

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

**DANOBAY PROPERTIES, LLC, and
PAIN & REHABILITATION PHYSICIANS, P.C.,
Plaintiffs,**

v.

**Case No. 14-141577-CB
Hon. James M. Alexander**

**MICHIGAN INSURANCE COMPANY,
Defendant.**

-and-

**DANOBAY PROPERTIES, LLC, and
PAIN & REHABILITATION PHYSICIANS, P.C.,
Plaintiffs,**

v.

**ROOTER MD PLUMBING, LLC.,
Defendant.**

_____ /

OPINION AND ORDER RE: SUMMARY DISPOSITION

This matter is before the Court on cross motions for summary disposition. This dispute arises from a water loss event that caused property damage to Plaintiffs' commercial building on January 25, 2013. The water loss event occurred when frozen pipes in the unoccupied portion of the building burst upon thawing out. Both corporate Plaintiffs are owned by a sole owner. Plaintiffs had purchased an insurance policy from Defendant, which covered such a loss unless specific exclusionary provisions determined otherwise.

Following the water loss event, Plaintiff submitted a timely claim on the damaged property, but Defendant denied the same – claiming that failure to heat the unoccupied section of

the building resulted in the frozen pipes bursting and thus falls within the exclusionary provisions of the insurance policy. More specifically, Defendant denied coverage because Plaintiffs did not “do [their] best to maintain heat in the building or structure.” Plaintiffs disagree and believe that the damage should be covered, and filed suit to seek coverage under the policy.

Defendant Michigan Insurance Company now seeks summary disposition under MCR 2.116(C)(8) and (C)(10).

A (C)(8) motion tests the legal sufficiency of the complaint when “the opposing party has failed to state a claim on which relief can be granted.” *Radke v Everett*, 442 Mich 368, 373 (1993). All well-pled factual allegations are accepted as true and construed in a light most favorable to the nonmovant. *Wade v Dept of Corrections*, 439 Mich 158; 483 NW2d 26 (1992). A motion under this subrule may be granted only where the claims alleged are “so clearly unenforceable as a matter of law that no factual development could possibly justify recovery.” *Id.* When deciding such a motion, the court considers only the pleadings. MCR 2.116(C)(G)(5).

A (C)(10) motion tests the factual support for a cause of action. *Maiden v Rozwood*, 461 Mich 109, 119-20 (1999). Summary judgment is proper, and the movant is entitled to judgment as a matter of law, if the evidence proffered by the non-moving party fails to establish a genuine issue of material fact. *Id.*

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.”).

Under the Commercial Property Coverage Special Form of the insurance policy, the Defendant agreed to “pay for direct physical loss to the building and business unless the cause of loss was specifically excluded.” Section B of the Special Form discusses causes of loss and provides several exclusionary provisions where insurance coverage will not apply if Plaintiffs’ directly or indirectly caused the loss.

Relevant to the current dispute, Section B(2)(g) states:

We will not pay for loss or damage caused by or resulting from any of the following:

...

- g. Water, other liquids, powder or molten material that leaks or flows from plumbing, heating, air conditioning or other equipment (except fire protective systems) caused by or resulting from freezing unless:
 - (1) **You do your best to maintain heat in the building or structure;** or
 - (2) You drain the equipment and shut off the supply if the heat is not maintained.

In support of its motion, Defendant argues that this provision “applies to exclude coverage when both of these requirements of failing to maintain heat and failing to drain or shut off water supply are applicable to the facts at hand.” Defendant argues that it is undisputed that: Plaintiff made no attempt to heat the unoccupied space in six months or more; Plaintiff knew or should have known the heat was off because the monthly heating bill was so low; and when the plumber came out on January 24, 2013 to identify the frozen pipes, he made it known that there would be more than may break.

Plaintiffs respond by disputing each of Defendant’s proffered “undisputed” facts. Specifically, Plaintiffs claim that they did not know the furnace was off (rather, it was merely turned down to a lower temperature); Plaintiffs didn’t realize the low gas bill meant that no gas was being used; and Plaintiffs, upon learning of the heat being shut off, immediately restored the heat and repaired the plumbing.

And each party cites to deposition testimony in support of their version of the facts. As a result, the Court finds that resolution of this issue is so substantially intertwined with fact-finding and credibility determinations as to render summary disposition on Plaintiffs’ claim wholly inappropriate. For the foregoing reasons, Defendant’s motion is DENIED¹.

Finally, Plaintiffs request summary disposition under MCR 2.116(I)(2) based on its interpretation of the phrase “in the building” in the exclusionary provision. In support, Plaintiffs argue that said phrase should be broadly construed such that their maintaining heat in the occupied space establishes that they did their best to maintain heat somewhere “in the building.”

¹ For the same reasons, Defendant’s MCR 2.116(C)(8) motion is DENIED. In interpreting the contract language for its plain and ordinary meaning, the “do your best to maintain heat in the building” is not such language that may be decided solely as a matter of law because it creates a situation where two reasonable interpretations could be construed in determining what may be considered “do your best” under the circumstances.

But Plaintiffs present no binding authority in support of this novel argument, and the Court disagrees with the conclusion of the Texas case offered by Plaintiffs. The Court finds that the intent behind the exclusionary provision would be lost if “in the building” was read so broadly to mean “any part of the building.” As such, Plaintiffs’ MCR 2.116(I)(2) request on this basis is DENIED.

IT IS SO ORDERED.

December 17, 2014
Date

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