FILED

PREPARED AND FILED BY THE COURT

12:19 pm, Jan 31, 2020

KATHY FERRELL Plaintiff, V. THE PROVIDENCE MUTUAL FIRE INSURANCE COMPANY Defendant.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION:ESSEX COUNTY DOCKET NO.: ESX-L-6742-17 Civil Action **ORDER**

THIS MATTER having been brought before the Court (1) by Methfessel & Werbel, attorneys for the Defendant, The Providence Mutual Fire Insurance Company, seeking an Order granting Summary Judgment and (2) Daniel W. Ballard, attorney for the Plaintiff, Kathy Ferrell, seeking an Order to Amend the Complaint; the Court having considered the matter and heard oral argument; for reasons stated in the accompanying Statement of Reasons; and for good cause shown;

IT IS on this 31 day of Jan., 2020;

ORDERED that the Motion for Summary Judgment is denied; and it is further

ORDERED that the Motion to Amend the Complaint is granted and the Plaintiff shall file the Amended Complaint within 10 days of posting hereof; and it is further

ORDERED that the claim for bad faith to be added in the Amended Complaint is severed and will not be subject to discovery or trial until the disposition of the coverage claim and only if the Plaintiff prevails; and it is further

ORDERED that a copy of this Order shall be deemed served by the uploading of this Order on eCourts.

J.S.C.

Opposed

Statement of Reasons

In this action seeking insurance coverage for damage to the insured's residence, the Defendant The Providence Mutual Fire Insurance Company ("Providence") moves for summary judgment. The insured Kathy Ferrell moves to amend her Complaint to assert a claim predicated on bad faith.

The Court heard oral argument. It requested, and the parties provided, supplemental briefing.

For the reasons set forth herein, the Court denies Providence's motion and grants the Plaintiff's motion. However, although the Court grants leave to amend the Complaint to assert a claim for bad faith, the Court severs that claim. It will not be subject to discovery or trial until the disposition of the coverage claim and then only if the Plaintiff prevails.

I

As the Defendant's motion seeks summary judgment, the Court examines the relevant facts in the light most favorable to the Plaintiff. The pertinent facts are as follows:

Ms. Ferrell is the named insured under a Providence Homeowners Policy No. HP 016634 (the "Policy"). The insured premises was located at 52 North 18th Street, East Orange. The Policy affords first-party coverage for insured perils resulting in damage to the dwelling, other structures, and personal property, as well as loss of use of property, and equipment breakdown. The Policy also provides third-party liability coverage. The Policy period commenced October 14, 2014 and extended to October 15, 2015.

On February 23, 2015, the Plaintiff suffered a loss to her home from an electrical fire. The fire interrupted electric service that then caused a breakdown of heating equipment and resulting freezing/bursting of pipes and water damage. Providence accepted the claim for

coverage. It paid $41,521.94 for building loss, $30, 553.50 for loss of use, $10,000 (the sublimit under the Policy) for mold abatement and $2,450 for personal property.

Although the insurer acknowledged its obligation to cover the loss, it asserts it was only obligated to bear the actual cash value of the loss. As a result, it held back depreciation of $12,441.06 on the claim for the dwelling and $1300 on the claim for the contents.

Providence acknowledged coverage, under the heading "Code", for the cost of abatement of asbestos-containing material present in the basement of the dwelling in the amount of $8985. However, it held back that amount, noting that it was "Recoverable."

The amount for asbestos removal was based on a Proposal that Providence's adjustor, Joseph Schleiffer of Schleiffer Associates, Inc., obtained in July 2015. The Proposal, in turn, was based on an inspection report prepared by Joseph P. Miller, a United States Environmental Protection Agency ("USEPA") – accredited asbestos inspector.

In a report entitled Asbestos Building Materials Inspection Report, Miller states that "[t]he State of New Jersey's 'Uniform Construction Code' require [sic] an inspection by a USEPA AHERA Accredited Inspector to determine the presence of any Asbestos Containing Building Materials (ACBM) which might become friable during renovation or demolition." The inspection revealed the presence in the basement area – the area to be renovated – of 33 linear feet of pipe insulation and also floor tiles that "should be removed." It stated a plaster ceiling "can be enclosed with drywall or removed." The report also stated that a copy of the report "should be submitted to the Local Building Department prior to renovation or demolition."

