IN THE COUNTY COURT OF THE THIRTEENTH JUDICIAL CIRCUIT
IN AND FOR HILLSBOROUGH COUNTY, STATE OF FLORIDA
GENERAL CIVIL DIVISION

AUTO GLASS AMERICA, LLC
a/a/o NEILSON CORDERO,
Plaintiff,

vs.

GEICO GENERAL INSURANCE COMPANY,
Defendant.

_____/

CASE NO.: 17-CC-19839
DIVISION: M

FINAL JUDGMENT FOR THE DEFENDANT

THIS CAUSE came before the Court on May 22, 2018 for a non-jury trial. After observing the demeanor of the witnesses, and having considered and weighed the admissible testimony and other evidence presented, and the arguments of counsel, and being otherwise fully advised, the Court hereby

ORDERS AND ADJUDGES, as follows:

I. Summary of the Parties' Positions

1. Plaintiff filed this breach of contract action seeking payment of the alleged unpaid balance of comprehensive coverage insurance benefits, following Plaintiff's replacement of Defendant's insured's damaged windshield. Plaintiff obtained an assignment of benefits from the insured, submitted an invoice to the Defendant for the windshield replacement services rendered to the insured, and the Defendant subsequently paid less than the full invoiced price for the services rendered. The total amount billed on the Plaintiff's Invoice was $1,105.33. (Plaintiff's Ex. 1). Defendant thereafter issued a payment to Plaintiff in the amount of $513.15, an amount $592.18 less than the billed amount (Plaintiff's Ex. 3). The Plaintiff contends that the Defendant's underpayment violated the relevant terms of the subject insurance policy. The Defendant contends that it paid the proper amount provided for under the terms of the insurance policy.

2. Upon the Plaintiff's resting, Defense counsel moved for Summary Disposition and for a Directed Verdict, arguing that the plaintiff failed to carry its burden of proof by failing to establish the competitive market price of the services in question, arguing that while the Plaintiff's testimony may have described how the Plaintiff arrived at its price, it did not establish the competitive market price.

3. Plaintiff responded that the burden of proving the competitive market price shifted to the Defendant once the Plaintiff had proved that it was a competent provider and offered its services

to the insured at a location convenient to the insured. It was the Plaintiff's position that once the Defendant accepted coverage, it was the burden of the Defendant to prove that it had paid the competitive market price for these services.

4. The Defendant also argued that the Safelite work order (Defendant's Exhibit 1) contained language that constituted an accord and satisfaction once the Plaintiff undertook the work in question. The work order on its face fails to establish the elements of accord and satisfaction, and this argument fails as a matter of law. *Oakland Park MRI Inc. d.b.a. DPI of Fort Lauderdale a.a.o. Niurka Fuentes v. United Auto. Ins. Co.*, 24 Fla. L. Weekly Supp. 82a (Broward Cty. Ct. July 28, 2015); *MR Services I, Inc. a.a.o. Kevin Henderson v. United Auto. Ins. Co.*, 22 Fla. L. Weekly Supp. 856a (Broward Cty. Ct. Jan. 24, 2014). See, too, Auto Glass America, LLC (a/a/o Leslie Regan) v. Geico General Insurance Company, Case number 17-8951COWE 81 (Broward Cty. Ct., May 8, 2018, J. Fishman, Judge). This work order describes the "pricing parameters" upon which the Defendant ultimately based its payment to the Plaintiff, but does not state any specific amount to be paid, and instead, only references a percentage of an unstated "list price." The Court finds that this work order does not create an obligation upon Plaintiff to object to, or accept the pricing parameters set forth therein.

5. This Court took the Defendant's Motions for Summary Disposition and Directed Verdict under advisement, and directed that the Defendant put on its case, which it did. The defense called two witnesses, Ms. Susanna Eberling as the corporate representative for GEICO, and Mr. Michael Quesada, as a fact witness, although he is also employed in a management position with GEICO. As explained below, because the Court has now decided to grant the Defendant's Motions for Summary Disposition and for Directed Verdict, the Court will not address the substance of the testimony of the Defendant's witnesses.

II. Discussion

6. The Court must first look to the relevant policy provision, which, in pertinent part, reads as follows:

> LOSSES WE WILL PAY
>
> Comprehensive (Excluding Collision)
>
> 1. **We will pay for each loss,** less the applicable deductible caused by collision to the owned or non-owned auto. **This includes glass breakage.**
>
> No deductible will apply to loss to windshield glass.
>
> . . . . . .
>
> The limit of liability for loss:
>
> . . . . .
>
> ... **Will not exceed the prevailing competitive price to repair or replace the property at the time of loss,** or any of its parts, including parts from non-original equipment manufacturers, with other like kind and quality and will not include compensation for any diminution of value that is claimed to result from the loss.

