15

NOTIFY

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 2284CV2019

NEW ENGLAND PROPERTY SERVICES GROUP, LLC,

PLAINTIFF,

vs.

BUNKER HILL PREFERRED INSURANCE COMPANY,

DEFENDANT.

MEMORANDUM OF DECISION AND ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

The plaintiff, New England Property Services Group, LLC ("NEPSG"), filed this action against the defendant, Bunker Hill Preferred Insurance Company ("Bunker Hill"), alleging: violation of Chapter 93A (Count I); breach of contract (Count II); and tortious interference with advantageous business relations (Count III) and seeking declaratory relief pursuant to G.L. c. 231A, § 1 (Counts IV & V). The plaintiff filed a motion for partial summary judgment on Counts IV and V (Paper No. 6). The defendant opposes the motion and filed a cross-motion for summary judgment (Paper No. 8). A hearing on the motions took place on January 5, 2024. For the following reasons, the plaintiff's motion for partial summary judgment is **ALLOWED IN PART** and **DENIED IN PART**, and the defendant's motion for summary judgment is **ALLOWED IN PART** and **DENIED IN PART**.

BACKGROUND

Bunker Hill issued a homeowner's insurance policy ("policy") to Eleni Lymberopoulos ("homeowner") and her now-deceased husband for their home at 36

Winona Street in Brockton ("property"). SOF ¶ 1-2.[1] The policy was effective from March 2, 2021 to March 2, 2022. *Id.* at ¶ 1. The property was damaged on July 6, 2021, when a motor vehicle crashed into it. *Id.* at ¶ 2. Shortly after, NEPSG notified Bunker Hill of the loss, and Bunker Hill opened a claim, number 3H2401960284 ("claim"). *Id.* at ¶ 3. It is undisputed that the claim occurred while the policy was in effect. *Id.* at ¶ 4.

On July 8, 2021, the homeowner and NEPSG executed a written irrevocable assignment of insurance claim benefits and rights contract ("assignment"). *Id.* at ¶ 5. Bunker Hill inspected the property on that day. *Id.* at ¶ 6.

NEPSG hired David Baker of Home Estimating Services to provide an estimate for the work required to repair the property. *Id.* at ¶ 7; JA Ex. 5. Baker estimated that the repair would cost $57,300.15. SOF ¶ 7. On August 10, 2021, NEPSG provided Bunker Hill with a scope-of-work and estimate of $139,883.55 to resolve the claim. *Id.* On August 16, 2021, Bunker Hill provided the homeowner and NEPSG with a copy of their estimate for the loss, which totaled $27,694.70. *Id.* at ¶ 8. On September 14, 2021, Bunker Hill issued a check in that amount to the homeowner before placing a stop-payment order on the check and reissuing it naming NEPSG as payee. *Id.* at ¶ 9. Thereafter, Bunker Hill issued two additional checks, bringing the total payment made by Bunker Hill on the claim to $57,695.14. *Id.* at ¶ 11.

On March 30, 2022, NEPSG emailed a demand for reference to Bunker Hill. *Id.* at ¶ 12. On April 28, 2022, Bunker Hill wrote to NEPSG asserting that NEPSG's claim for reference was invalid and/or otherwise inappropriate. *Id.* at ¶ 14. Bunker Hill maintains that it has no obligation to participate in a reference proceeding requested by NEPSG or acknowledge NEPSG's demand for reference in relation to the claim. *Id.* at ¶ 15.

[1] References to the Statement of Material Facts in Support of Plaintiff's Motion for Partial Summary Judgment on Count IV and Count V of its Complaint and Defendant's Cross Motion for Summary Judgment (Paper No. 11) will be denoted by the abbreviation "SOF" followed by a paragraph citation. References to the Joint Appendix will be denoted by the abbreviation "JA" followed by an exhibit number.

DISCUSSION[2]

Summary judgment is appropriate if there are no genuine issues as to any material fact and the moving party is entitled to judgment as a matter of law. See Mass. R. Civ. P. 56; *American Family Life Assurance Co. of Columbus* v. *Parker*, 488 Mass. 801, 804 (2022). The moving party bears the burden of affirmatively demonstrating the absence of a triable issue. *Pederson* v. *Time, Inc.*, 404 Mass. 14, 16-17 (1989). The moving party may satisfy this burden by either submitting affirmative evidence that negates an essential element of the opposing party's case or demonstrating that the opposing party has no reasonable expectation of proving an essential element of his case at trial. See *Flesner* v. *Technical Commc'ns Corp.*, 410 Mass. 805, 809 (1991); *Kourouvacilis* v. *General Motors Corp.*, 410 Mass. 706, 716 (1991). A court reviewing a motion for summary judgment must "draw all inferences in the light most favorable to the nonmoving party." *Drakopoulos* v. *U.S. Bank Nat'l Ass'n*, 465 Mass. 775, 777 (2013), quoting *Premier Capital, LLC* v. *KMZ, Inc.*, 464 Mass. 467, 474-475 (2013).

