

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Robert E. Blackburn

Civil Action No. 19-cv-01983-REB-KMT

PATRICK GATTENBY,

Plaintiff,

v.

AMERICAN NATIONAL PROPERTY AND CASUALTY COMPANY,

Defendant.

ORDER GRANTING DEFENDANT AMERICAN
NATIONAL'S MOTION FOR SUMMARY JUDGMENT

Blackburn, J.

The matter before me is **Defendant, American National's Motion for Summary Judgment** [#21],¹ filed March 9, 2020. Plaintiff did not file a response to the motion in the time permitted by D.C.COLO.LCivR 7.1(d).² I grant the motion and dismiss plaintiff's claims.

I. JURISDICTION

I have jurisdiction over this matter pursuant to 28 U.S.C. § 1332 (diversity of citizenship).

¹ "[#21]" is an example of the convention I use to identify the docket number assigned to a specific paper by the court's electronic case filing and management system (CM/ECF). I use this convention throughout this order.

² In this district, a party is not entitled to summary judgment merely because its opponent fails to file a response to the motion. *See Murray v. City of Tahlequah, Oklahoma*, 312 F.3d 1196, 1200 (10th Cir. 2002); *Martinez v. Milyard*, 2009 WL 1575179 at *1 (D. Colo. June 3, 2009). *Cf. Estate of Anderson v. Denny's Inc.*, 291 F.R.D. 622, 633-34 (D.N.M. 2013) ("The failure of a party to file and serve a response in opposition to a motion within the time prescribed for doing so constitutes consent to grant the motion.") (quoting D.N.M.LR-Civ 7.1(b)) (internal quotation marks omitted).

II. STANDARD OF REVIEW

Summary judgment is proper when there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. **FED. R. CIV. P.** 56(a); ***Celotex Corp. v. Catrett***, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). A dispute is “genuine” if the issue could be resolved in favor of either party. ***Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.***, 475 U.S. 574, 586, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986); ***Farthing v. City of Shawnee***, 39 F.3d 1131, 1135 (10th Cir. 1994). A fact is “material” if it might reasonably affect the outcome of the case. ***Anderson v. Liberty Lobby, Inc.***, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986); ***Farthing***, 39 F.3d at 1134.

A party who does not have the burden of proof at trial must show the absence of a genuine fact issue. ***Concrete Works, Inc. v. City & County of Denver***, 36 F.3d 1513, 1517 (10th Cir. 1994), ***cert. denied***, 115 S.Ct. 1315 (1995). Once the motion has been properly supported, the burden shifts to the nonmovant to show, by tendering depositions, affidavits, and other competent evidence, that summary judgment is not proper. ***Id.*** at 1518. All the evidence must be viewed in the light most favorable to the party opposing the motion. ***Simms v. Oklahoma ex rel Department of Mental Health and Substance Abuse Services***, 165 F.3d 1321, 1326 (10th Cir.), ***cert. denied***, 120 S.Ct. 53 (1999).

III. ANALYSIS

On March 20, 2016, plaintiff, Patrick Gattenby, was injured when his car was rear-ended by another driver. Mr. Gattenby received \$25,000 from the driver's insurer

to settle his claims. Claiming he sustained injuries in excess of the limits of the driver's policy, on November 14, 2016, Mr. Gattenby made a demand for \$250,000 in underinsured motorist ("UIM") benefits from his own insurance carrier, defendant, American National Property and Casualty Company ("American National").

Under the policy of insurance, American National will pay UIM benefits for bodily injury which is "caused by an accident and result[s] from the ownership, maintenance, or use" of an underinsured motor vehicle. (**Def. Motion App.**, Exh. N at 28.)

Accordingly, American National requested medical records in support of Mr. Gattenby's claim. Mr. Gattenby submitted records substantiating \$990 in charges for services provided by Rocky Mountain Chiropractic from March to September 2016. He also forwarded treatment records, but no medical bills, from Tri-Care for treatment received in this general time frame.

On December 1, 2016, American National informed Mr. Gattenby "we do not feel that we have sufficient information to evaluate your claim:"

Specifically, as this automobile accident is described as an exacerbation of your Traumatic Brain Injury sustained from your fall on the ice in December 2015, we do believe it is imperative that we have additional medical documentation to include records of the first injury and treatment, as well as any billing information that the VA can provide relative to this exacerbation also described as a mild "TBI."

. . . .

Without further information to support your claim, it would appear that you were made whole with the tender of the \$25,000 policy limits from the carrier for the adverse party for the injuries sustained in the automobile accident.

