

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

**MICHIGAN OUTDOOR SERVICES AND  
CONSTRUCTION, INC,  
Plaintiff,**

v.

**Case No. 15-147928-CB  
Hon. James M. Alexander**

**MICHIGAN INSURANCE COMPANY,  
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 an insurance coverage dispute. For a period of April 13, 2014 to April 13, 2015, Defendant issued both a Commercial Auto and a General Commercial Policy to Plaintiff.

In October 2014, Plaintiff’s sole shareholder, Jonathan Barnhart, contacted the Hazel Park Police Department to report the theft of: a 2007 Ford SRW Super Duty Pick-Up (VIN 1FTSX21P37EA88521); a 2000 Towmaster 2900 Trailer (VIN 4KNUT162XYL161934); a 2005 Bobcat (Serial S25016343); a Portable cement mixer; and various tools inside the truck and in a work box mounted on the trailer. Four months later, Barnhart supplemented the report with an inventory of personal property items.

After being informed of the loss, Defendant requested that Plaintiff tender a Sworn Statement in Proof of Loss and an Affidavit of Vehicle Theft. On November 17, 2014, Plaintiff tendered the Affidavit along with a duplicate Certificate of Title – showing the truck was a

“Rebuilt Salvage” and titled to Barnhart individually, not Plaintiff. On February 26, 2015, Plaintiff submitted its Sworn Statement along with copies of certain documents.

Defendant claims that, following a review of the documents, it found that the Bobcat and Trailer were not covered property under the Policy. Specifically, Defendant claims that Plaintiff reported a 2005 Bobcat as being stolen, but the Policy only listed 2011, 2009, and 1995 Bobcats. Similarly, Defendant claims that Plaintiff reported a 2000 Towmaster 2900 Trailer being stolen, but the Policy only lists a 2006 Royal Enclosed and 2005 Kaufman trailer.

Due to these inconsistencies, Defendant claims that it sought Barnhart’s Examination Under Oath. Barnhart was also requested to bring certain receipts for the purchase of certain of the claimed items.

During his exam, Barnhart admitted the existence of documents that Defendant sought, but apparently did not produce the same. Defendant claims that, as a result of Barnhart’s refusal to cooperate in its investigation, Defendant denied Plaintiff’s claim.

The Court will note that, in its Response Brief, Plaintiff claims that it “provided all requested original documentation to Defendant for the opportunity to review and make copies of.” In its Reply, however, Defendant challenges this statement.

In any event, after having its claim denied, Plaintiff filed the present lawsuit on declaratory judgment, breach of contract, breach of covenant of good faith and fair dealing, and defamation claims. Defendant now moves for summary disposition of these claims 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.*

### **1. Count II – Breach of Contract**

Regarding Plaintiff’s breach of contract claim, 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.”).

Defendant argues that, under both Policies, Plaintiff is prohibited from suing Defendant unless there has been “full compliance” by Plaintiff with all terms of the Policies.<sup>1</sup> These Policies also require that, in connection with a claim, Plaintiff “must . . . [c]ooperate with us in the investigation . . . of the claim.”<sup>2</sup> Further, with regard to the equipment loss, the General Policy permits Defendant to conduct an examination of the insured under oath – “including an insured’s books and records.”<sup>3</sup>

Defendant claims that, although he agreed to produce the requested documents while under oath at his exam, Barnhart has since failed to do so. As a result, Defendant argues that Plaintiff has failed to cooperate and, as such, failed to meet a condition precedent to bringing this lawsuit under the very terms of the contract Plaintiff seeks to enforce.

In support of its argument that Plaintiff’s claim should be dismissed with prejudice, Defendant primarily cites to an Federal Eastern District Opinion and Order Granting Defendant’s Motion for Summary Judgment in *Henry v State Farm Fire & Casualty Co*, Case No. 14-12004 (June 5, 2015). But *Henry* is both non-binding and distinguishable.

For example, in *Henry*, the insured failed to provide any of the requested documents. In this case, it appears that Plaintiff produced the majority of the documents that Defendant

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<sup>1</sup> Auto Policy CA 00 01 03 06, at Section IV.A., para 3.a., page 7 of 11; General Policy at CM 00 01 09 04, General Conditions, C.1., page 2 of 2; and General Policy at CP 00 90 07 88, D.1. page 1 of 1.

