STATE OF MICHIGAN
IN THE 17th CIRCUIT COURT FOR KENT COUNTY

OPEN SYSTEMS TECHNOLOGIES DE, LLC,

Plaintiff,

vs.

TRANSGUARD INSURANCE COMPANY OF AMERICA; CHAMPAGNE LOGISTICS; UNIVERSITY MOVING AND STORAGE CO.; C & C RELOCATION, INC.; and KEVIN COLTON,

Defendants.
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Case No. 14-01405-CKB

HON. CHRISTOPHER P. YATES

OPINION AND ORDER GRANTING IN PART, AND DENYING IN PART, DEFENDANTS' MOTIONS FOR SUMMARY DISPOSITION

From the Soo Locks to the Detroit River, Michigan is a state known for shipping. So when Plaintiff Open Systems Technologies DE, LLC ("Open Systems") had to arrange for the two-mile shipment of a piece of technology called an array for Spectrum Health ("Spectrum"), nobody would have predicted that the move would turn out like the wreck of the Edmund Fitzgerald. Open Systems enlisted a moving specialist, Defendant Champagne Logistics ("Champagne"), and bought $750,000 in insurance coverage for the trip from Defendant Transguard Insurance Company ("Transguard"). By the time the journey had ended, however, the array was no longer in working condition, so Open Systems had to buy a new array for Spectrum. Open Systems then filed this suit against Transguard, Champagne, and others involved in the move. Now, all of the remaining defendants have requested summary disposition. The Court concludes that Open Systems can proceed against Transguard and Champagne, but not Defendant University Moving and Storage Company ("University").

## I. Factual Background

Defendants Transguard, Champagne, and University have all requested summary disposition pursuant to MCR 2.116(C)(10),[1] which permits the defendants to test "the factual sufficiency" of the plaintiff's first amended complaint. Corley v Detroit Bd of Educ, 470 Mich 274, 278 (2004). "In evaluating such a motion, the court considers the entire record in the light most favorable to the party opposing the motion, including affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties." Id. Thus, the Court shall limn the facts by referring to all of the materials submitted by the parties.

In April 2013, Plaintiff Open Systems helped Spectrum buy two P9500 storage arrays, which a shipping company named Specialized Transportation Inc. ("STI") transported from Oklahoma to two separate Spectrum facilities. By all accounts, one of the arrays reached its final destination in Grand Rapids without incident. The other array, in contrast, had to be dropped off at a temporary storage location until the building at its final destination was ready for delivery. Spectrum officials oversaw STI's delivery of the array to the storage location on May 7, 2013. Although STI workers had to remove some of the packaging materials in order to fit the array into a freight elevator, nobody performing or observing the delivery noticed any damage to the array.

In July of 2013, when the final destination for the array was ready to accept delivery, Plaintiff Open Systems contacted Defendant Champagne to arrange for the final shipment of the array, which merely had to travel approximately two miles to Spectrum's Bradford Facility for installation. After

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[1] Defendant University has also cited MCR 2.116(C)(8) in moving for summary disposition, but the Court must consider materials outside the pleadings to resolve the motion, so the Court shall treat University's motion as a request for summary disposition exclusively under MCR 2.116(C)(10). See Silberstein v Pro-Golf of America, Inc, 278 Mich App 446, 457 (2008).

an exchange of e-mails and telephone calls, Champagne provided a quote to Open Systems for the move at the price of $524.40 with valuation coverage for an additional $4,500, see Plaintiff's Exhibit 1 (Bates # OST003690),[2] responding to an e-mail from Open Systems requesting " pickup/delivery on 8/1," identifying the pick-up and drop-off locations, and describing the nature of the specific load to be transported. See id. (Bates # OST003689). Open Systems not only paid the quote price for the delivery charge, but also paid the premium to obtain insurance coverage in the amount of $750,000. See First Amended Complaint, Exhibit 1 (Transit Evidence of Insurance).

On August 2, 2013, three movers arrived to transport the array from storage to the Bradford Facility.[3] See Plaintiff's Exhibit 13 (Deposition of Eric Ulmer at 11-18). The movers rolled all three of the racks comprising the array on their own wheels onto the moving truck, see id. (Deposition of Eric Ulmer at 17), and then the movers drove the truck containing the array components over to the Bradford Facility. See Plaintiff's Exhibit 10 (Deposition of Kevin Colton at 24-25). The Bradford Facility had a loading dock that was higher than the truck's storage compartment, so the movers had to use a leveler to "create a nice slope for the equipment to roll down." See Plaintiff's Exhibit 13 (Deposition of Eric Ulmer at 22). When Spectrum employees at the site told the movers to use the leveler, however, the movers ignored that command, continued pushing the first component of the array, and "[w]ith quite a bit of force . . . jumped the first rack off on the leveler." Id. (Deposition of Eric Ulmer at 22-24). As a result, "the full weight of the array came onto the first two wheels to

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[2] Plaintiff Open Systems filed a single set of exhibits to support its responses to the various motions for summary disposition. The Court shall simply refer to those documents as "Plaintiff's Exhibits."

