VERMONT SUPERIOR COURT
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CIVIL DIVISION
Case No. 20-CV-00692

Stacey Freda v. Union Mutual Fire Insurance Company d/b/a Union Mutual

ENTRY REGARDING MOTION

Title: Motion for Summary Judgment (Motion: 9)
Filer: Gary Michael Burt
Filed Date: August 15, 2022

The motion is GRANTED.

Freda v. Union Mut. Fire Ins. Co., No. 20-CV-692

Plaintiff Stacey Freda's homeowner's insurer, Defendant Union Mutual Fire Insurance Company (UM), denied her claim for damage to her roof from a hailstorm when the claim originally was presented to it in 2015 and again in 2020, after it had agreed to reopen the claim and investigate further. The principal basis for the denials was a lack of proof, according to the opinions of its experts, that hail damaged the shingles. Ms. Freda then filed this action disputing the coverage determination (Count 2) and claiming fraud (Count 4) and bad faith (Count 5).[1] UM has filed a motion for partial summary judgment addressing fraud and bad faith (Counts 4 and 5) only; coverage (Count 2) is not currently at issue.[2]

In opposition, Ms. Freda first argues two preliminary issues: (1) UM essentially has waived any ability to challenge her bad faith claim by not expressly pleading Vermont's legal standard for insurance

[1] The complaint is no model of clarity. Many legal concepts are repeated under multiple counts without clearly distinguishing the counts as individual legal claims. At this point, Ms. Freda has withdrawn Count 1 (negligence) and conceded that Count 3 (willful ignorance) is not a legal claim but a mere characterization of UM's conduct that applies to all or most other counts. Though Ms. Freda, to a large extent, includes the language of bad faith under Count 2 (breach of contract), her actual bad faith claim is fully asserted in Count 5. The court thus understands Count 2 to raise the contract issue (coverage) as opposed to the extra-contractual issue (bad faith). It is unclear whether Count 4 (fraud) really is distinguishable in substance from Count 5 (bad faith). However, because it is pleaded separately, and the parties have addressed it separately, the court will too.

[2] The scope of the coverage claim (shingles v. shingles and metal parts of the roof) is not clear in the complaint. Moreover, because coverage is not currently at issue, the court offers no opinion as to the interpretation of the policy and how it may apply to the facts of this case.

bad faith in its answer as an affirmative defense; and (2) summary judgment is premature because Ms. Freda needs more time for discovery. Otherwise, she argues that the facts amply demonstrate UM's bad faith and fraud or at least that they should be treated as disputed for summary judgment purposes.

Whether UM had to plead Vermont law as an affirmative defense

Ms. Freda's argument that UM cannot rely on the "fairly debatable" standard for bad faith claims in Vermont because it failed to plead that standard as an affirmative defense is poorly conceived. Rule 8(c) requires parties to expressly set forth affirmative defenses in their responsive pleadings. The essence of the requirement is to ensure out of fairness that the defendant will reveal upfront "matters which [seem] more or less to admit the general complaint and yet to suggest some other reasons why there [is] no right." 5 Wright & Miller, Federal Practice & Procedure: Civil 4th § 1270 (quoting Charles E. Clark, Proceedings, Washington and New York City Institutes on the Federal Rules at 49 (1939)). UM's summary judgment argument that Ms. Freda cannot come forward with evidence sufficient to demonstrate a triable issue as to her bad faith claim, for which she bears the burden of persuasion, has nothing of the character of an affirmative defense or claim of avoidance for Rule 8(c) purposes. UM nowhere concedes, even in the alternative, the asserted bad faith only to defend on some collateral basis notwithstanding the concession. This argument of Ms. Freda's has no merit.

Whether enough time for discovery has elapsed

Ms. Freda also attempts to avoid summary judgment by arguing that UM's motion is premature. She needs, she asserts, more time to depose one or more of the underlying experts hired by UM preliminary to the two denials. Rule 56(d) expressly requires a party making such an argument to explain in an affidavit why "it cannot present facts essential to justify its opposition." Ms. Freda's request to delay is not supported by an affidavit or any explanation as to what facts she cannot present to justify her opposition, much less why those facts would be material. This case has been pending since December 2020. There is no palpable demonstration of the need for more discovery as to the bad faith and fraud claims. This request is denied.

