DOCKET NO.: UWY-CV18-6042867-S	:	SUPERIOR COURT
KASTRIOT KUTROLLI	:	J. D. OF WATERBURY
VS.	:	AT WATERBURY
LIBERTY MUTUAL INSRUANCE CORPORATION, A/K/A LIBERTY MUTUAL INSURANCE GROUP, INC.	:	APRIL 25, 2024

MEMORANDUM OF DECISION RE: MOTION FOR SUMMARY JUDGMENT (#134.00)

The defendant, Liberty Mutual Insurance Corporation a/k/a Liberty Mutual Insurance Group, Inc., ("Liberty"), pursuant to Practice Book §17-44, et seq., filed a June 2, 2022 motion for summary judgment (#134.00) and supporting memorandum of law and exhibits submitted in support of this motion (#135.00). Liberty asserted that the plaintiff Kastriot Kutrolli ("plaintiff"), despite having been properly compensated, has alleged a claim for breach of contract, along with extra-contractual claims of bad faith and violations of the Connecticut Unfair Trade Practices Act ("CUPTA") and Connecticut Unfair Insurance Practice Act ("CUIPA"). Liberty asserts that the plaintiff has received all the benefits to which he is entitled under his homeowners insurance policy, there exists no genuine issue of material fact, and Liberty is entitled to judgment in its favor. In response, the plaintiff filed a March 25, 2024 objection to the motion for summary judgment (#169.00), asserting that the evidence submitted by the parties demonstrates that there is conflicting testimony between the parties, which presents a genuine issue as to a material fact and resolution of this conflict is within the exclusive province of the trier of fact, and that Liberty is not entitled to judgment in its favor.

FACTUAL BACKGROUND

The plaintiff is the owner of the residence located at 316 Sunnyside Avenue, Watertown, Connecticut ("premises"), damaged by a fire on February 5, 2017. The plaintiff was the named

insured under a Liberty homeowners insurance policy number H37-218-365607-40 ("policy"). A certified copy was attached to the motion for summary judgment as exhibit A. The policy provided Coverage A (dwelling) limits of $160,000, plus 40% extended replacement cost (for a total of $224,672). (exhibit A, p. A-2, A-22). It also provided Coverage C (personal property) limits of up to $120,000 with replacement cost, and Coverage D (additional living expense) of up to 12 months at actual cost. The policy had a $1,500 deductible per loss. (exhibit A, p. A-2).

The premises had 1,698 square feet of living area, two-bedroom, two-bathroom ranch with, and a partially finished basement. Two days after the fire, Liberty sent adjuster Richard Beaudette to inspect the damage and prepare an estimate of the cost to repair the premises. (Affidavit, exhibit H). The amount to repair the structure to its pre-loss condition (replacement cost value or "RCV") was determined to be $195,103.90. (exhibit H). Liberty retained Thomas A. Mierzwa, P.E., of T.A.M. Engineering & Associates, Inc. ("TAM") to inspect the damage to the dwelling. Mr. Mierzwa inspected the premises on March 9, 2017, and determined that the house did not have to be torn down to repair the damage caused by the fire. (exhibit H). A copy of his March 24, 2017 initial report was attached as exhibit B. Mr. Mierzwa performed a re-inspection on October 20, 2017. A copy of his November 7, 2017, supplemental report was attached as exhibit C. After subtracting the policy deductible and the recoverable depreciation, the plaintiff was paid the actual cash value ("ACV") of $167,768.72. (exhibit H). The RCV of the plaintiff's personal property was determined to be $68,884.60. (exhibit H). After subtracting the recoverable depreciation of $6,304.93, the plaintiff was paid the ACV of $62,579.67.2 (exhibit H).

The plaintiff was also paid $33,719.70 for 10 months of additional living expenses ("ALE"). (Exhibit H). The policy allows the actual costs incurred for "the shortest time required to repair or replace the damage" up to a maximum of 12 months. (Exhibit H). It was determined

that the time necessary to repair the dwelling to its pre-loss condition was four months. (Exhibit H). Notwithstanding the fact that the necessary repairs should have been completed within four months, Liberty Mutual agreed to pay 10 months of ALE. (Exhibit H).

The plaintiff did not repair the house to its pre-loss condition but chose to build an entirely different structure than the one damaged in the fire. As to additional living expenses, the plaintiff claims that he incurred unreimbursed expenses of $192,825, which amount far exceeds the policy limit of 12 months of ALE. The plaintiff testified at his October 28, 2019 deposition that he could not move back into the house until July or August of 2019 (approximately two and one half years after the fire) because it was still under construction. (See certified transcript of deposition (exhibit I)).

The new house has more than 3,000 square feet of living space and includes an attached garage, nearly double the existing structure (exhibit D). The plaintiff has not presented any line-item estimate of the cost to repair the original structure to its pre-loss condition, but he has submitted a one-page proposal, un-itemized, from Salerno Remodeling, LLC, in the amount of $458,982 (exhibit E). This un-itemized proposal exceeds the policy's Extended Coverage A limits by more than $200,000. There was no way to determine what the proposal includes. In addition to a new, much larger house, there were numerous upgrades including the kitchen, bathrooms and basement. Compare February 7, 2017 photographs (exhibit F) with February 10, 2020 one (exhibit G).

