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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Industrial Park Center LLC, Plaintiff, v. Great Northern Insurance Company, Defendant.	No. CV-22-01196-PHX-MTL **ORDER**

Plaintiff Industrial Park Center, LLC ("Plaintiff") filed breach of contract and breach of the covenant of good faith and fair dealing claims against Defendant Great Northern Insurance Company ("Defendant"), its commercial property insurer. (Doc. 1-3.) Before the Court are Plaintiff's motion for partial summary judgment as to the breach of contract claim (Doc. 101) and Defendant's motion for summary judgment as to both claims (Doc. 100). The motions are fully briefed, and the Court held oral argument. The Court will grant Defendant's motion for summary judgment as to both claims and deny Plaintiff's motion.

I. FACTUAL BACKGROUND

Plaintiff owns commercial property located at 2465 South Industrial Park Avenue, Building C, in Tempe, Arizona. (Doc. 1-3 ¶ 7; Doc. 4 ¶ 7.) Since 1990, Plaintiff leased a section of the building to Star Fisheries, which used the suites for "wholesale distribution of seafood." (Doc. 100-1 at 2, 8, 12.) As part of its business practices, Star Fisheries hosed down the floor with water daily. (Doc. 101-11 at 5, 7; Doc. 100-15 at 2.) Star Fisheries also

maintained walk-in freezers at temperatures below zero degrees Fahrenheit. (Doc. 101-11 at 5.)

In 2010, Plaintiff discovered damage to the building's concrete walls and stairs and retained Meyer, Bergman, and Johnson ("MBJ") to perform a structural investigation. (Doc. 100-5 at 2.) MBJ inspected the building and filed a report with a number of recommendations. (Docs. 100-5, 100-7.) As part of the inspection, a geotechnical engineer from Speedie and Associates also came out and wrote a report assessing the soil around and under the building. (Doc. 101-12.) As a result, Plaintiff implemented repairs, including installing "weep holes," repairing concrete tilt panels, stairs, and cracks in flooring, inspecting and repairing trench drains, and painting restored concrete. (Doc. 100-9; Doc. 100-10 at 10-11; Doc. 103-7 at 7-8.) In its report, MBJ suggested that Plaintiff could install a waterproof floor coating, below-slab water barrier, or additional drain system, but Plaintiff did not do so. (Doc. 100-7 at 6; Doc. 103 at 7; Doc. 101-23 at 91.)

In late 2020, Plaintiff hired Robert Vallelonga & Associates Consulting Engineers ("RVA") to provide engineering services related to work at the building. RVA performed an inspection and found cracks and spalling on the eastern and southern walls, as well as damage to the exterior stairs. (Docs. 100-17, 100-18.) A review of these reports and an additional site check in September 2021 by R. Lloyd Hamblin, an engineer retained by Plaintiff, found "cracked and delaminated concrete tilt wall panels" and damage to the building's stairs outside Star Fisheries. (Doc. 100-19 at 5.) A year later, in January 2022, when Plaintiff was repairing stairs per RVA's recommendation, it found that the bottoms of the tilt walls were crumbling and supporting rebar was rusted away to the extent that the structure of the entire building, not just the Star Fisheries, was compromised. (Doc. 100-20 at 7-8.)

Defendant provided insurance coverage of the building through an all-risk business insurance policy since 2008. (Doc. 101 at 2.) The relevant policy period is from June 7, 2021 through June 7, 2022. (Doc. 100-28.) Plaintiff filed a claim under its policy with Defendant in January 2022. (Doc. 100-21.)

Defendant retained Jed Larsen of Nelson Forensics to inspect the premises. (Doc. 101-4 at 7.) Defendant initially denied the claim because Mr. Larsen found the damage was due to "poor/inadequate soil preparation and compaction" and that the damage did not result from water usage by Star Fisheries. (Doc. 101-4 at 2-3.) Plaintiff's counsel wrote Defendant explaining that it ignored Plaintiff's engineer's reports. (Doc. 101-5.) As a result, Mr. Larsen came out again to reinspect Plaintiff's property. The supplemental report changed Defendant's original opinion and it concluded that Plaintiff's claim was exacerbated by the water and salt used by Star Fisheries. (Doc. 101-7.) Defendant ultimately denied the claim under the "wear and tear" and "settling" exclusions. (Doc. 101-7 at 1-5.)

