IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Daniel D. Domenico

Civil Action No. 1:20-cv-03295-DDD-NRN

CESARE MORGANTI,

Plaintiff,

v.

AMERICAN FAMILY MUTUAL INSURANCE COMPANY, S.I.,

Defendant.

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT AND DENYING MOTION TO AMEND THE SCHEDULING ORDER

Plaintiff Cesare Morganti brought this suit alleging that Defendant American Family Insurance wrongfully declined to cover damage he alleges was caused to his roof in a windstorm. American Family has moved for summary judgment. The motion is granted because the plaintiff has not rebutted the defendant's factual allegations sufficiently to show a genuine dispute of material fact. All other pending motions are denied as moot.

BACKGROUND

The details of this case have been recounted before, including in the order denying American Family's motion to dismiss. *Doc.* 39. The essentials are that a few months after Mr. Morganti renewed his American Family homeowner's insurance policy in 2019, a windstorm hit his Castle Rock home. Mr. Morganti alleges that the storm caused significant damage to his home, including dislodging multiple sections of the wood shake roofs of the home and garage. American Family determined that

the damage to the roofs was caused by age, not wind, and denied coverage. It continued to do so even after Mr. Morganti's contractor and a public adjuster concluded otherwise.

When American Family again declined coverage after Mr. Morganti filed a notice of claim and demand for payment, he filed this suit alleging bad faith breach of the insurance policy. *Doc.* 3. American Family removed the case to this Court, and filed a motion to dismiss, arguing that Mr. Morganti had failed to plead breach of contract because the contract only entitled him to the cash value of his roof, and given the age of the roof, its cash value was zero. *Doc.* 15. This Court denied the motion, finding that Mr. Morganti had sufficiently pleaded a claim of breach of this provision. *Doc.* 39 at 4-5. That order noted that while it was true that Mr. Morganti's policy might limit coverage for roof damage to the roof's actual cash value, whether that value was zero was a factual assertion that could not be presumed true at that stage, when all factual inferences must be made in favor of the non-moving party. *Id.* at. 5. Similar factual disputes also led the Court to reject American Family's argument that the damage was caused by wear and tear rather than the storm. *Id.* at 5-6.

The parties engaged in discovery and American Family filed the present motion for summary judgment.

LEGAL STANDARDS

The purpose of summary judgment is to assess whether trial is necessary. *White v. York Int'l Corp.*, 45 F.3d 357, 360 (10th Cir. 1995). Summary judgment is appropriate if there is no genuine dispute of material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Adamson v. Multi Cmty. Diversified Servs., Inc.*, 514 F.3d 1136, 1145 (10th Cir. 2008). A fact is material if it could affect the

outcome of the suit under the governing law; a dispute of fact is genuine if a rational jury could find for the nonmoving party on the evidence presented. *Id.* If a reasonable juror could not return a verdict for the nonmoving party, summary judgment is proper and there is no need for a trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). On a motion for summary judgment, the moving party bears the burden of demonstrating no genuine issue of material fact exists. *Adamson*, 514 F.3d at 1145.

This standard is largely the same as that applied at the motion to dismiss stage. *See Pena v. Greffet*, 108 F. Supp. 1030, 1063 n.16 (D. N.M. 2015). Now, however, rather than assessing the allegations in the complaint, courts must look at the evidence the parties have put forward. In deciding whether the moving party has carried its burden, a court does not weigh the evidence and instead must view it and draw all reasonable inferences from it in the light most favorable to the nonmoving party, here, Mr. Morganti. *Adamson*, 514 F.3d at 1145. But neither unsupported conclusory allegations nor mere traces of evidence are sufficient to demonstrate a genuine dispute of material fact on summary judgment. *Maxey v. Rest. Concepts II, LLC*, 654 F. Supp. 2d 1284, 1291 (D. Colo. 2009). And if "a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c), the court may . . . consider the fact undisputed for purposes of the motion." Fed. R. Civ. P. 56(e)(2).

DISCUSSION

I. Breach of contract

A claim for breach of contract in Colorado requires proof of a valid contract, breach, and damages. *W. Distrib. Co. v. Diodosio*, 841 P.2d 1053, 1058 (Colo. 1992). The parties disagree over two components of their contractual obligations: whether Mr. Morganti's loss was covered

by the policy, and the amount that American Family would owe Mr. Morganti if his loss was covered.

A. Amount owed to Mr. Morganti

Although there remains a genuine dispute over whether Mr. Morganti's loss was covered by the policy, there is no genuine dispute as to whether American Family owes him anything. All evidence shows that it does not. Mr. Morganti's insurance policy provides that, for damages to wood roof surfaces, American Family will pay the least of "a. the actual cash value; b. the cost to repair or replace damaged property with material of like construction; or c. any policy limit that applies." *Doc.* 95 Ex. 8 at 13-14. The actual cash value means the least of:

> a. the value of damaged property;
> b. change in value of damaged property directly due to the loss;
> c. cost to repair damaged property; or
> d. cost to replace damaged property less any deduction for:
> (1) age;
> (2) condition;
> (3) obsolescence; or
> (4) depreciation;
> at the time of loss."

