IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge R. Brooke Jackson

Civil Action No. 16-cv-03057-RBJ

ANN BASHAM,

Plaintiff,

v.

UNITED SERVICES AUTOMOBILE ASSOCIATION,

Defendant.

ORDER GRANTING MOTION FOR JUDGMENT ON THE PLEADINGS

After a hailstorm damaged her home, Ann Basham filed a homeowner's insurance claim with USAA. Her policy provides a two-step method for settling property damage claims above $5,000. First, USAA pays only the "actual cash value" for the loss, which is defined as "the amount it would cost to repair or replace covered property, at the time of loss or damage, with material of like kind and quality, subject to a deduction for deterioration, depreciation and obsolescence." ECF No. 12-1 at 8; ECF No. 12-2 at 8.[1] The policy warns that the actual cash value of damaged property "may be significantly less than its replacement cost." ECF No. 12-1 at 8. Second, if the homeowner completes the repair or replacement within one year and submits timely notice, USAA will pay for this replacement cost without a deduction for depreciation and

[1] The Court "may consider documents referred to in the complaint if the documents are central to the plaintiff's claim and the parties do not dispute the documents' authenticity." *BV Jordanelle, LLC v. Old Republic Nat'l Title Ins. Co.*, 830 F.3d 1195, 1201 n.3 (10th Cir. 2016) (quoting *Alvarado v. KOB–TV, LLC*, 493 F.3d 1210, 1215 (10th Cir. 2007)).

the like. ECF No. 12-2 at 8. Ms. Basham partially repaired her home and was reimbursed for her additional expenses on those items. However, she was stuck with the lesser actual cash value—after a depreciation deduction—for the property damage that she did not fix.

Ms. Basham accepts that USAA can deduct depreciation of the materials that make up an item of property in calculating its actual cash value. But she believes USAA violated her policy and the law by taking a depreciation deduction for the cost of labor as well. She has filed a putative class action against USAA alleging breach of contract, unjust enrichment, and violation of the Colorado Consumer Protection Act and Colo. Rev. Stat. §§ 10-3-1115 and 1116. Compl., ECF No. 1-1. Defendant has moved for judgment on the pleadings. ECF No. 12. The motion is granted.

An insurance policy is a contract and is construed using the general principles of contract interpretation. *Allstate Ins. Co. v. Huizar*, 52 P.3d 816, 819 (Colo. 2002). Clear and unambiguous provisions must be given their plain meaning. *Id.* To determine whether an ambiguity exists, the Court asks whether the document's plain language is reasonably susceptible to more than one interpretation. *Pinnacol Assurance v. Hoff*, 375 P.3d 1214, 1222 (Colo. 2016). Ambiguous provisions should be construed in favor of providing coverage to the insured. *Cyprus Amax Minerals Co. v. Lexington Ins. Co.*, 74 P.3d 294, 299 (Colo. 2003). Still, the Court may not rewrite a contract's language to extend or limit its terms. *See Cyprus Amax Minerals Co. v. Lexington Ins. Co.*, 74 P.3d 294, 299 (Colo. 2003).

USAA's policy is unambiguous. Actual cash value means "the amount it would cost to repair or replace covered property," which is evaluated (1) "at the time of loss or damage," (2) "with material of like kind and quality," and (3) "subject to a deduction for deterioration,

depreciation and obsolescence." ECF No. 12-1 at 1. "Lists commonly distinguish between separate items by the introduction of commas or semicolons, and that's exactly what we have here." *Payless Shoesource, Inc. v. Travelers Companies, Inc.*, 585 F.3d 1366, 1370 (10th Cir. 2009) (Gorsuch, J.). These commas signal the "independence" of each modifying clause from the one before. *Id.* Each of these parallel phrases refers back to the cost of repairing or replacing covered property.

As relevant here, actual cash value is thus "the amount it would cost to repair or replace covered property . . . subject to a deduction for . . . depreciation." *Id.* Covered property, such as a roof, is often the product of both materials and labor. Accordingly, repair and replacement costs comprise the cost of materials (e.g., shingles and nails), and the cost of labor (e.g., roofing contractors). Both the cost of materials and the cost of labor are therefore subject to a depreciation deduction.

