

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

THE OHIO SECURITY INSURANCE)	
COMPANY,)	
)	
Plaintiff,)	
)	
v.)	No. 1:20-cv-01223-RLY-MG
)	
BEST INN MIDWEST LLC,)	
)	
Defendant.)	
)	
BEST INN MIDWEST LLC,)	
)	
Counter Claimant,)	
)	
v.)	
)	
THE OHIO SECURITY INSURANCE)	
COMPANY,)	
)	
Counter Defendant.)	

**ENTRY ON OHIO SECURITY'S MOTION FOR SUMMARY JUDGMENT ON
BEST INN'S BAD FAITH CLAIM**

Before the court is Plaintiff The Ohio Security Company's Motion for Summary Judgment on Defendant Best Inn Midwest LLC's bad faith counterclaim. For the reasons explained below, Ohio Security's motion is **GRANTED**.

I. Factual Background

Best Inn has owned and operated a hotel in Indianapolis, Indiana since 2010. (Filing No. 72, Am. Compl. ¶¶ 4, 8). Over the years, the hotel has had many problems, including numerous health code violations, ceiling damage, broken windows, operating

without a city license, ongoing criminal activity at the hotel, and other public safety issues. (*Id.* ¶¶ 12-15). In 2014, after the City of Indianapolis filed a complaint for an injunction against Best Inn, the Marion County Court enjoined the hotel from continued operations and prohibited anyone from occupying the hotel. (*Id.* ¶¶ 13-15). In May 2017, the City agreed to allow Best Inn to reopen portions of the hotel subject to future compliance. (*Id.* ¶ 16). Beginning in September 2017, the Marion County Health Department began conducting monthly inspections and cited Best Inn for numerous violations. (*Id.* ¶ 18).

In late 2017, Best Inn acquired a commercial property insurance policy through Ohio Security (the "Policy"). (*Id.* ¶¶ 19-23; Filing No. 5, State Court Record at 130-207). Relevant here, the Policy limits coverage for certain losses when the hotel is deemed "vacant" for 60 consecutive days. (Filing No. 51-3, Vacancy Provisions). A building is "vacant" under the Policy "unless at least 31% of its total square footage is: (i) Rented to a lessee or sublessee and used by the lessee or sublessee to conduct its customary operations; and/or (ii) Used by the building owner to conduct customary operations." (*Id.*).

Between 2019 and 2020, Best Inn made 14 claims under the Policy. (Am. Compl. ¶¶ 50-114). The claims were for a variety of incidents of theft and damage, including a leaking roof, leaking water lines, vandalism, and thefts by employees and intruders. (*Id.*).

At issue in this motion is Best Inn's insurance claim of vandalism to its rooftop air

conditioners on top of Building A¹ of the hotel, which was reported on September 9, 2019. (Filing No. 135-1, Ex. 126). Ohio Security assigned claims adjuster Eric Doyle to the claim. (*Id.* at 3). Doyle had recently denied a claim by Best Inn in August 2019 regarding a leaking roof, finding the damage to the roof was the result of longstanding deterioration. (Filing No. 135-3, Ex. 128).

Ohio Security's Special Investigations Unit also hired an independent investigator, Terry Dockery, to assist Doyle. (Ex. 126). He and Doyle were scheduled to meet at the hotel with a representative of Best Inn, Dustin Carrico, on Wednesday, September 25, 2019, concerning the rooftop air conditioner claim. (*Id.* at 6). Just days before the September 25 meeting, Doyle was involved in an accident and fractured three bones in the orbit of his left eye. (Filing No. 135-6, Doyle Dep. at 28).

Doyle arrived at the hotel on September 25 and met with Dockery and Carrico in the hotel's conference room, where ceiling tiles and copper water lines were missing. (Ex. 126 at 4). They then inspected the flat roof where the air conditioner units were located to assess the damage. (Filing No. 138-2, Carrico Decl. ¶ 6). Doyle testified he was "having a bad day" and that job performance was "probably" affected by his eye injury. (Doyle Dep. at 27-28).