Summary judgment standard

Summary judgment is appropriate if the evidence in the record, referred to in the statements required by Rule 56(c)(1), shows that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. V.R.C.P. 56(a); *Gallipo v. City of Rutland*, 163 Vt. 83, 86 (1994). The court derives the undisputed facts from the parties' statements of fact and the supporting documents. *Boulton v. CLD Consulting Engineers, Inc.*, 2003 VT 72, ¶ 29, 175 Vt. 413. A party

opposing summary judgment may not simply rely on allegations in the pleadings to establish a genuine issue of material fact. Instead, it must come forward with deposition excerpts, affidavits, or other evidence to establish such a dispute. *Murray v. White*, 155 Vt. 621, 628 (1991). Speculation is insufficient. *Palmer v. Furlan*, 2019 VT 42, ¶ 10, 210 Vt. 375.

Bad faith

Bad faith, in this context, is extra-contractual; it does not necessarily rise and fall with the correctness of the coverage determination:

> To establish bad faith, the plaintiff must show that: "(1) the insurance company had no reasonable basis to deny benefits of the policy, and (2) the company knew or recklessly disregarded the fact that no reasonable basis existed for denying the claim." Where a claim is "fairly debatable," the insurer is not guilty of bad faith even if it is ultimately determined to have been mistaken.

Murphy v. Patriot Ins. Co., 2014 VT 96, ¶ 17, 197 Vt. 438 (quoting *Bushey v. Allstate Ins. Co.,* 164 Vt. 399, 402 (1995)); see 14A Steven Plitt, et al., Couch on Ins. § 204:28 (fairly debatable means "open to dispute or question"). "[I]f a realistic question of liability exists, an insurer may withhold payment." *Bushey*, 164 Vt. at 403; accord *Cohan v. Provident Life & Acc. Ins. Co*., 140 F.Supp.3d 1063, 1073–74 (D. Nev. 2015) ("At issue is not whether the insured was covered under the policy, but only whether a reasonable and legitimate dispute exists as to that coverage."), quoted in Litig. & Prev. Ins. Bad Faith § 11:17 (3rd ed.). Perfection is not required; "[i]t is enough that the legal or factual basis for denial was 'neither strained nor fanciful, regardless of whether it is correct.'" Litig. & Prev. Ins. Bad Faith § 11:17 (3rd ed.) (citation omitted). If the insurer's determination is reasonable as a matter of law, even if possibly wrong, summary judgment is appropriate. See *Bushey*, 164 Vt. at 403; see also *Town of Ira v. VLCT Property and Casualty Intermunicipal Fund, Inc*., 2014 VT 115, ¶ 22, 198 Vt. 12, 24 (fact that legal issue had not yet been decided in Vermont weighs in favor of reasonableness of insurer's action). As to the reasonableness of the basis for denial, the inquiry is objective. Bad Faith Actions Liability & Damages § 5:2 (2d ed.).

The following material facts (unless otherwise noted) are undisputed for purposes of UM's motion. Ms. Freda built a new home in Rutland in 2006 with an asphalt shingled roof. In 2014, a substantial hailstorm struck the Rutland area, damaging residences, automobiles, and other property. At some point, a roofer or other contractor advised Ms. Freda that her roof may have been damaged by

the hail. The UM policy covered losses caused by hail.[3] Ms. Freda reported the matter to UM, which opened a claim.