A written Proposal dated July 15, 2015 and prepared by Finishing Touch Asbestos Abatement Corp., Inc., with which Joseph Miller was affiliated, estimated the cost of

removing the insulation, floor tile and plaster at $8985. The Proposal indicated the contractor was prepared to perform the work upon acceptance.

The Policy provides for loss settlement as follows:

> In this Condition D., the terms "cost to repair or replace" and "replacement cost" do not include the increased costs incurred to comply with the enforcement of any ordinance or law, except to the extent the coverage for these increased costs is provided in E. 11. Ordinance or Law under Section I – Property Coverages. Covered property losses are settled as follows:
>
> 1. Property of the following types:
>
> a. Personal property;
>
> b. Awnings, carpeting, household appliances, outdoor antennas and outdoor equipment, whether or not attached to building;
>
> c. Structures that are not buildings; and
>
> d. Grave markers, including mausoleum;
>
> at actual cash value at the time of loss but not more than the amount required to repair or replace.
>
> 2. Buildings covered under Coverage A, or B at replacement cost without deduction for depreciation, subject to the following:
>
> a. If, at the time of loss, the amount of insurance in this policy the damage building is 80% or more of the full replacement cost of the building immediately before the loss, we will pay the cost to repair or replace, without deduction for depreciation, but not more than the least of the following amounts:
>
> (1) The limit of liability under this policy that applies to the building;
>
> (2) The replacement cost of that part of the building damaged material of like kind and quality and for like use; or
>
> (3) The necessary amount actually spent to repair or replace damaged building.
>
> If the building is rebuilt that a new premises, the cost described in (2) above is limited to the cost would have been incurred if the building had been built at the original premises.
>
> b. If, at the time of loss, the amount of insurance in this policy on the damage building is less than 80% of the full replacement cost is the building immediately before the loss, we will pay the greater of the following amounts, but not more than the limit of liability under this policy that applies to the building:
>
> (1) The actual cash value of that part of the building damaged; or
>
> (2) That portion of the cost to repair or replace, without deduction or depreciation, that part of the building damaged, which the total amount of insurance policy on the damaged building bears to 80% of the replacement cost of the building.

c. To determine the amount of insurance required to 80% of the full replacement cost of the building immediately before the loss, do not include the value of:

(1) Excavations, footings, foundations, piers or any other structures or devices that support all or part of the building, which are below the undersurface of the lowest basement floor;

(2) Those supports described in (1) above which are below the surface of the ground inside the foundation walls, if there is no basement; and

(3) Underground flues, pipes, wiring and drains.

d. **We will pay no more than the actual cash value of the damage until actual repair or replacement is complete.** Once actual repair or replacement is complete, we will settle the loss as noted in 2.a. and b. above.

However, if the cost to repair or replace the damages is both:

(1) Less than 5% of the amount of insurance in this policy on the building; and

(2) Less than $2500;

we will settle the loss as noted in 2.a and b. above whether or not actual repair or replacement is complete.

e. You may disregard the replacement cost loss settlement provisions and make claim under this policy for loss to buildings on an actual cash value basis. You may then make claim for any additional liability according to the provisions of this Condition D. Loss Settlement, provided you notify us, within 180 days after the date of loss, of your intent to repair or replace the damaged building.

[Emphasis added].

Although not cited by the parties, two provisions in the Section entitled "Additional Coverages" appear to have relevance to the issues presented by this motion. They relate to "Debris Removal" and "Ordinance or Law." The former provision provides as follows:

1. Debris Removal

a. We will pay your reasonable expense for the removal of:

(1) Debris of covered property if a Peril Insured Against that applies to the damage property causes the loss; or

(2) Ash, dust particles from a volcanic eruption that is caused direct loss to a building or property contained in a building. This expense is included in the limit of liability that applies to the damaged property. If the amount to be paid for the actual damage to the property plus the debris removal expense more than the limit of liability for the damage property, an additional 5% of that limit is available for such expense.