[3] The three movers were Kevin Colton, Brent Ten Eyck, and Timothy Sooy. See Plaintiff's Exhibit 10 (Deposition of Kevin Colton at 24-25). By all accounts, the movers had an independent-contractor relationship with Defendant University. See First Amended Complaint, Exhibit 7.

come off of the ramp" and "then the back portion of the rack came down with a solid thud as well." Id. (Deposition of Eric Ulmer at 24). Although the movers subsequently used the leveler properly when removing the second and third components of the array, id. (Deposition of Eric Ulmer at 25), Spectrum employees discovered substantial damage to more than one component of the array shortly after the move took place. See Plaintiff's Exhibit 17 (Deposition of Ray Ashley at 28). But before the movers left, Spectrum employee Eric Ulmer signed two bills of lading without making reference to any damage to the array components. See Plaintiff's Exhibits 8 & 14; see also Plaintiff's Exhibit 13 (Deposition of Eric Ulmer at 27-30).

In the fullness of time, Spectrum employees chronicled the extent of the damage to the array: damage to the drives and the equipment on the rack that was dropped as well as "all three racks have exterior damage from pressure bends, gouges to a dent and pressure pop rivet in [the] lower portion of one of the racks[.]" See Plaintiff's Exhibit 13 (Deposition of Eric Ulmer at 49). On August 7, 2013, Spectrum received a damage assessment, which concluded that the "long term reliability and serviceability is of the utmost concern to me which is why we need to have this unit replaced." See First Amended Complaint, Exhibit 4 (e-mail from Rick Fraidenburg to Mark Wynne). As a result, Spectrum submitted a claim to Defendant Transguard for insurance coverage, but Transguard denied that claim. See First Amended Complaint, Exhibit 5. Spectrum then turned to Hewlett Packard as the manufacturer of the array, but Hewlett Packard declined to "provide service and support to the damaged HP P9500 storage array." See First Amended Complaint, Exhibit 6. Therefore, Spectrum rejected the array, forcing Plaintiff Open Systems to purchase a replacement array for Spectrum. The replacement array arrived without incident, so Spectrum assigned its claims to Open Systems, which filed this action to recover the full amount it had to pay for the replacement array.

On March 24, 2015, Plaintiff Open Systems filed a first amended complaint presenting seven claims against Defendants Transguard, Champagne, University, C & C Relocation, Inc. ("C&C"), and Kevin Colton. On May 19, 2015, the clerk entered defaults against C&C and Colton, but all of the other defendants filed answers to the first amended complaint. After discovery closed, all of the remaining defendants moved for summary disposition under MCR 2.116(C)(10). Thus, the Court must now resolve each of those motions.

## II. Legal Analysis

Each defendant is entitled to summary disposition under MCR 2.116(C)(10) if, but only if, "there is no genuine issue regarding any material fact[.]" Rose v National Auction Group, 466 Mich 453, 461 (2002). Such a "genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." West v General Motors Corp, 469 Mich 177, 183 (2003). Applying these well-understood standards, the Court shall consider whether Defendants Transguard, Champagne, and University are entitled to summary disposition.

### A. Defendant Transguard.

Count One accuses Defendant Transguard of breaching the contract for transit insurance, and Count Two requests full recovery for the cost of the array from Transguard on the theory of equitable subrogation. Transguard does not dispute that Plaintiff Open Systems purchased insurance coverage for the shipment of the array for the benefit of Spectrum, but Transguard nonetheless insists that the Court must award summary disposition on that claim because Spectrum "failed to exhaust all other applicable insurance as required by the 'other insurance' clause" in the evidence of insurance. Thus,

the Court must turn to the language of the insurance documents concerning the Transguard coverage to ascertain whether a genuine issue of material fact exists with respect to Spectrum's obligation to seek coverage under "other insurance," *i.e.*, Spectrum's general commercial liability policy.[4]

