

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

CRAFT RECREATION COMPANY, LLC,
Plaintiff,

v.

Case No. 13-136669-CB
Hon. James M. Alexander

HOME-OWNERS INS CO,
Defendant.

OPINION AND ORDER RE: SUMMARY DISPOSITION

This matter is before the Court on cross motions for summary disposition. This dispute arises following a fire that destroyed Plaintiff’s bowling center in Waterford. Defendant issued a commercial fire insurance policy that was in effect at the time of the fire. After the fire, Plaintiff requested that Defendant tender the policy limit of \$1,525,652 because the repair/replacement cost substantially exceeded the same. Defendant refused and issued a check for \$363,569 – the amount that Defendant claims represented the actual cash value of Plaintiff’s damages.

Plaintiff then filed the present Complaint, seeking: (1) a judgment for \$1,162,081 – representing the difference between the policy limit and the amount that Defendant has already paid; (2) lost income from Defendant’s failure to pay for the rebuild; and (3) an appraisal.

Defendant argues that, under the policy’s plain terms, “[i]n order for Plaintiff to obtain replacement cost damages, Plaintiff must actually repair or replace the property lost.” Since Plaintiff has not rebuilt the bowling center, Defendant argues that Plaintiff is only entitled to the \$363,569 already paid.

The parties now seek cross motions for summary disposition – Plaintiff under MCR 2.116(C)(9) and Defendant under (C)(10). MCR 2.116(C)(9) tests whether the defendant’s defenses are so clearly untenable as a matter of law that no factual development could possibly deny plaintiff’s right to recovery. *Lepp v Cheboygan Area Schools*, 190 Mich App 726 (1991). MCR 2.116(C)(10) tests the factual support for Plaintiff’s claims. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). Plaintiff also seeks summary disposition in its Response to Defendant’s motion under (I)(2).

Michigan law is well-established that “[a] contract must be interpreted according to its plain and ordinary meaning.” *Holmes v Holmes*, 281 Mich App 575, 593; 760 NW2d 300 (2008), citing *St Paul Fire & Marine Ins Co v Ingall*, 228 Mich App 101, 107; 577 NW2d 188 (1998). “Under ordinary contract principles, if contractual language is clear, construction of the contract is a question of law for the court. If the contract is subject to two reasonable interpretations, factual development is necessary to determine the intent of the parties and summary disposition is therefore inappropriate.” *Holmes v Holmes*, supra at 594; quoting *Meagher v Wayne State Univ*, 222 Mich App 700, 721-722; 565 NW2d 401 (1997).

An insurance policy is construed in the same manner as any other type of contract. *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 47; 664 NW2d 776 (2003); *DeFrain v State Farm Mut Auto Ins Co*, 491 Mich 359, 367; 817 NW2d 504 (2012). Insurance contracts, however, are to be construed in favor of coverage. See *Rory v Continental Ins Co*, 473 Mich 457, 517; 703 NW2d 23 (2005); *Raska v Farm Bureau Mut Ins Co of Michigan*, 412 Mich 355, 362; 314 NW2d 440 (1982); and *Shumake v Travelers Ins Co*, 147 Mich App 600, 608; 383 NW2d 259 (1985) (finding “A policy should not be construed to defeat coverage unless the language so requires since the purpose of insurance is to insure.”).

The parties' central dispute is whether Plaintiff is entitled to the replacement/repair costs before rebuilding the bowling center. This decision hinges on whether § 2826 or § 2827 of the Insurance Code applies to this case. Under § 2826, the insurer can require rebuilding before it has to pay the amount specified in the policy. Under § 2827, however, an insurer cannot require rebuilding before payment if the loss or damage exceeds the policy limit.