Count One

Count one of the plaintiff's revised complaint alleges breach of contact. "The elements of a breach of contract action are the formation of an agreement, performance by one party, breach of the agreement by the other party and damages." (Citations omitted; internal quotation marks

omitted.) *Keller* v. *Beckenstein*, 117 Conn. App. 550, 558, 979 A.2d 1055 (2009). "The plaintiff has the burden of proving the extent of the damages suffered. . . . Although the plaintiff need not provide such proof with mathematical exactitude . . . he must nevertheless provide sufficient evidence for the trier to make a fair and reasonable estimate. . . ." *Naples* v. *Keystone Bldg. & Dev. Corp.*, 295 Conn. 214, 224, 990 A.2d 326 (2010). There has been no breach of the contract here. case. (NOTE: Liberty has quoted numerous sections of the policy between the parties, which cover provisions involving "Additional Living Expenses," "Loss Settlement" and "Appraisal," which need not be repeated verbatim here for the sake of brevity but will be duplicated from the policy and examined by the court in the Legal Analysis section below where needed.)

According to Liberty, it has paid the plaintiff everything he is entitled to under the policy. It has paid the RCV of the cost to repair the dwelling to its pre-loss condition, and it has paid 10 months of additional living expenses (even though the repairs should have taken 4 months to complete.) The plaintiff chose to build an entirely different, much larger house than his original premises. While that was his prerogative to do so, he was not entitled to the full cost of the new structure under his applicable homeowners policy. Not only does it conflict with the policy language, but it would create a "moral hazard" as noted in *In re State Farm Fire and Casualty Company*, 872 F.3d 567, 573 (8th Cir. 2017).

> "The basic premise of traditional property insurance is the concept of indemnity. The insured who suffers a covered loss is entitled to receive full, but not more than full, value for the loss suffered, to be made whole but not be put in a better position than before the loss. . . . The limitation of property loss coverage to the insured's actual loss serves the public policy of preventing over-insurance, which can be an "inducement to destroy property in order to procure the insurance upon it." (Citations omitted.)

Under the policy, the plaintiff is entitled to "[t]he replacement cost of that part of the building damaged using *like kind and quality construction on the same premises and intended for*

the same occupancy and use." (Emphasis added in brief.) The plaintiff has been fully paid for like kind and quality reconstruction of his existing home. Therefore, there has been no breach of the contract, and the defendant is entitled to a judgment as a matter of law as to count one.

Count Two

The second count alleges common law bad faith on the part of Liberty. Connecticut law is well-established that both parties to a contract owe each other a duty of good faith and fair dealing. In *Capstone Bldg. Corp.* v. *American Motorists Ins. Co.*, 308 Conn. 760, 794, 67 A.3d 961 (2013), our Supreme Court noted that "every contract carries an implied duty requiring that neither party do anything that will injure the right of the other to receive the benefits of the agreement".

The standard of proof for a claim of bad faith is clear: "To constitute a breach of [the implied covenant of good faith and fair dealing], the acts by which a defendant allegedly impedes the plaintiff's right to receive benefits that he or she reasonably expected to receive under the contract must have been taken in bad faith." (Citations omitted; internal quotation marks omitted.) *De La Concha of Hartford, Inc.* v. *Aetna Life Insurance Co.*, 269 Conn. 424, 432-33, 849 A.2d 382 (2004). "[B]ad faith . . . implies the conscious doing of a wrong because of dishonest purpose or moral obliquity. . . . [I]t contemplates a state of mind affirmatively operating with furtive design or ill will." (Internal quotation marks "Absent allegations and evidence of a dishonest purpose or sinister motive, a claim for breach of the implied covenant of good faith and fair dealing is legally insufficient." *Alexandru* v. *Strong*, 81, Conn. App. 68, 81, 837 A.2d 875 (2004). "Disagreement between an insurer and insured as to coverage of the appropriate amount to which the insured is entitled is not equivalent to bad faith and, standing alone, does not evince dishonest purpose. The insured's demand may itself be excessive and unwarranted, or the insurer's rejection of the claim may be erroneous but honestly held." *Jones* v. *Standard Fire Ins. Co.*, 2013 WL 541015 *1.

Bad faith is governed by our Supreme Court's decision in *Capstone*. The court held that "bad faith is not actionable apart from a wrongful denial of a benefit under the policy." Id., at 798. Here, there has been no wrongful denial of benefits, and the plaintiff has been fully compensated for his February 5, 2017 covered losses. *Capstone* agreed with the majority of jurisdictions that disallow independent actions for improper claims investigation where there is no violation of an express duty under the policy. Id., at 800. Any claim by the plaintiff that Liberty failed to adequately investigate his claim must also fail because there has been no breach of the contract.

Count Three

The defendant observed that the third count of the revised complaint incorporates the prior allegations of breach of contract and bad faith, and alleges, as the defendant asserts, in conclusory fashion that the defendant violated the CUTPA under General Statutes § 42-110a, et seq., and the CUIPA General Statutes § 38a-815, et seq. This claim fails for the same reason that the common law bad faith claim fails: the plaintiff has been fully compensated for his loss and there has been no wrongful denial of some benefit to which the plaintiff is entitled. *DiNardo* v. *Pacific Indemnity Co.*, 2019 WL 2487851 *12 stated that "Because the plaintiff's CUTPA/CUIPA claims . . . rest upon the premise that the defendants' coverage determinations were unreasonable, and because the court has concluded there is no coverage under their policies, an essential element of the CUTPA/CUIPA claims against them is lacking. The court, therefore, grants summary judgment to those three defendants on the CUTPA/CUIPA counts."

Connecticut has adopted the criteria set out by the Federal Trade Commission for determining "when a practice is unfair: (1) [W]hether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise - in other words, it is within at least the penumbra of some common

law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers. . . . All three criteria do not need to be satisfied to support a finding of unfairness. A practice may be unfair because of the degree to which it meets one of the criteria or because to a lesser extent it meets all three. . . .Thus, a violation of CUTPA may be established by showing either an actual deceptive practice . . . or a practice amounting to a violation of public policy. . . . In order to enforce this prohibition, CUTPA provides a private cause of action for [a]ny person who suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment of a [p]rohibited method, act or practice. (Internal quotation marks omitted.) *Ulbrich* v. *Groth*, 310 Conn. 375 409-410, 78 A.3d 76 (2013).

