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

MAXUS METROPOLITAN, LLC, Plaintiff, v. TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA, Defendant.	)	Case No. 20-cv-00095-FJG

DEFENDANT TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA'S SUGGESTIONS IN SUPPORT OF ITS MOTION FOR JUDGMENT AS A MATTER OF LAW PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 50(a)(2)

Defendant Travelers Property Casualty Company of America (Travelers) seeks judgment as a matter of law under Federal Rule of Civil Procedure 50(a)(2). Travelers is entitled to judgment as a matter of law on all of Maxus' claims because there is undisputed evidence that Plaintiff Maxus Metropolitan, LLC (Maxus) intentionally concealed material facts concerning combustion byproduct test results and the sprinkler break in Phase 5 of the Metropolitan apartment complex (the "Metropolitan"). Alternatively, Travelers is entitled to partial judgment as a matter of law on the following aspects of Maxus' claims:

1) The jury could not reasonably conclude based on the evidence presented by Plaintiff Maxus Metropolitan, LLC (Maxus) that the remediation project that was conducted in Phases 1-4 of the Metropolitan apartment complex (the "Metropolitan"), at a total cost of approximately $15.6 million, is covered by the insurance policy at issue (the "Policy").

2) The jury could not reasonably conclude that Maxus is entitled to coverage caused by water infiltration into Phases 1-4 of the Metropolitan because there is no evidence that it occurred during the policy period that ended on September 30, 2018.

3) The jury could not reasonably conclude that Maxus is entitled to Business Income and/or Rental Value losses attributable to being unable to rent Phases 1-4 based on the evidence presented by Maxus.

4) On Count II of Maxus' Petition, the jury could not reasonably conclude that Travelers vexatiously refused to pay the insurance claim at issue in violation of Mo. Rev. Stat. § 375.420.

APPLICABLE LEGAL STANDARD

Under Rule 50(a), "[i]f a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue, the court may: (A) resolve the issue against the party; and (B) grant a motion for judgment as a matter of law against the party on the claim or defense that, under controlling law, can be maintained or defeated only with a favorable finding on that issue." Fed. R. Civ. P. 50(a)(1); *see also, e.g.*, *Graham Const. Servs. v. Hammer & Steel Inc.*, 755 F.3d 611, 616 (8th Cir. 2014). The Court "views all facts in the light most favorable to [the nonmoving party] and does not weigh evidence or make credibility determinations." *Harrison v. United Auto Grp.*, 492 F.3d 972, 974 (8th Cir. 2007).

"A motion for judgment as a matter of law may be made at any time before the case is submitted to the jury," and "must specify the judgment sought and the law and facts that entitle the movant to the judgment." Fed. R. Civ. P. 50(a)(2).

ARGUMENT

I. Travelers Is Entitled to Judgment as a Matter of Law Based on the Policy's Concealment Provision

The Policy's "Concealment, Misrepresentation or Fraud" provision states that "This Coverage Part [providing property insurance coverage] is void in any case of fraud, intentional concealment or misrepresentation of a material fact, by you or any other insured, at any time, concerning … [a] claim under this Coverage Part." (Defendant's Exhibit 1, Policy, at p. 18 of 99.) "Some insurance policies, like the Policy at issue in this case, contain language that provides the entire policy will be void if an insured committed fraud or knowingly concealed or misrepresented any material fact or circumstances related to the insurance. Such misrepresentation clauses have been deemed valid and enforceable in Missouri." *Neidenbach v. Amica Mut. Ins. Co.*, 96 F. Supp. 3d 925, 930 (E.D. Mo. 2015), *aff'd*, 842 F.3d 560 (8th Cir. 2016). "In order to avoid liability under a policy, the insurer is required to sufficiently establish the existence of the insured's material misrepresentation or concealment." *Id.* "Under Missouri case law a misrepresentation as to a portion of the loss may void coverage to the entire claim." *Childers v. State Farm Fire & Cas. Co.*, 799 S.W.2d 138, 141 (Mo. Ct. App. 1990). A fact is material "if the fact misrepresented, if stated truthfully, would likely affect the conduct of those engaged in the insurance business acting reasonably and naturally, in accordance with the practice usual among such companies under such circumstances." *Am. Mod. Home Ins. Co. v. Thomas*, 993 F.3d 1068, 1072 (8th Cir. 2021).

