VERMONT SUPERIOR COURT
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CIVIL DIVISION

Case No. 22-CV-01169

Vincent Illuzzi et al v. Concord Mutual Insurance Company et al

Opinion and Order on Concord's Motion for Partial Summary Judgment

Plaintiff Frank Illuzzi owns a commercial rental building insured by Defendant Concord General Mutual Insurance Company under a Businessowners Commercial Policy.[1] Mr. Illuzzi's building and the neighboring building (owned by someone else) are exceptionally close to one another, and the roofline of the neighboring building is lower than his. He alleges that with no mitigating measures having been taken by the neighbor, rainwater runs off the neighbor's sloped roof directly onto the side of his building, which over time caused the brick veneer to separate from the wood structure, resulting in substantial damage. He tendered a claim for the loss to Concord, which investigated and denied the claim.

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[1] Vincent Illuzzi and Joseph Illuzzi also are named insureds on the Policy, but they have no ownership of the property at issue here. They have acted as agents of Frank Illuzzi at times in the underlying events of this case (and Attorney Vincent Illuzzi represents all three in this case), and the Policy covers other properties for which they presumably have interests. Vincent and Joseph evidently were named as plaintiffs in this case because they are insureds under the Policy but not for any other reason. It is not clear to the Court that they have any legal interest in this litigation at all. For purposes of this decision, the Court's references to the plaintiff–insured are to Mr. Frank Illuzzi alone.

He then filed this action, challenging Concord's coverage decision and claiming that the denial was in bad faith.[2]

Concord has filed a motion for partial summary judgment addressing the issue of bad faith only; coverage is not directly at issue at this time. In opposition, Mr. Illuzzi argues that there is a genuine issue as to bad faith, and the matter should be resolved by a jury.

I. Standard

Summary judgment is appropriate if the evidence in the record, referred to in the statements required by Vt. R. Civ. P. 56(c)(1), shows that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. Vt. R. Civ. P. 56(a); *Gallipo v. City of Rutland*, 163 Vt. 83, 86 (1994) (summary judgment will be granted if, after adequate time for discovery, a party fails to make a showing sufficient to establish an essential element of the case on which the party will bear the burden of proof at trial). The Court derives the undisputed facts from the parties' statements of fact and the supporting documents. *Boulton v. CLD Consulting Engineers, Inc.*, 2003 VT 72, ¶ 29, 175 Vt. 413, 427. A party opposing summary judgment may not simply rely on allegations in the pleadings to establish a genuine issue of material fact. Instead, it must come forward with deposition excerpts, affidavits, or other evidence to establish such a

[2] The neighboring building's owner and occupant are named defendants in this case, but the claims against them are not relevant to the pending motion, and they have not participated in the briefing.

dispute. *Murray v. White*, 155 Vt. 621, 628 (1991). Speculation is insufficient. *Palmer v. Furlan*, 2019 VT 42, ¶ 10, 210 Vt. 375, 380.

II. Undisputed Facts

The following basic facts are undisputed. After Mr. Illuzzi submitted his claim to Concord, Concord hired a structural engineer to investigate. Briefly, the engineer concluded that the long nails originally used to affix the brick veneer to the wood framing had failed, causing the veneer to separate. That separation and related issues allowed water infiltration, which created stress (from freezing and thawing) and exacerbated the deterioration of the brick veneer. He predicted that the dynamic also damaged parts of the wood framing behind it. Based on the engineer's report and Concord's interpretation of the Policy, it concluded that coverage was not available.[3] To briefly summarize, it concluded that (1) the collapse exclusion applies and its exceptions do not; (2) the other-types-of-loss exclusion applies; (3) the seepage-or-leakage-of-water exclusion applies; (4) the negligent-work exclusion applies; (5) and the limited coverage for fungi, wet rot, or dry rot does not apply.

On the strength of subsequent opinions by Mr. Illuzzi's own experts, including a brick mason and a carpenter, to the effect that the damage instead was

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[3] A presumably independent attorney signed and sent the denial letter to Mr. Illuzzi. The letter appears to reflect that lawyer's original analysis of the Policy as applied to the facts as described in the engineer's report. As the parties have not analyzed this circumstance -- the apparent delegation of interpretation to independent counsel -- in relation to the bad faith claim, however, the Court will disregard it for purposes of this decision.

caused directly by (not merely exacerbated by) water from the neighboring roof saturating the brick façade, the claim was "re-submitted" to Concord. By this time, the damage to the wood framing, as predicted by the engineer, had been documented. Concord was not persuaded, continued to rely on its own expert's opinion, and did not change the substance of its reasons for denying the claim.[4]

With each letter denying the claim, Concord walked through its understanding of the facts and how the Policy applied in detail, and it expressed willingness to initiate a declaratory judgment action to have the matter authoritatively resolved by a court if Mr. Illuzzi preferred. Mr. Illuzzi instead filed this action.