Here, there is no evidence whatsoever that the defendant engaged in conduct that was unlawful, offensive to public policy, immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers. To the contrary, the defendant fulfilled all of its obligations owed to the plaintiff. It is respectfully requested that summary judgment be granted as to all counts.

PLAINTIFF'S POSITION

The plaintiff provides in his objection to the motion for summary judgment an excerpt from the deposition of Richard Beaudette, Liberty's designated representative who indicated that when obtaining an estimate Liberty will "prepare and estimate a provide it to the customer and let them know it's a repair estimate." Later in the deposition Mr. Beaudette indicated that "We prepare an estimate for what we see the value of the damage at. We present it to the customer so they can review it with their contractor." And when asked "Okay, is there anything in the contract of insurance between Mr. Kutrolli and Liberty Mutual that he had to accept what you just called was the undisputed estimate that you provided him?" and Mr. Beaudette responded, "No."

The plaintiff goes on in his objection to the motion for summary judgment to state that "the Plaintiff denies the defendant's averment, stating in his [March 24, 2024 affidavit] Affidavit in support hereof at Exhibit A: "I was, and still am, the home owner of 356 Sunnyside Avenue, Watertown, Connecticut 06779 when a massive fire engulfed it on February 5, 2017. I witnessed the fire and the aftermath. The home thereon was severely damaged and what was left in a word 'stunk.' Who knew what was in the ashes? It needed to be rebuilt after what was left from the fire was torn down and the debris therefrom was safely removed before I could safely move my wife, daughter, son and myself into a new edifice and regain our previous 'quiet enjoyment' of the premises, Indeed, the attached letter hereto from my son's doctor 'prescribing' such a course of action (Exhibit A). Also attached hereto is an estimate at the time prepared from a local builder as to what it would cost to rebuild (Exhibit B) of $453,962.00. This does not include the $73,950.00 (Exhibit C) to demolish the ruined building and have the debris therefrom safely removed, which I did myself because Liberty Mutual would not agree thereto and I did not have the money therefore. Liberty Mutual refused, and still refuses, to do such: offering only to rehab the burnt cut shell of the house that stood after the fire for a total of some $195,000.00."

The plaintiff also provided an exhibit A to his affidavit, which is a March 18, 2018 letter from Sedat S. Shaban, which states in pertinent part" "Klarent Kutrolli has been a patient of mine since August 31, 2017 and carries a diagnosis of environmental allergies which causes him to have trouble breathing. His allergies have been occurring more frequently since the family began living at their current address. It is my opinion that the family should be allowed to move to a residence that is more conducive to his allergies as soon as possible." The plaintiff goes on in his objection, to state "Thus, we are left with nothing but conflicting testimony, which presents a genuine issue as to a material fact and resolution of this conflict is within the exclusive province of the trier."

The plaintiff alerts the court to *Spence* v. *Good Earth Restaurant Corporation*, 164 Conn. 194, 199, 319 A.2d 403 (1972). The court in *Spence* stated:

> In the present case, on the pleadings and affidavits, the parties were at issue as to whether in fact the named plaintiff purchased chow mein at the defendant's restaurant, whether the plaintiffs ate the chow mein, whether it contained glass, and whether the defendant was negligent. The plaintiffs alleged the truth of these facts and the defendant denied it. In the nature of the case no independent or documentary proof was available to make quite clear what the truth was and exclude any real doubt as to the actual factual situation. The situation was peculiarly one which required an evidentiary hearing for a trial of the issues of fact in which the trier would be called on to determine the credibility of witnesses and the weight to be given to their testimony. 'It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given to their testimony can be appraised.' *Poller* v. *Columbia Broadcasting System, Inc.*, . . . 368 U.S. 464, 473, 82 S. Ct. 486, 7 L. Ed. 2d 458; *Fortner Enterprises, Inc.* v. *United States Steel Corporation*, 394 U.S. 495, 500, 89 S. Ct. 1252, 22 L. Ed. 2d 495. United Oil Co. v. *Urban Redevelopment Commission*, supra, 376."

The plaintiff concludes by declaring that "For all these reasons, the Plaintiff, respectfully, requests that the Court deny the motion for summary judgment filed by the defendant."

LEGAL STANDARD

"[T]he trial court does not sit as the trier of fact when ruling on a motion for summary judgment . . . [Its] function is not to decide issues of material fact, but rather to determine whether any such issues exist." (Citation omitted; internal quotation marks omitted.) *Barasso* v. *Rear Still Hill Road, LLC*, 81 Conn. App. 798, 803, 842 A.2d 1134 (2004). "On a motion for summary judgment, the court is not to make credibility determinations or weigh conflicting evidence in deciding the motion for summary judgment . . . If the parties present conflicting evidence, it should be submitted to the fact finder." (Citations omitted.) *Papa* v. *Schroeder*, Superior Court, judicial district of Hartford, Docket No. CV–14–6052720–S (March 1, 2016, *Peck, J.*); see also *Martin* v. *Westport*, 108 Conn. App. 710, 728, 950 A.2d 19 (2008) (affirming trial court's granting of motion for summary judgment, reasoning that the court may review, but not weigh, evidence).