UM promptly hired an independent third-party, Globe Roof Inspection Program LLC (GRIP), to examine the roof. GRIP sent an experienced inspector to evaluate the roof. His CV reflects that he is HAAG-certified (HAAG Global, Inc., describes itself as a forensic engineering and consulting company that provides roof inspection certifications and courses). The resulting GRIP report reflects that an onsite examination took place on December 17, 2015, and the reason for the inspection was hail. The inspector noted the general condition of the roof as "poor" and estimated its age at "10–20 years" (it was actually 9 at the time). The principal conclusion in the report is this: "This roof is 1 layer of 3 tab shingles found in poor condition. We see no evidence of any hail related damage to the roof surface. We did note that front valley metal is dented likely due to hail fall. We do not see this as functional damage that would affect the roof systems performance. We saw no damage to fascia metal or vinyl siding consistent with hail." The report includes numerous photographs, many of which include express findings of no damage.

Based on the GRIP report, UM denied the claim. The 2015 denial letter, in pertinent part, reads as follows:

> The company's investigation into the cause of the loss is now complete. The expert review of your roof determined that the damage was due to wear and tear and not from the hail storm.
>
> . . .
>
> The reason your claim is being decline for coverage is because the policy specifically excludes coverage for wear and tear.[4]

The letter concludes with this: "As mentioned this letter is being sent based on the information currently available. If you do not agree with our assessment or have additional information regarding your loss please contact me at the number in this letter." The GRIP report was not attached to the denial letter,

[3] The policy's terms and extent of coverage in the circumstances of this case have not been argued. Coverage for substantial damage to the shingles is assumed for purposes of this decision as a factual matter.

[4] UM initially submitted into the record the wrong 2015 denial letter, one addressed to an unrelated insured. It corrected the record after it became aware of the matter.

which does not attempt to detail its specific findings. Following the denial, Ms. Freda did not object to the denial or provide more information in support of her claim, at least for several years.

In 2020, for reasons unrelated to this case, Ms. Freda's house was formally appraised to determine its fair market value. The section of the appraisal report providing a description of the condition of the property includes this: "[R]oof is at end of life expectancy. Roof was not replaced in 2015 after hail storm which has left entire rear section of shingles rolling and curling. This deficiency should be replaced in the very near future to protect the integrity of the dwelling." The report indicates the identity of the appraiser but is silent as to whether she might have had any expertise as to the cause of roof's condition.

Prompted by the report, Ms. Freda (or her insurance agent) asked UM to reopen the hail damage claim, and UM agreed. UM hired an independent adjustment agency, the Geo. C. Grant Adjustment Agency, to inspect the roof. The Grant report, in pertinent part, reads as follows:

> Union Mutual had GRIP inspect and they did not find hail damage except for cosmetic damage to valley metal. Coverage was denied.
>
> I inspected on 3/18/2020. Insured indicated that the shingles are original to the house which was built in 2006. Insured indicated that the hailstorm in question was in fact one of the 2014 hailstorms. . . .
>
> The roof is in poor condition for shingles that are only 14 years old. The shingles on the south facing slope are curling and lifting. The north slope is not as advanced as the south. I did find clear hail damage to the valley metal, metal rake edge and vent pipe flashing.
>
> The two hail events occurred almost 6 years ago. I cannot comment as to whether or not the impact of the hail (that we know did hit the house) contributed to the current condition or shortened the life expectancy. The lifting and curling does not appear [to] be a result of hail damage. I would note that on the north slope, the visible damage consists of individual round indentations through the surface of the asphalt shingle. Similar damage is found on the entire north slope.

Following the Grant report, UM sought an opinion from Beck Engineering, P.C. The Beck report, in pertinent part, states as follows:

In 2014 two hail storms swept over the Rutland Vermont area causing significant widespread damage. At that time the Fredas did not file a claim however some of the other residents in the neighborhood did file hail damage claims.

The following year in late fall or early winter, the Fredas filed a claim alleging that the 2014 hail storms had damaged the asphalt shingles on their roof. In response to that claim, Union Mutual retained Global Roof Inspection Program (GRIP) to inspect the roof for hail damage. The December 17, 2015 Grip report indicated that the three tab asphalt shingle roofing was "in poor condition" and GRIP found "no evidence of hail related damage to the roof surface". The GRIP report did confirm hail related dents in the metal valley flashing but indicated that these would not adversely affect the function of the asphalt shingle roofing system. Photographs included in the GRIP report show the condition of the

asphalt shingle roof in December of 2015. After receiving the GRIP report, Union Mutual declined the claim.

