DISTRICT COURT, COUNTY OF LARIMER, STATE OF COLORADO Court Address: 201 La Porte Avenue Fort Collins, Colorado 80521-2761 Phone Number: (970) 494-3500	DATE FILED: April 12, 2017 1:34 PM CASE NUMBER: 2016CV30594
Plaintiff(s): HAMLET CONDOMINIUM ASSOCIATION v. Defendant(s): AMERICAN FAMILY MUTUAL INSURANCE CO.	⮝ FOR COURT USE ⮝ Case No. 2016 CV 30594 Courtroom: 3C

ORDER REGARDING CROSS MOTIONS FOR SUMMARY JUDGMENT

This matter comes before the court on cross-motions for summary judgment. The court has reviewed the motions, responses, and replies filed by the parties and has reviewed the supporting documentation. Being fully advised in the premises, the court issues the following findings and order:

I. Factual and Procedural Background

Plaintiff, Hamlet Condominium Association, is a common interest community which maintains, preserves, and controls the covenants and architectural standards of certain real property known as The Hamlet at Miramont (the "Hamlet") located in Fort Collins, Colorado. The Hamlet is a condominium complex consisting of 21 separate buildings governed by the Plaintiff. Plaintiff purchased a Businessowners Policy (the "Policy") with Defendant American Family Mutual Insurance Company ("American Family") to insure the exterior of the Hamlet buildings. The present case arises from an insurance claim made by Plaintiff following a hail storm on June 24, 2014 that reportedly damaged the Hamlet buildings' roofing, windows, siding, chimney stacks, and air conditioning units. Damage to the buildings included damage to the exterior siding of the buildings including a stucco-like Exterior Insulation Finish System ("EIFS").[1]

[1] According to the motions filed by both parties the EIFS is a form of exterior siding that has the appearance of stucco but is made of modern composite materials. It consists of insulation board attached adhesively and/or mechanically to the exterior of a building, a base coat reinforced with fiberglass mesh, and a tinted finish coat.

The parties could not agree on the extent of the repairs or the value of the damage covered under the Policy. In particular, the parties dispute whether or not the Policy requires that Defendant pay for "skim-coating" of the EIFS to provide for visual matching of the stucco-like siding after physical damage caused by the hail storm. When the parties were unable to agree upon whether or not the Policy provides coverage for skim-coating the EIFS, Plaintiff filed its complaint on June 22, 2016. Plaintiff asserts claims against Defendant for breach of contract, bad faith breach of insurance contract, and violation of C.R.S. §§ 10-3-1115 and -1116 (referred to as "statutory bad faith" claims). Defendant American Family denies the Plaintiff's claims and asserts that it has fulfilled its obligation to Plaintiff under the Policy.

On November 17, 2016, Plaintiff filed a motion for partial summary judgment with regard to the breach of contract claim asserted against the Defendant. On the same day, Defendant American Family filed its motion for summary judgment arguing that based upon the material undisputed facts there is no coverage for skim-coating the EIFS under the Policy and that Defendant should be entitled to judgment as a matter of law as to both the Plaintiff's contract claim for coverage as well as bad faith and statutory claims under C.R.S. §§ 10-3-1115 and -1116.

II. Applicable Law

A. Summary Judgment

The granting of a motion for summary judgment brought pursuant to C.R.C.P. 56(b) is warranted upon a showing that no genuine issue as to any material fact exists and that the moving party is entitled to judgment as a matter of law. *Pueblo W. Metro. Dist. v. Southeastern Colo. Water Conservancy Dist*., 689 P.2d 594, 600 (Colo. 1984); *Ginter v. Palmer & Co*., 585 P.2d 583, 584 (Colo. 1978); *Abrahamsen v. Mountain States Tel. & Tel. Co*., 494 P.2d 1287, 1288 (Colo. 1972).

The moving party has the initial burden of establishing the lack of a triable factual issue, and all doubts as to the existence of such an issue must be resolved against the moving party. *Primock v. Hamilton*, 452 P.2d 375, 378 (Colo. 1969); see also *Greenwood Trust Co. v. Conley*, 938 P.2d 1141, 1149 (Colo. 1997). Once the moving party has met its initial burden of

production, the burden shifts to the nonmoving party to establish that there is a triable issue of fact. Id. at 1149. Therefore, when a motion for summary judgment is made and supported, an adverse party may not rest upon the mere allegations or denials of the opposing party's pleadings, but the opposing party's response must set forth specific facts showing that there is a genuine issue for trial. Id.