The evidence presented at trial is undisputed that Maxus intentionally concealed material information from Travelers regarding both combustion byproducts test results and the sprinkler break in April of 2019. Stephen Bryan of Travelers testified that Travelers was not provided prior to litigation with the Microvision and EMSL test results, and that those results would have

been important to Travelers in its evaluation of Maxus' claim. (Aug. 1, 2023 Rough Transcript, at 5-6.) The testimony of Brad Stiles of SELC demonstrates unequivocally that this concealment on the part of Maxus was intentional: when he told Alex Stehl that "We really didn't find anything," Alex Stehl of Maxus told him "[s]top what you're doing and don't publish the report." (*Id.* at 107.) Similarly, Stephen Bryan of Travelers testified that Travelers paid for the removal of the entire subfloor in Phase 5 of the Metropolitan along with related HVAC and sprinkler removal and reset work, without being informed of the sprinkler rupture. (*Id.* at 11-12.) Prior to the sprinkler break, Travelers did not believe that the entire subfloor needed to be replaced. Maxus' concealment of this information was unquestionably intentional as the May 1, 2019 letter from Maxus' CEO, David Johnson, to Travelers, specifically sought replacement of the subfloor that had been damaged by the sprinkler rupture on April 10, 2019. (*Id.* at 13-14.)

II. The Jury Could Not Reasonably Find in Favor of Maxus Regarding the $15.6 Million Remediation Project Conducted in Phases 1-4

For two reasons, the jury could not reasonably conclude based on the evidence presented by Maxus that the remediation project that was conducted in Phases 1-4 of the Metropolitan, at a total cost of approximately $15.6 million, is covered by the Policy. First, Maxus has not established "direct physical loss of or damage to property" under Eighth Circuit law where the only evidence of combustion byproducts in Phases 1-4 allegedly warranting the remediation is at a microscopic level. Second, the jury could not reasonably conclude on the evidence presented by Plaintiff that it was necessary to remedy the presence of the combustion byproducts that Plaintiff contends were identified by the microscopy because no expert testimony has been presented that the remediation was necessary.

A. Maxus Has Not Established "Direct Physical Loss of or Damage to Property" Under Eighth Circuit Law Where the Only Evidence of Combustion

Byproducts in Phases 1-4 Allegedly Warranting Remediation is at a Microscopic Level

Maxus bears the burden of proving coverage under the Policy. *Am. Fam. Mut. Ins. Co. v. Co Fat Le*, 439 F.3d 436, 439 (8th Cir. 2006) ("Under Missouri law, the insured has the burden of proving coverage, and the insurer has the burden of proving that an insurance policy exclusion applies."). Under the Policy, Plaintiff must establish "direct physical loss of or damage to Covered Property caused by or resulting from a Covered Cause of Loss." (Policy, Defendant's Ex. 1 at p. 22 of 99.) The term "Covered Cause of Loss" is defined as "RISKS OF DIRECT PHYSICAL LOSS unless the loss is excluded." (*Id.* at p. 23 of 99.)

As a matter of law, the presence of combustion byproducts that can be detected *only* at a microscopic level does not constitute "direct physical loss of or damage to property" under controlling Eighth Circuit law. In *Olmsted Medical Center v. Continental Casualty Co.*, 65 F.4th 1005 (8th Cir. 2023) (applying Minnesota law), the Eighth Circuit recently held, consistent with overwhelming law across the country, that the presence of the COVID-19 virus in the air or on a surface at an insured premises does not constitute "direct physical loss of or damage to property" under a property insurance policy. *Id.* at 1010. In reaching this result, the Eighth Circuit conclude that "direct physical loss or damage to property" requires: (1) a "physical effect on property" that cannot "be eliminated by 'routine cleaning procedures' and disinfectant"; and (2) a "danger … to human health" does not constitute "direct physical loss of or damage to property." *Id.*

While *Olmsted Medical Center* applied Minnesota law, the Eighth Circuit, in numerous COVID-19-related decisions over the last several years defining the phrase "direct physical loss of or damage to property" in property insurance policies, has not found any difference in state law. Rather, the Eighth Circuit has applied the same legal standard in cases decided under

Missouri, Minnesota, Iowa and Arkansas law.[1] There is every reason to believe that the Eighth Circuit would follow *Olmsted* in applying Missouri law. Missouri federal district courts have reached the same result. *See, e.g.*, *Mt. Hawley Ins. Co. v. City of Richmond Heights, Mo.*, No. 4:20-CV-01587-SEP, 2022 WL 767069, at *9 (E.D. Mo. Mar. 14, 2022), *reconsideration denied*, No. 4:20-CV-01587-SEP, 2023 WL 2561764 (E.D. Mo. Mar. 16, 2023); *MMMMM DP, LLC v. Cincinnati Ins. Co.*, No. 4:20-CV-00867-SEP, 2021 WL 2075565, at *4 (E.D. Mo. May 24, 2021).