> **Although you have the right to choose any repair facility or location, the limit of liability for repair or replacement of such property is the prevailing competitive price which is the price we can secure from a competent and conveniently located repair facility.** At your request, we will identify a glass repair facility that will perform the repairs at the prevailing competitive price.
>
> (Emphasis added)

7. Plaintiff demonstrated that it is a "competent" automobile glass replacement facility, and that Plaintiff is a "conveniently located" automobile glass replacement facility, in compliance with the relevant provision of the insurance policy and as set forth in the *Matthew Dick* decision.

A. The *Matthew Dick* Decision

8. Plaintiff contends that its invoiced price is the "prevailing competitive price," in compliance with this provision of the insurance policy and the standard set forth in *Government Employees Ins. Co. v. Superior Auto Glass of Tampa Bay, Inc., a.a.o. Matthew Dick, et al.*, Consolidated Appeal Nos. 16-CA-5106, 16-CA-7959, 16-CA-7963, 16-CA-7041 and 16-CA-8940, Slip Opinion (Fla. 13th Jud. Cir. Ct. App. Div. March 27, 2018) ("*Matthew Dick*").

9. The "*Matthew Dick*" decision sets forth the overriding concepts that must be applied in this case. To paraphrase, these concepts are as follows:

a. The above policy language unambiguously limits GEICO's liability to the "prevailing competitive price", which means the price the service would bring in a competitive market, and not the price set in an agreement between GEICO and particular providers.

b. The issue as it relates to the prevailing competitive price is not a coverage question, but rather, only the amount payable is at issue.

c. The claim for reimbursement under this policy must be a price that is both prevailing and competitive.

d. GEICO cannot limit its liability to the "prevailing competitive price" language, and then further limit its liability by entering into private, non-open-market agreements or transactions that it alone can obtain. Under the policy language, therefore, the test is what the service would cost in a competitive market in a normal, arms' length non-insurance transaction.[1]

[1] Based upon the entire context of this Opinion, the undersigned takes the phrase "non-insurance transaction" not to mean "cash transaction," but rather to an arms' length transaction other than one involving an affiliation or agreement between GEICO, including any of its affiliates, and any individual provider, as noted in subparagraph 9a, above.

e. GEICO is required to pay the price of the repair (or replacement) it can secure in a competitive market from a competent and conveniently located repair facility.

f. The "prevailing competitive price" is a question of fact that is to be determined in the context of the windshield repair and replacement market.

g. The record evidence before the finder of fact must be sufficient to evaluate whether the prices proposed by either party met the "prevailing competitive price" standard, as to both the "competitive" and the "prevailing" price, in order for the finder of fact to determine whether judgment should be for one of those proposed prices or some price within that range.

See, *Matthew Dick, id.*

B. Burden of Proof

10. The key question before this Court is whether, in this breach of contract claim for replacement costs of an insured's windshield, the Defendant's acceptance of coverage of the claim shifts the burden of proof from the Plaintiff to the Defendant to establish the competitive market price of the services involved. This Court answers this question in the negative; that the burden of proof remains with the Plaintiff to establish the prevailing competitive market price and that it suffered damages as a result of the Defendant's failure to pay such price.

11. The *Matthew Dick* decision does not specifically address the question of burden of proof. However, in stating that a dispute regarding competitive market pricing is not a coverage issue, this Appellate Court pointed out that this was only about how damages should be measured. In all breach of contract actions, the burden of proof is on the Plaintiff to prove by the greater weight of the evidence, all of the elements of a breach of contract, and an indispensable element of such a claim is the element of damages. Before this burden can be shifted, each element, including damages, must first be established.

12. Florida law holds that an action for breach of an insurance policy is an action for breach of contract. *Friedman v. New York Life Ins. Co.*, 985 So. 2d 56 (Fla. 4th DCA 2008). Florida law is further clear that the burden is on the Plaintiff to prove the existence of a contract, a material breach of the contract, and damages flowing from the breach. *Ferguson Enterprises, Inc. v. Astro Air Conditioning and Heating, Inc.*, 137 So.3d 613, 615 (Fla. 2d DCA 2014) (citing *Havens v. Coast Florida, P.A.*, 117 So.3d 1179, 1181 (Fla. 2d DCA 2013)).