---

[2] As a preliminary matter, the Plaintiff has embedded in its Reply to Defendant's Consolidated Memorandum (Paper No. 10) a motion to strike the entirety of the Consolidated Memorandum of Law in Support of Bunker Hill Preferred Insurance Company's Opposition to Plaintiff's Motion for Partial Summary Judgment on Count IV and Count V of Its Complaint and Its Cross-Motion for Summary Judgment (Paper No. 9). The Plaintiff argues that the Consolidated Memorandum should be struck because it exceeds the twenty-page limit set forth in Mass. R. Sup. Ct. 9A and is in violation of Mass. R. Civ. P. 11. Pursuant to Rule 9A, Bunker Hill is entitled to file a twenty-page memorandum in opposition to the Plaintiff's motion for partial summary judgment and an additional twenty-page memorandum in support of its own motion for summary judgment – for a total of forty pages. Instead, Bunker Hill filed a single consolidated twenty-six-page memorandum. As twenty-six pages is less than forty pages, the Court does not agree with the Plaintiff that the Consolidated Memorandum violates Rule 9A's twenty-page limit on memorandums. The Plaintiff further contends that the Consolidated Memorandum violates Mass. R. Civ. P. 11 because Bunker Hill categorized the Plaintiff's business practices as "fraudulent, predatory, and unlawful." The Court does not agree that such statements violate Mass. R. Civ. P. 11. Therefore, the motion to strike is denied.

I. Declaratory Relief

Pursuant to G.L. c. 231A, § 1, the Superior Court "may on appropriate proceedings make binding declarations of right, duty, status and other legal relations sought thereby . . . in any case in which an actual controversy has arisen and is specifically set forth in the pleadings." "An 'actual controversy' is presented if there exists 'a "real dispute" caused by the assertion by one party of a duty, right, or other legal relation in which he has a "definite interest," in circumstances indicating that a failure to resolve the conflict will almost inevitably lead to litigation.'" *St. George Greek Orthodox Cathedral of W. Mass., Inc.* v. *Fire Dep't of Springfield*, 462 Mass. 120, 124 (2012), quoting *Entergy Nuclear Generation Co.* v. *Department of Envtl. Prot.*, 459 Mass. 319, 325 (2011), quoting *District Attorney for the Suffolk Dist.* v. *Watson*, 381 Mass. 648, 659 (1980).

a. Matching

NEPSG seeks a declaration that the policy is a matching policy requiring replacement of all the vinyl siding on the property if matching materials cannot be found. Bunker Hill contends that the policy does not require matching and that it is only obligated to pay to repair the section of the property that has been damaged. The relevant portion of the policy provides:

> We will pay replacement cost if the damaged building is repaired or replaced by you on the "residence premises" or some other location within the Commonwealth of Massachusetts within a reasonable time but not more than two years from the date of loss.
>
> We will pay no more than the smallest of the following amounts:
>
> a. The replacement cost of that part of the building damaged with material of like kind and quality and for like use;
>
> b. The necessary amount actually spent to repair or replace the damaged building; or
>
> c. The limit of liability under this policy that applies to the building, increased in accordance with Paragraphs B.1. and B.2. of this endorsement.

JA Ex: 1a – Additional Limits of Liability for Coverages A, B, C and D – Massachusetts § B(4)(2). In this case, option (a) is applicable because the homeowner intends to replace the dar,aged vinyl siding with material "of like kind and quality and for like use."

.An insurance policy is a contract. *Commerce Ins. Co., Inc.* v. *Gentile*, 472 Mass. 1012, 1013 (2)15). The interpretation of a contract is a question of law. *James B. Nutter & Co.* v. *Estate of Murphy*, 478 Mass. 664, 667 (2018). "Contractual language is ambiguous 'if it is susceptible of more than one meaning and reasonably intelligent persons would differ as to which meaning is the proper one.'" *Id.* at 669, citing *Citation Ins. Co.* v. *Gomez*, 426 Mass. 379, 38 l (1998). "When the [contract] language is ambiguous, it is construed against the drafter, 'if the circumstances surrounding its use . . . do not indicate the intended meaning of the language.'" *Id.*, quoting *Merrimack Valley Nat'l Bank* v. *Baird*, 372 Mass. 721, 724 (1977). The phrase "of like kind and quality and for like use" is not defined in the policy. As the parties' arguments show, the phrase is susceptible to more than one meaning. Therefore, the phrase is ambiguous.

