DISTRICT COURT, ARAPAHOE COUNTY STATE OF COLORADO 7325 South Potomac Street Centennial, Colorado 80112	DATE FILED: October 20, 2014 3:11 PM CASE NUMBER: 2013CV30784
Plaintiff: **WOODGATE SOUTH HOMEOWNERS ASSOCIATION** v. **Defendant:** **AMERICAN FAMILY MUTUAL INSURANCE COMPANY**	**▲ COURT USE ONLY ▲** Case Number: 13cv30784 Div. 15
Order re Motion for Determination of a Question of Law and Motion for Partial Summary Judgment.	

Plaintiff presented two motions: first a motion for determination of questions of law; and second a motion for partial summary judgment. The parties have adequately set forth the legal standards and applicable legal authorities in their briefs, and such shall be repeated here.

I. Determination of Question of Law

Plaintiff contends that this Court should find that as a matter of law the payment of overhead and profit on a covered insurance claim are due and payable when the insurer makes an Actual Cash Value payment on a claim. In support of its position Plaintiff makes two arguments.

Plaintiff relies upon Bulletin B-5.1[1] from the Colorado Division of Insurance entitled "Calculation of Actual Cash Value: Prohibition Against Deducting Contractors' Overhead and Profit From Replacement Cost Where Repairs Are Not Made". Plaintiff points to following language, "Insurers shall be prohibited from deducting general contractor's overhead and profit in addition to depreciation

[1] The bulletin recognizes in Section I that "Bulletins are the Division's interpretations of existing insurance law or general statements of Division policy. Bulletins themselves establish neither binding norms nor finally determine issues of rights."

when policyholders do not repair or replace the structure." This regulation prohibits an insurer from not paying overhead and profit where such would be payable if the work had been performed, even if the work was not performed.

Defendant contends that the Bulletin only applies to residential policy claims and not business claims, which is what is before this Court. Defendant argues that such a distinction is proper as the issues and complexity of a business or commercial claim and repair are significantly different from a residential repair. The Court agrees. The language in the first paragraph defines the purpose as bring to clarify the issue in "residential insurance policies."

Defendant also contends that the Bulletin only applies to total replacements not repairs. The Court disagrees; the Bulletin addresses both repair and replacement.

Plaintiff also cites to case law from other jurisdictions for the proposition that overhead and profit is to be paid by the insurer where the insured is reasonably likely to require the services of a general contractor to repair the covered damage. The Defendant does not disagree as a general proposition that if the services of a general contractor are required, overhead and profit should be paid[2].

The Court finds that the law of this state is that overhead and profit is to be included as part of the actual cash value determination where it is reasonably likely that the services of a general contractor will be required to repair or replace the covered damage.

II. Motion for Partial Summary Judgment

Plaintiff seeks summary judgment on Defendant's affirmative defenses as Defendants C.R.C.P. 30 (b)(6) designee was unable to articulate a factual basis for any of the ten affirmative defenses. Defendant contends that the 30(b)(6) designee was not prepared to address the ten affirmative defenses as they were not part of the subject matter of any of the designated topics. Plaintiff counters that if the facts surrounding the affirmative defenses were not within Plaintiff's designated 30(b)(6) topics, the Defendant's representative could have supplied any such facts

[2] The issue of whether overhead and profit would be payable where the services of a general contractor would be reasonably anticipated, but the insured chose to act his own contractor, has been raised but is not an issue which appears to conform with the facts of this case, therefore it is not addressed.

with deposition changes after the deposition was concluded, but such was not done.

From the designation of topics it is not clear that the subjects of the affirmative defenses were included. Thus, the Court declines to enter summary judgment on that basis.

The Court is, however, concerned that Defendant did not respond to the motion for summary judgment with evidence which supports its affirmative defenses. Once the Plaintiff comes forward with a prima fascia case that there are insufficient facts to support an affirmative defense, the Defendant has the obligation to supply evidence which raises an issue of disputed facts.

Once the moving party demonstrates "that there is an absence of evidence in the record to support the nonmoving party's case" *Civil Serv. Comm'n v. Pinder*, 812 P.2d 645, 649 (Colo. 1991), the burden shifts to the opposing party to demonstrate that there exists a triable issue of fact. *City of Aurora v. ACJ Partnership (In re Application for Water Rights of the City of Aurora)*, 209 P.3d 1076, 1082 (Colo.2009); *Continental Air Lines, Inc. v. Keenan*, 731 P.2d 708, 713 (Colo. 1987). This rule requires the opposing party to affirmatively demonstrate by relevant and specific facts that a real controversy exists. *City of Aurora*, 209 P.3d at 1082; *Ginter v. Palmer & Co*., 196 Colo. 203, 206, 585 P.2d 583, 585 (1978).

Here Defendant has not brought any such evidence to the Court's attention. However, as Plaintiff framed its motion for partial summary judgment based upon the lack of the 30(b)(6) designee's ability to articulate factual support for any of the ten affirmative defenses, the Defendant may not have been alerted to the fact that it had an obligation to put forth evidence which supports each of the affirmative defenses. Therefore the motion for summary judgment is denied.

However, counsel shall confer about each of the ten affirmative defenses, and defense counsel shall explain the evidence which supports each, or agree to dismiss any for which he is not prepared to present evidence. Such shall be reflected in an amended trial management order to be filed promptly.

IT IS SO ORDERED THIS 20TH Day of October, 2014

BY THE COURT:

Charles M. Pratt
District Court Judge