IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI SOUTHERN DIVISION

SMITH FLOORING, INC., Plaintiff, v. PENNSYLVANIA LUMBERMENS MUTUAL INSURANCE COMPANY, Defendant.	))))))))))	No. 09-3237-CV-S-DW

ORDER

Before the Court is Defendant's Motion for Order of Court Altering Jury Verdict (Doc. 106), Plaintiff's Motion to Alter or Amend Judgment to Add Prejudgment Interest (Doc. 111), Defendant's Motion for Judgment Notwithstanding the Verdict or in the Alternative for a New Trial (Doc. 113) and Plaintiff's Motion for New Trial or Alternatively, to Alter or Amend the Judgment (Doc. 138). For the following reasons, Defendant's Motion for Judgment Notwithstanding the Verdict or in the Alternative for a New Trial (Doc. 113) is GRANTED. Accordingly, the other motions are DENIED as moot.

I. BACKGROUND

Plaintiff is a manufacturer of hardwood flooring. Plaintiff was insured under a policy issued by Defendant. A building situated on Plaintiff's property was damaged by accumulated ice and snow. Plaintiff sought payment from Defendant under the insurance policy, but Defendant denied payment, claiming that the building was excluded from coverage. Plaintiff filed this action against Defendant for declaratory judgment and breach of contract. Defendant filed a counterclaim for reformation of the insurance policy based on mutual mistake. Defendant seeks reformation of the policy to reflect that no insurance coverage existed for the building:

Defendant alleges that the parties agreed that the building would not be covered, but through a clerical error, the exclusion was not included in the policy.

Defendant filed a motion for trial by the bench, arguing that reformation is purely an equitable remedy and thus its counterclaim should be tried by the Court and not a jury. Plaintiff opposed the motion. The Court denied Defendant's motion and ordered that this matter be tried by a jury. A jury trial was conducted commencing May 2, 2011. On May 4, 2011, the jury returned a verdict in favor of Plaintiff on both its breach of contract claim and Defendant's counterclaim for reformation of the insurance policy.[1]

The parties filed their respective post-trial motions, requesting oral argument on the issues. On September 22, 2011, the Court heard argument on the motions. The Court took the matters under advisement and allowed the parties to file additional briefs in support of their positions. The parties submitted their briefs and Plaintiff filed an additional post-trial motion. All motions are now fully briefed, and the Court has carefully considered both parties' arguments.

Defendant bases its motion for judgment notwithstanding the verdict, or in the alternative for a new trial, on various grounds, one of which is that the reformation issue was erroneously tried by a jury rather than the Court. It is on this issue that the Court reverses its prior judgment. In its previous Order, the Court concluded that Plaintiff was entitled to a jury trial on the issues in this case. However, after further consideration the Court concludes that its initial holding was in error and this matter should not have been tried by a jury.

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[1] Plaintiff's declaratory judgment claim was not given to the jury.

II. DISCUSSION

A. This Action Should Have Been Tried by the Court

Although the Seventh Amendment to the U.S. Constitution preserves the right to a jury trial on legal claims, an action to reform an instrument, including an insurance contract, is an equitable claim and thus triable to the court. Great Atl. Ins. Co. v. Liberty Mut. Ins. Co., 773 F.2d 976, 978-79 (8th Cir. 1985) (noting that the defense of reformation was erroneously submitted to the jury); see also Aetna Ins. Co. v. Doheca A&W Family Rest. No. 501, Inc., 503 F. Supp. 199, 199-200 (E.D. Mo. 1980). The issue of reformation is triable to the court even if there is conflicting evidence for a trier of fact to resolve. See Great Atl. Ins. Co., 773 F.2d at 978. Furthermore, an equitable claim is triable to the court whether the claim is asserted as the basis for the suit or as a defense. See id.

The Court's previous determination that this case should be tried by a jury stemmed from the Supreme Court's holding that the constitutional right to a jury trial must be preserved when the litigation involves legal and equitable claims with common issues. See Dairy Queen, Inc. v. Wood, 369 U.S. 469, 472-73 & n.8 (1962); Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 510-11 (1959). The Court now recognizes, however, that there are no issues in this matter common to both the legal and equitable claims. The dispositive issue at trial was whether the insurance policy should be reformed based on mutual mistake, an equitable issue. The defendant acknowledged that the policy as written provided coverage for the building and agreed that if the policy was not reformed, Plaintiff would prevail on its breach of contract claim. Therefore, the only legal issue at trial was that of damages—and that issue only arose because the jury

determined not to reform the contract.[2] Accordingly, because no issues common to the legal and equitable claims exist, the Court erred in holding that this matter must be tried to a jury.