"Summary judgment should be denied where the affidavits of the moving party do not affirmatively show that there is no genuine issue of fact as to all of the relevant issues of the case." (Internal quotation marks omitted.) *Romprey* v. *Safeco Ins. Co. of America*, supra, 310 Conn. 320. "Once the moving party has met its burden, however, the opposing party must present evidence that demonstrates the existence of some disputed factual issue. . . . It is not enough, however, for the opposing party merely to assert the existence of such a disputed issue. Mere assertions of fact . . . are insufficient to establish the existence of a material fact and, therefore, cannot refute evidence properly presented to the court . . . ." (Internal quotation marks omitted.) *Ferri* v. *Powell-Ferri*, 317 Conn. 223, 228, 116 A.3d 297 (2015). "Accordingly, the rule that the party opposing summary judgment must provide evidentiary support for its opposition applies only when the moving party has first made out a prima facie case for summary judgment. . . . [I]f the party moving for summary judgment fails to show that there are no genuine issues of material fact, the nonmoving party may rest on mere allegations or denials contained in his pleadings . . . ." (Citation omitted; internal quotation marks omitted.) *Romprey* v. *Safeco Ins. Co. of America*, supra, 310 Conn. 320-21.

Practice Book § 17-45 states: "(a) A motion for summary judgment shall be supported by appropriate documents, including but not limited to affidavits, certified transcripts of testimony under oath, disclosures, written admissions and other supporting documents. (b) Unless otherwise ordered by the judicial authority, *any adverse party shall file* and serve *a response* to the motion for summary judgment within forty-five days of the filing of the motion, *including opposing affidavits and other available documentary evidence*. (Emphasis added.)

"Although the court must view the inferences to be drawn from the facts in the light most favorable to the party opposing the motion . . . a party may not rely on mere speculation or

conjecture as to the true nature of the facts to overcome a motion for summary judgment. . . . A party opposing a motion for summary judgment must substantiate its adverse claim by showing that there is a genuine issue of material fact together with the evidence disclosing the existence of such an issue." (Internal quotation marks omitted.) *Escourse* v. *100 Taylor Avenue, LLC*, 150 Conn. App. 819, 829-30, 92 A.3d 1025 (2014).

"Although the party seeking summary judgment has the burden of showing the nonexistence of any material fact . . . a party opposing summary judgment must substantiate its adverse claim by showing that there is a genuine issue of material fact together with the evidence disclosing the existence of such an issue. It is not enough, however, for the opposing party merely to assert the existence of such a disputed issue. Mere assertions of fact . . . are insufficient to establish the existence of an issue of material fact and, therefore, cannot refute evidence properly presented to the court [in support of a motion for summary judgment.]" (Citations omitted.) *Maffucci* v. *Royal Park Ltd. Partnership*, 243 Conn. 552, 554-55, 707 A.2d 15 (1998). "[T]he party opposing such a motion must provide an evidentiary foundation to demonstrate the existence of a genuine issue of material fact." *Appleton* v. *Board of Education*, supra, 254 Conn. 205, 209, 757 A.2d 1059. Issues of insurance coverage are particularly well suited to summary judgment as they typically involve questions of law. See, e.g., *Interface Flooring Systems, Inc.* v. *Aetna Casualty and Surety Co.*, 261 Conn. 601, 614, 804 A.2d 201 (2002); *Edelman* v. *Pacific Employers Ins. Co.*, 1997 WL 781814 (Conn. Super. 1997) (Exhibit E), aff'd, 53 Conn. App. 54, 728 A.2d 531 (1999).

If the language of the policy is clear and unambiguous, its terms will be given their ordinary and natural meaning. *Horak* v. *Middlesex Mutual Assurance Co.*, 181 Conn. 614, 616, 436 A.2d 783 (1980). If, to the contrary, insurance coverage is defined in terms that are ambiguous, such

ambiguity is, in accordance with standard rules of construction, resolved against the insurance company. "Where the terms of the policy are of doubtful meaning, the construction most favorable to the insured will be adopted." *LaBonte* v. *Federal Mutual Ins. Co.*, 159 Conn. 252, 256, 268 A.2d 663 (1970).

LEGAL ANALYSIS

The facts of the case are clear and stated above in significant detail. They need not be repeated verbatim for this analysis. The plaintiff owns a Watertown, Connecticut house damaged by a fire. This home was insured under a homeowners' policy that provided Coverage A (dwelling) limits of $160,000, plus 40% extended replacement cost (for a total of $224,672); Coverage C (personal property) limits of up to $120,000 with replacement cost; and Coverage D, ALE of up to 12 months at actual cost. The premises was a two-bedroom, two-bathroom ranch with 1,698 square feet of living area, and a partially finished basement. Liberty sent an adjuster, who inspected the damage and prepared an estimate of the cost to repair the structure to its pre-loss condition. This was determined to be $195,103.90. Liberty retained a professional engineer to inspect the damage and he determined that the house did not have to be torn down to repair the damage After subtracting the policy deductible and the recoverable depreciation, the plaintiff was the paid actual cash value ("ACV") of $167,768.72. The RCV of the plaintiff's personal property was determined to be $68,884.60. After subtracting the recoverable depreciation of $6,304.93, the plaintiff was paid the ACV of $62,579.67. The plaintiff was paid $33,719.70 for 10 months of ALE. The policy allows the actual costs incurred for "the shortest time required to repair or replace the damage" up to a maximum of 12 months. Liberty determined that the time to repair the dwelling to its pre-loss condition was four months. However, Liberty agreed to pay 10 months of ALE.

The plaintiff did not repair the house to its pre-loss condition but chose to build an entirely different structure. The plaintiff claims that he incurred unreimbursed expenses of $192,825, which exceeded the policy limit of 12 months of ALE. The plaintiff testified at his October 28, 2019 deposition that he could not move back into the house until July or August of 2019 (approximately two and one half years after the fire) because it was still under construction.

The new house is more than 3,000 square feet of living space, nearly double the existing structure The plaintiff has not presented any line-item estimate of the cost to repair the original structure to its pre-loss condition, but submitted a one-page proposal, not itemized, from Salerno Remodeling, LLC, in the amount of $458,982. This un-itemized proposal exceeds the policy's Extended Coverage A limits by more than $200,000. In addition to a new, considerably larger house, there were numerous interior upgrades, including the kitchen, bathrooms and basement.