B. Interpretation of Insurance Policies

Under Colorado law, "[t]he interpretation of an insurance policy, like any written contract, presents a question of law and, therefore, is appropriate for summary judgment." *Nat'l Union Fire Ins. Co. of Pittsburg, P.A. v. Federal Ins. Co.*, 2016 WL 73336729 ___F.Supp ___(D. Colo. 2016) (citing *Tynan's Nissan, Inc. v. Am. Hardware Mut. Ins. Co*., 917 P.2d 321, 323 (Colo. App. 1995) and *Bumpers v. Guarantee Trust Life Ins. Co*., 826 P.2d 358 (Colo. App. 1991)).

When construing the terms of an insurance policy, Colorado courts apply traditional principles of contract interpretation. *USAA Cas. Ins. Co. v. Anglum*, 119 P.3d 1058, 1059 (Colo. 2005); *Cotter Corp. v. Am. Empire Surplus Lines Ins. Co*., 90 P.3d 814, 819 (Colo. 2004); *Essex Ins. Co. v. Vincent*, 52 F.3d 894, 896 (10th Cir. 1995). Courts are to give effect to the intent and reasonable expectations of the parties and to enforce the policy's plain language unless it is ambiguous. *Hoang v. Assurance Co. of Am*., 149 P.3d 798, 801 (Colo. 2007). A "court should interpret a contract 'in its entirety with the end in view of seeking to harmonize and to give effect to all provisions so that none will be rendered meaningless.' " *Copper Mountain, Inc. v. Industrial Systems, Inc*., 208 P.3d 692, 697 (Colo. 2009).

The policy's words and phrases are to be given their plain meaning according to common usage, and strained or technical constructions should be avoided. *Allstate Ins. Co. v. Huizar*, 52 P.3d 816, 819 (Colo. 2002). Limitations on coverage must be clearly expressed in the policy to be enforceable. *Farmers Alliance Mut. Ins. Co. v. Ho*, 68 P.3d 546, 550 (Colo. App. 2002) (citing *Tepe v. Rocky Mountain Hosp. & Medical Services*, 893 P.2d 1323 (Colo. App. 1994)).

Whether the contract is ambiguous is a question of law. Id. Contract terms are ambiguous when they can be read to have more than one reasonable interpretation. *Hecla Min.*

Co. v. New Hampshire Ins. Co., 811 P.2d 1083, 1090 (Colo. 1991). In making the ambiguity determination, courts are to view the policy as a whole, using the generally accepted meaning of the words employed.

III. Material Undisputed Facts

Based upon the parties' submissions, the court finds that the following material facts to be undisputed:

1. Plaintiff, Hamlet Condominium Association, is a Colorado non-profit corporation which maintains, preserves, and controls the covenants and architectural standards of the Hamlet located in Fort Collins, Colorado.

2. The Hamlet is a residential condominium community consisting of 21 buildings governed by Plaintiff.

3. On June 24, 2014 a hail storm resulted in physical damage to the buildings of the Hamlet including the EIFS siding.

4. Defendant, American Family Mutual Insurance Company, is a licensed insurer authorized to do business in the State of Colorado.

5. On June 24, 2014, a hailstorm struck the Hamlet, damaging the buildings. This included damage to the stucco-like EIFS.

6. At the time of the hailstorm each of the Hamlet's 21 buildings were insured under the Policy, Policy No. 05XN047101.

7. The Policy was in force and effect on June 24, 2014.

8. The Policy's grant of property coverage states:

SECTION I — PROPERTY

A. Coverage

We will pay for direct physical loss of or damage to Covered Property at the premises described in the Declarations caused by or resulting from any Covered Cause of Loss.

9. The Policy defines "Covered Property" to include "Buildings" and it defines a Building as "the described building shown in the Declarations…"

10. All of the Hamlet's 21 buildings are listed and shown in the Policy Declarations and are Covered Property under the Policy.

11. The Policy includes the following loss payment provision:

5. Loss Payment

In the event of loss or damage covered by this policy:

a. At our option, we will either:

(1) Pay the value of lost or damaged property;
(2) Pay the cost of repairing or replacing the lost or damaged property;
(3) Take all or any part of the property at an agreed or appraised value; or
(4) Repair, rebuild or replace the property with other property of like kind and quality, subject to Paragraph **d.(1)(e)** below.