The following day, Doyle denied the claim, stating he saw no new damage to the rooftop air conditioner units that was not already part of the damages he saw in August

¹ Building A consists of a lobby, front desk, offices, conference/meeting rooms, a lounge, and a restaurant. (Filing No. 138-3, Reddy Decl., Ex. C).

2019. (*Id.* at 6). Later that afternoon, Dockery issued a report that contradicted the finding of Doyle, stating "photos were obtained of several air-conditioning units that had the inside components, copper, removed." (*Id.* at 4-5).

On January 30, 2020, Ohio Security sent Ashok Reddy, Best Inn's sole member, a request for an examination under oath as well as documents concerning occupancy of the hotel and guest registers to determine if the hotel was vacant within the meaning of the Policy. Over six weeks later, on March 19, 2020, Ohio Security filed a declaratory judgment action seeking a declaration that certain claims, including the claim at issue here, are not covered by the Policy. (Filing No. 1-2, State Court Record).

Ohio Security served document requests on Best Inn in April 2020, and again in June 2020, seeking the hotel's guest registers and guest records for 2019, as well as payroll, employee attendance, and revenue records for 2019, and tax returns and profit and loss statements for 2019 and prior years. (Filing No. 51-1, Requests for Production). Despite a court order and repeated requests from Ohio Security—including requests made directly to Reddy—Best Inn failed to produce the requested documents. Consequently, on January 12, 2021, Ohio Security filed a motion for sanctions, requesting an order declaring the hotel "vacant" within the meaning of the Policy. (Filing No. 51, Pl.'s Motion for Sanctions).

On May 3, 2021, Ohio Security sent Reddy and his attorney a 22-page letter explaining the results of its investigation to date and its decisions on the claims, including its reconsideration of the rooftop air conditioner claim. (*See* Filing No. 135-8, Ex. 133). The letter explained that Building A was "vacant" within the meaning of the Policy

because the measurements made during a January 14, 2021, inspection indicated less than 31% of the square footage of that building was being used for the customary operations of a hotel. (*Id.* at 4). Soon thereafter, Ohio Security tendered to Best Inn its expert disclosure reports which included a report from engineer Ben Hosinski prepared after his January 14, 2021, inspection. (Filing No. 135-9, Ex. 134). He concluded that less than 31% of Building A was being used as a hotel. (*Id.* at 5).

On May 28, 2021, the Magistrate Judge issued a Report and Recommendation that the court grant Ohio Security's motion for sanctions and declare the hotel "vacant." (Filing No. 77, Report and Recommendation). Thereafter, on August 16, 2021, the court adopted the recommendation and declared the hotel vacant for the policy year 2019. (Filing No. 91, Order Adopting Report and Recommendation). In the interim of these two decisions, Ohio Security answered Interrogatory 30 of Best Inn's Second Set of Interrogatories, which asked what information Ohio Security learned for the first time after Best Inn's discovery production:

[I]t was learned that Samcro Roofing Company had entered into a contract with Best Inn to work on the roof of Building(A). It was discovered that there was actually vandalism to the rooftop A/C units on Building(A) which occurred before Samcro commenced the roofing repairs.

(Filing No. 135-10, Ex. 135).

II. Standard of Review

Summary judgment should be entered if "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A fact is "material" if it "might affect the outcome of the

suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). And a factual dispute is "genuine"—precluding summary judgment—"only when the evidence could support a reasonable jury's verdict for the non-moving party." *Crawford v. Countrywide Home Loans, Inc.*, 647 F.3d 642, 650 (7th Cir. 2011).

III. Discussion

The parties agree that Indiana substantive law applies in this diversity action. As the parties' Second Amended Case Management Plan ("CMP") states, the issues before the court are: (1) whether Ohio Security engaged in bad faith when it denied Best Inn's claim regarding rooftop air conditioner vandalism in 2019; (2) whether Ohio Security engaged in bad faith during these proceedings when it did not pay Best Inn's rooftop vandalism claim prior to the court's August 16 sanctions order; and (3) whether Ohio Security engaged in bad faith by selling the Policy to Best Inn knowing that the Policy provided only illusory coverage for Building A, as Building A had no guest rooms.² (Filing No. 127, Second Am. CMP at 2).

