FILED with the COURT

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JOHN E. HARRINGTON, J.S.C.

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JEFFREY GRABLOW AND DANIELLE GRABLOW	SUPERIOR COURT OF NEW JERSEY LAW DIVISION
vs.	BURLINGTON COUNTY
	DOCKET NO.: L-0858-15
NEW JERSEY MANUFACTURERS INSURANCE COMPANY	**ORDER**

This matter having been opened to the Court by Daniel W. Ballard, Esquire, counsel for Plaintiffs, on Notice of Motion for Partial Summary Judgment, having been joined by Deborah C. Halpern, Esquire, and the Court having reviewed and considered the Certification of Counsel, Brief, and attachments in support of Plaintiffs' Motion for Partial Summary Judgment, after hearing all arguments in support of the motion and in opposition thereto:

IT IS on this 8th day of January, 2015, hereby **ORDERED**, **ADJUDGED** and **DECREED** that Plaintiffs' Motion is ~~GRANTED~~ DENIED. ~~Judgment is entered in favor of Plaintiffs and against Defendant as to Count I of Plaintiffs' Complaint seeking damage~~ for breach of contract with a proof hearing to be held forthwith.

IT IS FURTHER ORDERED that a copy of the within Order shall be served upon all parties within seven (7) days of the entry hereof:

BY THE COURT:

J.S.C.

Opposed ✓

Unopposed ____

copy mailed

See Statement of Reasons.

SMP

STATEMENT OF REASONS

Overview

This case comes before the Court on plaintiffs, Jeffrey and Danielle Grablow's (the "Grablows" or the "Plaintiffs") Motion for Partial Summary Judgment. Specifically, the Grablows contend that they are entitled to summary judgment on the issue of liability pursuant to the terms of their homeowner's insurance policy they have with the defendant, New Jersey Manufacturers Insurance Company ("NJM" or the "Defendant"). The Grablows further contend that their insurance policy is an "all risks" policy.

NJM opposes the Motion. Specifically, NJM denies that the insurance policy is an "all risks" policy, and contends that there are genuine issues of material fact as to whether the alleged damages are covered under the terms of the policy and as to what the terms of the policy mean.

For the reasons that follow, the Grablows' Motion for Summary Judgment is **DENIED**.

Facts

On May 22, 2014, the Grablows' property was damaged by a hail storm. (Pl. Stmt. of Facts at ¶ 4) On that date, the Grablows had a homeowner's insurance policy (the "Policy") with NJM that was in full force and effect. (*Id.* at ¶ 3) After the hail storm, the Grablows presented a claim for property damage to NJM. (*Id.* at ¶ 6) Subsequently, NJM retained Mark 1 Restoration to determine the scope of the damage covered under the Policy. (*Id.* at ¶ 7) NJM determined that some of the damage was covered under the Policy and some was not covered. (*Id.* at ¶ 8)

NJM paid for repairs of damage to the roof and siding of the Grablows property, but did not pay for certain damages that the Grablows characterize as "cosmetic" in nature, and NJM characterizes as "wear and tear" that is not a "direct physical loss." (*Id.* at ¶ 10; Def. Resp. to Stmt. of Facts at ¶ 10) The Policy only covers for direct physical loss, which is not defined within the Policy. (*Id.* at ¶ 13; Pl Br., Ex. C at pg. 7)

At some point after the hail storm occurred, NJM retained Paul Frye, P.E. ("Mr. Frye"), of National Forensic Consultants, Inc. to perform an inspection of the property. On August 13, 2014, Mr. Frye provided his report where he noted in his findings:

> During the inspection, I observed cosmetic damage in the form of spatter marks on the right and rear sides of the home when facing the home. A few minor dents from hail were also observed near the lower portions of the aluminum siding clapboards as noted in the photographs. During the inspection of the siding, I observed other portions of the residence for evidence of damage by hail, including the screens of the home, gutters, fascia board coverings and downspouts. Similar to the siding, some of these elements have cosmetic damage from hail of the right and rear side which indicate a hail storm did impact the home. Hail did impact the siding; however, most of the damage that was observed is a result of mechanical/personal damage and lawn damage as described below. The siding was painted and the paint marks appear as damage from hail but they are not. Also, there are many locations in the siding that have 1-inch-diameter plastic inserts, as noted in the photographs.