During the trial, there has not been any testimony that anyone who observed the conditions in the interior of Phases 1 through 4 of the Metropolitan during the months following the fire saw visible soot, char or any other combustion byproduct in the interior of Phases 1-4. Multiple witnesses, including Brad Stiles, Christopher Spicer and Kristin Stakely, have testified that they inspected or were present in Phases 1 through 4 during the months following the fire and did *not* see any visible soot, char or other combustion byproduct. The testimony has further demonstrated that thousands of photographs were taken, many of them were shown at trial, and only a few photographs revealed a dark substance on a diffuser for the HVAC system (out of 1,077 diffusers in Phases 1-4). With respect to those few photographs of a dark substance, *no* evidence was presented that the substance shown on the diffusers was confirmed to be a combustion byproduct, let alone that it would require anything other than ordinary cleaning. In fact, Maxus' witness Thomas Irmiter testified that the substance shown on the photographs was cleaned before he was able to test it, and therefore he *cannot* say what the substance was. (July

[1] *See, e.g.*, *Planet Sub Holdings, Inc. v. State Auto Prop. & Cas. Ins. Co.*, 36 F.4th 772 (8th Cir. 2022) (applying Missouri and other states' law); *Monday Rests. v. Intrepid Ins. Co.*, 32 F.4th 656 (8th Cir. 2022) (applying Missouri law); *Rock Dental Arkansas PLLC v. Cincinnati Insurance Co.*, 40 F.4th 868, 871 (8th Cir. 2022) (applying Arkansas law); *Oral Surgeons, P.C. v. Cincinnati Ins. Co.*, 2 F.4th 1141, 1144 (8th Cir. 2021) (applying Iowa law).

27, 2023 Rough Transcript, at 35-37.) He did not find *any* other photographs of soot taken after the fire. (*Id.* at 37.)

Maxus' claim for remediation of Phases 1-4 of the Metropolitan thus depends entirely on testimony of microscopists that a substance consistent with soot or char was detected under a microscope in certain test results. There has been no evidence presented, however, that the claimed presence of these merely *microscopic* levels of soot or char, invisible to the human eye, have a "physical effect on property," as required to trigger coverage. This is analogous to how the presence of an invisible virus on a surface does not have a "physical effect on property" as a matter of law. *Olmsted Medical Center*, 65 F.4th at 1010. Health risks are not direct physical loss of or damage to property under *Olmsted Medical Center*, *id.*, and there was also no evidence presented that microscopic soot would grow over time or would present any kind of long term or permanent problem for the walls or other building components.

B. There is Insufficient Evidence for the Jury to Reasonably Conclude That the Remediation Project in Phases 1-4 Was Necessary

The jury also could not reasonably conclude on the evidence presented by Maxus that it was necessary to remedy the presence of the combustion byproducts in Phases 1-4 that allegedly were detected only at a microscopic level. Whether the presence of combustion byproducts at a *microscopic* level necessitated the extraordinary $15.6 million remediation that was done requires expert testimony from someone with an appropriate scientific background. This was clearly a highly technical issue requiring a scientific analysis. A layperson juror does not know as a matter of common knowledge whether microscopic amounts of combustion byproducts necessitate a destructive remediation of an entire apartment complex. *See, e.g.*, *Reed v. Bob Barker Co.*, Inc., No. 12-03562-CV-S-GAF, 2014 WL 12575814, at *8 (W.D. Mo. Apr. 7, 2014) ("Whether Defendant's products, when set afire, emitted smoke in a manner that made the

product 'unreasonably dangerous' is a conclusion that is sufficiently technical and complex to be outside a jury's common knowledge or experience and therefore requires expert testimony."); *Stone v. Missouri Dep't of Health & Senior Servs.*, 350 S.W.3d 14, 21 (Mo. 2011) ("When a fact at issue is so technical or complex that no fact finder could resolve the issue without expert testimony, expert testimony is 'necessary' and, therefore, required.").