Id. At 1.

The parties dispute whether this provision applies to Mr. Morganti's roof. Mr. Morganti argues that "roof surface" means materials such as "shingles, shakes, tiles, slates, panels, sheets, rolled materials, or . . . any type of built up surface." *Doc.* 95 at 24. I disagree. The contractual provision plainly applies to all surfaces of a roof that are made out of wood. To the extent that Mr. Morganti seeks to recover damages from wooden components of his roof, the formulation cited above applies. Damages stemming from non-wooden parts of the roof are not assessed

using that formula. But nor are they mentioned in the complaint. *Doc.* 3.

Applying the contract's formula for wooden roofs, American Family argues that Mr. Morganti is not entitled to recovery. Its expert witness, Mr. Logan, looking to item b. in the contract's list, calculated that the "change in value of damaged property directly due to the loss" was $0, which, if true, would preclude any recovery by Mr. Morganti. *Doc.* 79 at 13. Mr. Morganti asserts, without elaboration, flaws in Mr. Logan's analysis, such as alleged use of an outdated estimate, failure to limit his calculation to the wood roof surfaces only, and erroneous assertion that there was no change in the property's value. *Doc.* 95 at 25. Under Fed. R. Civ. P. 56(e)(2), however, if "a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c), the court may . . . consider the fact undisputed for purposes of the motion." Mr. Morganti's rebuttal consists of unsupported assertions. He does not, as required by Rule 56(f), cite to particular materials in the record that support a contrary conclusion, or show that the materials cited do not establish the absence of a material dispute. I find Mr. Logan's ACV analysis undisputed for purposes of this motion.

In his response to the motion, Mr. Morganti asserts that even if the defendant's ACV calculation is accurate, he could still recover through the policy's "Ordinance, Law, Or Regulation" endorsement. That provision provides that in the event of a covered loss, American Family "pays the increased cost you incur because an ordinance, law, or regulation requires you to construct, demolish, or repair that part of the covered building damaged on the residence premises." *Doc.* 95 Ex. 8 at 24. Mr. Morganti asserts that "the local building authorities require the damaged roofs to be replaced with a different surface material" and that "the

ventilation on Plaintiff's residence roof does not meet applicable code." *Doc.* 95 at 23. Mr. Morganti does not cite evidence showing that the building code requires him to rebuild the roof. At best, he has shown that if he were to rebuild the roof, he could need different materials. *Doc.* 95 at 17-18. He also did not mention this provision as relevant to his claims for relief in his complaint, *Doc.* 3, or anywhere else until the response to the summary judgment motion so far as I can discern. Mr. Morganti's argument in the complaint was that the alleged breach was to the underlying policy, not to this rider. Even if this provision were applicable, the response to a motion for summary judgment is too late to bring it into the case.

II. Bad faith

Mr. Morganti's bad faith claims fail because he cannot show damages. An insured may seek recovery under common law bad faith if the insurer "unreasonably refus[es] to pay a claim and fail[s] to act in good faith," as "determined objectively, based on proof of industry standards." *Goodson v. Am. Standard Ins. Co.*, 89 P.3d 409, 414-415 (Colo. 2004). An insured may seek recovery under statutory bad faith if the insurer "unreasonably delay[s] or den[ies] payment of a claim for benefits owed." C.R.S. §§ 10-3-1115(2); 10-3-1113(1). Mr. Morganti asserts that American Family's adjuster (1) "ignored obvious evidence of wind damage, including shakes on the ground and missing, lifted, and displaced wood shakes on the roofs;" (2) "failed to properly address wind in his report;" (3) "used photographs taken from angles concealing wind as a cause of loss;" (4) "focused on facts which might support a denial." *Doc.* 95 at 26. He further argues that Defendant "disregarded or never read both supportive and contradictory comments" within a report by Knott Laboratory that it used to justify denial. *Id.* at 27-28. Since Mr. Morganti's

insurance claims have failed, he cannot show damages related to bad faith by American Family.

III. Motion to amend the scheduling order

Mr. Morganti's motion to amend the scheduling order is denied because there is no viable underlying claim. *Doc.* 76. This motion is premised on his desire to bring a claim for exemplary damages. Colorado law says that "[a]fter the plaintiff establishes the existence of a triable issue of exemplary damages, the court may, in its discretion, allow additional discovery on the issue of exemplary damages as the court deems appropriate." Colo. Rev. Stat. § 13-21-102(1.5)(a). There being no such triable issue, this is not triggered. Under Fed. R. Civ. P. 16(b)(4), "[a] schedule may be modified only for good cause and with the judge's consent." I find that since Mr. Morganti has no underlying viable claim, he lacks good cause to amend the scheduling order.

CONCLUSION

It is ORDERED that:

The MOTION FOR SUMMARY JUDGMENT (Doc. 79) is GRANTED;

The MOTION TO AMEND THE SCHEDULING ORDER (Doc. 76) is DENIED; and

All remaining motions are DENIED AS MOOT.

DATED: March 21, 2023

BY THE COURT:

~~Daniel~~ D. Domenico
United States District Judge