Fast forward to the spring of 2020, the Fredas put their house up for sale. During an inspection of the residence related to this sale, the inspector informed Mr. and Mrs. Freda that the roof had previously been damaged by hail. In response to that information the Fredas filed a second claim alleging that the 2014 hail storm did in fact damage the asphalt shingle roofing.

The Grant Adjustment Agency was assigned this [loss] after the second claim was filed and Grant Adjustment Agency's Curt McCuin made a site visit on 3/18/20. Examining the asphalt singles during this site visit Mr. McCuin found the south plane of the hip roof was in the worst shape exhibiting many areas with no aggregate and many tab corners curling up. The areas of shingles with no aggregate included the bottom of the tabs and in area were [sic] the surface shingles have molded to the lapped portions of the lower singles forming a distinct line across the tabs. Some isolated small circle like areas with no aggregate were also observed, many of these located in the vicinity of the lap mentioned above. Mr. McCuin concluded that the asphalt shingles (especially on the south plane of the hip roof) had exceeded [their] useful life and needed to be replaced, however he could not conclude, one way or the other if the current condition of the shingles had been influenced by the 2014 hail storm or if the condition was a result of the normal aging process.

Beck Engineering was then contacted and asked to provide an opinion as to the likelihood that the 2014 hail storms in Rutland VT contributed to the deteriorated condition of Mr. and Mrs. Freda's asphalt single roofing. We reached out to the Asphalt Roofing Manufactures Association (ARMA), and to Owning Corning and GAF, two asphalt shingle manufactures. We found that hail damage to asphalt shingles can be difficult to see but can contribute to premature aging of the product.

When hail hits the roof, it can create a dimple which might not be readily observable. Some aggregate is often lost at the site of a hail impact leaving a small blackish mark (the underlying base mat is dark). Severe hail damage might crack or tare the base mat. When the damage is not as severe, the base mat might be bruised. Pushing gently at these impact locations, the asphalt base mat might feel like a bruised apple.

According to Mr. McCuin the Freda's residence is 14 years old being constructed in 2006. The least expensive asphalt shingles have an expected life of 15 years. Many environmental conditions and building details can [a]ffect the useful life of the roofing including hail and inadequate ventilation. These two factors are totally unrelated but both can contribute to shortening the useful life of the shingles.

Beck Engineering did not make a site visit to the Freda's residence in Rutland Vermont in preparation for this report. We did examine photographs of the roof taken in 2015, approximately 1 year after a reported hail storm pas[sed] over Rutland by GRIP and the photographs taken by Mr. McCuin in March of

2020. We can see that during the elapsed 4.5 years the condition of the asphalt shingles has significantly worsened. These five years could also be the last 5 years of a 15 year useful life where significant advances in the deterioration of the shingles would not be unexpected. However, there was wide spread hail damage reported in the Rutland area in 2014. Other structures in the area surrounding the Freda residence had restorative work performed after the 2014 hail storms.

We do not know the quality of the shingles used on the Freda roof and we did not examine the shingles first hand for this report or back in 2014 after the hail event or in 2015 after the first claim was made. At this point, six years after the hail event we would not be able to pinpoint specific hail impact points. The

roof has continued to weather during the 6 years subsequent to the hail event. However, if hail impacts went unnoticed and the base mat was damaged (the spongy areas), these damaged locations would degrade faster as the shingles continue to age.

> In conclusion, many residences in the vicinity of the Freda's residence did sustain hail damage during the 2014 hail events. Evidence of hail impacts were observed in 2015 in the metal valley flashing of the Freda residence. Currently the asphalt singles are 14 years old and at the end of their useful life. The
>
> south plane of the gable roof is more degraded than the north plane which is not unusual as the north side sees less sunlight. With that said, Beck Engineering cannot rule out that the hail events during 2014 accelerate the natural degradation process of these asphalt shingles.