Here, no scientific testimony was presented by Maxus to support the necessity of the remediation that was done. The microscopists did not and could not testify as to what remediation was required. The only such testimony was Mr. Irmiter's testimony regarding his "opinion" provided to Maxus regarding a "potential" "hazardous condition," which was not based on any scientific knowledge. (July 26, 2023 Rough Transcript, at 144-46.) In any event, Mr. Irmiter, with no science degree or background, clearly lacked the qualifications necessary in building science, material science, or any relevant scientific discipline that would allow the jury to reach the conclusion that microscopic presence of combustion byproducts required the extraordinary remediation that was done. (*Id.* at 219-220.)

II. There Is Insufficient Evidence for the Jury to Conclude That Water Infiltration into Phases 1-4 from Ember Holes (a/k/a Brands) Occurred During the Policy Period

The Policy provides that "We cover loss or damage commencing with the inception date of the policy period … and *ending when any one of the following first occurs … [t]his policy expires* or is cancelled." (Defendant's Exhibit 1, Policy, at p. 37 of 99 (emphasis added).) It has been stipulated by the parties that "[t]he policy expired on September 30, 2018." (ECF Doc. 161, at 18 ¶ 17.) There is no coverage for a loss that occurs after the Policy expired. *Transcontinental Ins. Co. v. W.G. Samuels Co.*, 370 F.3d 755, 760 (8th Cir. 2004) (no coverage where "the property damage allegedly suffered … occurred outside the policy period"). Maxus bears the burden of proving that the loss for which it seeks to recover occurred during the policy period.

New Hampshire Ins. Co. v. Martech USA, Inc., 993 F.2d 1195, 1199 (5th Cir. 1993) (Texas law) ("proof that the loss occurred within the policy period is a precondition to coverage and, thus, the insured's responsibility").

On the evidence presented at trial, the jury could not reasonably conclude that Maxus is entitled to coverage for damage caused by water infiltration into Phases 1-4 because there is no evidence that the damage occurred during the Travelers policy period which ended on September 30, 2018. Mr. Irmiter testified that he is no longer opining that this water damage was caused by water cannons from firefighting efforts, instead his testimony was that it was caused by rainwater entering through ember holes. (July 26, 2023 Rough Transcript at 239.) Mr. Irmiter further testified that the damage from water infiltration was not discovered by his company until November of 2019, more than a year after the fire, and that the water damage occurred every time it rained until the ember holes were patched. (July 27, 2023 Rough Transcript at 23, 79-81.) The Policy's coverage does not extend beyond September 30, 2018 simply because Maxus failed to timely identify and patch ember holes for more than a year, according to its own expert. There is no evidence introduced by Maxus on which the jury could reasonably determine that water infiltration through ember holes occurred to Phases 1-4 during the period from September 27 to 30, 2018, or the reasonable cost of repairing such damage occurring during the policy period. Even if coverage were somehow extended (contrary to the Policy's express terms) for some reasonable short period of time to allow for the ember holes to be patched, no weather records were introduced demonstrating that rainfall occurred shortly after September 27, 2018 to an extent that would cause damage from ember holes before proper emergency patching could reasonably have been done.

III. There Is Insufficient Evidence to Support Maxus' Business Income/Rental Value Claim for Phases 1-4

The jury also could not reasonably conclude that Maxus is entitled to Business Income losses from Phases 1-4. The Policy covers "actual loss of 'business income' [and 'rental value'] you sustain due to the partial or complete: a. Cessation of your business activities; or b. Delay in start up of your business activities; during the 'post-loss period of repair or construction'." (Policy, Defendant's Exhibit 1, at p. 41 of 99.) The Policy further requires that "[s]uch cessation or delay *must be caused by or result from direct physical loss of or damage to Covered Property by a Covered Cause of Loss*." (*Id.* (emphasis added).) Based on the evidence presented by Maxus, the cessation of operations in Phases 1-4—the eviction of tenants—was for the purpose of the remediation project. (July 27, 2023 Rough Transcript, at 177-78.) For the same reason that there is insufficient evidence for the jury to find coverage for the remediation project in Phases 1-4, as set forth in Section I above, there was likewise insufficient evidence to support Maxus' Business Income/Rental Value claim for Phases 1-4.