13. Plaintiff relies on *State Farm Mutual Automobile Insurance Company v. Pridgen*, 498 So.2d 1245 (Fla. 1986) in arguing that the burden of proof in this case should be shifted to the Defendant. However, *Pridgen* addresses the burden of proof in the context of an exclusionary

clause in an insurance policy, holding that "once it is established that a loss falls within the comprehensive coverage of an automobile insurance policy, it is the insurer who has the burden to prove that the loss arose from a cause which is excepted under the policy." *Id.* at 1248. This is not the context of the present case. The case *sub judice* does not address a claimed exclusion to coverage. Rather, the Defendant did not dispute coverage, acknowledged and afforded coverage, and made payment for the claim at issue. The Plaintiff has sued for breach of contract claiming it is owed additional amounts under the Policy. This is exactly the type of claim that the *Matthew Dick* decision affirmatively determined was not a coverage issue. The burden of proof therefore remains upon the Plaintiff to prove its breach of contract claim. *See U.S. Liability Ins. Co. v. Bove*, 347 So.2d 678, 680 (Fla. 3d DCA 1977).

14. The Plaintiff, therefore, had the burden of proving that the Defendant did not pay the "prevailing competitive price" as defined in the Limit of Liability provision contained in the Policy. Accordingly, pursuant to the test established in *Matthew Dick*, the Plaintiff was required to prove that the Defendant failed to pay the amount that "the service would cost in a competitive market in a normal, arms' length non-insurance transaction." Once the Plaintiff met this burden, the burden would shift to the Defendant to affirmatively assert its position by presenting evidence that its payment was consistent with the prevailing competitive market price.

C. Meeting its Burden

15. The ultimate question, then, is whether the Plaintiff met this burden. For the reasons stated herein, the Court finds that the Plaintiff failed to carry its burden of establishing that the Defendant breached its contract by failing to pay a competitive market price for the services in question, and that, as a result, the Defendant's dispositive motions should be granted.

16. As its only witness, Plaintiff called its principal officer and owner, Charles Isaly. Mr. Isaly testified that he is the owner/operator of the Plaintiff, and oversees all aspects and operations of the Plaintiff's business, including but not limited to, managing day to day operations, processing claims, and setting prices. Mr. Isaly testified that the Plaintiff is a windshield replacement company that works primarily with insurance companies, in the insurance non-network market (i.e., an independent windshield replacement facility not contracted as an insurance company's network affiliate). Mr. Isaly testified in detail how the Plaintiff set its prices.

17. The Plaintiff introduced summaries into evidence (Plaintiff's Exhibits 4 and 5) which were compilations of many jobs where it received its full invoice price from many different insurance companies, as well as a summary of some 670 claims which were paid in full by this Defendant. Defense counsel stipulated to the admission of these two exhibits, but preserved an objection as to relevance.

18. While these summaries might be useful as a means or a factor in determining a usual and customary charge or the reasonableness of the Plaintiff's charge herein, these summaries are not helpful in determining the competitive market price. These summaries address only what the Plaintiff has charged for certain jobs and what it has been paid for certain jobs by various insurance companies, including this Defendant. These summaries, as presented in this case, provide no

explanation as to why any of these bills were paid. Although some notations indicate that they were paid after litigation began, we do not know why those particular bills or claims were paid. We cannot tell from these summaries whether these payments were made as a result of unrelated business decisions by any of the various carriers, or whether these carriers had the same or different limits of liability provisions. We do not know whether other claims went unpaid, nor can we tell what percentage of the relevant market is represented by these summaries.

19. These summaries do not establish whether the Plaintiff's charge for the services rendered in this case was competitive in the relevant market. These two exhibits provide only a picture of Plaintiff's success in having his bills paid, but do not establish what his competitors charge for similar services. *Matthew Dick* specifically held that the amount Plaintiff chooses to charge does not establish the prevailing competitive market price under the Limit of Liability provision of this Policy.

20. Plaintiff offered no other evidence of what the service at issue in this case would cost in such a market. Plaintiff offered no competitive or prevailing market price evidence at all, and no evidence of what the services at issue would cost in an arms' length transaction as contemplated by the *Matthew Dick* opinion. Rather, the only evidence offered by Plaintiff is what Plaintiff itself chooses to charge in insurance transactions. Mr. Isaly testified that he will charge a higher price to an insurance company that he has found to be difficult to work with. These are vague and otherwise intangible elements that he includes in his pricing structure, and therefore, his pricing structure alone cannot establish that his prices are within competitive market prices, *per se*.

D. Determining the Competitive Market Price

21. The Court in *Matthew Dick* held that the prevailing competitive price is the price the service would bring in a competitive market, not the price set in an agreement between Defendant and a particular provider. *Matthew Dick*, at 2. Nor is the prevailing competitive price the Plaintiff's "proposed rates, which have been negotiated with *no one*. That is simply not a 'prevailing competitive rate.'" *Id.* at 8. The Court specifically held that the Limit of Liability provision cannot be read to mean that GEICO is required "to pay any arbitrary price a repair facility decides to charge." *Id.* at 7. What the Defendant must pay is the competitive market price, determined by sufficient facts to establish what that price is. It is the Plaintiff's burden to prove that his price is within the prevailing and competitive market price range. The evidence presented to this Court was insufficient to allow the Court to evaluate whether Plaintiff's proposed price met this competitive market price standard.