b. We will also pay your reasonable expense, up to $1000, for the removal from the "residence premises" of:

(1) Your trees felled by the peril of Windstorm or Hail or Weight of Ice, Snow or Sleet; or
(2) A neighbor's trees felled by a Peril Insured Against under coverage C; provided the trees:
(3) Damage a covered structure; or
(4) Do not damage a covered structure, but:
(a) Block of driveway on the "residence premises" which prevents a motor vehicle, that is registered for use on public roads or property, from entering or leaving the "residence premises"; or
(b) Block a ramp or other fixture designed to assist the handicapped person to enter or leave the dwelling building.
The $1000 limit is the most we will pay in any one loss, regardless of the number of fallen trees. No more than $500 of this limit will be paid for the removal of any one tree.
This coverage is additional insurance.

The provision dealing with "Ordinance or Law" provides as follows:

11. Ordinance or Law
a. You may use up to 10% of the limit of liability that applies to Coverage A for the increased costs you incur due to the enforcement of any ordinance or law which requires or regulates:
(1) The construction, demolition, remodeling, renovation or repair of that part of a covered building or other structure damaged by a Peril Insured Against;
(2) The demolition and reconstruction of the undamaged part of a covered building or other structure, when that building or other structure must be totally demolished because of damaged by a peril insured against to another part of that covered building or other structure; or
(3) The remodeling, removal or replacement of the portion of the undamaged part of a covered building or other structure necessary to complete the remodeling, repair or replacement of that part of the covered building or other structure damaged by a Peril Insured Against.
b. You may use all or part of this ordinance or law coverage to pay for the increase costs you incur to remove debris resulting from the construction, demolition, remodeling, renovation, repair or replacement of the property as stated in a. above.
c. We do not cover:
(1) Loss in value to any covered building or other structure due to the requirements of any ordinance or loss; or
(2) The costs to comply with any ordinance or law which requires any insured or others to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way

> respond to, or assess the effects of, pollutants in or on any covered building or other structure.
> Pollutants means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed.
> This coverage is additional insurance.

III

Rule 4:46-2(c) expressly provides that a party is entitled to summary judgment "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." An issue of fact is genuine "only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact." R. 4:46-2(c).

In Brill v. Guardian Life Ins. Co., 142 N.J. 520, 529 (1995), the Supreme Court stated that "Rule 4:46-2 dictates that a court should deny a summary judgment motion only where the party opposing the motion has come forward with evidence that creates a genuine issue as to any material fact challenged" (internal quotations omitted). Moreover, "a determination whether there exists a genuine issue of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Id. at 540. The Court must conduct "a kind of weighing that involves a type of evaluation, analysis and sifting of evidential materials." Id. at 536. The essence of the inquiry is "whether the evidence presents a sufficient disagreement to require submission to a [finder of fact] or whether it is so

one-sided that one party must prevail as a matter of law." Id. at 533 (internal quotations omitted).

IV

On this motion, the Defendant contends that it covered the Plaintiff's claim to the maximum extent provided by the Policy. It asserts that it paid the Plaintiff the actual cash value of her loss. It contends that it was not and is not obligated to bear the replacement cost of the Plaintiff's loss. It asserts the Policy explicitly requires the insured to undertake repair or replacement of the damaged property as a condition precedent to recovery of the full replacement cost and the insured has failed to do so.

Providence avers that the Plaintiff has not contested, with competent proof, including expert proof, Providence's determination of the actual cash value of her loss. It argues that her expert opines only as to the replacement cost to which she is not entitled under the Policy. As a result, it contends there is a failure of proof and it has a right to judgment on the Plaintiff's coverage claim as a matter of law.

The Plaintiff asserts that Providence did not pay for several items of damage that are covered under the Policy. These items were the cost of repair or replacement of the water heaters and boiler and temporary restoration of electrical service.

She also asserts that, although she intends to undertake repairs to the residence, she is unable to do so until the necessary abatement of asbestos-containing materials is performed. She avers that the contractors engaged to perform repairs will not do so until that work is completed. She asserts that Providence has failed to pay for – or authorize its own contractor to perform – asbestos abatement.