Plaintiff argues that the issues in this action include determining the existence and nature of the contract and the parties' intent, both of which are legal issues for the jury to resolve. However, by their nature, reformation claims based on mutual mistake require a determination of the intent of the parties and the nature of their contract. See e.g., Giant Eagle, Inc., 884 F. Supp. at 986; Black & Veatch Corp. v. Wellington Syndicate, 302 S.W.3d 114, 118 (Mo. Ct. App. 2009) ("For reformation on grounds of mistake, the primary factual issues to be established are the *existence of a prior agreement* and mutual mistake. . . . The party seeking reformation must show that *the writing fails to accurately set forth the terms of the actual agreement* or fails to incorporate *the parties' true prior intentions*." (emphasis added)). Adhering to Plaintiff's reasoning would render all reformation claims based on mutual mistake legal claims, when the law clearly states that they are equitable claims.

Neither is the Court persuaded by Plaintiff's argument that Turner v. Burlington Northern Railroad Co., 771 F.2d 341 (8th Cir. 1985) requires that this action be tried by a jury. In Turner, the U.S. Court of Appeals for the Eighth Circuit upheld the district court's decision to allow a jury to hear the defendant's counterclaim for specific performance. Id. at 343-45. However Turner is distinguishable from the case at bar.

In Turner, the plaintiff was injured while working for the defendant Burlington Northern Railroad Co. ("Burlington Northern") and filed suit under the Federal Employers' Liability Act

[2] The argument that a damages claim overlaps an equitable reformation claim such that the claims share common issues has been rejected. See, e.g., Giant Eagle, Inc. v. Fed. Ins. Co., 884 F. Supp. 979, 985 n.3 (W.D. Pa. 1995) (citing Royal Aviation, Inc. v. Aetna Cas. & Sur. Co., 770 F.2d 1298, 1302 (5th Cir. 1985)).

("FELA"). Id. at 342. The parties discussed settlement and Burlington Northern issued a settlement check to the plaintiff. Id. at 343. The plaintiff refused to accept the check because he did not believe parties reached a settlement agreement. Id. The plaintiff then amended his complaint to add an additional defendant. Id. Burlington Northern filed an answer to the amended complaint, this time including a counterclaim for specific performance of the settlement agreement. Id. The district court allowed the counterclaim to be tried to a jury, and the question later arose as to the propriety of that decision based on the fact that specific performance is an equitable remedy. See id.

The court of appeals found that although specific performance is an equitable remedy, courts may consider more than just the equity/law distinction in determining whether the action should be tried to the court or a jury. Id. at 344. The court of appeals held that equitable actions may be tried to a jury where Congress or the Supreme Court extends the right to a jury trial to that action. See id. at 344-45. In holding that the district court did not err by allowing the counterclaim to be heard by a jury, the court of appeals stated: "In FELA cases, the Supreme Court has repeatedly emphasized that Congress intended that FELA lawsuits would be tried to the jury." Id. at 344.

Unlike Turner, which involved a claim that Congress specifically stated should be tried to a jury, no statute or Supreme Court precedent indicates that the right to a jury trial exists in a claim for reformation of an insurance policy based on mutual mistake. Accordingly, the Court finds that Plaintiff did not have a right to have this case tried by a jury and Defendant's counterclaim for reformation of the policy should have been tried to the Court.

B. The Court May Properly Issue Its Own Findings of Fact and Conclusions of Law

A court's power to treat a jury's verdict as advisory and issue its own findings of fact and

conclusions of law stems from the Federal Rules of Civil Procedure. Rule 39 provides that: "In an action not triable of right by a jury, the court, on motion or on its own[,] may try any issue with an advisory jury." Fed. R. Civ. P. 39(c) (internal marks omitted). Rule 39(c) does not require that the parties receive advance notice that the court intends to treat the jury as advisory. Allen v. Tobacco Superstore, Inc., 475 F.3d 931, 941 (8th Cir. 2007) (quoting Ind. Lumbermens Mut. Ins. Co. v. Timberland Pallet & Lumber Co., Inc., 195 F.3d 368, 375 (8th Cir. 1999)). A court's determination to treat the jury's verdict as advisory will only be reversed by a reviewing court if the complaining party demonstrates that it was prejudiced by that determination. See id. "[F]ailure to give advance notice alone, absent some demonstrable prejudice to the complaining party, would not be a basis for reversal." Ind. Lumbermens, 195 F.3d at 375.