22. The *Matthew Dick* decision sets out neither a Herculean nor a Sisyphean task for the Plaintiff. According to Mr. Isaly's testimony, his company has a significant percentage of the non-insurance affiliated market. Because convenience is one of the bases in determining coverage or exclusion of coverage, there obviously are competitors in this area who are available to testify as to their charges for similar jobs. Similarly, appropriately credentialed expert testimony can also be used to establish a proper market and a range of competitive prices for similar jobs. Such testimony could establish a *prima facie* competitive market price which would then shift the

burden to the Defendant to affirmatively establish its position regarding the proper market price range.

23. Because this Court is granting the Defendant's Motion for Summary Disposition and for Directed Verdict, this Court does not make a determination as to the propriety of the Defendant's methodology used in determining what it considers to be the competitive market price.

24. However, in order to determine comparable market pricing, one must limit the price comparison to comparable markets. Mr. Isaly testified that this claim involves only the non-network market, where the windshield shop does not have a previously agreed upon rate with the insurance company and is not otherwise within the insurance company's network of preferred or affiliated repair shops.

25. The Plaintiff further testified that the amount it charges to cash-paying non-insurance customers is less than what it would bill to an insurance company. Mr. Isaly testified that the Plaintiff negotiates or discusses windshield pricing only with a customer when it involves a cash-paying non-insurance transaction. These cash jobs comprise approximately 2% or less of Plaintiff's total business, and that the Plaintiff charges its usual and customary price for the windshield services provided to the insured customer. The cash only market is less cumbersome, less confrontational, and payment is immediate, and these elements would likely support a much lower competitive market pricing structure than the other two markets, if this was a cash-only case.

26. The so-called affiliate market is appropriately differentiated from the non-affiliated market in that affiliated providers have contracted with the insurance companies to charge less in exchange for an increase in referrals and the consequent increase in business volume from these companies. This would be a business decision to charge less in exchange for more business, and not an independent business decision to charge less to attract business. This, too, is not the case here.

27. The non-affiliated providers cannot compete, price-wise, in either of the other two types of markets, but must be competitive within their own market to survive. This market must compete for business without having their business supported by a base of business provided by an affiliation. This market's pricing will be directly affected by its competitor's prices, and this market will have costs associated with the collection of its invoices that neither of the other markets will have to consider. It is in this market that that the Plaintiff must be competitive, and it is from this market that the Defendant must determine its limit of liability under this contract as it relates to this provider in this case.

28. As definitively stated in the *Matthew Dick* decision, the competitive market price is not the price set by agreement between the Defendant and a particular provider or providers, nor can the Defendant limit its liability by entering into private non-open-market agreements or transactions it alone can obtain. It requires proof of the cost of such services in "a normal, arms' length non-insurance transaction." Therefore, it is this non-affiliated market in which competitive and prevailing prices must be measured.

III. Conclusions of Law

29. The Court finds that the Plaintiff had the burden of proof to establish that its invoice was for a price within the appropriate competitive market. The Court finds that reliance on the Plaintiff's testimony alone, even including the summaries provided, requires speculation and conjecture to determine the proper competitive market price, and therefore leaves this Court without the ability to resolve the issues outlined and required by the *Matthew Dick* decision. The Court further finds that the Plaintiff failed to carry its burden. The failure to carry this burden must result in a Summary Disposition and Directed Verdict for the Defendant.

30. Rule 7.135 of the Small Claims Rules provide that a Summary Disposition can be granted at any time if the Court determines that "there is no triable issue". The standard for a Directed Verdict is that, "the Plaintiff, in general, has the burden of proof. He must introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a substantial factor in bringing about the result. A mere possibility of such causation is not enough; and when the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the Court to direct a verdict for the Defendant." Friedrich v. Fetterman and Associates, P.A., 137 So.3rd 362, 365 (Fla., 2013), quoting Prosser, Law of Torts Sec. 41 (4th ed. 1971). See, too, Sanders v. ERP Operating Ltd. Partnership, 157 So.3rd 273, 277 (Fla., 2015).

FINAL JUDGMENT

IT IS THEREFORE **ORDERED AND ADJUDGED** that:

A. Defendant's Motions for Summary Disposition and Directed Verdict are GRANTED.

B. Final Judgment is entered in favor of Defendant. Plaintiff shall take nothing by this action, and Defendant shall go hence without day.

C. Without affecting the finality of this Final Judgment, the Court reserves jurisdiction to determine any claims for attorneys' fees and costs.

DONE and **ORDERED** in Chambers at Tampa, Hillsborough County, Florida, this 31 day of July, 2018.

HERBERT M. BERKOWITZ, COUNTY JUDGE

Cc: Attorneys of record