For summary judgment purposes only, Concord accepts Mr. Illuzzi's representation that the brick façade has long received runoff from the neighbor's roof.

In the complaint, Mr. Illuzzi generally asserts that Concord had "no reasonable basis" to deny the claim. He faults Concord for relying on its expert's report, especially after receiving the ostensibly competing opinions from his own experts. He does not in the complaint describe any more specific bases for the bad faith claim, and he does not expressly assert any competing interpretations of the Policy.

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[4] In both letters, Concord reserved the right to rely on other policy provisions not detailed in each letter. Mr. Illuzzi has not argued that Concord is foreclosed from asserting any basis for denial at issue here.

III. Analysis

In seeking summary judgment, Concord relies on the "fairly debatable" standard for bad faith claims, which is described in greater detail below. The fairly debatable standard protects an insurer's right to deny a claim that is reasonably uncertain. Concord argues that, regardless how coverage might finally be determined in this case, Mr. Illuzzi has failed to come forward with evidence that could support the conclusion that coverage is not at least fairly debatable. In so arguing, it points to the reasons offered in the denial letters and the lack of any asserted challenge in the complaint to Concord's interpretation of the Policy.

In opposition, Mr. Illuzzi principally argues that, if Concord had simply not ignored its own engineer's report, then it would have concluded that there is coverage available under two additional coverages for "collapse" and "dry rot." Mr. Illuzzi frames the argument more to show that there is coverage rather than to show that the denial of coverage was in bad faith. As far as bad faith goes, the thrust appears to be that based on Concord's own expert's report, leaving aside the opinions of his own experts, coverage under the two endorsements is *so* clear that Concord could have no reasonable basis for disputing it, or at least that the matter should be treated as disputed for summary judgment purposes.[5]

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[5] This argument appears in Part I of Mr. Illuzzi's opposition filing. In Part II, he addresses collateral matters—subrogation, the continuing tort doctrine, the statute of limitations, and the "duty of mutual trust"—that have no apparent bearing on the bad faith claim at issue now. In Part III, he reviews in details certain findings of the professionals he hired to examine or work on the damaged building. This section also has no apparent bearing on Concord's motion, which largely follows from the language of the Policy without regard to these factual nuances.

As a general matter, the basic principles of insurance policy interpretation are as follows:

> When interpreting an insurance policy, this Court follows well-established principles . . . . "An insurance policy is construed according to 'its terms and the evident intent of the parties as expressed in the policy language.'" An insurance policy "is to be strictly construed against the insurer." . . . .
>
> Vermont law "requires that policy language be accorded its plain, ordinary meaning consistent with the reasonable expectation of the insured, and that terms that are ambiguous or unclear be construed broadly in favor of coverage." "Words or phrases in an insurance policy are ambiguous if they are fairly susceptible to more than one reasonable interpretation." Further, "[w]hen a provision is ambiguous or may reasonably be interpreted in more than one way, then we will construe it according to the reasonable expectations of the insured, based on the policy language." However, "the fact that a dispute has arisen as to proper interpretation does not automatically render the language ambiguous." And, "we will not deprive the insurer of unambiguous terms placed in the contract for its benefit."

Rainforest Chocolate, LLC v. Sentinel Insurance Company, Ltd., 2018 VT 140, ¶¶ 6–7, 209 Vt. 232, 235–36 (citations omitted).

As noted, a bad faith claim does not necessarily rise and fall depending on the correctness of a 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, 445 (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).

In his effort at demonstrating a genuine issue as to Concord's bad faith, Mr. Illuzzi makes the case that, in denying coverage, Concord got it wrong. As the following analysis shows, that effort falls well short of establishing any basis for a determination that, of the two coverage provisions relied on by Mr. Illuzzi, Concord's determination was strained or fanciful.

A. Additional coverage—collapse

The Policy provides "additional coverage" for "collapse" at Policy § I.A.5.d. According to Mr. Illuzzi, some bricks have fallen from the deteriorated wall, and that is a partial collapse within the terms of the Policy. Relying on *Equinox on Battenkill Management Ass'n, Inc. v. Philadelphia Indemnity Ins. Co., Inc*, 2015 VT

98, 200 Vt. 33, he argues that "collapse" entails an imminent collapse, and the brick façade is clearly at risk of imminent collapse.

