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U.S. DISTRICT COURT
N.D. OF ALABAMA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

| | | |
|---|---|---|
| RANDALL SCOTT NELSON, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | 2:24-CV-01277-SGC |
| v. | ) | |
| | ) | |
| FRANKENMUTH MUTUAL INSURANCE COMPANY, | ) | |
| | ) | |
| | ) | |
| Defendant. | ) | |

**DEFENDANT FRANKENMUTH MUTUAL INSURANCE COMPANY'S REPLY BRIEF IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT**

**COMES NOW** Defendant Frankenmuth Mutual Insurance Company ("Frankenmuth"), and submits this reply brief in support of its motion for summary judgment, respectfully showing the Court as follows:

**RESPONSE TO ADDITIONAL UNDISPUTED FACTS**

Plaintiff failed to respond to Frankenmuth's statement of undisputed facts; thus, they are admitted for purposes of this motion. As to Plaintiff's alleged facts, Frankenmuth will attempt to address but because Plaintiff did not utilize separate marked paragraphs it is difficult, and states: Plaintiff stated that he tinkered on items at the subject premises. [Doc. 22, p. 6] Frankenmuth disputes this statement because it does not show that he did so within 60 days of the loss (after October 27, 2022). In fact, Plaintiff testified that he had not done anything at the subject

premises since October 2, 2022 – well outside the 60 day requirement of the policy. [Doc. 21-4, p. 39 (158:7-14)]

## ARGUMENT

Whether Plaintiff's claim is covered under the terms of the Policy depends on whether the subject property was "vacant" within the meaning of the Policy's Vacancy Exclusion. The undisputed facts show that the damage to the subject property was discovered by Plaintiff on December 26, 2022. Accordingly, in order for the claim to be covered under the 60-day Vacancy Exclusion, the subject property could not be "vacant" as defined by the Policy after October 27, 2022. If the subject property became vacant before December 26, 2022, the court must determine whether Plaintiff was conducting "customary operations" on the subject property or whether the subject property was "under renovation or construction" after October 27, 2022.

### I. The Policy Defines What Constitutes Vacancy.

The subject insurance policy defines vacancy. Specifically, the Policy states with regards to vacancy of the Subject Premises, as follows:

> b. **Vacancy Provisions**
>
> If the building where loss or damage occurs has been vacant for more than 60 consecutive days before the loss or damage occurs:

> (1) We will not pay for any loss or damage caused by any of the following even if they are Covered Causes of Loss:
>
> (d) Water damage;

[Doc. 21-2, p. 25]

6. The Policy defines vacancy as follows:

> a. **Description of Terms**
>
> (1) As used in this vacancy condition, the term building and the term vacant have the meanings set forth in (1) (a) and (1) (b) below:
>
> ***
>
> (b) When this policy is issued to the owner or general lessee of a building, building means the entire building. Such building is vacant unless at least 31% of the square footage is:
>
> (i) Rented to a lessee or sub-lessee and used by the lessee or sub-lessee to conduct its customary operations; and/or
>
> (ii) Used by the building owner to conduct customary operations.
>
> (2) Buildings under construction or renovation are not considered vacant.

[Doc. 21-2, p. 25] Thus, the policy has specifically defined what will constitute vacancy, and those terms control. This negates Plaintiff's argument, which relied upon cases citing to homeowners' insurance policies that did not contain the same

policy language, that the building was not vacant because it contained personal items. See State Farm Mut. Auto Ins. Co. v. Barrow, 46 Ala. App. 392, 243 So. 2d 376, 381 (Ala. Civ. App. 1971) (terms contained in an insurance policy are to be given their common meaning only in the absence of a specific definition contained in the policy.)

Moreover, any argument that the vacancy provision is ambiguous, and should thus be construed in favor of coverage, is meritless. The same vacancy provision seen in the case at hand was considered in Lui v. Essex Ins. Co., 186 Wash. App. 1045 (2015), aff'd sub nom. Kut Suen Lui v. Essex Ins. Co., 185 Wash. 2d 703, 375 P.3d 596 (2016), as amended on denial of reconsideration (Aug. 15, 2016), with that court holding that this provision was not ambiguous, and added the following:

> Insurers use vacancy provisions like this one to reflect the increased risk posed by vacant buildings. See, e.g., Heartland Capital Invs., Inc. v. Grange Mut. Cas. Co., 2010 WL 432333 (C.D. Ill. 2010). Vacant buildings are more susceptible to insurance risks such as fire, trespass, leaks, and other defects that often cause greater damage because they go unnoticed. Rojas v. Scottsdale Ins. Co., 678 N.W.2d 527, 533 (Neb. 2004). Washington courts have recognized that vacancy provisions are reasonable and should be enforced as any other contract provision. Brehm Lumber Co. v. Svea Ins. Co., 36 Wash. 520, 524, 79 P. 34 (1905).

