

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

**BEACON HILL MANAGEMENT, LLC,  
Plaintiff,**

v.

**Case No. 14-144602-CB  
Hon. James M. Alexander**

**CITIZENS INSURANCE COMPANY OF AMERICA,  
Defendant.**

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**OPINION AND ORDER RE: SUMMARY DISPOSITION**

This matter is before the Court on Defendant’s motion for summary disposition. This is a first-party insurance coverage dispute. On January 31, 2013, Defendant issued a Businessowners Insurance Policy to Plaintiff. For an additional cost, Plaintiff purchased the Advantage Select Property Broadening Endorsement that provided coverage for water damage arising from drain back-up or overflow.

On June 27, 2013, during the policy’s term, a severe rainstorm occurred in Auburn Hills (where Plaintiff’s property is located). This led to water entering 64 apartments in 14 buildings throughout Plaintiff’s complex. Plaintiff claims \$2,361,782 in damages resulted. Although Defendant paid \$510,000 for the damages to 16 of the 64 apartments, it refused to pay any additional amounts. Defendant characterizes this payment as a showing of its “good faith” and claims that Plaintiff was “overcompensated.”

Defendant maintains that the damage Plaintiff suffered was not solely caused by water backing up from a drain and the event constituted a flood, which is excluded in the sewer backup provision of the policy. Plaintiff, on the other hand, argues that the entirety of the damage was

the result of a drain back-up, which is covered. In other words, the parties dispute the nature of the water that caused Plaintiff's damages, which affects whether there is coverage.

Defendant now seeks dismissal of Plaintiff's Complaint and a declaration that there is no insurance coverage for Plaintiff's alleged loss. Defendant also seeks its costs and attorney fees. To this end, Defendant moves for summary disposition under MCR 2.116(C)(10), which tests the factual basis of a complaint. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

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.").

“Interpretation of an insurance policy ultimately requires a two-step inquiry: first, a determination of coverage according to the general insurance agreement and, second, a decision regarding whether an exclusion applies to negate coverage.” *Auto Owners v Harrington*, 455 Mich 377, 382; 565 NW2d 839 (1997).

The relevant provision is found in Section 36.s. of the Policy. It provides:

- (1) We will pay for direct physical loss or damage to Covered Property at the described premises, solely caused by or resulting from water or waterborne material carried or moved by water that backs up or overflows or is otherwise discharged from a sewer, drain, sump, sump pump or related equipment.
- (2) Payment under this Additional Coverage is included within the applicable Limit of Insurance for Covered Property at the location of loss or damage.
- (3) **Special Sewer Backup Exclusion**  
We will not pay for loss or damage from water or other materials that back-up or overflow from any sewer or drain when it is caused by or results from any “flood”, regardless of the proximity of the back-up or overflow to the “flood” condition.

Under the Policy’s language, in order to be covered, Defendant argues that “Plaintiff must prove that all damage was solely caused by” water **that originated from** a drain. Because, Defendant argues, “[i]t is undisputed that much of the flood water never entered a sewer or drain, and thus the water never ‘backed up,’ ‘overflowed’ or ‘discharged’ **from** the sewer or drain.” (emphasis in original). In other words, Defendant argues that in order to be covered under the policy, the water that caused damage must have physically been in the sewer system before returning to the surface and entering Plaintiff’s buildings.

Plaintiff, on the other hand, argues that its expert, Tim Lapham, opined that the damage was “more probably than not . . . caused by backup and overflow of the sewer drainage system” on the property. And, Plaintiff argues, this falls squarely within the Policy’s language, which provides: “We will pay for direct physical loss or damage to Covered Property at the described

premises, **solely caused by or resulting from water . . . that backs up or overflows** or is otherwise discharged from a sewer, drain, sump, sump pump or related equipment.” (emphasis added).

Mr. Lapham further opined that the damage was not caused by a flood. Instead, the heavy rainfall overwhelmed the drainage system’s capacity, which led to a backup of said system and left the rainwater nowhere else to go but into Plaintiff’s buildings. This, Plaintiff argues, amounts to a covered “back up or overflow” under the Policy’s terms. The Court agrees with Plaintiff’s interpretation of the Policy, but the precise source of the water remains a fact question.