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d. Except as provided in Paragraphs (2) through (7) below, we will determine the value of Covered Property as follows:

(1) At replacement cost without deduction for depreciation, subject to the following:

(a) If, at the time of the loss, the Limit of Insurance on the lost or damaged property is 80% or more of the full replacement cost of the property immediately before the loss, we will pay the cost to repair or replace, after application of the deductible and without deduction for depreciation, but not more than the least of the following amounts:

(i) The Limit of Insurance under Section I – Property That applies to the lost or damaged property;

(ii) The cost to replace, on the same premises, the lost or damaged property with other property:

i. Of comparable material and quality; and
ii. Used for the same purpose; or

(iii) The amount that you actually spend that is necessary to repair or replace the lost or damaged property…

12. The Policy contains the following exclusions:

B. Exclusions
…
2. We will not pay for loss or damage caused by or resulting from any of the following:
…
l. other Types Of Loss:

(1) Wear and tear;
(2) Rust or other corrosion, decay, deterioration, hidden or latent defect or any quality in property that causes it to damage or destroy itself…

13. The parties disagree about whether skim-coating of the EIFS is required under the language of the policy.

14. When the parties were unable to agree on the coverage required under the Policy, on September 1, 2015, Plaintiff invoked the Policy's "appraisal" provision, which provides:

2. Appraisal

If we and you disagree on the amount of loss, either may make written demand for an appraisal of the loss. In this event, each party will select a competent and impartial appraiser. The two appraisers will select an umpire. If they cannot agree, either may request that selection be made by a judge of a court having jurisdiction. The appraisers will state separately the amount of loss. If they fail to agree, they will submit their differences to the umpire. A decision agreed to by any two will be binding. Each party will:

a. Pay its chosen appraiser; and

b. Bear the other expenses of the appraisal and umpire equally.

15. American Family agreed to participate in the appraisal process. American Family noted that appraisers do not have the ability to resolve coverage questions, and American Family specifically reserved its right to deny coverage.

16. Hamlet appointed Chris Wilson of Lodge Consulting as its appraiser. American Family appointed Jim Stoops of Cunningham Lindsey as its appraiser. The two appraisers jointly selected Laura Haber as the umpire. The umpire hired an engineer, Ronald Huffman, P.E., to observe, evaluate, and determine an appropriate course of remediation for the hail damage to the Hamlet buildings.

17. Engineer Huffman inspected the damaged buildings, observing "hail strike damage to the EIFS on the north, west, and south elevations on the bands and tops of walls as well as some locations in the fields of walls." (Ex. 3, Report at 3). According to Huffman, "[t]he hail strikes punctured the EIFS damaging the EPS [insulation] and tearing the fiberglass mesh . . . ."

18. Huffman noted in his report that "it becomes almost impossible for the typical EIFS applicators in Colorado to perform patches in walls, especially at inside and outside corners, that properly blend for a uniform appearance."

19. Huffman concluded in his report as follows:

> "The skimming of all wall surfaces is the key to achieving a uniform non-patched like new appearance for all walls on The Hamlet. It has been my experience in Colorado that patches in the field of the wall are still obvious no matter how hard or many times the EIFS applicator attempts to match the existing wall; therefore, it is my opinion that skimming the entire walls is required to achieve a uniform appearance. Again, skim coating is applying new base coat with embedded fiberglass mesh, once the base coat has cured then apply new finish coat to all wall surfaces on all elevations.

20. After reviewing Huffman's report, the appraisers and the umpire agreed to an appraisal award which included $914,058.54 in costs to skim-coat all the Hamlet's buildings to "achieve the same color as repairs."

21. The appraisers confirmed that whether there was "coverage" under the Policy was specifically excluded from the scope of their appraisal.

22. American Family paid the amounts set forth in the appraisal award with the exception of the EIFS skim-coating, which it concluded was not covered by its Policy.

23. Based upon the appraisal the cost to skim-coat the Hamlet's buildings was $914,058.54 to achieve the same color as the repairs.

24. Two weeks after the appraisal award, American Family sent a letter refusing to pay for any portion of the EIFS skim-coat.

25. American Family denies coverage for the EIFS skim-coating on the basis that its policy restricts coverage to direct physical damage and that payment for skim-coating is not a covered cause of loss as allowed in its Policy.