MCL 500.2826 provides (emphasis added):

An insurer may issue a fire insurance policy, insuring property, by which the insurer agrees to reimburse and indemnify the insured for the difference between the actual value of the insured property at the time any loss or damages occurs, and the amount actually **expended to repair, rebuild, or replace with new materials of like size, kind, and quality**, but not to exceed the amount of liability covered by the fire policy. **A fire policy issued pursuant to this section may provide that there shall be no liability by the insurer to pay the amount specified in the policy unless the property damaged is actually repaired, rebuilt, or replaced at the same or another site.**

MCL 500.2827 provides (emphasis added):

(1) An insurer may issue a fire policy, insuring property, by which the insurer agrees to reimburse and indemnify the insured for the difference between the actual cash value of the lost or damaged insured property at the time of the loss or damage, and the amount actually necessary **to repair, rebuild, or replace the lost or damaged insured property to a condition and appearance similar to that which existed at the time of the loss or damage** based on the use of conventional materials and construction methods which are currently available without extraordinary expense. The insurer's liability shall not exceed the amount of liability covered by the contract of insurance.

(2) The contract of insurance established pursuant to subsection (1) shall not preclude an insured from selecting a cash settlement based on the actual cash value of the lost or damaged insured property at the time of the loss or damage, but not to exceed the amount of liability covered by the contract.

(3) The contract of insurance established pursuant to subsection (1) may provide that there shall be no liability on the part of the insurer to pay an amount in excess of the actual cash value of the lost or damaged insured property at the time of the loss or damage, unless the lost or damaged property is actually repaired, rebuilt, or replaced at the same or another contiguous site. However, **this subsection shall not apply if the amount of loss or damage to the insured property under the**

standards of subsection (1) exceeds the amount of liability covered by the contracts.

Under the policy in question, Defendant:

will not pay more for loss or damage on a replacement cost basis than the least of:

- (1) The Limit of Insurance applicable to the lost or damaged property;
- (2) The cost to replace, on the same premises, the lost or damaged property with other property:
 - (a) Of comparable material and quality; and
 - (b) Used for the same purpose; or
- (3) The amount you actually spend that it necessary to repair or replace the lost or damaged property.

Plaintiff argues that, “[b]ecause this policy language provides for replacement/repair cost coverage based on the cost of ‘comparable’ materials, instead of the cost of ‘new materials of like size, kind, and quality,’ it is not a policy under MCL 500.2826.” Rather, Plaintiff argues, it is a policy under MCL 500.2827, “which addresses policies valuing replacement/repair cost based on ‘similar’ condition and ‘conventional’ materials.”

In support, Plaintiff cites *Cortez v Fire Ins Exch*, 196 Mich App 666; 493 NW2d 505 (1992). In *Cortez*, a homeowner’s house was destroyed by fire. There was no dispute that the loss exceeded the policy limit. When she filed a claim with her insurer, however, the insurer refused to provide coverage until the homeowner actually repaired the home – pursuant to a clause so providing in the policy. But the homeowner could not afford to rebuild without the insurer’s help in providing benefits.

The *Cortez* Court analyzed whether § 2826 or § 2827 of the Insurance Code applied to the case. If § 2826, the insurer could require rebuilding before it has to pay. If § 2827 applied, however, the insurer “was not authorized to withhold plaintiff’s replacement-cost benefits on the

bases that she had not actually repaired or replaced the property” – despite any contractual provision so requiring. *Cortez*, 196 Mich App at 670.¹

The *Cortez* policy provided for replacement costs for “equivalent construction.” The Court held that use of this term brought the policy under § 2827 of the code, “which addresses replacement-cost policies that require the insurer to rebuild or replace the lost or damaged property ‘to a condition and appearance **similar to** that which existed at the time of loss **based on the use of conventional materials** and construction methods.’” *Cortez*, 196 Mich App at 669 (emphasis added).

Defendant argues that the policy falls under § 2826 of the code – arguing that the policy language is more similar to that section. In support, Defendant cites *Smith v Michigan Basic Property Ins Ass’n*, 441 Mich 181; 490 NW2d 864 (1992) – arguing that the *Smith* policy contained language that was “virtually identical” to the present case. The *Smith* policy provided replacement costs for “like construction and use on the same premises.” *Smith*, 441 Mich at 191.