The Plaintiff contends that, as a result of Providence's denial of portions of her claim and its failure to advance the cost of asbestos abatement (or undertake the work on its own),

Providence has rendered it impossible for the Plaintiff to perform the requirement of the Policy that she repair or replace the damaged building as a condition precedent to recovery of the replacement cost. She thus asserts entitlement to the replacement cost.

Ward v. Merrimack Mut. Fire Ins. Co., 332 N.J. Super. 515 (App. Div. 2000), is instructive as to the issues presented by this motion. There, the plaintiff suffered a loss of a building in a fire. At the time of the fire, the insurer's agent had issued a policy binder, but the insurer had not issued a policy. After the insured gave notice of the fire loss, the insurer responded that it was "unable to accept [plaintiff's] application and [is] accepting no responsibility for any losses that have occurred here." Id. at 519. At the same time, the insurer consented to the designation of an umpire and the umpire submitted an appraisal fixing the cash value of the building prior to the fire at $164,600.

The plaintiff brought a declaratory judgment action, seeking a ruling that the defendant had insured the property through an agent, and that the defendant breached the contract. Under the terms of the putative policy, the insurer was obligated to pay the actual cash value of the insured's loss "until actual repair or replacement is completed." Ibid.
A jury found in favor of the plaintiff as to the defendant's liability. The court issued an order stating that the insurer "was obligated to provide a policy of insurance to the plaintiff, and that [the insurer] breached that obligation." Id. at 520. The court then determined that the plaintiff was entitled only to the actual cash value of the building, as opposed to its replacement cost. It so held because the building was never rebuilt and, pursuant to the terms of the policy, the insured was limited to recovery of the actual cash value.

The Appellate Division reversed, holding there were genuine issues of fact concerning whether the defendant's breach of the insurance contract had made it impossible for the plaintiff to satisfy the precondition for recovering replacement value of replacing the

building. The court remanded for a trial on damages addressing the plaintiff's contention of impossibility of performance.

The court noted that, on the appeal, the plaintiff argued that he was entitled to the replacement cost, as opposed to actual cash value. He asserted this was so as "it was his intention from the outset to rebuild the structure, but that his ability to do so was frustrated by [the insurer's] wrongful disclaimer of the binder issued by [the agent]." Id. at 521. The court determined that "[a] party to a contract may not avail itself of a condition precedent where by its own conduct it has rendered compliance therewith impossible (citing Creek Ranch, Inc. v. New Jersey Turnpike Auth., 75 N.J. 421, 432 (1978)). It concluded that "[t]his principle has been applied in the present context." Id. at 522 (citing Bailey v. Farmers Union Co-operative Ins. Co. of Neb., 1 Neb.App. 408, 498 N.W.2d 591, 598 (1992) (where carrier's refusal to pay even the actual cash value of the structure, a condition precedent requiring replacement of the structure to recover replacement cost was waived under the rule that "[a] condition is excused if the occurrence of the condition is prevented by the party whose performance is dependent upon the condition"); Johnny Parker, Replacement Cost Coverage: A Legal Primer, 34 Wake Forest L. Rev. 295, 321 n.201 (1999)).

The court observed that "[a]pplying this equitable rule, courts in other jurisdictions have held that an insurer is estopped from arguing that an insured cannot demand replacement costs under a policy provision requiring actual replacement of the damaged property as a precondition to recovery where the insurer's conduct frustrates the insured's ability to satisfy the precondition." Id. at 522-523 (citing Zaitchick v. American Motorists Ins. Co., 554 F. Supp. 209, 217 (S.D.N.Y. 1982), aff'd o.b., 742 F.2d 1441 (2d. Cir. 1983, cert. den., 464 U.S. 851 (1983)). It then noted that, although some courts apply the principle

of equitable estoppel in cases of this nature, most courts "generally base their determination on the theory of impossibility, that is, that the carrier's conduct made it impossible for the insured to satisfy the precondition." Id. at 523. The court pointed out that "other courts as well have held that the replacement cost provision had been waived by the insurer because its conduct thwarted the insured's ability to satisfy it." Id. at 524 (citing McCahill v. Commercial Union Ins. Co., 179 Mich. App. 761, 446 N.W.2d 571, 585 ("[w]ithout the necessary funds being advanced by defendant, plaintiff would have little likelihood of being able to secure financing to repair or replace his property"); Pollock v. Fire Ins. Exch., 167 Mich. App. 415, 423 N.W.2d 234, 237 (1988) ("defendant's failure to pay on the claim hindered, and quite possibly even prevented plaintiff from complying with her obligation to repair or replace the building")).