As a result, Plaintiff filed a lawsuit alleging that by denying its insurance claim, Defendant breached the insurance policy contract and the covenant of good faith and fair dealing. (Doc. 1-3.) Plaintiff seeks compensatory damages that it alleges are owed under the policy, punitive damages, attorneys' fees, and costs. (*Id.* at 8-9.)

II. LEGAL STANDARD

Summary judgment is appropriate when the evidence, viewed in the light most favorable to the non-moving party, demonstrates "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A genuine issue of material fact exists when "the evidence is such that a reasonable jury could return a verdict for the nonmoving party," and material facts are those "that might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). At the summary judgment stage, "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Id.* at 255 (citations omitted); *see also Jesinger v. Nev. Fed. Credit Union*, 24 F.3d 1127, 1131 (9th Cir. 1994) (holding that the court determines whether there is a genuine issue for trial but does not weigh the evidence or determine the truth of matters asserted).

When the "parties submit cross-motions for summary judgment, each motion must be considered on its own merits." *Fair Hous. Council of Riverside Cnty. v. Riverside Two,*

249 F.3d 1132, 1136 (9th Cir. 2001) (citations and internal quotations omitted). The summary judgment standard operates differently depending on whether the moving or non-moving party has the burden of proof. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). When the movant bears the burden of proof on a claim at trial, the movant "must establish beyond controversy every essential element" of the claim based on the undisputed material facts to be entitled to summary judgment. *S. Cal. Gas Co. v. City of Santa Ana*, 336 F.3d 885, 888 (9th Cir. 2003). If the movant fails to make this showing, summary judgment is inappropriate, even if the non-moving party has not introduced contradictory evidence in response. When, on the other hand, the non-movant bears the burden of proof on a claim at trial, the movant may prevail either by citing evidence negating an essential element of the non-movant's claim or by showing that the non-movant's proffered evidence is insufficient to establish an essential element of the non-movant's claim. *See Celotex*, 477 U.S. at 322-23; 10A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2727.1 (4th ed. updated June 2024).

III. DISCUSSION

A. Breach of Contract

The salient issue in this breach of contract claim is whether the loss incurred by Plaintiff is fortuitous. Defendant argues that Plaintiff has not demonstrated the damage was fortuitous. (Doc. 100 at 10-13.) It argues that Plaintiff's loss resulted from a known risk, that the damage would predictably occur because of the way Star Fisheries used the property. (*Id.* at 11-13.)

Insurance policy interpretation is a matter of law for the Court to decide. *McHugh v. United Servs. Auto. Ass'n.*, 164 F.3d 451, 454 (9th Cir. 1999). Under Arizona law, courts give words in insurance policies "their plain and ordinary meaning, examining the policy from the viewpoint of an individual untrained in law or business." *Teufel v. Am. Fam. Mut. Ins. Co.*, 244 Ariz. 383, 385 (2018) (cleaned up). Arizona courts apply "a rule of common sense" to the policy terms. *State Farm Mut. Auto. Ins. Co. v. Wilson*, 162 Ariz. 251, 257 (1989).

"Under 'all risks' coverage, recovery is allowed for all fortuitous losses not resulting from misconduct or fraud of the insured unless the policy contains a specific provision expressly excluding the particular loss from coverage." *Pac. Indem. Co. v. Kohlhase*, 9 Ariz. App. 595, 597 n.1 (App. 1969). When an insured seeks recovery for a loss under an insurance contract, the insured has the burden of proving that the loss resulted from an insured risk. *Id.* at 598. "The insurer, on the other hand, has the burden of showing the loss was within a policy exclusion." *Id.* at 597. "Where the evidence is conflicting, the question of whether the loss is within the risks of the policy or excepted therefrom is ordinarily for the trier of fact." *Id.*

"[A] fortuitous event is one that occurs by chance or accident and not by purposeful design." *Baugh Constr. Co. v. Mission Ins. Co.*, 836 F.2d 1164, 1169 (9th Cir. 1988). "Courts have further concluded that a fortuity inquiry should look to, among other things, whether a particular loss was certain to occur, the parties' perception of risk at the time the policy issued, and whether the loss could reasonably have been foreseen." *Ingenco Holdings, LLC v. Ace Am. Ins. Co.*, 921 F.3d 803, 815 (9th Cir. 2019).

At oral argument, the parties conceded that there were no disputed material facts specific to the issue of fortuity. (Doc. 109.) The parties also agree that determining whether a loss is fortuitous is a question for this Court to decide. (Doc. 101 at 7; Doc. 109.) *See Univ. of Cincinnati v. Arkwright Mut. Ins. Co.*, 51 F.3d 1277, 1281 (6th Cir. 1995).