Count I - Breach of Contract

"The construction of an insurance policy presents a question of law . . . . When construing an insurance policy, [the Court] look[s] at the [policy] as a whole, consider[ing] all relevant portions together and, if possible, give[s] operative effect to every provision in order to reach a reasonable overall result. . . . Insurance policies are interpreted based on the same rules that govern the interpretation of contracts. . . . In accordance with those rules, [t]he determinative question is the intent of the parties . . . . If the terms of the policy are clear and unambiguous, then the language, from which the intention of the parties is to be deduced, must be accorded its natural and ordinary meaning. . . . In determining whether the terms of an insurance policy are clear and unambiguous, [a] court will not torture words to import ambiguity where the ordinary meaning leaves no room for ambiguity . . . . Similarly, any ambiguity in a contract must emanate from the language used in the contract rather than from one party's subjective perception of the terms. . . . As with contracts

generally, a provision in an insurance policy is ambiguous when it is reasonably susceptible to more than one reading. . . . Under those circumstances, any ambiguity in the terms of an insurance policy must be construed in favor of the insured . . . ." (Citations omitted; internal quotation marks omitted.) *Kling* v. *Hartford Cas. Ins. Co.*, 211 Conn. App. 708, 712-13 (2022), 273 A.3d 717, 712-13, cert. denied, 343 Conn. 926, 275 A.3d 617 (2022).

The coverage is clear and unambiguous. Several provisions are critical to the analysis of the motion for summary judgment. Exhibit A, p. A-2 states:

"Section I Coverages	LIMITS	PREMIUM
A. *Dwelling with Expanded Replacement Cost*	*$160,000*	
B. Other Structures on Insured Location	$ 16,000	
C. Personal Property with Replacement Cost	$120,000	
D. Loss of Use of Insured Location	Actual Loss Sustained" (Emphasis added.)	

The policy in Exhibit A, p. A-22 states:

"**HOMEPROTECTOR PLUS ENDORSEMENT**

. . . .

B. REPLACEMENT COST PROVISION - DWELLING AND PERSONAL PROPERTY

. . . .

3. Loss Settlement. Covered property losses are settled as follows:

a. The applicable limit of liability for Buildings under Coverage A or B is the replacement cost, after application of deductible and without deduction for depreciation, subject to the following:

(1) We will pay the cost of repair or replacement, but not exceeding:

(a) *The replacement cost* of that part of the building damaged *using like kind and quality construction on the same premises and intended for the same occupancy and use*;

(b) *With respect to Coverage A, an amount not exceeding 40% greater than the limit of liability stated in the declaration*, as modified by Inflation Protection Provision of the policy;" (Emphasis added.)

The policy in Exhibit A, p. A-22 states:

"3. Loss Settlement. Covered property losses are settled as follows: . . . .

a. The applicable limit of liability for Buildings under Coverage A or B is the replacement cost, after application of deductible and without deduction for depreciation, subject to the following:

(1) We will pay the cost of repair or replacement, but not exceeding:

(a) The replacement cost of that part of the building damaged using like kind and quality construction on the same premises and intended for the same occupancy and use;

(b) With respect to Coverage A, an amount not exceeding 40% greater than the limit of liability stated in the declaration, as modified by Inflation Protection Provision of the policy;

. . . .

(d) The amount actually and necessarily spent to repair or replace the damage.

(2) 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 according to the provisions of a. (1) above."

The policy in Exhibit A, p. A-15 states:

6. **Appraisal.** *If you and we fail to agree on the amount of loss, either may demand an appraisal of the loss.* In this event, *each party will choose a competent appraiser* within 20 days after receiving a written request from the other. *The two appraisers will choose an umpire.* If they cannot agree upon an umpire within 15 days, you or we may request that the choice be made by a judge of a court of record in the state where the "residence premises" is located. The appraisers

> will separately set the amount of loss. If the appraisers submit a written report of an agreement to us, the amount agreed upon will be 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 set the amount of loss.*
>
> Each party will:
>
> a. pay its own appraiser; and
>
> b. bear the other expenses of the appraisal and umpire equally." (Emphasis added.)

As recited above in *Kling* v. *Hartford Cas. Ins. Co.*, 211 Conn. App. 708, 712-13, (2022), 273 A.3d 717, 712-13, cert. denied, 343 Conn. 926, 275 A.3d 617 (2022), "*The construction of an insurance policy presents a question of law* . . . . (When construing an insurance policy, [the Court] look[s] at the [policy] as a whole, consider[ing] all relevant portions together and, if possible, give[s] operative effect to every provision in order to reach a reasonable overall result. . . . Insurance policies are interpreted based on the same rules that govern the interpretation of contracts. . . . In accordance with those rules, [t]he determinative question is the intent of the parties . . . . *If the terms of the policy are clear and unambiguous*, then the language, from which the intention of the parties is to be deduced, must be accorded its natural and ordinary meaning. . . . In determining whether the terms of an insurance policy are clear and unambiguous, *[a] court will not torture words to import ambiguity where the ordinary meaning leaves no room for ambiguity* . . . . Similarly, any ambiguity in a contract must emanate from the language used in the contract rather than from one party's subjective perception of the terms. . . . As with contracts generally, a provision in an insurance policy is ambiguous when it is reasonably susceptible to more than one reading. . . . Under those circumstances, any ambiguity in the terms of an insurance policy must be construed in favor of the insured . . . ." (Citations omitted; emphasis added; internal quotation marks omitted.) There is no ambiguity in the above-referenced applicable policy provisions.

Liberty complied with the requirements of the policy and tendered payment to the plaintiff of the amount he was due. Liberty has met its burden to demonstrate that there is no genuine issue of material fact, and it is entitled to judgment as a matter of law.