IV. There Is Insufficient Evidence to Support Maxus' Vexatious Refusal Claim

There is also insufficient evidence for the vexatious refusal claim (Count II) to go to the jury. This claim requires Maxus to establish that Travelers "has refused to pay [the] loss without reasonable cause or excuse." Mo. Rev. Stat. § 375.420. "The law is well-settled that for an insured to obtain a penalty for an insurance company's vexatious refusal to pay a claim, the insured must show that the insurance company's refusal to pay the loss was willful and without reasonable cause or excuse, as the facts would have appeared to a reasonable person before trial." *Watters v. Travel Guard Int'l*, 136 S.W.3d 100, 108 (Mo. Ct. App. 2004). "There may be no vexatious refusal where the insurer has reasonable cause to believe and does believe there is no liability under its policy and it has a meritorious defense." *Id.* at 109 (finding no vexatious

refusal where the "claim was novel"). "When there is an open question of law or fact, the insurance company may insist upon a judicial determination of those questions without being penalized." *Id.* "Moreover, the purpose of allowing for vexatious-refusal penalties is to correct the evil of an arbitrary refusal for the sole purpose of delaying the plaintiff in the collection of the claim." *Id.* at 110; *see also Minden v. Atain Specialty Ins. Co.*, 788 F.3d 750, 756 (8th Cir. 2015) ("[U]nder Missouri law, there is no vexatious refusal where the insurer has reasonable cause to believe there is no liability and there is a meritorious defense to the policy.").

Based on the evidence presented, Travelers had reasonable grounds for its position and bona fide disputes existed concerning coverage and the amount of loss. The cause of any damage to the Metropolitan that has not been paid for by Travelers is a matter of bona fide dispute based on the evidence. Maxus' claim that the microscopic presence of combustion byproducts required a massive reconstruction of Phases 1-4 was novel. Even if the Court allows that claim to go to the jury, at a minimum Travelers had reasonable grounds to dispute it where there was no visual evidence to support it. As to the remaining issues in dispute, Maxus' own expert, Mr. Irmiter, testified that the Metropolitan "would make my top ten wall of shame" out of over 10,000 buildings he has inspected, due to the extent of the pre-fire faulty construction that was discovered. (July 26, 2023 Rough Transcript at 231; July 27, 2023 Rough Transcript, at 17.) The damage he found due to faulty construction in brand-new buildings was "consistent with damage that we see that is on buildings that have been leaking for 20 years." (July 26, 2023 Rough Transcript at 231.) Travelers was entitled to investigate the faulty construction. Mr. Irmiter's changing his conclusion regarding the cause of damage from the water cannons to the ember holes also demonstrates the presence of a bona fide dispute. (July 26, 2023 Rough Transcript at 239.) The evidence also demonstrates that Maxus withheld relevant information from Travelers,

including withholding test results for months and not informing Travelers of the sprinkler leak. (Aug. 1, 2023 Rough Transcript, at 7, 11-12.) Maxus' own CEO even stated in a letter to Bomasada's principal on April 9, 2019, that Travelers was not acting in bad faith. (July 27, 2023 Rough Transcript, at 135.) Travelers' executive general adjuster testified at length and in detail regarding the issues that arose on the claim, Travelers' continual efforts to obtain the information that it needed to make decisions on the claim, and Travelers' efforts to make timely and appropriate payments after the relevant information was provided by Maxus. Based on the evidence presented, the jury could not reasonably conclude that Travelers' conduct satisfies the standard for vexatious refusal. *See, e.g., Shri Ganesai, LLC v. Amguard Ins. Co.*, No. 21-00355-CV-W-BP, 2022 WL 5082085, at *6 (W.D. Mo. July 26, 2022) ("The state of the Record demonstrates that the question of coverage is the subject [of] reasonable (and substantial) dispute, so no jury could find that Defendant acted unreasonably by awaiting a judicial determination of the issue."); *Walker v. Country Mut. Ins. Co.*, No. 06-00333-CV-WREL, 2007 WL 2249131, at *13 (W.D. Mo. Aug. 1, 2007) ("Nothing in the record suggests that Defendant's actions were vexatious or recalcitrant; rather, the undisputed facts show that Defendant made numerous requests to obtain the [information needed].").

CONCLUSION

For the foregoing reasons, the Court should grant judgment as a matter of law on all of Maxus' claims for the reasons set forth in Section I above. Alternatively, the Court should grant partial judgment as a matter of law on the following aspects of Maxus' claims:

1) Maxus' claim for remediation of combustion byproducts in Phases 1-4 of the Metropolitan;
2) Maxus' claim for damage caused by water infiltration into Phases 1-4;

3) Maxus' claim for Business Income/Rental Value losses from Phases 1-4; and

5) Count II of the Petition, alleging vexatious refusal to pay under Mo. Rev. Stat. § 375.420.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that on August 2, 2023, I electronically submitted the foregoing with the Clerk of the Court for the United State District Court for the Western District of Missouri using the CM/ECF system, which will send a Notice of Electronic Filing to the following counsel of record:

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