IV. Analysis

A. Plaintiff's Claim for Coverage under the Policy

The Policy provides a grant of coverage that obliged American Family to pay for "direct physical loss of or damage to Covered Property" caused by a "Covered Cause of Loss." It is not disputed that the hail damage to the Hamlet buildings resulted in a "direct physical loss" covered under the Policy. The Policy defines "Covered Property" to include "Buildings" and it defines a Building as "the described building shown in the Declarations…" which list all of the Hamlet buildings.

Plaintiff argues that Defendant American Family is required to cover the cost of EIFS skim-coating because Defendant agreed to repair or replace damaged property with materials "of comparable material and quality." According to Plaintiff, leaving the EIFS with obvious repair patches fails to meet this standard. Defendant contends that the "comparable materials and quality" language is not applicable here, and that, even if it is, it does not require Defendant to pay the cost of skim-coating, which would repair portions of the EIFS with preexisting damage

that was not otherwise damaged by the hail storm. According to Defendant, the Policy does not require it to pay for repairs so that the surface appears completely consistent and like new. This, American Family argues, "would effectively require American Family to put Hamlet in a better position than it was prior to the loss."

In support of its argument for coverage of the EIFS skim-coating, Plaintiff relies on the holding in *Cedar Bluff Townhome Condominium Ass'n, Inc. v. American Family Mutual Ins. Co*., 857 N.W.2d 290 (Minn. 2014). In *Cedar Bluff*, American Family insured several condominium buildings managed by the plaintiff that were damaged in a hail storm. A dispute arose as to whether the terms of the policy required the replacement of undamaged siding panels, in addition to the damaged ones, in order to achieve a uniform siding color. Similar to the present case, an appraisal panel determined that replacing all of the siding, damaged or otherwise, was required to achieve a reasonable color match because of the lack of replacement panels that reasonably matched the existing panels. In *Cedar Bluff*, American Family disputed the award based on the appraisal panel's lack of authority to resolve questions of coverage, arguing that the policy did not require them to pay for identical color matching. Based on the same policy language at issue in the instant case, the Minnesota Supreme Court determined that "'comparable materials and quality' requires something less than an identical color match, but a reasonable color match nonetheless." The court therefore deferred to the appraisal panel's determination that replacing all of the siding was required to obtain a reasonable color match.

Plaintiff cites additional authority for the proposition that an insurer's obligation to pay based on "comparable," "similar," "like kind," or "equivalent" quality requires a reasonable match between the replacement and existing materials. See, e.g., *National Presbyterian Church, Inc. v. GuideOne Mut. Ins. Co.*, 82 F.Supp.3d 55, 59-60 (D.D.C. 2015) (interpreting nearly identical language and concluding that insurer was obligated to pay for a reasonable match between damaged and undamaged exterior stone); *Trout Brook South Condominium Ass'n v. Harleysville Worcester Ins. Co.*, 995 F.Supp.2d 1035, 1044 (D. Minn. 2014) ("The terms 'similar materials' and 'material of like kind and quality' simply cannot be defined, as a matter of law, to preclude consideration of color."); *Alessi v. Mid-Century Ins. Co., Inc*., 464 S.W.3d 529, 532-33 (Mo. Ct. App. 2015) ("Considering the definition in full, construed in favor of the insured to provide the broadest coverage possible, 'equivalent' requires that the replacement [siding] be

'equal in value' and 'virtually identical'"). The court agrees with Plaintiff's cited authority and therefore finds that the Policy covers the cost of obtaining reasonable matching.

Defendant argues, however, that it is not obligated to pay for skim-coating because the "comparable material and quality" language in the Policy does not apply in situations where, as here, Defendant has elected to repair, rather than replace, the damaged property. The court finds that the Policy does not support Defendant's proposed distinction. The specific Policy language provides Defendant with different options in the event of a covered loss:

> In the event of loss or damage covered by this policy:
>
> b. At our option, we will either:
>
> (1) Pay the value of lost or damaged property;
> (2) Pay the cost of repairing or replacing the lost or damaged property;
> (3) Take all or any part of the property at an agreed or appraised value; or
> (4) Repair, rebuild or replace the property with other property of like kind and quality, subject to Paragraph **d.(1)(e)** below.

However, nothing in the Policy suggests that American Family's obligation to "repair" is limited to a greater extent than its obligation to "replace" damaged property. Whether there is a repair or replacement of lost or damaged property the plain language of the Policy requires American Family to "repair…or replace the property with other property of like kind and quality." Moreover, the policy goes on to provide that American Family's obligation with regard to determining the value of "Covered Property" shall be at "replacement cost" which is limited to the lesser of the limit of insurance or the cost to replace the lost or damage property with other property of a "comparable material and quality" used for the same purpose. This is consistent with American Family's obligation to repair or replace damaged property with other property of "like kind and quality."