(**Def. Motion App.**, Exh. C at 1.) American National requested medical authorizations

and a list of Mr. Gattenby's treatment providers so it could complete a "full and complete evaluation" of his claim. (*Id.*) Mr. Gattenby responded that he would not remit the medical authorization form because he had already made a request for relevant records from Evans Army Hospital and feared initiating a new request "would slow the process down." (*Id.*, Exh. D.)

The policy of insurance applicable to Mr. Gattenby's claim requires him, *inter alia*, to "[c]ooperate with [American National] concerning a claim," to "[a]uthorize [American National] to obtain medical and other records," and to "[p]roduce and authorize use to examine any record, receipts, and invoices, including financial records, needed to investigate the loss." (*Id.*, Exh. N at 17.) To that end, and throughout 2017 and 2018, American National made repeated requests to Mr. Gattenby to provide medical authorizations, a list of treatment providers, additional medical bills, and other documentation substantiating his claim. (*See id.*, Exhs. E & F.) Although Mr. Gattenby promised to provide these records, there is no evidence establishing he did so at any time during this period.³

Mr. Gattenby ultimately provided medical authorizations of American National on January 25, 2019. (*Id.*, Exh. G.) On March 1, American National responded that it still had not received a listing of Mr. Gattenby's treatment providers, further medical records or billings,⁴ or records substantiating Mr. Gattenby's claims for lost wages.⁵ (*Id.*, Exh.

³ It appears from the record that by at least February 2017, Mr. Gattenby had retained an attorney to represent him, as all correspondence between the parties during this time frame took place between counsel.

⁴ American National ultimately received medical records from Tri-Care on June 19, 2019, after this lawsuit had been filed. (*See Def. Motion App.*, Exh. J.) These records comprise nearly 350 pages. (*See id.*, Exh. I.) American National represents these documents contain no medical billings or other

H.) This lawsuit was filed shortly thereafter.

Mr. Gattenby's primary claim for relief is for breach of the contract of insurance. In Colorado the elements of a claim for breach of insurance contract are the same as those for breach of contract generally: "(1) existence of a contract; (2) performance by plaintiff or some justification for nonperformance; (3) failure to perform the contract by defendant; and (4) damages to plaintiff." **Arenberg v. Central United Life Insurance Co.**, 18 F.Supp.2d 1167, 1172 (D. Colo. 1998) (citing **Western Distributing Co. v. Diodosio**, 841 P.2d 1053, 1058 (Colo.1992)). A failure to show a material dispute of fact as to any of these elements entitles the movant to summary judgment. **Natural Wealth Real Estate, Inc. v. Cohen**, 2008 WL 511761 at *5 (D. Colo. Feb. 21, 2008).

"In addition to the duty to investigate owed by the insurance company to the insured, the insured owes contractual duties of cooperation and reporting to the insurance provider." **Cribari v. Allstate Fire & Casualty Insurance Co.**, 375 F.Supp.3d 1189, 1202 (D. Colo. 2019) (citing **State Farm Mutual Automobile Insurance Co. v. Brekke**, 105 P.3d 177, 189 (Colo. 2004)), **appeal filed** (10th Cir. July 31, 2019) (No. 19-1270). Where the contract of insurance includes a cooperation

information showing charges Mr. Gattenby incurred as a result of his treatment from Tri-Care. In the absence of any argument or evidence establishing American National's representation regarding this cache of documents is inaccurate, I accept it as established. **See Gross v. Burggraf Construction Co.**, 53 F.3d 1531, 1546 (10th Cir. 1995) (nonmovant must identify sufficient evidence to establish material issue for trial; court "will not search the record in an effort to determine whether there exists dormant evidence which might require submission of the case to a jury"); **see also S.E.C. v. Capital Holdings, L.L.C.**, 2006 WL 1660541 at *1 (D. Colo. June 12, 2006) (movant must "specifically set forth the facts and law that arguably entitle him to relief," and court is "neither required nor inclined to peruse the record in this case in search of evidence that might support his motion").

⁵ Mr. Gattenby has since withdrawn his claim for lost wages. (**See Def. Motion App.**, Exh. M at 3-4.)

provision and an insurer in good faith requests the insured's assistance, an insured who fails to cooperate breaches the contract if his failure creates a material and substantial disadvantage to the insurer. **See State Farm Mutual Automobile Insurance Co. v. Secrist**, 33 P.3d 1272, 1275 (Colo. App. 2001); **Hansen v. Barmore**, 779 P.2d 1360, 1364 (Colo. App. 1989).