## II. The Vacancy Provision Bars Coverage For Plaintiff's Lawsuit.

Plaintiff, without any legal citation, erroneously states that the Policy is ambiguous because it does not define the terms "customary operations", "renovation" or "construction". Although the Policy does not define these terms, "[i]f a word or phrase is not defined in the policy, then the court should construe the word or phrase according to the meaning a person of ordinary intelligence would reasonably give it." Safeway v. Herrera, 912 So. 2d 1140, 1143 (Ala. 2005). A non-legal dictionary may be used to ascertain such meaning. See Id. at 1143-44; Carpet Installation & Supplies v. Alfa Mut. Ins. Co., 628 So. 2d 560, 562 (Ala. 1993).

**A. "Customary Operations" Were Not Occurring At The Subject Premises.**

The initial consideration is whether the insured premises were leased to another entity. If so, the building is vacant unless at least 31% of the square footage is leased and being used by the lessee for its customary operations. If that does not apply, the building will be considered vacant if it is not used for the owner's customary operations. As the building was not leased, it had to be used by the Plaintiff for customary operations in order to qualify for coverage.

Although the Policy does not define "customary operations"; courts have found that the term is not ambiguous. See Wilheit Family Properties, L.P. v. The Netherlands Inc. Co., 2013 WL 12291715 (N.D. Ga. 2013).

Plaintiff is the building owner and does not dispute that it was not utilizing the insured premises for its "customary operations" within 60 days before the loss. Accord 7th & Allen Equities v. Hartford Cas. Ins. Co., No. 11-CV-01567, 2012 WL 5392167, at *6 (E.D. Pa. Nov. 2, 2012) (finding showing rental property to prospective tenants insufficient to establish that it was used for plaintiff's customary operations.). See also Saiz v. Charter Oak Fire Ins. Co., 299 Fed. Appx. 836, 840 (10th Cir. 2008), the court held that a restaurant owner who operated his other businesses from an office in the closed restaurant was not conducting the customary operations of a restaurant at the time of a loss. Similar decisions were reached in Keren Habinyon Hachudose D'Rabeinu Yoel of Satmar BP v. Philadelphia Indem. Ins. Co., 462 Fed.Appx. 70 (2nd Cir. 2012) (The customary operation of the insured high school was the operation of a school and it had not been used for that purpose in the 60 day prior to the loss); and Sorema N. Am. Reinsurance Co. v. Johnson, 574 S.E.2d 377 at 379 (Ga. Ct. App. 2002) (owner of building purchased for use as a meat packing plant was not conducting customary operations even though he was storing meat packing equipment at the building). These cases show that courts look to the primary business of an entity when deciding if it is conducting its customary operations and will not find an ancillary pursuit to be a customary operation.

Plaintiff closed the business in April/May 2021, and was not open at all in 2022. [Doc. 21-4, p. 30 (121:7-13); p. 38 (150:7-16)] This is confirmed by the fact that the Plaintiff's business generated no income in 2022 (Doc. 21-4, p. 31 (122:4-9)), and performed no work for any customers in 2022 and/or 2023 (Doc. 21-4, p. 31 (125:4-18)).

When Plaintiff closed his business in 2021, the business placed the following message on its voice mail:

> "Thank you for calling Scott's Motorcycle Service. We are closing our store Friday, May the 28th at 7:00 p.m. We would like to thank everyone for all the years of business. We really appreciate it. Gary will be at Peck 46 beginning Tuesday, June 1st. That number is 205-583-4640."

[Doc. 21-4, p. 33 (130:1-132:6)]

Since June 1, 2021, until the date of loss, the business has not taken any paying jobs as Mr. Nelson was not capable of working. [Doc. 21-4, p. 34 (134:3-135:16); and, p. 35 (138:1-19 and 140:9-141:16)]

Thus, the subject property was not being utilized for "customary operations."

**B. The Subject Property Was Not Under Construction or Renovation.**

The Policy also states that the property is not considered vacant if it is "under construction or renovation." As with "customary operations," the terms

"construction" and "renovation" are not defined by the Policy. The Courts, however, do not find these terms ambiguous. Both have generally understood meanings and dictionary definitions are comparable to the understood meanings. Frankenmuth Mut. Ins. Co. v. Five Points West Shopping City, LLC, 2022 WL 949888, at *9 (N.D. Ala. 2022)(dictionary definitions construe the ordinary meanings of words).

**1. Under Construction.**

Courts have defined "in the process of construction" as meaning "the building or erection of something new which theretofore did not exist; the creation of something new rather than the repair or improvement of something already existing. Travelers Indem. Co. v. Wilkes Cnty., 116 S.E.2d 314, 317 (Ga. Ct. App. 1960). Indeed, "[s]everal state courts have held that in an insurance policy, the term construction [in a vacancy exclusion] does not include repairs, maintenance, reconstruction, renovation and the like to an already existing structure." Myers v. Merrimack Mut. Fire Ins. Co., 788 F.2d 468, 472 (7th Cir. 1986).