The court reasoned that the insurer's breach of contract in refusing to acknowledge the issuance of a binding policy of insurance was "no less 'wrongful' than the carrier's refusal to pay benefits in Zaitchick because of its suspicion of arson and the insureds' fraudulent exaggeration of their claim." Id. at 524. It concluded that "the focus is whether in fact [the insurer's] refusal to tender even the actual cash value made it impossible for plaintiff to satisfy the precondition of replacing the structure." Id. at 524-525. It determined that "genuine issues of material fact exist respecting this issue, requiring a trial on damages." Id. at 525.

The court further stated that "the question is whether in fact [the insurer's refusal to pay under the policy] was the cause of plaintiff not replacing the structure." Ibid. It found that "[t]he record supports plaintiff's contention that he was ready and able to obtain all necessary governmental permits to commence rebuilding." Id. at 525-526.

At the same time, however, the court stated that "the insured's intention to repair or replace the damaged structure is not enough to trigger the carrier's obligation to pay." Id. at 526. It reasoned that "to excuse the condition precedent, the facts must show that 'the promisor [insurer] has caused the non-performance of the condition. . . . If the promisee [insured] could not or would not have performed the condition, or it would not have happened whatever had been the promisor's conduct, the condition is not excused.'" Ibid. (quoting 5 Williston on Contracts § 677 (Jaeger ed.1961) (emphasis added)). The court noted that "[e]vidence of financial wherewithal or the ability to finance would obviously belie plaintiff's claim that [the insurer]'s refusal to provide coverage frustrated his plans to rebuild." Id. at 526-527.

Ward, which involved a claim for coverage under a policy containing the same loss settlement provision at issue here, establishes that where a denial of coverage by the insurer renders impossible the insured's ability to perform replacement of the damaged dwelling, the limitation on the insured's recovery to actual cash value does not apply. The court in that case determined there was a genuine issue of material fact as to whether the insured intended to undertake replacement, but had been frustrated in its ability to do so by the insurer's action in denying coverage. Given these circumstances, it rejected the insurer's claim to limit as a matter of law the insured's benefits to the actual cash value of the damaged building.

Likewise, here, the Plaintiff asserts that Providence interfered with her ability to undertake replacement of the damaged portions of her dwelling, because it failed to cover her claim for boiler/water heater repairs and temporary restoration of electricity and did not pay for asbestos removal. Under the holding in Ward, such actions by the insurer would, if supported in the record, give rise to a triable issue of fact as to whether the insurer is entitled to limit its response under the Policy to the insured's loss to the actual cash value.

Examining the record, it does appear to the Court that the insurer did cover the boiler repair and the cost for restoration of electric service, albeit subject to a depreciation holdback. The table in the motion record showing the insurer's reconciliation of the claim includes line items for the boiler repair and restoration of electric service.

At the same time, however, it is not apparent form the motion record that the insurer covered the cost of replacement/repair of the hot water heater(s). There is also no evidence in the record concerning the method and basis used by the insurer to determine the amount of the depreciation holdback, including if and why a holdback for depreciation would have applied to the cost of restoring electric service.

In addition, it is apparent from the record that Providence acknowledged its obligation to cover the cost of asbestos abatement in the damaged basement. The chart noted above contains a column headed "Code." That notation appears to refer to the provision of the Policy quoted above referring to costs to comply with applicable laws and ordinances. The provision of the Policy relating to coverage for removal of debris may also apply to this item of the Plaintiff's alleged loss. Although Providence thus acknowledged coverage, it withheld the full amount of the estimated cost of asbestos abatement.

