IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

BRANDYWINE SMYRNA, INC. and BCP SMYRNA, INC.,	)	
Plaintiffs,	)	
	)	C.A. No. 08C-11-065 MMJ
v.	)	
MILLENNIUM BUILDERS, LLC and GRAPHIC ARTS MUTUAL INSURANCE CO.,	)	
Defendants.	)	

Submitted: March 30, 2010
Decided: April 8, 2010

On Motion for Summary Judgment
and Motions for Partial Summary Judgment

MEMORANDUM OPINION

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Francis X. Nardo, Esquire, Tybout, Redfearn & Pell, Wilmington, Delaware, Attorneys for Defendant Millennium Builders, Inc.

James S. Yoder, Esquire, Dana Spring Monzo, Esquire, White and Williams, LLP, Wilmington, Delaware, Attorneys for Defendant Graphic Arts Mutual Insurance Co.

JOHNSTON, J.

PENDING MOTIONS

Graphic Arts' Motion for Summary Judgment on the Issue of the Surface Water Exclusion;

Graphic Arts' Motion for Partial Summary Judgment Concerning the Absence of Bad Faith;

_____Graphic Arts' Motion for Partial Summary Judgment with Respect to Second Building;

_____Millennium Builders, LLC's Motion for Partial Summary Judgment Regarding Personal and Real Property Losses;

_____Millennium Builders, LLC's Motion for Partial Summary Judgment on the Issue of Loss of Sales Loyalty Performance Income; and

Millennium Builders, LLC's Motion for Partial Summary Judgment on the Issue of Lost Profits.

FACTS

For purposes of the pending motions, the following facts will be considered by the Court in the light most favorable to the non-moving party.

Plaintiffs Brandywine Smyrna, Inc. and BCP Smyrna, Inc. ("Brandywine") operate a car dealership in Smyrna, Delaware. The dealership has two buildings located at 19 South DuPont Highway ("Building 19") and 36 South DuPont

Highway ("Building 36"). In September 2007, Brandywine hired defendant Millennium Builders, LLC to recondition the roof of Building 19.

On September 22, 2007, a severe rainstorm resulted in water damage to Building 19 and its contents. Brandywine alleges that Millennium had left the roof without adequate roofing membrane, and that the decking had three holes around what had been functioning drains. Consequently, water from the storm collected on the roof's surface and entered Building 19 through seams in the plywood decking and the three holes. Brandywine claims that water triggered fire in the electrical boxes. As a result, Brandywine asserts that the electrical, phone and computer systems needed to be rewired.

Brandywine notified its insurer, defendant Graphic Arts Mutual Insurance Company, of the property damage. Graphic Arts assigned an adjuster, who inspected the property. By letter dated October 17, 2007, Graphic Arts denied Brandywine's claim for coverage. The disclaimer letter provides in part:

> Our investigation reveals the roof on this structure had been removed in an attempt to replace it with a new roof. In this process, the contractors also disconnected the roof drains. As there was no roof in place on part of the structure and the drains were disconnected; rain was allowed to enter the interior of the structure and caused water damage to both the interior structure and some business property contained within.
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> * * *

> We will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss.
>
> g) Water
>
> 1) Flood, surface water, waves, tides, tidal waves, overflow of any body of water, or their spray, all whether driven by wind or not;

SUMMARY JUDGMENT - "SURFACE WATER"

Graphic Arts moved for summary judgment, arguing that the insurance policy specifically excludes coverage for Brandywine's loss. The precise issue is whether the loss was caused by "surface water." If so, there is no coverage pursuant to the water exclusion in section (B)(1)(g)(1), listed in the "Causes of Loss - Special Form" portion of the insurance policy.

As a general rule, an insurance contract is construed strongly against the insurer, and in favor of the insured, because the insurer drafted the policy.[1] However, this rule is not applicable unless there is some ambiguity in the policy language. If the language is clear and unambiguous a Delaware court will not destroy or twist the words under the guise of construing them.[2] Moreover, when

[1] *Hallowell v. State Farm Mut. Auto. Ins. Co.*, 443 A.2d 925, 926 (Del. 1982); *Steigler v. Insurance Co. of North America*, 384 A.2d 398, 400 (Del. 1978); *Novellino v. Life Ins. Co. of North America*, 216 A.2d 420, 422 (Del. 1966).