Here, the Court finds that nothing in the record suggests that the parties entered into the insurance contract knowing that the building would experience such damage. Also, nothing in the record suggests that Plaintiff intentionally caused the damage to the building or that it occurred from fraud or misconduct. Nonetheless, based on the undisputed material facts, the Court finds that Plaintiff's loss was reasonably foreseeable and almost certain to occur.

In 2010, MBJ found that Star Fisheries "routinely wash[ed] down the interior slab-on-grade" and regularly rinsed the rear exterior stairs with water. (Doc. 101-11 at 6.) MBJ also noted that "due to the extended use of freezers and coolers, the soil below the slab-on-

grade is most likely in a state of permafrost," which "may be constantly undergoing a freeze-thaw cycle when the southern wall panels receive thermal load from the sun." (Doc. 101-11 at 5, 8.) MBJ explained in its report that moisture contents in the suite may have been greater than the original design allowed for:

> [I]t appears that the building walls have been designed to retain soil below the slab-on-grade elevation. However, in our opinion the retaining wall design parameters were most likely for that of dry soil or free draining backfill. If the sub-grade water content exceeds that of the original design specifications, damage similar to that observed can occur to the walls due to higher static pressure from saturated earth.

(Doc. 101-11 at 3.)

Per MBJ's recommendation, a geotechnical engineer from Speedie assessed the soil composition. Speedie observed that the "majority of the distress" appeared in the southeast corner of the building, where Star Fisheries was located. (Doc. 101-12 at 2.) Speedie pulled three samples of soil and found that soil from the south wall, the cooler section of the suite, was very moist. (*Id.* at 2-3.) The other two samples from the east wall were "about normal." (*Id.* at 2.) Speedie concluded that "the distress is likely related to the increased moisture levels in the supporting clayey soils. The moisture levels appear to increase with depth and towards the south wall" and "could be contributing to wall and slab movement." (*Id.* at 3.)

After Speedie's site visit and report, MBJ wrote its final report and recommended several measures including installing weep holes to drain existing moisture from the soil, repairing of concrete tilt panels, stairs, and cracks in flooring, inspecting and repairing trench drains, and painting restored concrete. (Doc. 100-7 at 5-7.) Plaintiff implemented these measures. (Doc. 100-9; Doc. 100-10 at 10-11; Doc. 103-7 at 7-8.)

MBJ recommended additional measures to control future moisture infiltration: (1) installing a waterproof floor coating "to completely *prevent* future infiltration of moisture" and (2) a more expensive option, of removing and replacing "large sections of concrete slab and install[ing] a 4-inch layer of ABC subgrade and a vapor barrier system

below the concrete slab." (Doc. 101-13 at 6 (emphasis added).) Speedie also recommended that "[i]t may be possible to install a new waterproof floor coating or remove and replace large sections of the slab with a vapor barrier/drain system to collect water and *prevent* infiltration to the deeper soils." (Doc. 101-12 at 3 (emphasis added).) The parties agree that Plaintiff did not implement these recommendations. (Doc. 100 at 13-14, Doc. 101 at 7; Doc. 101-23 at 91.)

Most of the recommendations were to mitigate future moisture intrusion, not necessarily prevent it. MBJ's engineer, Mr. Huseman, testified that the purpose of the recommendations was to provide options to Plaintiff for different levels of protection to "*try* and *mitigate* moisture intrusion." (Doc. 103-6 at 9 (emphasis added).) He also testified that the "intention wasn't to necessitate that all three be installed concurrently" but that "there's more than one option to *mitigate* moisture intrusion." (*Id.* (emphasis added).) Mr. Huseman said it was "a fair statement" to say that Plaintiff could have gone with only "sealing cracks, control joints, saw cuts, and be done with it." (*Id.*)