> Typically, this type of insert is installed when clown insulation is added to the home. Several areas of mechanical/personal damages were observed around the home from this process.

(Def. Br, Ex. D at pg. 2-3) Mr. Frye then went on to note that detached garage roof had many scratches that were not consistent with damage caused by hail. (*Id.* at pg. 4)

Standard

A motion for summary judgment is governed by R. 4:46-2 of the New Jersey Court Rules. The rule provides that summary judgment shall be "rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2.

The case of *Brill v. Guardian Life Insurance Company of America*, 142 N.J. 520 (1995), set forth a new standard for a trial court to apply when determining whether an alleged disputed issue should be considered "genuine" for purposes of R. 4:46-2. The *Brill* court stated that:

> Under this new standard, a determination whether there exists a "genuine issue" of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party.

142 N.J. 540.

The *Brill* court further clarifies that, "[i]f there exists a single, unavoidable resolution of the alleged disputed issue of fact, that issue should be considered insufficient to constitute a 'genuine' issue of material fact for purposes of R. 4:46-2." Id. Rather, when the evidence "is so one-sided that one party must prevail as a matter of law, the trial court should not hesitate to grant summary judgment." *Id.* (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986)).

Discussion

Here, the Grablows contend that they are entitled to summary judgment on the issue of liability pursuant to the terms of the Policy because cosmetic damage is physical damage,[1] and the Policy is an "all risks" insurance policy. NJM denies that the Policy is an "all risks" policy, and contends that there are genuine issues of material fact as to what the terms of the policy mean and as to whether the alleged damages are covered under the terms of the policy. The Court shall first address whether the Policy is an "all risks" policy and the terms of the Policy.

All Risk Policy and Terms of the Policy

[1] The Court cognizant of the fact that the Policy itself does not use the term "physical damage" but, rather, uses the term "direct physical loss."

This Court has previously dealt with "all risks" insurance policies in *Ariston Airline & Catering Supply Co. v. Forbes*, 211 N.J. Super. 472 (1986). Courts have construed the language of insurance policies that purport to cover "all-risks of direct physical loss" as creating all risks coverage. *Id.* at 479 (citing *N-Ren Corporation v. American Home Assurance Co.*, 619 F.2d 784 (8th Cir. 1980)). In defining what "all risk" means, the Court stated:

> The label "all risk" is essentially a misnomer. All risk policies are not "all loss" policies; all risk policies . . . contain express written exclusions and implied exceptions which have been developed by the courts over the years. However, the language of all risk policies is not to be given a restrictive meaning. In a nutshell,
>
> > a policy of insurance insuring against 'all risks' is to be considered as creating a special type of insurance extending to risks not usually contemplated, and recovery will usually be allowed, at least for all losses of a fortuitous nature, in the absence of fraud or other intentional misconduct of the insured, unless the policy contains a specific provision expressly excluding loss from coverage."

Id. (citations omitted).

Here, the Court concludes that the Policy is not an "all risk" policy. The Policy specifically states "[w]e insure against risk of direct physical loss to property described in Coverages A and B." (Pl. Br., Ex. C at pg. 7) Were the Court to conclude that the language employed by the Policy creates an "all risk" policy would render the use of the word "all" in other policies superfluous and make every insurance policy an "all risk" policy, unless stated otherwise. In accordance with the canons of contract interpretation and public policy, the Court cannot conclude the Policy in this case to be an "all risk" policy.

An insurance policy is a contract between the insured and the carrier. *Bromfeld v. Harleysville Ins. Cos.*, 298 N.J. Super. 62, 75 (App. Div. 1997). When interpreting the meaning of a contract "the terms of a contract must be given their plain and ordinary meaning." *Schor v. FMS Fin. Corp.*, 357 N.J. Super. 185, 191 (App. Div. 2002). "When the terms of the contract are not ambiguous, the construction and effect of that agreement is a matter of law which must be resolved by the court and not the jury." *Cedar Ridge Trailer Sales, Inc. v. Nat'l Community Bank of New Jersey*, 312 N.J. Super 51, 62-63 (App. Div. 1998).