Following the Grant and Beck reports, UM again denied Ms. Freda's claim. The 2020 denial letter, in pertinent part, reads as follows:

> The company declined coverage on December 23, 2015 as our expert inspection of the roof revealed hail damage to the soft metals on the roof but not to the shingles. The report also noted the roof to be in poor condition. On March 10, 2020 the agent called requesting that we reconsider our position as a recent inspection of your home by a real estate appraiser noted that the roof required replacement and that it was not replaced after the hail storm.
>
> We engaged an independent adjuster to conduct a second inspection. The adjuster was not able to confirm hail damage due to the condition of the roof. We then had an engineer review the reports and photos from the initial and subsequent inspections. The engineer did not conduct a physical inspection of the roof noting that the condition of the roof as depicted in the recent photos would make it impossible for him to confirm hail damage.
>
> Based on the above the company is not able to provide coverage for the cost to replace your roof.

After that, Ms. Freda complained to the Vermont Department of Financial Regulation, which asked UM to reconsider. When that proved fruitless, Ms. Freda filed this action.

Ms. Freda's bad faith claim largely is at war with the applicable procedural and substantive standards. She mainly asserts that UM did not conduct a fair and impartial investigation, quickly jumped

at the chance to deny the claim, and willfully ignored evidence that it might have uncovered if it had more thoroughly investigated the claim.

Again, the ultimate burden of persuasion and the legal standard is as follows: "To establish bad faith, the plaintiff must show that: '(1) the insurance company had no reasonable basis to deny benefits of the policy, and (2) the company knew or recklessly disregarded the fact that no reasonable basis existed for denying the claim.' Where a claim is 'fairly debatable,' the insurer is not guilty of bad faith even if it is ultimately determined to have been mistaken." *Murphy v. Patriot Ins. Co*., 2014 VT 96, ¶ 17, 197 Vt. 438. No doubt, the insurer has a duty to investigate the claim, and its knowledge as to the basis for the claim might be inferred "from its reckless indifference to the facts or to proofs the insured has submitted." Bad Faith Actions Liability & Damages § 5:8 (2d ed.). The corollary is that "the insurer need investigate no further once it has found a reasonable, debatable basis for denying the claim." *Id*.

In this case, UM hired an independent expert to evaluate the roof in 2015, and that expert did a physical examination of the roof and did not find hail damage affecting the integrity of the roofing system.[5] Ms. Freda's allegations of bad faith are a laundry list of further inquiries that UM could have made that might have uncovered information that may have raised some question as to the conclusion in the GRIP report. But Ms. Freda has not come forward with evidence showing that UM should have known that the GRIP report was incompetently conducted or that its conclusion was wrong, that UM was reckless in relying on it, or that some tangibly more compelling proof of loss was presented to UM (of which there was none) but was unreasonably disregarded. In other words, the record simply does not demonstrate a triable issue to the effect that the GRIP report was not a reasonable basis to deny the claim and that UM knew it.

The 2020 denial is no different. It followed two more independent expert inquiries, neither of which found a covered loss and, though ultimately both were inconclusive, neither clearly undermined the 2015 GRIP report. During the course of the underlying events, Ms. Freda never came forward with any expert report of her own casting doubt on the experts hired by UM or their conclusions, and Ms. Freda still has not in the course of summary judgment. The court notes in addition that a competing opinion from a different expert alone would not necessarily establish UM's bad faith.

The objective question is whether there was any reasonable basis to deny the claim. There was. The subjective question is whether UM knew that there was no reasonable basis to deny the claim. No such evidence has been developed. Ms. Freda's conjecture about what UM or may not have learned

[5] Ms. Freda's allegations that GRIP, or its agent who evaluated her roof, were "incompetent" is conclusory in the extreme. If her point is that GRIP or its agent did not know what they were doing or were purposely conducting the evaluation to arrive a preordained result favorable to the insurer, she has developed no evidence in support of such a determination, much less that UM, in hiring GRIP, knew it. The burden in these regards is on Ms. Freda, and baseless speculation does not satisfy it.

had it gone about its investigations differently is insufficient to demonstrate a triable issue as to either matter.