The Court so finds based on the plain language of the Policy. While Defendant concentrates its argument on the “from” found in the latter part of the above language, there is no reason to even reach that “from.” This is so because there is an “or” that precedes said “from.” As a result, damage “**solely caused by or resulting from water . . . that . . . is otherwise discharged from a sewer, drain, sump, sump pump or related equipment**” is only one way that the Policy provides coverage. Another is damage “solely caused by or resulting from water . . . **that backs up or overflows.**” This, Plaintiff argues (and its expert opines), is the case here. And a reasonable trier-of-fact may so determine.

Next, Defendant argues that even if the Policy provides coverage, then an exclusion still applies. As stated, the “Special Sewer Backup Exclusion” provides:

We will not pay for loss or damage from water or other materials that back-up or overflow from any sewer or drain when it is caused by or results from any “flood”, regardless of the proximity of the back-up or overflow to the “flood” condition.

And Defendant argues that the water was the result of a “flood” which excludes coverage. “Flood” is a specifically defined term in the Policy. It means:

[A] general and temporary condition of partial or complete inundation of normally dry land areas due to:

- a. The overflow of inland or tidal waters;
- b. The unusual or rapid accumulation of runoff of surface waters from any source, or
- c. Mudslides or mudflows which are caused by flooding as defined in **b.** above. For the purpose of this Covered Cause of Loss, a mudslide or mudflow involved a river of liquid and flowing mud on the surface of normally dry land areas as when earth is carried by a current of water and deposited along the path of the current.

Only subsection b. could apply. Defendant argues, under this section, that the rainwater constituted surface water. In support, Defendant cites *Fenmode, Inc v Aetna Cas & Sur Co of Hartford, Conn*, 303 Mich 188, 192; 6 NW2d 479 (1942), which reasoned:

surface waters are commonly understood to be waters on the surface of the ground, usually created by rain or snow, which are of a casual or vagrant character, following no definite course and having no substantial or permanent existence. Such waters are lost by percolation, evaporation or by reaching some definite watercourse or substantial body of water in which they are accustomed to and do flow with other waters.

In this case, however, Plaintiff argues that the water that flowed into its buildings was not surface water because it was caused solely by a sewer backup or overflow. To conclude otherwise, Plaintiff argues, would mean that the Policy's coverage for overflow "is illusory." The Court agrees.

Defendant's interpretation appears to read a requirement that (in order for there to be coverage) the water must flow **out of a drain located inside of a building** and directly cause damage – because once the water touches the earth outside of a building, it automatically

becomes surface water, and there is no coverage for surface water. Although the policy could have so provided, it doesn't. And Defendant's arguments to the contrary are strained.<sup>1</sup>

Plaintiff's expert opines that the sole source of the water that damaged Plaintiff's property was the direct result of the sewer system becoming overwhelmed and backing up – causing the water to overflow onto Plaintiff's property and enter its buildings. This is the precisely the type of event that the Policy's sewer backup provision covers. No exclusion applies.

This case presents a battle of experts on the source of the water, and the trier-of-fact appropriately makes the decision on which to accept as true.

Finally, Defendant argues that any damages should be "limited to the amount actually spent to repair or replace the property." In this case, Defendant argues, the appropriate damage amount should be the documented cost of repairs that Plaintiff already spent on the property.

Plaintiff responds that it performed some in-house makeshift repairs, but it should not be limited to recovery of solely these amounts when full repairs have yet to be made. The Court agrees. The Court has insufficient evidence before it to reach a conclusion relative to the amount of damages. Damages remain a question of fact.

For the foregoing reasons, Defendant's motion for summary disposition is DENIED in its entirety.

**IT IS SO ORDERED.**

January 21, 2016  
Date

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

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<sup>1</sup> *Fenmode*, 303 Mich 188, is also factually distinguishable because the insured sought coverage for water entering its building from a variety of sources, not just drain backup or overflow. Similarly, Defendant's reliance on *Sunshine Motors, Inc v New Hampshire Ins Co*, 209 Mich App 58; 530 NW2d 120 (1995) is misplaced because the policy in that case excluded water damage from a backed-up drain.