"Once the moving party has met its burden, however, the opposing party must present evidence that demonstrates the existence of some disputed factual issue. . . . It is not enough, however, for the opposing party merely to assert the existence of such a disputed issue. Mere assertions of fact . . . are insufficient to establish the existence of a material fact and, therefore, cannot refute evidence properly presented to the court . . . ." (Internal quotation marks omitted.) *Ferri* v. *Powell-Ferri*, 317 Conn. 223, 228, 116 A.3d 297 (2015). The burden of proof has shifted to the plaintiff to demonstrate that there exists a genuine issue of material fact and that Liberty is not entitled to summary judgment in its favor.

A review of the plaintiff's position is needed to determine if the plaintiff has demonstrated the "existence of some disputed fact." The plaintiff provided an excerpt from the deposition of Richard Beaudette. Mr Beaudette is Liberty's representative who indicated that when obtaining an estimate Liberty will "prepare and estimate and provide it to the customer and let them know it's a repair estimate." "We prepare an estimate for what we see the value of the damage at. We present it to the customer so they can review it with their contractor." And when asked "Okay, is there anything in the contract of insurance between Mr. Kutrolli and Liberty that he had to accept what you just called was the undisputed estimate that you provided him?," Mr. Beaudette responded, "No." This excerpt provides no support for the breach of contract claim. It outlined what colloquy took place at the deposition, but adds nothing to support the plaintiff's claim for breach of contract.

Next, the plaintiff provided his March 24, 2024 affidavit which states that "the Plaintiff denies the defendant's averment, stating in his [March 24, 2024 affidavit] Affidavit in support

hereof at Exhibit A: "I was, and still am, the home owner of 356 Sunnyside Avenue, Watertown, Connecticut 06779 when a massive fire engulfed it on February 5, 2017. I witnessed the fire and the aftermath. The home thereon was severely damaged and what was left in a word 'stunk.' Who knew what was in the ashes? It needed to be rebuilt after what was left from the fire was torn down and the debris therefrom was safely removed before I could safely move my wife, daughter, son and myself into a new edifice and regain our previous 'quiet enjoyment' of the premises, Indeed, the attached letter hereto from my son's doctor 'prescribing' such a course of action (Exhibit A). Also attached hereto is an estimate at the time prepared from a local builder as to what it would cost to rebuild (Exhibit B) of $453,962.00. This does not include the $78,950.00 (Exhibit C) to demolish the ruined building and have the debris therefrom safely removed, which I did myself because Liberty Mutual would not agree thereto and I did not have the money therefore. Liberty Mutual refused, and still refuses, to do such: offering only to rehab the burnt cut shell of the house that stood after the fire for a total of some $195,000.00."

While the above averment of the plaintiff may be an accurate statement of the plaintiff's reasoning was for the construction of a completely new, much larger home with significant upgrades, it provides no support for his assertion that Liberty breached the policy provisions and that he is entitled to recover the $453,962.00 that he claims is due him under the policy. The affidavit is just a self-serving statement. Without more, it does not rebut Liberty's demonstration that there is no genuine issue of material fact.

The plaintiff's exhibit A to his affidavit, the March 18, 2018 letter from Dr. Sedat S. Shaban, states in pertinent part "Klarent Kutrolli has been a patient of mine since August 31, 2017 and carries a diagnosis of environmental allergies which causes him to have trouble breathing. His allergies have been occurring more frequently since the family began living at their current

address. It is my opinion that the family should be allowed to move to a residence that is more conducive to his allergies as soon as possible." How can Dr. Shaban know that the breathing problem is worse in the current residence? He started treating Klarent August 31, 2017, well after the fire that occurred on February 5, 2017. This means Dr. Shaban never examined Klarent while he was living in the house before the fire.

While the above statements contained in Dr. Shaban's letter may be an accurate health assessment of the plaintiff's son's respiratory condition, which medical condition preexisted the fire, that motivated the plaintiff through his admirable concern for the health of his son, in his decision that the construction of a completely new, much larger home with significant upgrades is the best for his son's respiratory illness, it, just as his affidavit, provides no support for his assertion that Liberty breached the policy provisions. The letter from Dr. Shaban may be completely accurate, and a legitimate reason for the plaintiff to construct the new, much larger home, but it adds nothing in the plaintiff's attempt to rebut Liberty's demonstration that there is no genuine issue of material fact.

Finally, the plaintiff goes on in his objection to the motion for summary judgment to state, "Thus, we are left with nothing but conflicting testimony, which presents a genuine issue as to a material fact and resolution of this conflict is within the exclusive province of the trier." He then cites to *Spence* v. *Good Earth Restaurant Corporation*, 164 Conn. 194, 199, 319 A.2d 403 (1972), which stated:

> In the present case, on the pleadings and affidavits, the parties were at issue as to whether in fact the named plaintiff purchased chow mein at the defendant's restaurant, whether the plaintiffs ate the chow mein, whether it contained glass, and whether the defendant was negligent. The plaintiffs alleged the truth of these facts and the defendant denied it. In the nature of the case no independent or documentary proof was available to make quite clear what the truth was and exclude any real doubt as to the actual factual situation. The situation was peculiarly one which required an evidentiary hearing for a trial of the issues of fact in which the trier

> would be called on to determine the credibility of witnesses and the weight to be given to their testimony. 'It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given to their testimony can be appraised.' *Poller* v. *Columbia Broadcasting System, Inc.*, . . . 368 U.S. 464, 473, 82 S. Ct. 486, 7 L. Ed. 2d 458; *Fortner Enterprises, Inc.* v. *United States Steel Corporation*, 394 U.S. 495, 500, 89 S. Ct. 1252, 22 L. Ed. 2d 495. United Oil Co. v. *Urban Redevelopment Commission*, supra, 376."