Despite this straightforward definition, plaintiff strains to find ambiguity in the policy. On her reading, the depreciation clause could be understood to modify the word "material" in the immediately prior phrase: "with material of like kind and quality." The policy would then extend coverage to "material . . . subject to a deduction for . . . depreciation." But material itself cannot be decreased by depreciation. Instead, the depreciation deduction comes out of the only costs mentioned in this sentence: the overall "amount it would cost to repair or replace covered property." The policy could have forbidden depreciation of labor costs if it said something like: repair and replacement costs are "subject to a deduction for . . . depreciation *of materials only*." But that is not what the policy says.

The principles of indemnity support the plain reading of this insurance policy. "[A]n actual cost policy is designed to avoid placing the insured in a better position than he or she was in before the" property damage. *Dupre v. Allstate Ins. Co.*, 62 P.3d 1024, 1030 (Colo. App. 2002). In general, "the actual value of the property" depends on "the condition it was in at the time of loss, taking into consideration its age and condition," and is "not necessarily what it would cost to erect a new building." *State Ins. Co. v. Taylor*, 24 P. 333, 337 (Colo. 1890).

After the parties submitted their briefs, the Tenth Circuit issued an opinion applying these concepts to a similar two-step replacement cost policy with an initial actual-cash-value payment. *See Graves v. Am. Family Mut. Ins. Co.*, No. 15-3187, 2017 WL 1416278 (10th Cir. Apr. 21, 2017) (unpublished). The court reasoned that "if [the insurance company] could depreciate only the cost of materials in determining the actual cash value of [the insured's] loss, she would receive a windfall based on labor costs she never incurred." *Id.* at *3. "Such a result is contrary to the principle of indemnity because she would be in a better position than she was before the damage occurred. Had she wanted to recover the full replacement cost under her policy she should have had the repairs completed by the one-year deadline." *Id.* This logic applies with equal force here.

Like the value of a property's materials, the value added by labor is depreciable. To illustrate:

> Suppose that a person wants to buy a grand piano. The piano materials themselves—wood, metal, and the like—may have a value of only $500. But building a piano requires great skill and hours of labor. Because of this labor, the value of the finished piano is $5000. The labor has increased the price of the finished good, and it has merged into part of a completed product. And as this finished good—the piano—depreciates in value, the value of the labor that went into building it depreciates as well.

Brown v. Travelers Cas. Ins. Co., No. 15-50-ART, 2016 WL 1644342, at *4 (E.D. Ky. Apr. 25, 2016). It is the same with all tangible property. A heap of asphalt, fiberglass, and mineral granules is not worth much. But combine these ingredients in the right manner and you might make a shingle. Similarly shingles, nails, ridge vents, underlayment, and flashing materials don't do much good lying in your front yard. But install them on the top of your house and you've got a useful roof. Whenever property is the indivisible product of materials (stuff) and labor (work), its physical components and the assembly of those pieces will decay over time.

Plaintiff disagrees with this framing, arguing that USAA has depreciated "labor" when "labor does not depreciate." ECF No. 20 at 12. Of course labor does not depreciate; labor is a service, not an asset. *See Depreciation*, Black's Law Dictionary (10th ed. 2014) (defining depreciation as "[a] reduction in the value or price of something; specif[ically], a decline in an asset's value because of use, wear, obsolescence, or age"). However, labor can increase the value of an asset, like shingles, or create a new asset, like a roof.

I am therefore not persuaded by the few opinions finding the embedded labor portion of an asset's value nondepreciable. The leading opinion, by a dissenting Justice of the Oklahoma Supreme Court, rejects the characterization of a roof as "a single product" because you "cannot go to the lumber yard or the retail store and buy a roof." *Redcorn v. State Farm Fire & Cas. Co.*, 55 P.3d 1017, 1022 (Okla. 2002) (Boudreau, J., dissenting). But I see no difference between on-site or off-site labor producing an asset. A roof has value, and gives a home value, beyond the cost of its materials whether it is custom-built or prefabricated.