<sup>2</sup> Auto Policy CA 00 01 03 06, at Section IV.A., para 2.b.(3), page 7 of 11; General Policy at CM 00 01 09 04, Loss Conditions, C.10., page 1 of 2; and General Policy at CP 00 10 06 07, E.3.a.(8) page 8 of 13.

<sup>3</sup> General Policy at CM 00 01 09 04, Loss Conditions, C.7., page 1 of 2; and General Policy at CP 00 10 06 07, E.3.b. page 8 of 13.

requested. Further, in *Henry*, the insured was a “person of interest” in arson for the claimed fire loss. In this case, Defendant’s hired private investigator did not find that Plaintiff had anything to do with the theft. (See Defendant’s Exhibit 6).

When the Court considers all evidence presented, it cannot conclude that Plaintiff willfully failed to comply with Defendant’s document request such that the appropriate remedy would be dismissal. This is simply not a case like *Henry*. When viewing all evidence in the light most favorable to Plaintiff, the Court finds that Plaintiff sufficiently complied with Defendant’s request such that a failure to meet condition precedent does not bar this claim.

For the foregoing reasons, Defendant’s motion for summary disposition of Plaintiff’s Count II is DENIED.

## **2. Count I – Declaratory Judgment**

Defendant next seeks dismissal of Plaintiff’s Count I for declaratory judgment, claiming the same is simply a re-hashed breach of contract claim. The Court agrees.

In its Count I, Plaintiff seeks entry of an order declaring: (1) that Defendant breached its contractual duties by failing to provide coverage, (2) Defendant is liable under the policy and must compensate Plaintiff, and (3) Plaintiff is entitled to costs incurred in prosecuting this action.

Should Plaintiff succeed on its breach of contract claim, then necessarily the trier-of-fact would have found that Defendant breached its contractual duties and owed coverage that it did not provide. Plaintiff seeks nothing in its Count I that it does not seek in its Count II, which makes the same duplicative.

For this reason, the Court GRANTS Defendant’s motion for summary disposition of Plaintiff’s Count I and DISMISSES said claim.

### **3. Count III – Breach of Covenant of Good Faith and Fair Dealing**

Defendant next seeks dismissal of Plaintiff's Count III alleging a breach of a covenant of good faith and fair dealing because Michigan does not recognize such a claim.

Indeed, Michigan does not recognize a cause of action for breach of the implied covenant of good faith and fair dealing. *Fodale v Waste Mgmt of Mich, Inc*, 271 Mich App 11, 35; 718 NW2d 827 (2006). This also applies to the handling of an insurance claim. *Roberts v Auto-Owners Ins Co*, 422 Mich 594, 608; 374 NW2d 905 (1985).

Further, in order to support a tort action, there must be some breach separate and distinct from the parties' contractual relationship. *Fultz v Union-Commerce Assoc*, 470 Mich 460, 467; 683 NW2d 587 (2004) (holding "If no independent duty exists, no tort action based on a contract will lie."). And Plaintiff fails to identify a separate and distinct legal duty between the parties outside of their written contracts to support a tort claim.

For all of the foregoing reasons, the Court GRANTS Defendant's motion for summary disposition of Plaintiff's Count III and DISMISSES said claim.

### **4. Count IV – Defamation**

Finally, Defendant seeks dismissal of Plaintiff's defamation claim. This claim is founded on the denial of claim letter that Defendant sent to Plaintiff, in care of its counsel.

The elements of a defamation claim are: (1) a false and defamatory statement concerning the plaintiff, (2) an unprivileged communication to a third party, (3) fault amounting at least to negligence on the part of the publisher, and (4) either actionability of the statement irrespective of special harm (defamation per se) or the existence of special harm caused by publication. *Mitan v Campbell*, 474 Mich 21, 24; 706 NW2d 420 (2005).

Defendant argues that Plaintiff's claim fails because there was no publication to a third party. The Court agrees. Defendant only tendered this letter to Plaintiff, through its counsel.

Defendant was notifying Plaintiff directly of its reasons for denying Plaintiff's claim. This is not defamation.

For this reason, the Court GRANTS Defendant's motion for summary disposition of Plaintiff's Count IV and DISMISSES said claim.

**IT IS SO ORDERED.**

December 16, 2015  
Date

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