"An insurance policy is similar to any other contractual agreement, and, thus, the court's role is to 'determine what the agreement was and effectuate the intent of the parties.'" Hunt v Drielick, 496 Mich 366, 372 (2014). The Court must "'employ a two-part analysis' to determine the parties' intent." See id. at 373. "First, it must be determined whether the policy provides coverage to the insured, and, second, the court must 'ascertain whether that coverage is negated by an exclusion.'" Id. While it "'is the insured's burden to establish that his claim falls within the terms of the policy,'" id., the "'insurer should bear the burden of proving an absence of coverage[.]'" Id. When the terms of any contract – including an insurance policy – are unambiguous, those terms "must be *enforced as written*." Rory v Continental Ins Co, 473 Mich 457, 468 (2005). In contrast, "the meaning of an ambiguous contract is a question of fact that must be decided by the jury." Klapp v United Ins Group Agency, Inc, 468 Mich 459, 469 (2003).

Despite the fact that Defendant Transguard accepted a premium and provided insurance for the very shipment at issue in this lawsuit, see First Amended Complaint, Exhibit 1, Transguard now contends that some other insurer must be primarily responsible for covering the damage to the array.

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[4] Defendant Transguard's reply brief refers in passing to Plaintiff Open Systems's insurance policy from "Hartford" as well. The Michigan Court Rules do not even permit reply briefs, and our Court of Appeals follows the sound practice of not allowing parties to raise issues for the first time in reply briefs. See Blazer Foods, Inc v Restaurant Properties, Inc, 259 Mich App 241, 252 (2003), citing MCR 7.212(G). Moreover, Transguard's argument about "Hartford" – which surely is not the full name of the insurance company – provides no analysis whatsoever, and the Court need not take on the responsibility of filling out the argument for Transguard. After all, "[j]udges are not like pigs, hunting for truffles buried in briefs." United States v Dunkel, 927 F2d 955, 956 (7th Cir 1991).

But according to the Transit Evidence of Insurance ("TEI"), Transguard promised that, "[u]p to the Declared Value of the property shown, we will pay for any direct physical loss or damage to your property while in transit" that "is caused by an Accident, Event or Happening which occurs during the coverage period, unless such cause or such property is specifically excluded . . . ." Id. In spite of this clear language dictating coverage for "loss or damage" to the array "while in transit," see id., Transguard contends that the "other insurance" clause in the TEI forecloses recovery in this action because Spectrum had a general commercial liability policy that should have served as the primary layer of coverage for the "loss or damage" to the array.

The "other insurance" clause of the TEI issued by Defendant Transguard provides: "If there is other insurance covering your property, then coverage provided under this Evidence of Insurance shall be excess over that other insurance. This coverage shall not apply until such other insurance has been exhausted by payment or settlement of claims." See First Amended Complaint, Exhibit 1. Therefore, Transguard cannot avail itself of the "other insurance" clause as a defense to coverage unless Spectrum's general commercial liability policy unambiguously constitutes "other insurance covering" the array while in transit. To be sure, Spectrum submitted a claim for the array damage to its general commercial liability insurer, Lexington Insurance Company, and ultimately withdrew that claim. See Brief in Support of Transguard's Motion for Summary Disposition, Exhibit L. But the policy governing insurance provided by Lexington Insurance Company to Spectrum contains an express exclusion for "[p]roperty in transit, except expressly as provided elsewhere in this Policy[.]" See Plaintiff's Exhibit 22 (Manuscript Domestic Property Policy at Page 10 of 32). And although the policy was "extended to cover personal property . . . while such property is in transit[,]" see id. (Page 21 of 32), none of the three extensions of coverage unambiguously applies to the array while

in transit. See id. Indeed, the extension for "[p]ersonal property shipped to customers" clearly does *not* apply to the array. See id. Similarly, the extension for "[p]ersonal property of others sold by the Insured" has nothing to do with the array. Finally, although the extension for "[t]he interest of the Insured in, and legal liability for personal property of others in the actual or constructive custody of the Insured" could be stretched to apply to the array manufactured by Hewlett Packard and shipped at the behest of Open Systems for Spectrum's benefit, the Court cannot conclude that that extension unambiguously renders Lexington Insurance Company obligated to Spectrum for insurance coverage for damage to the array. Instead, the Court must leave the interpretation of the ambiguous insurance documents for the jury at trial.[5] See Klapp, 468 Mich at 469. Accordingly, the Court must deny the request by Transguard for summary disposition on Counts One and Two.[6]

B. Defendant Champagne.

Count Three of the first amended complaint alleges that Defendant Champagne breached its contract with Plaintiff Open Systems because the array arrived in damaged condition as a result of its transportation arranged by Champagne. In seeking summary disposition, Champagne argues that it had no contract with Open Systems. "'The essential elements of a contract are parties competent

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[5] As luck – or the insurance industry – would have it, Lexington Insurance Company's policy also contains an "other insurance" clause, see Plaintiff's Exhibit 22 (Manuscript Domestic Property Policy at Page 26 of 32), which Lexington Insurance Company could invoke to argue that Defendant Transguard should cover the loss for the array. Apparently every insurance provider wants to be able to respond to a loss by yelling "not it!" as quickly and loudly as possible.