[2] *Apotas v. Allstate Insurance Co.*, 246 A.2d 923, 925 (1968); *Novellino,* 216 A.2d at 422.

the language of an insurance contract is clear and unequivocal, a party will be bound by its plain meaning because creating an ambiguity where none exists could, in effect, create a new contract with rights, liabilities and duties to which the parties had not assented.[3] An ambiguity exists when the language in a contract permits two or more reasonable interpretations.[4]

It appears that the only Delaware case interpreting the term "surface water" is *Bringhurst v. O'Donnell*.[5] In *Bringhurst,* the Court of Chancery considered the right of a property owner to use an adjacent alley for the purpose of carrying off surface water. The principal question was whether water falling on a roof is surface water, within the meaning of the reservation in the property title. The Court ruled:

> No case has been cited which holds that in order to become surface water the rains must fall, or the snows must melt upon the soil of the earth. In the case of a building erected on land, the roof is to be regarded as an artificial elevation of the earth's surface. When it intercepts the falling rain or snow, it therefore gathers surface waters. That such must have been the understanding of the parties in wording the reservation in question would appear to be evident not alone from the ordinary sense which common usage attributes to the words, but as

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[3] *Apotas*, 246 A.2d at 925; *Lamberton v. Travelers Indemnity Company*, 325 A.2d 104, 106 (Del. Super. 1974), *aff'd*, 346 A.2d 165 (Del. 1975).

[4] *Cheseroni v. Nationwide Mut. Ins. Co.*, 402 A.2d 1215, 1217 (Del. Super. 1979), *aff'd*, 410 A.2d 1015 (Del. 1980); *Lamberton*, 325 A.2d at 106.

[5] 124 A. 795 (Del. Ch. 1924).

> well from the fact that when the reservation was made (January 7, 1857) the entire lot of the complainants was covered with its present buildings. [6]

The instant case arises in the context of interpretation of the language of an insurance policy. Also, the entire property at issue is not completely covered by the building. While *Bringhurst* is instructive, the Court does not find the decision to be dispositive of the coverage issue.

As a general matter, it would defy common sense to exclude precipitation falling on a roof from a definition of "surface water." Obviously, rain falling on a roof is merely temporarily detoured from its eventual manifestation as surface water. However, here the damage was not proximately caused by the ordinary and reasonably foreseeable behavior of surface water - even surface water resulting from a torrential downpour. Rather, the damage directly resulted from the allegedly improper method of protecting the building from harm during roof repair.

The term "surface water" is not defined in the policy. The language must be construed against the insurer. Water falling through holes in a roof created during the course of, and for the purpose of repair, is not surface water within the plain meaning of the contract language.

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[6] *Id.* at 797.

Therefore, the Court finds that the surface water exclusion (in section (B)(1)(g)(1) of the Causes of Loss - Special Form portion of the insurance policy) does not bar coverage. Graphic Arts' Motion for Summary Judgment is hereby **DENIED.**

PARTIAL SUMMARY JUDGMENT - ABSENCE OF BAD FAITH

Brandywine claims that Graphic Arts acted in bad faith, and breached its implied covenants of good faith and fair dealing, by failing to conduct a reasonable investigation before denying coverage. Graphic Arts has moved to exclude the bad faith claim from this litigation.

A party seeking to establish a claim of bad faith must show that the insurer lacked reasonable justification in delaying or refusing payment of a claim.[7] The ultimate question is whether at the time the insurer denied coverage, there existed a *bona fide* dispute, and therefore a meritorious defense to the insurer's liability. If the insurer did not have reasonable grounds for relying upon the defense to liability, the question of bad faith refusal to pay should not be submitted to the jury.[8]

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[7] *Tackett v. State Farm Fire and Cas. Ins. Co.,* 653 A.2d 254, 262 (Del. 1995).

[8] *Casson v. Nationwide Ins. Co.,* 455 A.2d 361, 369 (Del. Super. 1982).