There is no reason offered as to why the insurer held back the amount it acknowledged it owed for asbestos abatement pending the undertaking of repairs by the insured and declined to authorize its own contractor to implement the abatement work based on its proposal for the same. The Policy appears to afford coverage for the cost without limitation on the basis of "actual cash value." The record reflects evidence that could cause the trier of fact to conclude that contractors engaged by the insured to perform repairs to the Plaintiff's damaged basement were unable or unwilling to proceed to perform the repair work until a licensed professional removed the asbestos-containing materials from the area.

The record, examined in the light most favorable to the Plaintiff, could thus permit the trier of fact to find that the insured was prepared to proceed with repairs to satisfy the condition precedent in the Policy to recovery of full replacement cost but was thwarted in her ability to do so by actions of Providence in the handling of her claim. Under the court's holding in Ward, there is a triable issue of fact as to whether the actions of the insurer rendered impossible her satisfaction of the condition requiring repair to the dwelling and, as a result, whether the Providence's obligation to afford coverage to the Plaintiff is limited to actual cash value.

The Court recognizes that this case, unlike Ward, does not involve a complete denial of coverage by the insurer. Although the fact that the insurer here covered a significant portion of the insured's claim is surely a factor to be considered by the trier of fact in determining if the insurer's actions rendered impossible the insured's undertaking of repairs to her dwelling, that fact alone is not dispositive of the insured's contention. Instead, as noted, the insured has established a genuine dispute of material fact concerning satisfaction of the Policy condition requiring repair or replacement of the damaged property as a predicate to recovery of the replaced cost.

V

The Plaintiff moves to amend her Complaint to add a claim for bad faith. Providence opposes the motion, contending the proposed amendment would be futile because its coverage decisions as to the Plaintiff's claim were, at minimum, "fairly debatable."

Pursuant to R. 4:9-1, the Court must grant applications to amend pleadings freely. The only circumstances in which the Court does not permit leave to amend are those in which the opposing party would suffer undue prejudice as a result of the proposed amendment or the new claim or defense asserted in the amendment would be futile.

Here, Providence asserts that the Court should deny the motion as a claim for bad faith would perforce be unsustainable. It points out that, in Pickett v. Lloyd's, 131 N.J. 457, 473 (1991), the Supreme Court held that, if a claim by an insured "[i]s 'fairly debatable'[,] no liability in tort will arise." Moreover, in order "'[t]o show a claim for bad faith, a plaintiff must show the absence of a reasonable basis for denying benefits of the policy and the [carrier's] knowledge or reckless disregard of the lack of a reasonable basis for denying the claim.'" Bibeault v. Hanover Ins. Co., 417 A.2d 313, 319 (quoting Anderson v. Continental Ins. Co., 85 Wis.2d 675, 271 N.W.2d 368, 376 (1978)). Implicit in this standard is a finding of the insurer's "'reckless . . . indifference to facts or to proofs submitted by the insured.'" Ibid. (quoting Anderson, 271 N.W.2d at 376).

Providence contends that the Plaintiff could never make the requisite showing to establish bad faith. It asserts it not only accepted the claim for coverage and paid more than $84,000 in respect of the loss, but it had a reasonable basis in the Policy language for its adjustment of the claim, including the withholding of payment of full replacement cost.

Although Providence's argument may well carry the day, the Court cannot conclude that a claim sounding in bad faith would be futile. As noted, the insurer acknowledged its obligation to cover the Plaintiff for asbestos abatement, but then withheld the amount estimated to do so and failed or declined to effectuate the abatement work using its own contractor.

Given the liberal standards that apply to a motion to amend pleadings, the Court concludes it must grant the Plaintiff's motion. Issues concerning whether Providence's coverage decisions were "fairly debatable" must await a more complete record than what is presented on a motion to amend the Complaint.

Although the Plaintiff presents this motion at a late hour, there is no undue prejudice to Providence. Courts presented with insurance coverage actions accompanied by assertions of bad faith routinely sever the bad faith claim for disposition at a later time. In this case, the Court will permit the amendment, but it will likewise sever the newly-added bad faith claim for purposes of discovery and trial. The Court will take up that claim at a later time if the Plaintiff prevails on her claim for coverage. As a result, there can be no material and undue prejudice from granting the proposed amendment.