In reviewing dictionary definitions, the courts have generally found that "construction" contemplates the building of something new and a certain level of substantially continuing activity. Wilheit Family Properties, at *5.

Plaintiff appears to concede that the subject property was not "under construction" in his response as he cites to no such evidence. Likewise, based on

the definition, no construction was conducted on the subject premises within 60 days of the loss.

**2. Renovation.**

"Renovation" is not ambiguous because it has a straightforward dictionary definition, *to-wit*, "to restore to former[,] better state (as by cleaning, repairing or rebuilding". See Wilheit Family Properties, at *5. See also American Heritage Dictionary 1047 (2d College ed, 1982) (defining renovate as "[t]o restore to an earlier condition, as by repairing or remodeling"). Examples of "renovation" include the tearing down of an awning and restoring a walkway (The Farbman Group v. Travelers Ins. Co., 2006 WL 2805646 (E.D. Mich. 2006). Whatever the activity is, however, it must be something to "change or repair the building to a better state." Certain Underwriters at Lloyd's, London v. 170 Estell Manor, LLC, 2021 WL 2525684 (D.N.J. 2021).

*De minimis* activities will not, however, constitute renovation. In Suder-Benore Co., Ltd. v. Motorists Mut. Ins. Co., 995 N.E. 2d 1279 (Ohio App. 2013) the insured was required to turn on a sprinkler system in a partially vacant building. The activity consisted of changing out a few parts, testing the air, and turning on the water. Later, heaters were placed in the building to keep the pipes from bursting and a security system was reactivated. 995 N.E. 2d at 1286. These activities were deemed insufficient to constitute "renovation." Id. at 1287.

The theme of the cases regarding renovation and vacancy is that the restorative change must be made to the property itself in order to constitute renovation. AN Properties, LLC v. Ohio Cas. Ins. Co., 2022 WL 3700047, at *1 (N.D. Texas 2022). Plaintiff appears to concede that the subject property was not "under renovation" in his response as it cites to no such evidence. Likewise, based on the definition, no renovation was conducted on the subject premises within 60 days of the loss.

## III. Frankenmuth Is Entitled To Summary Judgment On Plaintiff's Breach of Contract Claim.

As to damages, the only submitted and identified damages by the Plaintiff was set forth his Initial Disclosures, which did not identify the documents or amounts claimed in his Affidavit. However, given his affidavit, Frankenmuth will acknowledge that he has at least shown payment of approximately $4,000 in claimed remediation costs. But, this payment does not defeat Frankenmuth's motion for summary judgment as to the breach of contract claim.

Frankenmuth is entitled to summary judgment as to the breach of contract claim because Plaintiff cannot prove that the claim was due to be paid because it constituted a covered peril. Specifically, Plaintiff contends that Frankenmuth breached the contract of insurance with him when it denied coverage for his claimed loss. The burden of proving policy coverage in Alabama rests with the insured (i.e., Plaintiff). Parker Supply Co., Inc. v. Travels Indem. Co., 588 F.2d

180 (5th Cir. 1979). So, in analyzing this claim, Plaintiff, not Frankenmuth, bears the burden of proving that his claim is covered under the insurance policy. A breach of contract is defined as a "failure, without legal excuse, to perform any promise which forms the whole or part of a contract." See Mann v. Bank of Tallassee, 794 So. 2d 1375 (Ala. Civ. App. 1996) (citing Black's Law Dictionary 188 (6th ed. 1990)). To establish a breach of an insurance contract claim in Alabama, Plaintiff must show: (1) the existence of a valid contract binding the parties in the action; (2) his performance under the contract; (3) the defendant's nonperformance; and, (4) damages. State Farm Fire & Cas. Co v. Slade, 747 So. 2d 293, 301 (Ala. 1999) (citing Southern Medical Health Systems, Inc. v. Vaughn, 669 So. 2d 98, 99 (Ala. 1995)).

Plaintiff cannot show, and has failed to show, that the claim was due to be paid because the subject premises was not vacant. As demonstrated above, the subject premises was vacant on the day of loss and had been vacant for over 60 days before the loss. Thus, plaintiff has failed to show that the claim is covered and Frankenmuth is entitled to summary judgment based on the aforementioned policy analysis.

## IV. Because Frankenmuth Has An Arguable Or Debatable Basis For Its Claims Position, The Bad Faith Claim Fails As A Matter Of Law.