> [W]here the terms of a contract are clear and unambiguous there is no room for interpretation or construction and the courts must enforce those terms as written. The court has no right "to rewrite the contract merely because one might conclude that it might well have been functionally desirable to draft it differently." Nor may the courts remake a better contract for the parties than they themselves have seen fit to enter into, or to alter it for the benefit of one party and to the detriment of the other.

Schor, 357 N.J. Super. 191-92 (internal citations omitted).

As a general proposition, the burden is upon the insured to bring the claim within the terms of the policy. *Wakefern Food Corp. v. Liberty Mut. Fire Ins. Co.*, 406 N.J. Super. 524, 538 (App.

Div. 2009) (citing *S.T. Hudson Eng's, Inc. v. Pa. Nat'l Mut. Cas. Co.*, 388 N.J. Super. 592, 603-04 (App. Div. 2009), *cert. denied*, 189 N.J. 647 (2007)).

> Where the language of a policy supports two reasonable meanings, one favorable to the insurer and one favorable to the insured, the interpretation supporting coverage will be applied. Where an insurer claims the matter in dispute falls within exclusionary provisions of the policy, it bears the burden of establishing that claim. Coverage clauses are interpreted liberally, whereas exclusions are strictly construed. Further, as with any contract, construing insurance policies requires a broad search "for the probable common intent of the parties in an effort to find a reasonable meaning in keeping with the express general purposes of the policies." Finally, insurance contracts are to be interpreted so as to effectuate the reasonable expectations of the insured.

Id. 538-39.

Additionally, it is well settled that purchasers of insurance "should not be subjected to technical encumbrances or to hidden pitfalls and their policies should be construed liberally in their favor to the end that coverage is afforded 'to the full extent that any fair interpretation will allow.'" *Id.* at 539 (citing *Kievit v. Loyal Protective Life Ins. Co.*, 34 N.J. 475, 482 (1961)).

Here, the term "direct physical loss" is undefined. The Grablows contend that the term encompasses any type of physical damage, including cosmetic damage, while NJM contends the term to be akin to the property was made inutile, requiring replacement, or damage affecting its structural integrity. Both are reasonable interpretations of the meaning of the phrase and, thus, the Court concludes the term to be ambiguous. *See Id.* at 541-42 ("Since 'physical' can mean more than material alteration or damage, it was incumbent on the insurer to clearly and specifically rule out coverage in the circumstance where it was not to be provided . . . .") (quoting *Customized Distribution Servs. v. Zurich Ins. Co.*, 373 N.J. Super. 480, 491 (App. Div. 2004).

Accordingly, the interpretation proffered by the Grablows must be applied pursuant the precedent of this State's Courts. *See Wakefern*, 406 N.J. Super 538 ("Where the language of a policy supports two reasonable meanings, one favorable to the insurer and one favorable to the insured, the interpretation supporting coverage will be applied")

Coverage Under the Policy

NJM next contends that there are factual disputes as to whether the Grablows sustained a covered loss as a result of the hail storm. In his report, Mr. Frye noted that

> [h]ail did impact the siding; however, most of the damage that was observed is a result of mechanical/personal damage and lawn damage as described below. The siding was painted and the paint marks appear as damage from hail but they are not. Also, there are many locations in the siding that have 1-inch-diameter plastic inserts, as noted in the photographs. Typically, this type of insert is installed when clown insulation is added to the home. Several areas of mechanical/personal damages were observed around the home from this process.

(Def. Br, Ex. D at pg. 3) Pursuant to the terms of the Policy, "wear and tear" and "mechanical breakdown" are excluded from coverage. (Pl. Br., Ex. C at pg. 8) Were the findings of Mr. Frye to be accepted as true by the factfinder, then the Grablows' claims may be excluded by the Policy's terms. As such, the Court concludes that there is a genuine issue of material fact as to whether the damage claimed by the Grablows was caused by the hail storm or some other event which may exclude coverage.

Accordingly, the Grablows' Motion for Partial Summary Judgment as to Liability is **DENIED**.