In Allen, the court of appeals upheld the trial court's decision to vacate the jury verdict and issue its own findings of fact and conclusions of law. 475 F.3d at 941. The court of appeals also found that the defendant was not prejudiced by having to present its case to a jury without knowing that the jury was advisory. Id. On August 20, 2004, three days before the plaintiff's case was set for trial, the trial court *sua sponte* ordered that the case be tried to a jury. Id. at 935. The jury returned its verdict after a seven-day trial. Id. On January 6, 2005, the trial court vacated the jury verdict, concluding it had erred in ordering the case to be heard by a jury. Id. The trial court reasoned that because it had the authority under Rule 39 to call an advisory jury, it could treat the jury's verdict as advisory. Id. On June 16, 2005, the trial court issued an order containing its own findings of fact and conclusions of law. Id.

The defendant appealed, arguing that it was prejudiced by the trial court's failure to give advance notice that the jury's verdict was advisory. Id. at 941. The defendant stated that it would have made different presentations and arguments if it had known that it was actually trying

the case to the bench. Id. The court of appeals disagreed and found that mere failure by the district court to give advance notice of the advisory jury trial did not sufficiently prejudice the defendant. Id. Like the plaintiff in Allen, Plaintiff has not demonstrated how it was prejudiced by the court's failure to give advance notice that it would treat the jury's verdict as advisory.

As described above, the Court finds that it erred in its previous ruling that this case should be tried by a jury. However, the Court also finds that a new trial would be a waste of judicial resources, as the Court has heard the evidence. Therefore, the Court will treat the jury's verdict as advisory pursuant to Federal Rule of Civil Procedure 39(c), vacate the jury's verdict and issue its own findings of fact and conclusions of law in accordance with Federal Rule of Civil Procedure 52(a).

After consideration of the testimony adduced at trial, the exhibits introduced in evidence and the applicable law, the Court hereby makes the following findings of fact and conclusions of law. Any finding of fact equally applicable as a conclusion of law is hereby adopted as such, and conversely, any conclusion of law applicable as a finding of fact is adopted as such.

C. Findings of Fact

1. Plaintiff Smith Flooring, Inc. is a Missouri corporation with its principal place of business in Howell County, Missouri. Smith Flooring is engaged in the wood flooring business.

2. Defendant Pennsylvania Lumbermens Mutual Insurance Company ("Pennsylvania Lumbermens") is a Pennsylvania corporation and is authorized to engage in the insurance business in the state of Missouri. Pennsylvania Lumbermens was Smith Flooring's insurer during the time period relevant to this action.

3. A building known as the Pine Warehouse was located on Smith Flooring's property at Location 1: 1501 West Highway 60, Mountain View, Missouri.

4. On January 28, 2009, the Pine Warehouse was damaged due to the weight of accumulated ice and snow.

5. Smith Flooring submitted a claim for damages to Pennsylvania Lumbermens and Pennsylvania Lumbermens denied the claim on the basis that the Pine Warehouse was not covered under the applicable insurance policy.

6. Pennsylvania Lumbermens has issued the following insurance policies to Smith Flooring:

a. Policy 24-S006-01-04 for the period of March 1, 2004 to March 1, 2005.

b. Policy 24-S006-01-05 for the period of March 1, 2005 to March 1, 2006.

c. Policy 24-S006-01-06 for the period of March 1, 2006 to March 1, 2007.

d. Policy 24-S006-01-07 for the period of March 1, 2007 to March 1, 2008.

e. Policy 24-S006-01-08 for the period of March 1, 2008 to March 1, 2009.

7. These insurance policies provided blanket coverage for the buildings at Location 1. These policies also contained endorsements that excluded certain property from coverage.

8. Policies 24-S006-01-04,-05 and -06, covering the time period from March 1, 2004 to March 1, 2007, contained endorsements that excluded various buildings at Location 1, including the Pine Warehouse, from coverage.

9. Policies 24-S006-01-07 and -08, covering the period from March 1, 2007 to March 1, 2009, contained endorsements that excluded coverage for certain property, however no buildings at Location 1 were listed as excluded.

10. Policy 24-S006-01-08, the policy in effect on the January 28, 2009 date of loss, did not, by its terms, exclude the Pine Warehouse from coverage.

11. Jon Smith is the president of Smith Flooring.

12. Wausau Signature Agency ("Wausau") was Smith Flooring's insurance agency during the relevant time period.

13. Steven Young was employed by Wausau as an insurance agent and served as Smith Flooring's insurance agent from 2003 until March 20, 2008.