.A reasonable interpretation of the phrase is that it requires matching. If there are no "materials of like kind and quality" available to repair the damage to an insured's property, the only way an insurer could fulfill its obligation to repair the damage with materials of like kind and quality is to replace both the damaged and undamaged portions of the insured's property. Thus, the policy at issue is a matching policy, and the plaintiff is entitled to the replacement of all the vinyl siding at the property if siding of like kind and quality as the existing, undamaged siding cannot be found. Summary judgment shall, therefore, enter in favor of the plaintiff as to this portion of Count IV.

NEPSG seeks a further declaration that matching materials cannot be found as to the vinyl siding at the property and, therefore, per the policy, Bunker Hill must cover the cost to replace all the vinyl siding. Unlike interpretation of the policy, this is not a question of law but a question of fact that cannot be resolved by the court on summary judgment. See *Alessi* v. *Mid-Century Ins. Co.*, 464 S.W.3d 529, 533 (E.D. Mo. App. 2015) ("Under the facts before this Court following the trial court's entry of summary judgment, we cannot answer the question[ ] of whether the replacement siding is virtually identical

. . .. [This is a] question[ ] of fact for a jury to decide."); *Collins* v. *Allstate Ins. Co.*, 2009 WL 4729901 at *1, 5-6 (E.D. Pa. 2009) (where insurance policy calls for reimbursing insured for repair costs of "equivalent construction for similar use" and plaintiff claims replacement materials are not equivalent, issue is one of material fact, precluding summary judgment). Because this is a genuine issue of material fact that must be resolved by a factfinder, neither party is entitled to summary judgment as to this portion of Count IV.

b. Right to Reference

NEPSG also seeks a declaration that it has the authority to demand reference pursuant to the policy and/or Massachusetts insurance law and that it is entitled to go through the reference process regarding the claim. Bunker Hill contends that NEPSG is not entitled to reference because the named insured may not assign the policy to another without Bunker Hill's written consent, and only the named insured is entitled to reference.

NEPSG and the homeowner executed the assignment. That document states, in pertinent part:

> IN WITNESS WHERE OF, the undersigned(s) have caused this transfer and irrevocable assignment of the claim officially reported and referenced by **Claim Number and/or 3rd Party File Number: 3H2401960824** and/or applicable **Client's Insurance Policy Number and/or 3rd Party Policy Number: MAH00002009916** covering insurable property at **36 Winona Street Brockton, MA 02301** to be duly executed this **8th day of July, 2021**.

(emphasis in original). The assignment clearly evinces an intent on the part of the homeowner and NEPSG to assign the claim, not the entirety of the policy. The claim is specifically referenced by number in the assignment. The inclusion of the "and/or" language included after the claim number does not transform the assignment into an assignment of the entire policy. As the homeowner did not need Bunker Hill's consent to assign the claim, the assignment is valid.

"When a claim is assigned, the assignee stands in the shoes of the assignor and is in the same position as the assignor would have been in without the assignment."

Rubenstein v. *Royal Ins. Co.*, 45 Mass. App. Ct. 244, 246 (1998). The policy provides, in relevant part:

> **3. Arbitration**
>
> If you and we fail to agree on the amount of loss, we shall, upon receipt of your written request to do so, refer this matter to a three[-] member board of referees. They are selected and must act according to the procedures set by the law. Their decision will be binding. This board does not make decisions about matters of coverage or fault.

The homeowner clearly has the right to demand reference in connection with the claim, given the dispute over the amount of loss. As a proper assignee of the claim, NEPSG, therefore, has the right to demand reference.[3]