Another dissenting Justice in *Redcorn* reasoned that the insured had a roof with sixteen-year-old shingles before the damage, so his insurance policy entitled him "to have on his house

sixteen-year-old shingles, or their value in money." *Id.* at 1023 (Summers, J., dissenting). In my view, however, requiring an insurer to pay for the installation of used shingles provides the full replacement cost for the labor component of an old roof rather than its actual depreciated value; in plaintiff's words, "it will cost the same in labor to replace [a] worn and ragged roof as it would a roof that was only one year old." ECF No. 20 at 12. This payout would over-indemnify plaintiff relative to the pre-loss value she was due.

These considerations also lead me to disagree with the courts in *Adams v. Cameron Mutual Insurance Co.*, 430 S.W.3d 675 (Ark. 2013), and *Bailey v. State Farm Fire & Cas. Co.*, No. CIV.A. 14-53-HRW, 2015 WL 1401640 (E.D. Ky. Mar. 25, 2015), both of which adopted the dissenting Oklahoma Justices' approaches.

Plaintiff's case citations are unpersuasive for additional reasons. Five of these cases involve policies that "do[] not define actual cash value" or otherwise "provide how actual cash value will be calculated."[2] The two others plaintiff cites concern policies that explicitly limit depreciation to "physical deterioration and obsolescence" alone.[3] A similar number of cases, however, have construed policies with these exact features to allow depreciation of labor costs.[4]

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[2] *Boss v. Travelers Home & Marine Ins. Co.*, No. 2:16-CV-04065-NKL, 2016 WL 3983833, at *1 (W.D. Mo. July 25, 2016); *see also Brown*, 2016 WL 1644342, at *1; *LaBrier v. State Farm Fire & Cas. Co.*, 147 F. Supp. 3d 839, 843 (W.D. Mo. 2015), *appeal docketed*, No. 16-3562 (8th Cir. Sept. 9, 2016); *Bailey*, 2015 WL 1401640, at *5; *Adams*, 430 S.W.3d at 676.

[3] *See Lains v. Am. Family Mut. Ins. Co.*, No. C14-1982-JCC, 2016 WL 4533075, at *1 (W.D. Wash. Feb. 9, 2016); *Riggins v. Am. Family Mut. Ins. Co.*, 106 F. Supp. 3d 1039, 1039 (W.D. Mo. 2015).

[4] *See, e.g.*, *Matchniff v. Great Nw. Ins. Co.*, 224 F. Supp. 3d 1119, 1129 (D. Or. 2016) (policy did not define actual cash value); *Papurello v. State Farm Fire & Cas. Co.*, 144 F. Supp. 3d 746 (W.D. Pa. 2015) (same); *Henn v. Am. Family Mut. Ins. Co.*, 894 N.W.2d 179, 181 (Neb. 2017) (same); *Wilcox v. State Farm Fire & Cas. Co.*, 874 N.W.2d 780 (Minn. 2016) (same); *Redcorn v. State Farm Fire & Cas. Co.*, 55 P.3d 1017 (Okla. 2002) (same); *Graves*, 2017 WL 1416278 (policy had deduction for physical deterioration and obsolescence); *Ware v. Metro. Prop. & Cas. Ins. Co.*, 220 F. Supp. 3d 1288 (M.D. Ala. 2016) (same).

At most it appears that courts disagree on how to interpret policies with two characteristics that might favor plaintiff's reading. But this Court need not pick a side in this debate because plaintiff's policy lacks those characteristics—it does define actual cash value, and it does not provide for depreciation based solely on physical deterioration and obsolescence.

Given the specific policy language here and background insurance principles, "a reasonably prudent insured would understand 'depreciation' to mean a decline in an asset's overall value." *Graves*, 2017 WL 1416278, at *4. USAA therefore did not impermissibly depreciate labor costs in determining the actual cash value of plaintiff's losses, so no additional amount was due under the policy. Because all of plaintiff's claims assume her entitlement to payment for labor costs without a depreciation deduction, all of these claims must be dismissed.

For the reasons set forth above, Defendant's Motion for Judgment on the Pleadings [ECF No. 12] is GRANTED. Ms. Basham's complaint is dismissed with prejudice. As the prevailing party, defendant is awarded its reasonable costs pursuant to Fed. R. Civ. P. 54(d)(1) and D.C.COLO.LCivR 54.1.

DATED this 28th day of July, 2017.

BY THE COURT:

R. Brooke Jackson
United States District Judge