[6] The relationship between Count One and Count Two is a bit of a mystery, but it appears that Count One presents a straightforward claim for breach of the insurance contract while Count Two seeks to impose liability upon Defendant Transguard to reimburse Open Systems for the costs that it incurred in buying a replacement array in the wake of Transguard's wrongful denial of coverage. The Court concludes that Open Systems can seek recovery on those alternative theories flowing from Transguard's decision to disclaim its obligation to provide insurance coverage.

to contract, a proper subject matter, legal consideration, mutuality of agreement, and mutuality of obligation.'" City of Huntington Woods v City of Oak Park, 311 Mich App 96, 119 (2015). Here, Open Systems requested a quote from Champagne on July 23, 2013, see Plaintiff's Exhibit 1 (Bates # OST003690-OST003691), and Champagne responded with a quote of $524.40 for the move cost and an additional $4,500 for valuation coverage. See id. (Bates # OST003690). Open Systems paid Champagne for the move, thereby providing consideration, and Champagne arranged to have the array moved by Defendant University. See Plaintiff's Exhibit 3 (Deposition of William Cumings at 19). This series of events not only established a contract between Champagne and Open Systems,[7] but also conformed to Champagne's usual practice of contracting for single moves. Id. (Deposition of William Cumings at 17).

Defendant Champagne next argues that it did not breach its contractual obligation to deliver the array. Champagne seems to suggest that it satisfied its contractual duty so long as the array made it to its final destination, regardless of whether the array was badly damaged along the way. Under Michigan law, however, "in every contract there is an implied 'duty to perform it skillfully, carefully, diligently, and in a workmanlike manner.'" See Co-Jo, Inc v Strand, 226 Mich App 108, 114 (1997). Failure to satisfy that duty gives rise to a claim for breach of contract when damages occur. Thus, the Court cannot subscribe to Champagne's remarkable theory that it would have met its contractual obligation to Open Systems even if the array had arrived in a thousand pieces. Champagne further

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[7] Contrary to Defendant Champagne's contention, the two bills of lading addressing the move do not constitute the parties' contract. Those bills of lading were not signed until after the move was complete, and the only signatories on the bills of lading were representatives of C&C and Spectrum, see Plaintiff's Exhibits 8 & 14, so the Court is at a loss to understand how Champagne believes that those two documents form even a part – much less the entirety – of the contract between Champagne and Plaintiff Open Systems. Consequently, the Court must reject Champagne's argument that the bills of lading limit Open Systems's recovery on its breach-of-contract claim.

contends that it committed no breach of contract because either University or C&C – as opposed to Champagne – damaged the array during the move. That argument, which rests upon the premise that Champagne outsourced its contractual obligation when it outsourced the move itself, misapprehends the nature of Champagne's duties under the contract. By entering into a contract with Open Systems and accepting money for the move, Champagne accepted the contractual obligation to move the array to its final destination in a skillful, careful, diligent, and workmanlike manner. See Co-Jo, Inc, 226 Mich App at 114. Champagne could not absolve itself of that contractual obligation merely through the act of enlisting someone else to do the work. No matter whether Champagne, University, C&C, or another entity acting at Champagne's behest performed the work, Champagne remained obligated to ensure that the array was moved in a skillful, careful, diligent, and workmanlike manner. Failure to do so may well lead to liability for breach of Champagne's contract with Open Systems.