II. Violations of Chapters 93A & 176D

General Laws c. 176D, § 3(9), prohibits deceptive acts by insurance companies. Those who claim they were injured by an insurance company's unfair acts may also bring an action under G.L. c. 93A. See *Bolden* v. *O'Connor Café of Worcester, Inc.*, 50 Mass. App. Ct. 56, 59 n.8 (2000). NEPSG alleges that Bunker Hill violated G.L. c. 176D, § 3(9)(a), which prohibits "[m]isrepresenting pertinent facts or insurance policy provisions relating to coverages at issue"; G.L. c. 176D, § 3(9)(b), which prohibits "[f]ailing to acknowledge and act reasonably promptly upon communications with respect to claims arising under insurance policies"; G.L. c. 176D, § 3(9)(c), which prohibits "[f]ailing to adopt and implement reasonable standards for the prompt investigation of claims arising under insurance policies"; G.L. c. 176D, § 3(9)(f), which prohibits "[f]ailing to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear"; and G.L. c. 176D, § 3(9)(g), which prohibits "[c]ompelling insureds to institute litigation to recover amounts due under an insurance policy by offering substantially less than the amounts ultimately recovered in actions brought by such insureds." "To proceed against

[3] The finding that NEPSG is a proper assignee of the claim and had the right to demand reference defeats Bunker Hill's argument that NEPSG acted as an unlicensed private insurance adjuster throughout this process, as NEPSG, standing in the shoes of the homeowner (see *supra*) is entitled to represent itself.

an insurer who has violated G.L. c. 176D, § 3(9), a plaintiff must bring a claim under G.L. c. 93A, § 9 or § 11." *Silva* v. *Steadfast Ins. Co.*, 87 Mass. App. Ct. 800, 803 (2015). NEPSG brought its claim under Section 11.[4]

"A ruling that conduct violates G.L. c. 93A is a legal, not a factual, determination." *Casavant* v. *Norwegian Cruise Line, Ltd.*, 460 Mass. 500, 503 (2011), quoting *R.W. Granger & Sons* v. *J & S Insulation, Inc.*, 435 Mass. 66, 73 (2001). Accord *Schwanbeck* v. *Federal-Mogul Corp.*, 31 Mass. App. Ct. 390, 414 (1991) ("Although whether a particular set of acts, in their factual setting, is unfair or deceptive is a question of fact . . . the boundaries of what may qualify for consideration as a c. 93A violation is a question of law . . .."). The court can, therefore, properly address the c. 93A and c. 176D claims on summary judgment.

"An absence of good faith and the presence of extortionate tactics generally characterize the basis for a c. 93A – 176D action based on unfair settlement practices." *Guity* v. *Commerce Ins. Co.*, 36 Mass. App. Ct. 339, 344 (1994). In determining whether a business practice is unfair, the court considers factors such as "(1) whether the practice . . . 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, [and] (3) whether it causes substantial injury to consumers (or competitors or other businessmen)." *PMP Assoc., Inc.* v. *Globe Newspaper Co.*, 366 Mass. 593, 596 (1975). "A plausible, reasoned legal position that may ultimately turn out to be mistaken . . . is outside the scope of the punitive aspects of the combined application of c. 93A and c. 176D." *Guity*, 36 Mass. App. Ct. at 343.

Standing alone, a breach of contract is not a c. 93A violation. *Madan* v. *Royal Indem. Co.*, 26 Mass. App. Ct. 756, 762 (1989). A breach of contract violates c. 93A only if "the nature, purpose, and effect of the challenged conduct is coercive or extortionate in nature." *Diamond Crystal Brands, Inc.* v. *Blackleaf, LLC*, 60 Mass. App. Ct. 502, 507 (2004).

---

[4] The Complaint purports to assert the claim pursuant to G.L. c. 93A, § 2. However, since the claim must be brought under Section 9 or 11, the court considers the claim to have been brought pursuant to Section 11, which provides a right of action in a business context.

"Ordinary contract disputes, or the failure to negotiate a settlement in lieu of litigation . . . typically fall outside the reach of the statute." *Aggregate Indus. – Ne. Region, Inc.* v. *Hugo Key & Sons, Inc.*, 90 Mass. App. Ct. 146, 152 (2016). See *Duclersaint* v. *Federal Nat'l Mortg. Ass'n*, 427 Mass. 809, 814 (1998) ("[A] good faith dispute as to whether money is owed, or performance of some kind is due, is not the stuff of which a c. 93A claim is made"); *Kobayashi* v. *Orion Ventures, Inc.*, 42 Mass. App. Ct. 492, 505 (1997) (ordinary contract disputes "without conduct that was unethical, immoral, [or] oppressive," are not actionable under c. 93A).

The dispute in this case arose after NEPSG and Bunker Hill reached differing conclusions about the cost to repair the property.[5] At that point, as the assignee of the claim, NEPSG asserted a right to reference under the policy. Disagreeing that NEPSG, as assignee, could assert a right to reference under the policy, Bunker Hill denied the request. Whether the assignee of a claim possesses a right to reference under the insured's policy appears to present a novel question under Massachusetts law. The parties disagreed as to that issue, although neither's interpretation is patently unreasonable. Consequently, this dispute amounts to an ordinary contract dispute in which NEPSG asserts that Bunker Hill breached the policy by failing to engage in reference. There is no evidence that Bunker Hill engaged in any unethical or oppressive actions that would properly give rise to claims under c. 93A and/or c. 176D. Consequently, summary judgment must enter for Bunker Hill on this claim.

