evidence that Sette was partially or totally disabled. For example, in his report dated July 25, 1994, Dr. Irving Parnes found Sette to be totally disabled. In a report dated August 12, 1994, the University of Pennsylvania Smell and Taste Center diagnosed a total loss of the sense of smell, caused by the severance of Sette's olfactory nerves. In addition, there is no dispute that Sette did not return to any type of employment prior to the jury damages trial held in April 2003.

NYCM's conclusion that Sette could not meet the No-Fault Law serious injury threshold appears to have been shared by AAIC. In January 2002, an AAIC claims representative reviewed

Sette's medical records generated since the 1994 accident, and noted that "many tests have revealed normal results and the medical exams conducted indicated no objective findings for plaintiff's complaints and/or that many complaints were pre-existing" (AAIC Consolidated Reporting Form, Jan. 15, 2002). The AAIC representative concluded that "[r]eviews also indicate [Sette] may be grossly exaggerating her symptoms and diagnostic tests fail to reveal objective signs of cognitive problems" (*id.*).

However, the record also includes evidence that NYCM should have known that Sette's injuries were serious, and had a value far exceeding the limits of the NYCM primary policy. For example, there is no dispute that NYCM, as the no-fault carrier, paid Sette's lost wages for almost two years following the accident.

In addition, defense counsel retained by NYCM prior to the liability trial evaluated the *Sette* action claims, and advised NYCM that, "if a jury believes [Sette's] injuries, it is conceivable that a verdict well into the six-figure range could be awarded" (Boeggeman, George, Hodges & Corde, P.C. Jan. 14, 2000 letter). In 2003, GMAC and AAIC advised NYCM that Sette met the serious injury threshold in the 90/180 category, inasmuch as she had been out of work since the accident in 1994, and demanded that NYCM contribute the full primary policy limits toward a settlement to be negotiated by GMAC and AAIC (*see* Lester Schwab Katz & Dwyer, LLP Mar. 19, 2003 letter).

Triable issues sufficient to preclude summary judgment also exist regarding whether NYCM had an actual opportunity to settle the *Sette* action prior to trial, and whether its loss of the opportunity was caused by its bad faith. "[P]roof that a demand for settlement was made is a prerequisite to a bad-faith action for failure to settle" (*Pavia v State Farm Mut. Auto. Ins. Co.*, 82 NY2d at 454).

The record includes evidence that Sette changed counsel several times during the *Sette* action, and that her counsel made a number of settlement demands during the pendency of the *Sette* action. Triable issues exist regarding whether some of the demands were high, in light of the medical evidence, and whether Sette had authorized the demand. Sette's counsel demanded $3 million in June 2001, $2.5 million in December 2002; $300,000 in January 2003 but withdrew the demand almost immediately, and demanded $1 million during the damages trial, then $750,000 while the jury was deliberating. There is also evidence that, with regard to the last demand, AAIC proposed that, if NYCM would offer the $300,000 primary policy limits, AAIC would offer the $450,000 balance.

NYCM contends that it justifiably declined to enter into settlement negotiations, and take the verdict on the ground that its monitoring counsel reported on a daily basis that defense counsel was doing an outstanding job of defending the case, and had exposed critical weaknesses in Sette's case, and that Sette had failed to present credible objective evidence of causally related serious injuries sufficient to satisfy the No-Fault Law requirements.

Plaintiffs also cross-move for summary judgment in their favor on the complaint, on the ground that this court's conditional preclusion order, as modified and affirmed by the Appellate Division, First Department holds that evidentiary matters cannot be resolved because of NYCM's spoliation of critical evidence.

Contrary to plaintiffs' contention, the preclusion order, as modified and affirmed, does not resolve any of the triable issues detailed above, nor does it mandate an award of summary judgment in plaintiffs' favor. In the preclusion order, as modified and affirmed, this court ordered that NYCM produce certain missing documents, or be precluded from using the absence of these documents at

trial to its tactical advantage, as a sanction for NYCM's spoliation of evidence and noncompliance with discovery orders, which compromised plaintiffs' ability to prosecute this action. This court expressly declined to strike NYCM's answer.

The missing documents consist of a May 19, 2000 NYCM claims meeting and certain correspondence regarding the *Sette* action by NYCM to Baxter & Smith, NYCM's trial counsel. Given the voluminous production of medical records, letters and reports by counsel hired by NYCM to represent Appleby and GMAC in the *Sette* action and NYCM's monitoring counsel, and the deposition testimony by NYCM employees, the intentional or negligent loss of these documents is rectified by the preclusion order. Contrary to plaintiffs' contention, NYCM's spoliation of these documents does not eviscerate any meritorious defense that NYCM may have demonstrated.

Accordingly, it is

ORDERED that the defendant's motion restoring it's prior summary judgment motion is granted, and upon restoration, defendant's application for dismissal of the summons and complaint, is denied; and it is further

ORDERED that plaintiffs' cross motion is denied; and it is further

ORDERED that the parties proceed to mediation and/or trial forthwith.

Dated: August 14, 2013

ENTER:

J.S.C.