14. Mary Henke was employed by Wausau and served as Smith Flooring's account manager.

15. Woodus K. Humphrey & Co., Inc. ("Woodus K. Humphrey") was an insurance agent for Pennsylvania Lumbermens during the relevant time period.

16. Steven Young sought insurance for Smith Flooring through Woodus K. Humphrey. Woodus K. Humphrey placed Smith Flooring's insurance with Pennsylvania Lumbermens.

17. Steven Young's understanding was that the Pine Warehouse was excluded from coverage under Policies 24-S006-01-04, -05, -06, -07 and -08.

18. Woodus K. Humphrey's understanding was that the Pine Warehouse was excluded from coverage under Policies 24-S006-01-04, -05, -06, -07 and -08.

19. There are no documents in Wausau's file on Smith Flooring that relate to adding coverage to the Pine Warehouse.

20. There are no documents in Woodus K. Humphrey's file that indicate an employee of Wausau contacted Woodus K. Humphrey and requested coverage on the Pine Warehouse.

21. An employee of Wausau did not instruct Woodus K. Humphrey to add coverage to the Pine Warehouse prior to March 1, 2008.

22. Lora Roberts was an employee of Woodus K. Humphrey and as part of her duties she prepared insurance policies.

23. When preparing Policy 24-S006-01-07, covering the period of March 1, 2007 to

March 1, 2008, Lora Roberts failed to include the Pine Warehouse in the endorsement that listed the property not covered. Her failure to do so was clerical error on her part and no one instructed her that the Pine Warehouse should not be listed in the endorsement.

24. When preparing Policy 24-S006-01-08, covering the period of March 1, 2008 to March 1, 2009, Lora Roberts failed to include the Pine Warehouse in the endorsement that listed the property not covered. Her failure to do so was based on the fact that she referenced the previous year's policy when preparing Policy 24-S006-01-08.

D. Conclusions of Law

1. The Court has jurisdiction pursuant to 28 U.S.C. § 1332(a).

2. Any agreements entered into by Wausau and Steven Young as insurance agent for Smith Flooring bind Smith Flooring. See Mark Andy, Inc. v. Hartford Fire Ins. Co., 229 F.3d 710, 717 (8th Cir. 2000).

3. Any agreements entered into by Woodus K. Humphrey as agent for Pennsylvania Lumbermens bind Pennsylvania Lumbermens. See id.

4. Jon Smith's intent that coverage exist for the Pine Warehouse is irrelevant because that intent was not objectively manifested to Woodus K. Humphrey prior to or at the time the insurance contract—Policy 24-S006-01-08—was formed. See id. at 717-18.

5. Reformation of a written contract is an equitable remedy that may be granted in the case of a mutual mistake. See Black & Veatch, 302 S.W.3d at 126.

6. To prevail on its claim for reformation based on mutual mistake, Pennsylvania Lumbermens must show by clear, cogent and convincing evidence that Policy 24-S006-01-08 does not accurately set forth the terms of the agreement between Smith Flooring and Pennsylvania Lumbermens or fails to incorporate the parties' prior true intentions. See Kopff v.

Econ. Radiator Serv., 838 S.W.2d 449, 452 (Mo. Ct. App. 1992).

7. "Clear, cogent and convincing evidence is that which instantly tilts the scales in the affirmative when weighed against evidence in opposition; evidence which clearly convinces the fact finder of the truth of the proposition to be proved." In re J.A.J., 652 S.W.2d 745, 748 (Mo. Ct. App. 1983) (internal marks and citation omitted).

8. Reformation of Policy 24-S006-01-08 is appropriate because clear, cogent and convincing evidence demonstrates that the policy does not accurately set forth the agreement between Smith Flooring and Pennsylvania Lumbermens that the Pine Warehouse be excluded from coverage.

III. CONCLUSION

Because the Court reforms Policy 24-S006-01-08 to reflect that the Pine Warehouse was not covered under the policy, Plaintiff's breach of contract claim against Defendant cannot succeed. Judgment is hereby entered in favor of Defendant.

Accordingly, and for the reasons described in this Order, Defendant's Motion for Judgment Notwithstanding the Verdict or in the Alternative for a New Trial (Doc. 113) is GRANTED. Defendant's Motion for Order of Court Altering Jury Verdict (Doc. 106), Plaintiff's Motion to Alter or Amend Judgment to Add Prejudgment Interest (Doc. 111), and Plaintiff's Motion for New Trial or Alternatively, to Alter or Amend the Judgment (Doc. 138) are DENIED as moot.

SO ORDERED.

Date: February 28, 2012

/s/ Dean Whipple
Dean Whipple
United States District Judge