While the quotation is an accurate assessment of our Supreme Court's dealing with a scenario of where the "The plaintiffs alleged the truth of these facts and the defendant denied it," it is only persuasive if there actually exists allegations by the plaintiff that conflicts with the defendant's. Id. The plaintiff, based on his objection alone, provided no evidence as required by Practice Book § 17-45, which states that ". . . (b) . . . *any adverse party shall file and serve a response to the motion for summary judgment . . . including opposing affidavits and other available documentary evidence*" to demonstrate otherwise. (Emphasis added.)

In addition, "Mere assertions of fact . . . are insufficient to establish the existence of an issue of material fact and, therefore, cannot refute evidence properly presented to the court in support of a motion for summary judgment." (Citations omitted; internal brackets omitted.) *Miller* v. *United Technologies Corp.*, 233 Conn. 732, 745, 660 A.2d 810 (1995). "[T]he party opposing such a motion must provide an evidentiary foundation to demonstrate the existence of a genuine issue of material fact." (Citations omitted.) *Appleton* v. *Board of Education*, 254 Conn. 205, 209, 757 A.2d 1059 (2000). The plaintiff provided nothing to dispute the clear, unambiguous provisions of the policy.

Liberty is accurate in its position that it has paid the plaintiff everything he is entitled to under the above-referenced provisions of the policy. Liberty has paid the RCV to repair the dwelling to its pre-loss condition, and it has paid 10 months of ALE. While the plaintiff has the power to choose to build an entirely different, much larger house than that was damaged on

February 5, 2017, that decision does not mean he is entitled to the full cost of the new structure under the clear and unambiguous applicable homeowners provision in his policy. The linchpin of the resolution of this count and the two additional counts does not turn on his fatherly desire to build a completely new, more respiratory and environmentally friendly house for his family, but, whether he had the unilateral authority to decide to build a much larger new house and require Liberty to pay the entire cost when he has contracted with Liberty for a homeowners policy with unambiguous coverage amounts and his payment of the premium required to secure those specific coverage limits. The court finds that he has the right to build what he chooses to construct, but clearly has no legal authority under the agreed upon contractual coverage limitation provisions to demand that Liberty pay for his personal desire for a new and large home. The plaintiff has presented nothing to rebut Liberty's demonstration that there is no genuine issue of material fact as to the breach of contract count I, and Liberty is entitled to judgment as a matter of law.

The court cannot also fathom how the plaintiff can claim that he is entitled to reimbursement for more than two times the maximum coverage of the policy which is limited to $160,000 plus 40% extended replacement cost or a total of $224,672. Under the policy, the plaintiff is entitled to "[t]he replacement cost of that part of the building damaged using *like kind and quality construction on the same premises and intended for the same occupancy and use.*" (Emphasis added.) The plaintiff has been fully paid for like kind and quality reconstruction of his existing home. The plaintiff paid the premium due for the coverage he obtained and he is not entitled to any additional funds, despite his protestations.

Count II - Bad Faith

Connecticut courts have held that "bad faith is not actionable apart from a wrongful denial of a benefit under the policy. . . ." *Capstone Bldg. Corp.* v. *Am. Motorists Ins. Co.*, 308 Conn. 760,

798, 67 A.3d 961 (2013). Since this court has determined that there is no genuine issue of material fact that Liberty was not liable to the plaintiff the demanded replacement cost coverage in excess of the policy limits, there is also no genuine issue of material fact that Liberty could not have denied replacement cost coverage benefits in bad faith. Our Supreme Court held that "the covenant of good faith and fair dealing only requir[es] that neither party [to a contract] do anything that will injure the right of the other to receive the benefits of the agreement, it is not implicated by conduct that does not impair contractual rights. . . . [T]he covenant of good faith and fair dealing presupposes the *terms and purpose of the contract* are agreed upon by the parties and that what is in dispute *is a party's discretionary application or interpretation of a contract term.*" (Citations omitted; emphasis in original; internal quotation marks omitted). Id. at 795. "A bad faith cause of action not tied to duties under the insurance policy must therefore fail as a matter of law. . . . [Indeed,] cases involving the duty of good faith and fair dealing reveal[] that *violations of express duties are necessary* to maintain a bad faith cause of action." Id. at 797. (Emphasis added.)

The policy language recited above is clear. The plaintiff did not qualify for replacement cost coverage in excess of the policy limits of $160,000 plus the 40% extended replacement cost for a total of $224,672. The demand that Liberty pay $458,982 to the plaintiff is without merit. Liberty did not breach the policy, nor did it act in bad faith on count II, as no duty was violated by Liberty under the policy. Based on the foregoing, Liberty has demonstrated that there is no genuine issue of material fact that the defendant did not violate the covenants of good faith and fair dealings, and the burden shifted to the plaintiff. The plaintiff, as noted above in the analysis, as to count I for breach of contract, provided no evidence to allow this court to conclude that there is a genuine issue of material fact that Liberty did fully comply with the policy provisions.

Count III – CUTPA Violation

The third count of the revised complaint incorporates the prior allegations of breach of contract, and bad faith, and alleges that the Liberty violated CUTPA under General Statutes § 42-110a, et seq., and the CUIPA General Statutes § 38a-815, et seq. This claim must fail for the same reason that the common law bad faith claim fails - the plaintiff has been fully compensated for his loss and there has been no wrongful denial of policy benefits to which the plaintiff is entitled. *DiNardo* v. *Pacific Indemnity Co.*, 2019 WL 2487851, *12, stated that "Because the plaintiff's CUTPA/CUIPA claims . . . rest upon the premise that the defendants' coverage determinations were unreasonable, and because the court has concluded there is no coverage under their policies, an essential element of the CUTPA/CUIPA claims against them is lacking. The court, therefore, grants summary judgment to those three defendants on the CUTPA/CUIPA counts."