The Court finds Graphic Arts' motion to be premature. After the conclusion of plaintiffs' case-in-chief, the Court will determine whether a genuine issue of material fact for the jury exists on the issue of bad faith.

Therefore, Graphic Arts' Motion for Partial Summary Judgment Concerning the Absence of Bad Faith is hereby **DENIED AT THIS TIME AS NOT YET RIPE FOR DETERMINATION.**

PARTIAL SUMMARY JUDGMENT - SECOND BUILDING

As of the time of the loss, Brandywine had moved its parts and service operations to the new facility in Building 36. Graphic Arts asserts that Building 36 was not insured for loss of business income.

The insurance policy provides coverage for loss of business income due to a "suspension of operations." "Operations" is defined as "business activities occurring at the described premises." Graphic Arts alleges that although Building 19 was covered for business income loss, there was no policy providing such coverage for Building 36.

Brandywine concedes that there was no physical damage to Building 36. Brandywine tacitly concedes that there was no actual policy in effect at the time of the loss that specifically provided business income loss coverage for Building 36.

Nevertheless, Brandywine argues that Graphic Arts has waived its right to deny, or should be estopped from denying, business loss coverage. Brandywine states that once construction was completed on Building 36, on September 16, 2007, Brandywine requested that the insurance agent cancel the builders risk policy. That policy was to be replaced with appropriate coverage for operations in Building 36. The agent prepared and transmitted a Policy Change Endorsement. The Endorsement does not make express reference to "business income." The changes were to be effective on September 15, 2007; however, Brandywine did not receive the Endorsement until after the loss, on October 17, 2007. Brandywine claims that coverage for Building 36 was to be the same as coverage for Building 19.

Further, Brandywine asserts that although Building 36 did not sustain any physical damage, all computer and phone systems were rendered inoperable by the water and fire damage to Building 19. The Court finds that there is a question of fact as to whether the damage to Building 19 resulted in a loss of business income.

Additionally, viewing the facts in the light most favorable to Brandywine, Brandywine's insurance agent was the agent of Graphic Arts. Brandywine has established the existence of a genuine issue of material fact as to whether Graphic

Arts has waived its right to deny, or should be estopped from denying, coverage for loss of business income.

Therefore, Graphic Arts' Motion for Partial Summary Judgment with Respect to Second Building is hereby **DENIED.**

PARTIAL SUMMARY JUDGMENT - PERSONAL AND REAL PROPERTY LOSSES

Millennium has moved for partial summary judgment on the issue of the proper measure of damages for Brandywine's real and personal property losses as a matter of law. Brandywine has provided an expert opinion by William A. Santora, CPA, calculating damages. Brandywine concedes that it cannot recover for "betterments" to the property achieved as a result of repairs following the loss. Brandywine also agrees that damages calculations should include depreciation on furniture and personal property.

The dispute concerns Building 19 itself. Millennium contends that the proper measure of damages is fair market value, *i.e.,* replacement value adjusted for depreciation. Brandywine counters that no depreciation should be applied.

Compensation for damage to real property should be the difference between the value of the land before the harm and the value after the harm. In an appropriate case, the reasonable cost of restoration may be the proper measure.

However, if the cost of restoring the property to its original condition is disproportionate to the diminution in the value of the land caused by the loss, damages should be measured only by the difference in the property before and after the harm.[9]

The measure of damages in cases such as this can be complex and require the exercise of careful judicial discretion. In *Council of Unit Owners of Sea Colony East v. Carl. M. Freemen Associates, Inc.,*[10] this Court held:

> In developing a measure of damages for the tort and contract claims included in this case, it is assumed that a claimant will have to show the reasonableness of any repair or replacement estimates or requests for reimbursement for funds spent.
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> Also for purposes of determining a measure of damages, this Court accepts that there are significant allegations that Plaintiff did not have full use and enjoyment of the referenced components even for what is alleged to be their useful life. Conceptually there would be some attraction in giving a defendant the benefit of having provided a component that performed properly until it had to be replaced. Of course, if this were the case there would be no need for repair or replacement of the component. Assuming then that a plaintiff did not get the benefit of his bargain, and there is a need for replacement or repair of a component and a defendant is entitled to some "mitigation" for "useful life," then the plaintiff should also receive an "offset" for the diminished use of the defective component during its "not-so-useful life." Although qualitatively attractive as an approach, the quantification of such diminished use, along with assessment of useful

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[9] *Brandywine 100 Corp. v. New Castle County,* 527 A.2d 1241, 1241 (Del. 1987); Restatement (Second) Torts § 929 (a).