This is precisely the case here. For over two years, American National repeatedly requested Mr. Gattenby provide it with sufficient records to allow it to properly evaluate his claim for UIM benefits. Mr. Gattenby only provided medical authorizations to American National in late January 2019; two months later, having been informed that American National had not yet received records in response to these authorizations, he filed suit. Mr. Gattenby's failure to provide authorizations and/or records in a timely fashion clearly prejudiced American National's ability to timely and thoroughly investigate his claim, leaving it vulnerable to the very lawsuit that ultimately was filed. **See Cribari**, 375 F.Supp.3d at 1196 ("[I]f [the insured] had provided all relevant records . . . , [the insurer] could have made an informed offer on the claim and possibly avoided this lawsuit.") (citation and internal quotation marks omitted).

In addition, the record fails to establish that Mr. Gattenby suffered any compensable damages as a result of American National's failure to pay his claim for benefits under the contract of insurance. As American National points out, at best the record shows Mr. Gattenby was billed \$990 for chiropractic services rendered in 2016. There is no evidence to establish any other medical charges related to the accident for

which Mr. Gattenby sought recovery.⁶ As the other driver's insurance policy fully compensated him for those injuries, she was not underinsured. **See** §10-4-609(1)(c), C.R.S. (UIM insurance covers "the difference, if any, between the amount of the limits of any legal liability coverage and the amount of the damages sustained . . . up to the maximum amount of the coverage obtained pursuant to this section"); **Jordan v. Safeco Insurance Co. of America, Inc.**, 348 P.3d 443, 449 (Colo. 2013) ("UIM coverage is payable for damages exceeding the tortfeasor's liability policy limit, subject only to the UIM coverage limit in the insured's policy."). Accordingly, the underinsured motorist provision of the insurance contract was not triggered, and "[a] policy that has not been triggered does not provide any coverage." **Leprino v. Nationwide Property & Casualty Insurance Co.**, 89 P.3d 487, 490 (Colo. App. 2003). Thus, American National is entitled to summary judgment on this claim.

Moreover, in the absence of an underlying breach of the insurance contract, American National cannot be liable for bad faith breach of the insurance contract or breach of the duty of good faith and fair dealing. "It is settled law in Colorado that a bad faith claim must fail if, as is the case here, coverage was properly denied and the plaintiff's only claimed damages flowed from the denial of coverage." **MarkWest Hydrocarbon, Inc. v. Liberty Mutual Insurance Co.**, 558 F.3d 1184, 1193 (10th Cir. 2009). **See also DISH Network Corp. v. Arch Specialty Insurance Co.**, 989 F.Supp.2d 1137, 1155 (D. Colo. 2013) ("The issue of coverage is a central predicate to

⁶ Moreover, the evidence suggests Mr. Gattenby suffered a prior head injury as a result of a 2015 slip and fall accident. Mr. Gattenby failed to endorse any experts in this case. He therefore has no way in which to prove that any alleged damages he did suffer were caused by the 2016 car accident and not the prior injury.

any claim of bad faith breach of the insurance contract.”) (citation and internal quotation marks omitted), ***aff’d***, 772 F.3d 856 (10th Cir. 2014); ***Travelers Insurance Co. v. Savio***, 706 P.2d 1258, 1274 (Colo. 1985) (to establish claim for breach of duty of good faith and fair dealing, insured must show “insurer acted unreasonably and with knowledge of or reckless disregard for the fact that no reasonable basis existed for denying the claim”). Accordingly, summary judgment is appropriate as to these claims as well.

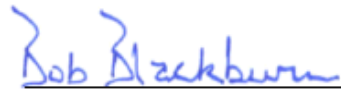
IV. ORDERS

THEREFORE, IT IS ORDERED as follows:

1. That **Defendant, American National’s Motion for Summary Judgment** [#21], filed March 9, 2020, is granted;
2. That the claims of plaintiff, Patrick Gattenby, against defendant, American National Property and Casualty Company, are dismissed with prejudice;
3. That judgment with prejudice shall enter on behalf of defendant, American National Property and Casualty Company, against plaintiff, Patrick Gattenby, on all claims for relief and causes of action asserted herein;
4. That the combined Final Pretrial Conference and Trial Preparation Conference scheduled for July 1, 2020, at 11:00 a.m., is vacated;
5. That the trial scheduled to commence on July 20, 2020, is vacated;
6. That defendant, American National Property and Casualty Company, is awarded its costs to be taxed by the clerk in the time and manner required by Fed. R. Civ. P. 54(d)(1) and D.C.COLO.LCivR 54.1; and
7. That this case is closed.

Dated April 16, 2020, at Denver, Colorado.

BY THE COURT:

A handwritten signature in blue ink that reads "Bob Blackburn". The signature is written in a cursive, slightly stylized font.

Robert E. Blackburn
United States District Judge