Connecticut courts have adopted the criteria set out by the Federal Trade Commission for determining "when a practice is unfair: (1) [W]hether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise - in other words, it is within at least the penumbra of some common law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers. . . . All three criteria do not need to be satisfied to support a finding of unfairness. A practice may be unfair because of the degree to which it meets one of the criteria or because to a lesser extent it meets all three. . . . Thus a violation of CUTPA may be established by showing either an actual deceptive practice . . . or a practice amounting to a violation of public policy. . . . In order to enforce this prohibition, CUTPA provides a private cause of action for [a]ny person who suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment of a

[p]rohibited method, act or practice. (Internal quotation marks omitted.) *Ulbrich* v. *Groth*, 310 Conn. 375 409-410, 78 A.3d 76 (2013); see also State v. Acordia, Inc., 310 Conn. 1, 37, 73 A.3d 711 (2013).

Here, there is no evidence presented by the plaintiff that Liberty engaged in conduct that was unlawful, offensive to public policy, immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers. According to a review of the policy provision, Liberty has fulfilled all its contractual obligations owed to the plaintiff. As this court has noted above in its analysis as to count I for breach of contract, the plaintiff has not provided any evidence to allow this court to conclude that there is a genuine issue of material fact that the defendant violated CUTPA or CUIPA.

As our Supreme Court has opined, "Mere assertions of fact . . . are insufficient to establish the existence of an issue of material fact and, therefore, cannot refute evidence properly presented to the court in support of a motion for summary judgment." (Internal brackets omitted, internal citations omitted.) *Miller* v. *United Technologies Corp.*, 233 Conn. 732, 745, 660 A.2d 810 (1995). "[T]he party opposing such a motion must provide an evidentiary foundation to demonstrate the existence of a genuine issue of material fact." (Internal citations omitted.) *Appleton* v. *Board of Education*, 254 Conn. 205, 209, 757 A.2d 1059 (2000).

The plaintiff asserts, without the presentation of any admissible evidence, that "we are left with nothing but conflicting testimony, which presents a genuine issue as to a material fact and resolution of this conflict is within the exclusive province of the trier." While novel, the plaintiff's position that there are genuine issues of material fact, is not substantiated by anything presented in the plaintiff's objection to the motion for summary judgment. Liberty's is entitled to judgment on count III.

Failure to Comply with Policy Provisions

While not mentioned by either party, after a review of the policy, this court identified another policy provision that may have affected the outcome of this matter, if the analysis above did not address all of the issues presented in the motion for summary judgment. The court is identifying the provision because it became aware of it when reviewing policy, but will not need to determine its effect on the merits so as to use in it rationale for the ruling on each of the three counts noted. As the analysis of the applicable case law arrives at a resolution without such evaluation, the court will only include it for the sake of completeness. The policy in exhibit A, p. A-20 states:

> "6. **Suit Against Us.** *No action can be brought* against us *unless there has been compliance with the policy provisions.*" (Emphasis added.)

Even though it may exist, there has been no evidence presented that the plaintiff has complied with this provision. The policy clearly and unambiguously outlines the procedure if Liberty's estimate for the repair cost is in an amount less than what the policy holder seeks. The policy states"

> "6. Appraisal. *If* you and *we fail to agree on the amount of loss, either may demand an appraisal* of the loss. In this event, *each party will choose a competent appraiser* within 20 days after receiving a written request from the other. *The two appraisers will choose an umpire*. If they cannot agree upon an umpire within 15 days, you or we may request that the choice be made by a judge of a court of record in the state where the "residence premises" is located. *The appraisers will separately set the amount of loss. If the appraisers submit a written report of an agreement* to us, *the amount agreed* upon *will be 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 set the amount of loss.* (Emphasis added.)

The policy has an appraisal provision that outlines the procedure that must be invoked by the policy holder before the policy holder can initiate a lawsuit if he disagrees over the insurer's value of the estimated loss. Failure of the policy holder to comply with the appraisal provision in the event of

a disagreement with the repair estimate provided by Liberty, would then activate the application of the "Suits Against Us" provision which prevents the policy holder from initiating a lawsuit without first attempting to resolve the loss dispute by the use of appraisers and an umpire. It is critical to note that the thrust of the plaintiff's assertions is that Liberty allegedly would not pay the plaintiff's demanded amount based on the plaintiff's deposition, despite repeated demands and then his initiation of this case. Unfortunately, the plaintiff, based on what has been presented to this court, failed to avail himself of the required contractual provision of the policy drafted to allow an amicable resolution of a disagreement over the amount of the policyholder's loss before a lawsuit is initiated. This could subject the plaintiff to another dispositive motion by Liberty.

In any case, even if the arbitration and suit provisions are disregarded, there is no ambiguity in the provisions of the policy that limit the amount of reimbursement due the plaintiff after a loss. The plaintiff was paid everything he was entitled to under the policy, which ends the inquiry. As the plaintiff fails in the count 1, the two remaining counts for bad faith and for CUTPA/CUIPA violations must also fail.

CONCLUSION

Based on the foregoing, the defendant Liberty Mutual Insurance Corporation a/k/a Liberty Mutual Insurance Group, Inc.'s June 2, 2022, motion for summary judgment (#134.00) is hereby GRANTED as the plaintiff Kastriot Kutrolli's complaint; and the plaintiff's March 25, 2024 memorandum of law in opposition to the defendant's motion for summary judgment is hereby OVERRULED.

A JDNO was sent on April 25, 2024 notifying all counsel of record of the availability of this Memorandum of Decision in the electronic file and sent by electronic Means to RJD. By the Clerk,
Matthew P. Stevens, TAC
4/25/2024

BY THE COURT,

D'ANDREA, Robert A., Judge
Juris #439597