[10] 564 A.2d 357 (Del. Super. 1989).

> lives of components such as those pertinent to this case, as a proof problem, is simply overwhelming. A telephone pole hit by a car has a specific, identifiable period of useful service which is readily determined by looking at the number of years it performed prior to being damaged. Building components, alleged to have been defective early in their respective lives are not amenable to such easy and straightforward characterization.
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> For all of the foregoing reasons, this Court denies the Freeman Defendant's Motion to Establish the Measure of Damages and grants Plaintiff's Motion in Limine, which establishes as a measure of damages, the "cost of repair."[11]

At the conclusion of the evidence, the Court intends to instruct the jury that the proper measure of damages in this case will be the reasonable cost of repair. However, if the evidence demonstrates that the cost of restoration is unreasonable or disproportionate to the diminution in the value of the land caused by the loss, the cost of repair will be offset by depreciation.

Therefore, Millennium Builders, LLC's Motion for Partial Summary Judgment Regarding Personal and Real Property Losses is hereby **GRANTED** to the extent that the Court has set out the law regarding measurement of damages for personal and real property losses.

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[11] *Id.* at 364.

PARTIAL SUMMARY JUDGMENT - LOSS OF SALES LOYALTY PERFORMANCE INCOME

Millennium contends that Brandywine's expert opinion, regarding loss of sales loyalty performance income, is too speculative to support a claim for damages.

The expert employed the following methodology:

> Loss of sales loyalty performance income was determined by calculating the average number of cars per month from the above lost profits calculation and multiplying them by BCP's repeat customer rating furnished by Chrysler. Then taking that result and multiplying it by the service revenue and repeat customer revenue (both values furnished by Chrysler) and discounting the latter to present value. Both amounts were then added together to determine loss of sales loyalty performance income.

Millennium challenges this methodology as lacking in reliability. Millennium argues that the expert failed to take into consideration any other economic factors which may have had an effect on Brandywine's ability to sell new vehicles during the claimed period of loss. Further, the expert did not conduct any independent research to confirm the accuracy of the figures provided by Chrysler.

The Court finds that Millennium's objections legitimately go to the weight to be given to the expert's testimony, not to its admissibility. Therefore, Millennium Builders, LLC's Motion for Partial Summary Judgment on the Issue of Loss of Sales Loyalty Performance Income is hereby **DENIED.**

PARTIAL SUMMARY JUDGMENT - LOST PROFITS

Millennium argues that Brandywine's expert opinion, regarding lost profits, is too speculative and unreliable to support a claim for damages.

The expert employed the following methodology:

> Lost profits were calculated by determining the average monthly profitability for the last five years and six months and comparing it to the actual monthly profitabiity from September 2007 to May 2008. Mr. Santora's methodology is a "bottom line" approach. He determined the average monthly net income during the five and one half years prior to the loss and then compared that amount of Plaintiffs' reported income or loss per its Dealer Financial Statement for each month during the claimed period of loss. He attributed the difference solely to the roof collapse and water damage without taking into consideration any other possible factors.
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> Mr. Santora chose this methodology specifically to comply with the definition of lost profits set forth in the insurance policy for co-Defendant Graphic Arts; according to Mr. Santora, Graphic Arts' insurance policy defines "lost profits" as "the net profits of the business."

Millennium faults this methodology for failing to take into consideration economic factors, expenses affecting profitability, and costs expended to renovate the dealership.

The Court finds that Millennium's objections legitimately go to the weight to be given to the expert's testimony, not to its admissibility. Therefore, Millennium

Builders, LLC's Motion for Partial Summary Judgment on the Issue of Lost Profits is hereby **DENIED.**

IT IS SO ORDERED.

/s/ Mary M Johnston
The Honorable Mary M. Johnston