Implied in all insurance contracts is the duty of an insurer to deal with its insured in good faith. *Erie Ins. Co. v. Hickman*, 622 N.E.2d 515 (Ind. 1993). In *Hickman*, the Indiana Supreme Court recognized, for the first time, a cause of action against an insurer

² Best Inn's bad faith claim, which is set forth in the Second Amended CMP, is hard to explain in just a few words. Best Inn argues that because Ohio Security filed a motion for sanctions seeking guest occupancy discovery for purposes of determining whether the hotel was vacant under the Policy, and because "[t]he Magistrate Judge adopted this analysis when determining the importance of the lost paperwork . . . which related to occupancy," "[Ohio Security] has exposed the fact that Building A has no guest rooms and therefore could never have qualified for coverage under the executed insurance contract." (Second Am. CMP at 2). "Best Inn asserts that this hidden benefit was posited in the insurance agreement in bad faith so that Best Inn would never be covered for Building A." (*Id.*).

for the tortious breach of that duty. The Court noted that a cause of action for breach does not arise every time an insurance claim is denied. *Id.* at 520. "For example, a good faith dispute about the amount of a valid claim or about whether the insured has a valid claim at all will not supply the grounds for a recovery in tort for the breach of the obligation to exercise good faith." *Id.* Instead, an insurer breaches its duty if it "denies liability knowing that there is no rational, principled basis for doing so." *Id.*; *see also Freidline v. Shelby Ins. Co.*, 774 N.E.2d 37, 40 (Ind. 2002) ("To prove bad faith, the plaintiff must establish, with clear and convincing evidence, that the insurer had knowledge that there was no legitimate basis for denying liability."). "Poor judgment or negligence do not amount to bad faith; the additional element of wrongdoing must also be present." *Colley v. Indiana Farmers Mut. Ins. Grp.*, 691 N.E.2d 1259, 1261 (Ind. Ct. App. 1998). "A finding of bad faith requires evidence of a state of mind reflecting dishonest purpose, moral obliquity, furtive design, or ill will." *Monroe Guaranty Ins. Co. v. Magwerks Corp.*, 829 N.E.2d 968, 977 (Ind. 2005) (quoting *Colley*, 691 N.E.2d at 1261)). With that standard in mind, the court now turns to Best Inn's bad faith claim.

Best Inn argues Doyle had no rational, principled basis for denying its claim because the evidence of vandalism to the rooftop air conditioners was "obvious." Doyle admits he did not take enough photographs, did not record enough details, and generally did a poor job regarding the rooftop air conditioner inspection. (Doyle Dep. at 27, 28, 42, 62). Doyle also testified he was "having a bad day," (*id.* at 27), his inspection was "probably" affected by his eye injury, (*id.* at 28), and that he had made a "mistake,"

(*id.* at 62). Doyle's testimony reflects that he may have acted negligently, but not with dishonest purpose or ill will. No reasonable jury could conclude otherwise.

The second issue—whether Ohio Security engaged in bad faith during these proceedings by failing to cover the rooftop air conditioner vandalism claim prior to the August 16 sanctions order—must also be decided in Ohio Security's favor. The undisputed evidence shows that Ohio Security did not learn that Doyle had erroneously denied the claim until discovery was conducted in this case. Moreover, Ohio Security put Best Inn on notice that it believed the hotel may be vacant under the meaning of the Policy even before it filed the present declaratory judgment action. It sought to inspect the property to determine whether the hotel was vacant³ but was stymied by Best Inn's dilatory tactics, which led to the August 16 sanctions order deeming the hotel vacant. No reasonable jury could find Ohio Security acted in bad faith by failing to cover the rooftop air conditioning units prior to the August 16 sanctions order.