Here, the mitigation measures may have slowed down the progression of the damage, but it was not certain to prevent it. Star Fisheries continued to lease the space and use water and freezers as part of its daily operations. (Doc. 100-15 at 2-3; Doc. 100-20 at 9.) Plaintiff only implemented mitigation measures in the building—the measures that MBJ and Speedie recommended to "prevent future infiltration of moisture" were not implemented. (Doc. 101-13 at 6; Doc. 100 at 13-14, Doc. 101 at 7; Doc. 101-23 at 91.) It is therefore reasonably foreseeable that Star Fisheries' continued practice of washing down the concrete slab and its use of sub-zero freezers would almost certainly continue to introduce moisture into the soil and eventually affect the building's infrastructure. *See, e.g*, *Fry v. Phoenix Ins. Co.*, 54 F. Supp. 3d 354, 365-67 (E.D. Pa. 2014) (holding fortuity exclusion barred coverage when the bulging and eventual collapse of a home's unrepaired and unbraced exterior was certain to occur because homeowner knew and did not make necessary repairs); *see also Fidelity & Guar. Ins. Underwriters, Inc. v. Allied Realty Co., Ltd.*, 384 S.E.2d 613, 615 (Va. 1989) ("A fortuitous loss is one that does not result from

any inherent defect in the property insured, *ordinary wear and tear*, or intentional misconduct." (emphasis added)).

To be sure, Plaintiff claims it "believed that, by following and implementing all of the necessary repair, remediation and mitigation recommendations of [MBJ and Speedie] all damage issues arising out of Star Fisheries' use of the Premises had been completely resolved."[1] (Doc. 101-10 at 3.) Plaintiff, however, considered that future damage may occur as a result of Star Fisheries' occupancy. From 2014 onward, Plaintiff included a clause in their lease with Star Fisheries to shift the cost of repairing such future damage. (*See, e.g.*, Docs. 100-10, 100-11, 100-12, 100-13.)

> Restoration, as required by Landlord, to any component of the building, including but not limited to the buildings foundation, interior/exterior walls, and roof structure as a result of Tenant's use of the Premises. In particular, Landlord shall have the building's concrete slab/exterior walls, and sub foundation evaluated by qualified engineers/material testing agencies to ascertain the damage, if any, to the foregoing as a result of Tenant's perpetual use of the Premises as (1) a "wet environment" and (2) to house freezer/cooler units.

(Docs. 100-10, 100-11, 100-12, 100-13.) By adding this clause to the lease renewals, Plaintiff anticipated that future damage was reasonably foreseeable.

Based on these undisputed material facts, Plaintiff's loss was not fortuitous, and therefore, the risk was not covered by the all-risk policy. *See Pac. Indem. Co.*, 9 Ariz. App. at 597 n.1. As such, Defendant did not breach the insurance contract, and the Court grants Defendant's motion as to the breach of contract claim.

B. Breach of the Covenant of Good Faith and Fair Dealing

Defendant moves for summary judgment on the breach of the covenant of good faith and fair dealing claim. (Doc. 100 at 18-20.) Plaintiff asserts that Defendant repeatedly

[1] This statement is from a declaration of Mills Brown, a member of Industrial Park Center LLC. The declaration provided, however, does not include the verification requirements established under 28 U.S.C. § 1746. Specifically, the declaration fails to include that the statements are "true" and "correct." (Doc. 101-10.) It will be considered because Defendant did not object to it.

raised invalid coverage defenses and did not have a factual basis for its denials. (Doc. 103 at 15-17.) Defendant argues that it "promptly investigated the claim and continued to investigate and evaluate the claim even after receiving information demonstrating it was not covered." (*Id.* at 20.)

An insurer breaches the implied covenant of good faith and fair dealing and acts in bad faith when it, "intentionally denies, fails to process or pay a claim without a reasonable basis." *Zilisch v. State Farm Mut. Auto. Ins. Co.*, 196 Ariz. 234, 237 (2000) (quoting *Noble v. National Am. Life Ins. Co.*, 128 Ariz. 188, 190 (1981)). A plaintiff must show that (1) "the insurer acted unreasonably toward its insured," and (2) "the insurer acted knowing that it was acting unreasonably *or* acted with such reckless disregard that such knowledge may be imputed to it." *Trus Joist Corp. v. Safeco Ins. Co. of Am.*, 153 Ariz. 95, 104 (App. 1986) (emphasis in original). An insurer may defend a fairly debatable claim if it exercises reasonable care and good faith. *Tritschler v. Allstate Ins. Co.*, 213 Ariz. 505, 516 (Ct. App. 2006) (citing *Zilisch*, 196 Ariz. at 237).

An insurer's belief in fair debatability is a question of fact for the jury. *Id.* At the summary judgment stage, whether the insurer acted knowingly or with reckless disregard as to the reasonableness of its actions, the appropriate inquiry is whether sufficient evidence exists from "which reasonable jurors could conclude that in the investigation, evaluation, and processing of the claim, the insurer . . . either knew or was conscious of the fact that its conduct was unreasonable." *Christie's Cabaret of Glendale LLC v. United Nat'l Ins. Co.*, 562 F. Supp. 3d 106, 122 (D. Ariz. 2021) (quoting *Zilisch*, 196 Ariz. at 238).