> This provision provides coverage, in relevant part, as follows:
>
> The coverage provided under this [section] applies only to an abrupt collapse as described and limited in Paragraphs [(1)–(7)].
>
> (1) For the purpose of this [section], abrupt collapse means an abrupt falling down or caving in of a building or any part of a building with the result that the building or part of the building cannot be occupied for its intended purpose.
>
> * * *
>
> (3) This [section] does not apply to:
> (a) A building or any part of a building that is in danger of falling down or caving in;
> (b) A part of a building that is standing, even if it has separated from another part of the building; or
> (c) A building that is standing or any part of a building that is standing, even if it shows evidence of cracking, bulging, sagging, bending, leaning, settling, shrinkage or expansion.

Mr. Illuzzi does not cogently explain how either some bricks falling out of the wall or the imminent collapse of the entire wall could satisfy these coverage terms.

The bricks that apparently fell out of the wall did so as the result of long enduring degradation of the wall. Assuming doing so could comport with the temporal implication of the word "abrupt," there is still no allegation or reasonable inference to be drawn from the record that those fallen bricks caused the "result that the building or part of the building cannot be occupied for its intended purpose." Mr. Illuzzi's argument that the *imminent* collapse of the wall finds coverage here faces long odds in relation to the provision providing that a part of a

building that is merely "in danger of falling down or caving in" is not covered. On this latter point, Mr. Illuzzi relies too heavily on *Equinox*.

Equinox addresses coverage, not bad faith, and the relevant policy terms at issue there are materially different from those at issue here. In *Equinox*, collapse coverage, among other differences, included "risks of direct physical 'loss' involving collapse." *Equinox on Battenkill Management Ass'n, Inc. v. Philadelphia Indemnity Ins. Co., Inc*, 2015 VT 98, ¶ 17, 200 Vt. 33, 38. The *Equinox* Court ruled that this language extended coverage to "a risk of imminent collapse." *Id*. at ¶ 24, 200 Vt. at 41. Mr. Illuzzi seizes on the *Equinox* Court's interpretation of the policy language at issue in that case and applies it here with no regard for the actual policy language in this case. Ironically, that is the precise mistake the lower court in *Equinox* made by relying on *Gage v. Union Mutual Fire Insurance Co*., 122 Vt. 246 (1961), which addresses the concept of collapse but subject to much different policy language than was at issue in *Equinox*.

Insurance policies are interpreted based on the language appearing in the policy at issue, not based on different language from different policies that appears in court decisions addressing that different language. The policy language in this case is dramatically different from that at issue in *Equinox* and does not clearly, if at all, support an interpretation that extends coverage to a risk of imminent collapse.

As a matter of law, Concord's position on this coverage provision is neither strained nor fanciful.

B. Additional coverage—wet or dry rot

The Policy also provides "additional coverage" for wet or dry rot at Policy § I.A.5.r. Without delving into the policy language, Mr. Illuzzi argues that the losses related to the brick façade, and more so the damaged wood framing, should be within this coverage for "rot" because rot (euphemistically speaking) existed in the bricks and framing.

This provision provides coverage, in pertinent part, when "wet or dry rot is the result of a 'specified cause of loss' other than fire or lightning." "Specified cause of loss" is defined at Policy § I.H.12. The only cause of loss that appears as though it could possibly apply in this case is "water damage." "Water damage," however, is defined to mean discharge or leakage from the "breaking apart or cracking of any part of a system or appliance . . . containing water" or a "water or sewer pipe that is located off the described premises." Policy § I.H.12.c.

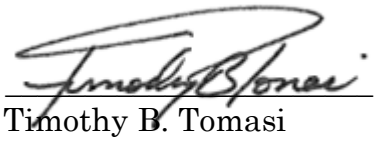
Mr. Illuzzi argues that because there was, as he characterizes it, rot, then there should be coverage under the wet or dry rot provision. He does not explain how there could be coverage based on the actual policy language which limits the scope of the available coverage considerably. If there is any way that this provision can be interpreted to cover the losses at issue in this case, that matter is certainly not clear based on the plain meaning of the policy language. Concord's interpretation that it does not extend coverage in the circumstances of this case is neither strained nor fanciful, and is, at least, fairly debatable.

The Court's role in this decision is not to definitively interpret the Policy at this time, and it does not do so. The dispute over coverage remains to be determined. As to the instant motion, Mr. Illuzzi has failed to come forward with evidence demonstrating any genuine issue contesting whether Concord had a reasonable basis to deny benefits of the policy, much less suggesting that it knew or recklessly disregarded the fact that no reasonable basis existed for denying the claim. Concord is entitled to judgment as a matter of law on Mr. Illuzzi's bad faith claim.

Conclusion

For the foregoing reasons, Concord's motion for partial summary judgment is granted.

Electronically signed on Tuesday, February 14, 2023, pursuant to V.R.E.F. 9(d).



Timothy B. Tomasi
Superior Court Judge