As for the last issue, an insurance policy issued in Indiana offers "illusory" coverage if the policy is "basically valueless to the insured" because the insured would

³ Relying on Reddy's declaration, Best Inn argues Building A was not "vacant" because Best Inn used 31% of Building A for its "customary business operations." This argument is rejected for two reasons. First, this issue has already been decided by the court. Second, even if the issue were properly before the court, Reddy's declaration undermines Best Inn's assertion that Building A was not vacant. For example, Reddy states that the main conference room was used as a storage area for 70 toilets and 50 air conditioner units Best Inn hoped to install in guest rooms, and the area behind a meeting room was used to store lawn equipment, paint, power equipment, a new water heater, a maintenance sink, and 72 buckets of roof coating pallets. (Reddy Decl. ¶ 9). Best Inn admits the restaurant and bar were not being used at all. (Filing No. 138, Pl.'s Resp. at 9). And Hosinski, Ohio Security's expert, concluded that Building A was vacant, as less than 31% of Building A's square footage was being used for its customary use. (Ex. 134 at 5). In light of this evidence, no reasonable jury could conclude that Best Inn was using 31% or more of Building A's total square footage for "customary business operations."

"not recover benefits under any reasonably expected set of circumstances." *Davidson v. Cincinnati Ins. Co.*, 572 N.E.2d 502, 507 (Ind. Ct. App. 1991). If the policy is illusory, the court will not enforce the policy as written; instead, the court must enforce the policy "to satisfy the reasonable expectations of the insured." *Id.* at 508; *see also Landis v. Am. Interinsurance Exch.*, 542 N.E.2d 1351, 1354 (Ind. Ct. App. 1989) ("Where an otherwise unambiguous insurance clause provides only illusory coverage when construed within the insurance contract in its entirety, the courts of this state will enforce the provision so as to give effect to the reasonable expectation of the insured.").

Confusingly, Best Inn does not argue the *Policy* is illusory. Instead, it argues its *bad faith tort claim* is not illusory because under Indiana law bad faith is an independent tort. (Filing No. 138, Def.'s Resp. at 14). This argument is non-sensical. Illusory coverage is a contract-based theory of recovery, not a tort. *See Davidson*, 572 N.E.2d at 508 ("Provisions in an insurance policy, which are unambiguous when read within the policy as a whole, but in effect, provide only illusory coverage, should be enforced to satisfy the reasonable expectations of the insured."). Furthermore, this argument is not responsive to the issue Best Inn asked the court to decide—whether the *Policy* provides illusory coverage for Building A—and is waived. *Crespo v. Colvin*, 824 F.3d 667, 674 (7th Cir. 2016) (noting that "perfunctory and undeveloped arguments, and arguments that are unsupported by pertinent authority, are waived").

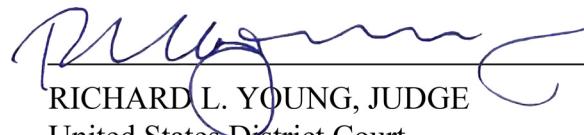
Even if the court were to entertain Best Inn's bad faith claim as described in the Second Amended CMP, the insurance contract is not illusory. The *Policy* provides coverage to Best Inn except when it is vacant—a condition operating to curtail coverage

by excluding vandalism. As is relevant here, Building A is deemed vacant under the Policy unless it is "[u]sed by the building owner to conduct customary operations." (Vacancy Provisions ("Such building is vacant unless at least 31% of its total square footage is . . . [u]sed by the building owner to conduct customary operations.")). There is nothing illusory about those provisions. Indeed, had the hotel not been "vacant" under the meaning of the Policy, it would have been entitled to coverage for the vandalism to its rooftop air conditioners. Consequently, no reasonable juror could find Ohio Security acted in bad faith when it issued the Policy to Best Inn.

IV. Conclusion

The court finds, as a matter of law, that Ohio Security did not commit the tort of bad faith when it denied Best Inn's vandalism claim. Accordingly, Ohio Security's Motion for Summary Judgment (Filing No. 134) is **GRANTED**. As all issues have been resolved in Ohio Security's favor, final judgment shall issue forthwith.

SO ORDERED this 13th day of March 2023.



RICHARD L. YOUNG, JUDGE
United States District Court
Southern District of Indiana

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