As set forth above, the court is required to give effect to the intent and reasonable expectations of the parties and to enforce the policy's plain language unless it is ambiguous. *Hoang v. Assurance Co. of Am.*, 149 P.3d 798, 801 (Colo. 2007). In interpreting the Policy, the court should seek to "harmonize and to give effect to all provisions so that none will be rendered meaningless." *Copper Mountain, Inc. v. Industrial Systems, Inc.*, 208 P.3d 692, 697 (Colo. 2009)

(quoting *Pepcol Mfg. Co. v. Denver Union Corp*., 687 P.2d 1310, 1313 (Colo.1984)). Construing the plain language of the Policy requires American Family to repair or replace damaged property with property of "like kind and quality" and with "comparable material and quality." Indeed, as Defendant itself points out after quoting the Policy language, "the obvious intent of these provisions is to limit American Family's obligation to providing its insureds with something of comparable quality to what they had before the loss."

Defendant further claims that it should not be required to pay the cost of skim-coating even if the "comparable material and quality" language does apply to repairs because the EIFS had preexisting damage and cosmetic inconsistencies, and skim-coating would therefore provide Plaintiff with an EIFS that is beyond comparable to what it had before the hail storm.

The court disagrees. The appraisal panel determined that skim-coating was the only way for the hail divot repairs to achieve a reasonable color match, but reduced its award by 25% to account for depreciation. Moreover, the cosmetic mismatch left after repairing the divots in the EIFS constitutes a direct physical loss caused by or resulting from a covered cause of loss under the policy. *See, Welton Enterprises, Inc. v. Cincinnati Insurance Compan*y, 131 F.Supp. 3d 827 (W.D.Wis. 2016) (direct physical loss covered under insured's property insurance policy includes damage that is merely cosmetic where there is no exception or exclusion for cosmetic damage). The Policy covers "direct physical loss of or damage to Covered Property at the premises described in the Declarations caused by or resulting from any Covered Cause of Loss." (Emphasis supplied). The specific exclusions to coverage under the Policy for "wear and tear . . . decay, deterioration, hidden or latent defect[s] or any quality in property that causes it to damage or destroy itself" do not exclude coverage for cosmetic damage resulting from any covered cause of loss. Further, the Policy is a replacement cost policy, and not an actual cost policy. "While an actual cost policy is designed to avoid placing the insured in a better position than he or she was in before the [covered loss], a replacement cost policy allows for such a possibility." *Dupre v. Allstate Ins. Co*., 62 P.3d 1024, 1030 (Colo. App. 2002). Because the court has determined that the Policy provides coverage for reasonable matching, the appraisal panel's determination that skim-coating is necessary to repair the mismatching patches and provide a reasonable match is binding under the Policy. Incidental additional benefits do not defeat coverage.

Based upon the foregoing, the court finds that based upon the material undisputed facts, Plaintiff is entitled to summary judgment on its breach of contract claim for coverage under the American Family policy. Defendant American Family's motion for summary judgment with regard to the coverage claim is, therefore denied.

B. Defendant's motion for summary judgment as to Plaintiff's Common Law Bad Faith and Statutory Bad Faith Claims under C.R.S. §10-3-1115- 1116

In its motion for summary judgment on Plaintiff's common law bad faith claims and statutory bad faith claims, Defendant American Family argues that because skim-coating of the EIFS was not required by the terms of the Policy, Plaintiff's tort and statutory claims must fail as a matter of law. The court has, however, determined that the terms of the Policy do require payment for skim-coating of the EIFS under the plain language of the Policy. Notwithstanding this fact, there are disputed issues of fact as to whether or not American Family's refusal to pay for the skim-coating was unreasonable or that American Family knew it was acting unreasonably when it refused to pay the cost for skim-coating awarded by the appraisal panel. Accordingly, American Family's motion for summary judgment with regard to Plaintiff's common law bad faith claims and statutory bad faith claims under C.R.S. §10-3-1115 and 10-3-1116 is hereby denied.

SO ORDERED: April 12, 2017.

BY THE COURT:

COMBINED COURT SEAL LARIMER COUNTY COLORADO

Stephen J. Jouard
District Court Judge