---

[5] In a September 20, 2021, email, Richard Tilden, a representative at one time assigned to the claim, noted that the difference in the estimates is almost entirely attributable to NEPSG's assertion that it will take 480 hours to replace the siding at the property, as opposed to Bunker Hill's estimated 128 hours, and 204 hours for hazardous waste removal. Ex. 3 to the Complaint. The hours for the two tasks account for $96,116.20 of NEPSG's $139,883.55 estimate. *Id.* As to the 480 hours relative to the siding, NEPSG asserts that it will take four workers six days to remove the existing siding on the property and nine days to put up new siding. JA Ex. 8. It is the court's view that the suggestion it would take fourteen (14) days – nearly three full work weeks – to take down and replace the siding is dubious. A more realistic estimate as to the time required to complete said tasks would likely bring the parties' estimates much closer together.

III. Tortious Interference with Advantageous Business Relations

To prevail on a claim of tortious interference with advantageous business relations, the plaintiff must prove: (1) it had an advantageous relationship with a third party; (2) the defendant knowingly induced a breaking of the relationship; (3) the defendant's interference with the relationship, in addition to being intentional, was improper in motive or means; and (4) the plaintiff was harmed by the defendant's actions. *Blackstone* v. *Cashman*, 448 Mass. 255, 260 (2007). NEPSG asserts that Bunker Hill tortiously interfered with its relationship with the homeowner by contacting her directly. The record, however, contains no evidence that NEPSG's relationship with the homeowner was damaged. Further, Bunker Hill believed, correctly, that it was communicating with its insured. The homeowner remained the insured on the policy even after assigning the claim to NEPSG. Consequently, it cannot be said that Bunker Hill had improper motive or means in contacting the homeowner. Further, there is no evidence that NEPSG suffered harm resulting from Bunker Hill's communication with the homeowner. As NEPSG cannot prove all elements of the claim of tortious interference with advantageous business relations, summary judgment must enter for Bunker Hill on that claim.

IV. Breach of Contract

To prevail on a claim for breach of contract, NEPSG must demonstrate that: there was an agreement between it and Bunker Hill; the agreement was supported by consideration; NEPSG was ready, willing, and able to perform its part of the contract; Bunker Hill committed a breach of the contract; and NEPSG suffered harm as a result. *Bulwer* v. *Mount Auburn Hosp.*, 473 Mass. 672, 690 (2016). As noted, *supra*, "[w]hen a claim is assigned, the assignee stands in the shoes of the assignor and is in the same position as the assignor would have been in without the assignment." *Rubenstein*, 45 Mass. App. Ct. at 246. Therefore, because the policy was a contract between Bunker Hill and the homeowner, a contract exists between Bunker Hill and NEPSG, as assignee of the homeowner, as it relates to the claim. The policy dictates that NEPSG can request reference to resolve the dispute surrounding the amount of the claim. Bunker Hill refused

NEPSG's request for reference, thereby breaching the contract. At this point, however, it is unclear whether NEPSG suffered any harm from Bunker Hill's refusal to proceed to reference. The issue of harm, therefore, remains an unresolved issue of material fact, rendering summary judgment on this count inappropriate.

CONCLUSION & ORDER

For the foregoing reasons:

1. NEPSG's Motion for Partial Summary Judgment is **ALLOWED** as to that portion of Count IV which seeks a determination that the Policy is a matching policy and Count V. The court hereby declares and adjudges that the Policy provides matching coverage and that NEPSG is entitled, as the homeowner's assignee, to demand reference pursuant to the policy.
2. NEPSG's Motion for Partial Summary Judgment is **DENIED** as to that portion of Count IV which seeks a determination that materials of like kind and quality are not available and Bunker Hill must replace the vinyl siding on the entire property.
3. Bunker Hill's Motion for Summary Judgment is **ALLOWED** as to Count I, alleging violation of c. 93A, and Count III, alleging tortious interference with advantageous business relations.
4. Bunker Hill's Motion for Summary Judgment is **DENIED** as to Count II, alleging breach of contract.

/s/ David A. Deakin
David A. Deakin
Associate Justice

Dated: April 22, 2024