Further, Defendant argues that *Cortez* and *Smith* were decided around the same time and “*Cortez* was wrongly decided” and “directly inconsistent with the Supreme Court’s decision in *Smith*,” and therefore “is no longer good law.”²

The problem with Defendant’s argument, however, is that *Cortez* is the more recent case and remains good law. Further, the Court finds that *Cortez* is not inconsistent with *Smith* – as Defendant contends. Rather, *Smith* involved different language than *Cortez*. Additionally, and perhaps more importantly, *Smith* also did not involve a dispute about whether § 2826 or § 2827

¹ MCL 500.2860 provides:

Any provision of a fire insurance policy, which is contrary to the provisions of this chapter, shall be absolutely void, and an insurer issuing a fire insurance policy containing any such provision shall be liable to the insured under the policy in the same manner and to the same extent as if the provision were not contained in the policy.

² *Smith* was decided in September 1992, and *Cortez* was decided in November 1992.

applied. Instead, the *Smith* Court only involved interpretation of § 2826. To the extent that Defendant argues that *Smith* trumps *Cortez* on this issue, the Court rejects the same.

In our case, the policy bases replacement cost on the cost of “comparable material and quality.” Because the policy does not use the term “new materials of like size, kind, and quality,” the Court finds that it falls under MCL 500.2827. Just like the *Cortez* Court’s conclusion that the term “equivalent construction” falls within § 2827, the use of the term “comparable material and quality” in our policy must also fall within § 2827, which provides “use of conventional materials.”

This finding is also supported by the post-*Cortez*, unpublished decision in *Khoury v Northern Mutual Ins Co*, unpublished opinion per curiam of the Court of Appeals, issued March 23, 2001 (Docket No. 219604), lv den 465 Mich 906 (2001) (finding the term “material of like kind and quality, to the extent practical” to invoke § 2827).

Next, the Defendant argues that, even if § 2827 controls, there is a dispute about whether the loss exceeds the policy limits. As a result, Defendant argues that it is entitled to arbitration under the policy’s terms.

Plaintiff responds that the parties do not have a **material** dispute. While Defendant may now wish to invoke the arbitration provision, Plaintiff argues that both parties acknowledge that the loss exceeds the policy limits. As a result, it is irrelevant by how much.

In support, Plaintiff attaches the Affidavit of Lawrence Fucinari, the public adjuster serving on the claim. Mr. Fucinari claims that the replacement cost value of the building repairs is \$2,094,910. He also claims that both he and Home-Owners agreed that the loss exceeded the policy limit by over \$500,000. In support of this claim, Plaintiff also attaches the Statement of

Loss prepared by Defendant's adjuster, Butler & Associates, who determined the replacement cost value to be \$2,094,087.01 – within \$850 of Mr. Fucinari's number.

While Defendant claims that it never agreed that the replacement cost exceeded the policy limits, it also never denied as much. Instead, in its Answer on the relevant paragraphs of Plaintiff's Complaint, Defendant stated that it "was without sufficient information or knowledge to admit or deny" the replacement cost.³

Because the only evidence establishes that the replacement cost value exceeds the policy limit by some \$500,000, the Court finds that there are no material questions of fact in dispute whereby Defendant is entitled to enforce the appraisal provision of the policy as a matter of law.

For all of the foregoing reasons, this Court concludes that defendant's defenses are so clearly untenable as a matter of law that no factual development could possibly deny plaintiff's right to recovery. As a result, Plaintiff's motion for partial summary disposition is GRANTED under both (C)(9) and (I)(2).

Defendant owes Plaintiff the full \$1,525,652 policy limit. Accounting for Defendant's prior \$363,569 payment, Defendant remains liable for \$1,162,081.

Also for the above reasons, Defendant's motion for summary disposition under (C)(10) is DENIED.

IT IS SO ORDERED.

March 5, 2014
Date

/s/ James M. Alexander
Hon. James M. Alexander, Circuit Court Judge

³ See paragraphs 10, 16, 17, and 32 of Complaint and Answer.