Here, viewing the facts in the light most favorable to Plaintiff, sufficient evidence does not exist to show that Defendant acted in bad faith.

Plaintiff filed its claim on January 12, 2022. (Doc. 100-21.) Defendant retained Jed Larsen of Nelson Forensics to assist with the investigation. (Doc. 100-23.) Nelson Forensics inspected the building on January 24, 2022, and gave the final report to Defendant on March 11, 2022. (Doc. 100-23 at 3, 5.) Using the report, Defendant denied the claim on March 18, 2022. (Doc. 100-24 at 2.) Defendant denied the claim finding the

damage was caused by "inadequate soil preparation and compaction" and was unrelated to the water usage by the tenant. (*Id.* at 2.)

On April 5, 2022, Plaintiff's counsel wrote a letter rebutting Mr. Larsen's report with Mr. Hamblin's report. (Doc. 100-25.) In response, Defendant had Mr. Larsen re-inspect the building and address Mr. Hamblin's report. Mr. Larsen issued a supplemental report on April 29, 2022, and Defendant denied Plaintiff's request for reconsideration on June 1, 2022. (Docs. 100-16, 100-27.) Defendant denied the claim a second time stating it was based in part on the water used at Star Fisheries, and ultimately, found the wear and tear and settling exclusions applied. (Doc. 100-27 at 3-5.) These facts indicate that Defendant pursued a thorough and timely investigation for the foundation of its denial. *See Demetrulias v. Wal-Mart Stores Inc.*, 917 F. Supp. 2d 993, 1006 (D. Ariz. 2013) ("An insurer cannot reasonably and in good faith deny payments to its insured without thoroughly investigating the foundation for its denial." (citation omitted)); *see also Zilisch*, 196 Ariz. at 237 ("[The insurer] cannot lowball claims or delay claims hoping that the insured will settle for less.").

Plaintiff does not explain why Defendant amending its denial to include factual allegations that align with the facts laid out by both parties is an unreasonable basis for the denial. Rather, Plaintiff claims that Defendant's denial was not based on sufficient facts. (Doc. 103 at 16.) Plaintiff argues that Mr. Dowd, Defendant's adjuster, "admitted he did not have a factual basis to invoke the settling exclusion." (*Id.*) Mr. Dowd's testimony, however, was in reference to the denial letter and not the investigation itself. Specifically, he testified that his denial letter, which referenced the settling exclusion, did not provide an explanation for why the exclusion applied. (Doc. 100-26 at 42.) Mr. Dowd also explained that he did not "know that the settling applied so much as the wear and tear." (*Id.*)

Defendant also argues that Mr. Dowd "never bothered to learn" how courts interpret the wear and tear exclusions. (*Id.*) Mr. Dowd testified that he relies on the insurance policy to make his determinations and that he is "not gonna know the law in every state to make

[his] decision." (*Id.* at 17.) Mr. Dowd, however, further explained that he had an outside attorney review his June 1, 2022 denial letter "[t]o have [his] . . . coverage position reviewed." (*Id.*) This shows that Mr. Dowd did rely, in part, on legal counsel before sending the final determination. Furthermore, the parties' briefing demonstrates that there is no binding authority under Arizona law as to the definition of a "wear and tear" exclusion, so the plain meaning of the policy—which Mr. Dowd relied on to make his determination—applies. (Doc. 100 at 15-18; Doc. 101 at 17-19.) *See Teufel*, 244 Ariz. at 385.

The Court finds no disputed material facts to show that sufficient evidence exists from "which reasonable jurors could conclude that in the investigation, evaluation, and processing of the claim, the insurer . . . either knew or was conscious of the fact that its conduct was unreasonable." *See Christie's Cabaret of Glendale LLC*, 562 F. Supp. 3d at 122. Therefore, the Court grants Defendant's motion for summary judgment as to the breach of the covenant of good faith and fair dealing claim.

IV. CONCLUSION

Accordingly,

IT IS ORDERED granting Defendant's motion for summary judgment (Doc. 100).

IT IS FURTHER ORDERED denying Plaintiff's motion for partial summary judgment (Doc. 101).

IT IS FINALLY ORDERED directing the Clerk of Court to enter judgment in favor of Defendant and close this case.

Dated this 26th day of July, 2024.

Michael T. Liburdi

Michael T. Liburdi
United States District Judge