Finally, in a breathtakingly audacious argument, Defendant Champagne asserts that Plaintiff Open Systems's breach-of-contract claim is too speculative to survive summary disposition. More specifically, Champagne argues that Open Systems "cannot establish that the alleged damage to the array occurred during C&C Relocation's move, or that C&C's actions caused the alleged damage, or even that there is any damage beyond superficial, cosmetic damage." First, three witnesses from Spectrum watched the movers drop one component of the array by pushing it off the truck before the leveler was properly positioned. Second, the array was so severely damaged that Open Systems had to buy a replacement array for Spectrum. What further proof would Champagne like beyond three eyewitnesses to an event that caused demonstrable damage to the array, expert reports detailing the extensive damage to the array, and the resulting expenditure of a large sum of money to replace the array? Champagne is welcome to try to persuade the jury that the array was not badly damaged, or

that the movers did not cause whatever damage the array suffered, or that the array was moved in a manner that satisfied the requirements of the contract. But genuine issues of material fact on each of those issues plainly prevent the Court from awarding summary disposition to Champagne under MCR 2.116(C)(10).

C. Defendant University.

Defendant University has been named in Count Four on a negligence claim and Count Five on a claim for breach of bailment, but it seeks summary disposition on the straightforward argument that it neither had any agreement with Open Systems nor participated in the shipment of the array. To be sure, Defendant Champagne enlisted University to take part in the move, but University then engaged C&C to perform the move. Consequently, University contends that it owed no duty to Open Systems and it never had possession of the array, so the claims against it necessarily fail.

To prevail on its negligence claim against Defendant University, Plaintiff Open Systems must prove: "(1) duty; (2) breach of that duty; (3) causation, both cause in fact and proximate causation; and (4) damages." Romain v Frankenmuth Mutual Ins Co, 483 Mich 18, 21-22 (2009). Whether University "owed a duty to plaintiff [Open Systems] is a question of law." Fultz v Union-Commerce Associates, 470 Mich 460, 463 (2004). Our Supreme Court has determined that whenever a plaintiff pursues a claim for negligence against a downstream contracting defendant, "no tort liability arises for failing to fulfill a promise in the absence of a duty to act that is separate and distinct from the promise made." See id. at 470. In the context of that litigation, our Supreme Court reasoned that the "threshold question for negligence claims brought [by an injured plaintiff] against a contractor on the basis of a maintenance contract between a premises owner and the contractor is whether the

contractor breached a duty separate and distinct from those assumed under the contract." Id. at 461-462. Here, Open Systems can only proceed with its negligence claim if University "breached a duty separate and distinct from those assumed under [University's] contract" with Champagne. See id. Because University's contract with Champagne simply contemplated transportation of the array to Spectrum's Bradford Facility and Open Systems's negligence claim against University rests entirely upon an alleged breach of that very contractual obligation,[8] Open Systems's negligence claim cannot succeed in light of our Supreme Court's ruling in Fultz. Accordingly, the Court must grant summary disposition to University under MCR 2.116(C)(10) on the negligence claim in Count Four.

Plaintiff Open Systems's claim for breach of bailment fares no better. "A bailment requires the delivery of personal property in trust." Orton v Markward & Karafilis, Inc, 83 Mich App 548, 551 (1978). "In order to constitute a sufficient delivery of the subject of the bailment, there must be a full transfer to the bailee so as to exclude the possession of the owner and all other persons and to give to the bailee the sole custody and control thereof." Id. Here, the array was transported from its storage location to the Bradford Facility by C&C under the watchful eye of Spectrum employees and pursuant to a contractual obligation assumed by Defendant Champagne. Under the circumstances, even if the Court treats C&C as an agent of University (which is itself a dubious proposition), there exists no evidence that University ever received "a full transfer" of the array that gave University the "sole custody and control" of the array. Throughout the two-mile shipment of the array, Spectrum, Champagne, and C&C all had hands in possession of the item. Thus, the Court must grant summary disposition to University under MCR 2.116(C)(10) on the bailment claim in Count Five.

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[8] The Court rejects Plaintiff Open Systems's reliance upon some separate duty arising from MCL 440.7302(1), which concerns through bills of lading that deal with situations where connecting carriers are involved. Simply put, no such arrangement existed in this case.

## III. Conclusion

For all of the reasons set forth in this opinion, the Court shall deny summary disposition to Defendant Transguard on Counts One and Two of the first amended complaint, and to Defendant Champagne on Count Three of the first amended complaint. But the Court shall grant Defendant University's motion for summary disposition under MCR 2.116(C)(10) on Counts Four and Five of the first amended complaint. The remaining parties – Plaintiff Open System, Defendant Transguard, and Defendant Champagne – shall appear for trial at 9:00 A.M. on June 20, 2016, unless the Court receives some form of voluntary dismissal or stipulated order finally resolving the case prior to the date of trial.

IT IS SO ORDERED.

Dated: May 6, 2016

HON. CHRISTOPHER P. YATES (P41017)
Kent County Circuit Court Judge