Ms. Freda's implicit argument seems to be that UM was required, despite hiring third-party experts to investigate and identifying at least a fairly debatable basis for denying the claim, to keep probing until all doubt was conclusively ruled out. That is not the law.

UM is entitled to summary judgment on Ms. Freda's bad faith claim.

Fraud

The court understands the essence of the fraud claim to be that UM misled Ms. Freda by (1) hiring an incompetent roof inspector (GRIP) while leading her to believe that GRIP was an expert, (2) not revealing in the 2015 denial letter that GRIP found at least some evidence of hail damage, and (3) characterizing the poor condition of the roof as "wear and tear" though GRIP never said that. See *Silva v. Stevens*, 156 Vt. 94, 102 (1991) ("An action for fraud and deceit will lie upon an intentional misrepresentation of existing fact, affecting the essence of the transaction, so long as the misrepresentation was false when made and known to be false by the maker, was not open to the defrauded party's knowledge, and was relied on by the defrauded party to his damage." (citation omitted)).

There is no triable issue as to any such fraud claim. There is no evidence in this case that GRIP was incompetent, much less that UM knew that GRIP was incompetent, implying that it was hired to conduct a sham investigation. See *supra* n.5 at 8. The only fair inference from the record is that GRIP was in the business of conducting professional examinations of roofs, and the inspector it sent to evaluate Ms. Freda's roof was experienced and competent to perform that inspection.

The GRIP report included findings to the effect that some aesthetic damage from hail had occurred, but that determination was accompanied by the examiner's conclusion that no such damage affected the integrity of the roofing system. The denial letter did not get into the details. It merely represented that the expert did not find an insured loss. The record is clear that Ms. Freda, at the time, did not ask for a copy of the report. The purpose of the denial letter was to communicate the denial of the claim. It did not purport to describe in detail what the report said. Moreover, to the extent that the claim is that not proactively producing the report with the denial letter somehow misled her, the court notes that the letter is consistent with the report, and the status of the roof was always available for her to investigate on her own. Nothing was "hidden" from her.

The reference to "wear and tear" in the 2015 denial letter is not fraudulent. The drafter of the letter wrote, "The expert review of your roof determined that the damage was due to wear and tear and not from the hail storm." The GRIP report noted that the condition of the roof was poor, and it found that the poor condition was not due to hail. It did not expressly say that the condition was caused by wear and tear as opposed to some other non-hail reason. However, hail damage was the issue being investigated. Hail damage was not found. Wear and tear generally refers to injury or loss that naturally occurs in the course of use. Although attributing the wear and tear conclusion to GRIP may have overstated the case, it was not an unreasonable, if unnecessarily euphemistic, assertion in context because the poor condition of the roof alone would not have triggered coverage.[6]

In any event, Ms. Freda makes no showing whatsoever as to how she relied on the representation as to wear and tear to her detriment. The only way the court can imagine is if she were to claim that it led her to believe that hail had not damaged her roof, but that is completely consistent with the GRIP report.

To the extent that Ms. Freda claims that there was something deceptive about not proactively supplying any of the reports before she requested them, she does not explain how that was fraudulent. In fact, as far as the record goes, two of the reports were supplied when eventually requested and she obtained the other from the Department of Financial Regulation. How any of this deceived her, as fraud goes, is entirely unclear.

To the extent that Ms. Freda characterizes anything else that UM did or did not do as fraud, the court notes that the fundamental issue as to coverage was (and is) whether hail damaged the roof within the meaning of the applicable coverage. The roof was always available to Ms. Freda to examine or have examined so that she or anyone else could develop their own opinions, whether contrary or consistent with UM's and the experts on which it relied.

Ms. Freda's bad faith and fraud claims do not survive summary judgment. The coverage claim (Count 2) remains to be determined.

ORDER

For the foregoing reasons, UM's motion for partial summary judgment is granted.

Electronically signed on 9/22/2023 8:49 AM, pursuant to V.R.E.F. 9(d)

Robert R. Bent,
Judge

[6] Again, in so stating, the court does not intend to make any determination as to coverage.