The absence of a debatable or arguable basis for the claim decision is an element of any bad faith claim, regardless of whether arising from a failure to pay

or a failure to investigate. State Farm Fire & Cas. Co. v. Brechbill, 144 So. 3d 248, 259-60 (Ala. 2013). The non-availability of coverage under the policy establishes that Frankenmuth possesses an arguable or debatable basis for its position relative to Plaintiff's claim/suit. Because such a basis exists, Plaintiff's bad faith claim fails. Id.

Here, in addition to the breach of contract claim, Plaintiff asserts bad faith failure to pay in its Complaint. In order for Plaintiff to prevail on this claim, it must show the following:

(a) existence of an insurance contract between the parties and a breach thereof by the Defendant;
(b) an intentional refusal to pay the insured's claim;
(c) the absence of any reasonably legitimate or arguable reason for that refusal;
(d) the insurer's actual knowledge of the absence of any legitimate or arguable reason; and
(e) if the intentional failure to determine the existence of a lawful basis is relied upon, the Plaintiff must prove the insurer's intentional failure to determine whether there is a legitimate or arguable reason to refuse to pay the claim.

Miller v. Preferred Risk Mut. Ins. Co., 572 So. 2d 1260, 1262 (Ala. 1990). According to Alabama law, the plaintiff's burden of proving facts "sufficient to sustain a case of bad faith against [Frankenmuth] is a heavy one." Tyson v. Safeco Ins. Co., 461 So. 2d 1308, 1311 (Ala. 1984); Bishop v. State Auto Mut. Ins. Co., 600 So. 2d 262, 264 (Ala. Civ. App. 1991). The Alabama Supreme Court's characterization of "a plaintiff's burden of proof as a 'heavy' one was no doubt

prompted by the Court's previous recognition [in past cases] of the necessity for allowing insurers a broad range of freedom to thoroughly evaluate claims and to decline payment in non-meritorious cases." State Farm Fire & Cas. Co. v. Slade, 747 So. 2d 293, 305 (Ala. 1999).

Plaintiff must show that Frankenmuth had no legal or factual defense to the claim by eliminating "any arguable reason propounded by the insurer for refusing to pay the claim." Burns v. Motor Ins. Corp., 530 So. 2d 824, 827 (Ala. Civ. App. 1987). An arguable reason is "one that is open to dispute or question." Liberty National Life Ins. Co. v. Allen, 699 So. 2d 138, 142 (Ala. 1997). Plaintiff's opposition to the motion for summary judgment fails to do so.

Additionally, "if the evidence produced by either side creates a fact issue with regard to the validity of the claim and, thus, the legitimacy of the denial thereof, the tort claim must fail and should not be submitted to the jury." National Savings Life Ins. Co. v. Dutton, 419 So. 2d 1357, 1362 (Ala. 1982). Thus, "the plaintiff's contract claim ha[s] to be so strong that the plaintiff would be entitled to a pre-verdict JML." State Farm Fire & Cas. Co. v. Slade, 747 So. 2d 293, 303 (Ala. 1999). If a fact issue makes a JML inappropriate for the breach of contract claim, then the defendant is entitled to a JML on the plaintiff's bad faith claim. Shelter Mut. Ins. Co. v. Barton, 822 So. 2d 1149, 1158 (Ala. 2001). In other words, if there is no valid underlying breach of contract claim, the bad faith claim must fail.

Id. Because the underlying breach of contract claim against Frankenmuth fails, the bad faith claim is due to be dismissed.

Here, Plaintiff argued in its brief that "genuine disputes of material fact exist regarding the breach of contract claim." [Doc. 22, p. 16 ("When the above evidence is construed in the light most favorable to Nelson this Court must find that genuine issues of material fact exist …[.]")] Although Frankenmuth does not agree, this statement proves that Plaintiff is not entitled to a directed verdict on its breach of contract claim; thus, the bad faith claim fails as a matter of law. West Beach Dev. Co., LLC v. Royal Indemnity Co., 2000 WL 1367994 (S.D. Ala. 2000) (if the Plaintiff's evidence does not eliminate any arguable reasons for denying the claim, the Plaintiff cannot recover for bad faith).

In an attempt to survive summary judgment, Plaintiff attempts to argue that Frankenmuth did not fairly investigate the claim because it "did not estimate the contents/personal property loss". [Doc. 22, p. 22] First, Plaintiff cites to no legal authority to show that Frankenmuth was required to estimate the Plaintiff's damages when there is no coverage. Second, Plaintiff has failed to show how the failure to estimate damages constitutes bad faith. Further, where a bad faith claim is premised on inadequate investigation, the plaintiff must not only identify what additional investigative steps the insurer should have taken, but also must offer evidence that those additional steps would in fact have uncovered the missing

information. Absent such evidence, any criticisms about omitted avenues of investigation are mere speculation. Lee v. First Nat'l Ins. Co., 2010 WL 11549637, at *18-19 (C.D. Cal. Dec. 22, 2010) (the court granted summary judgment despite fact that insurer did not interview all witnesses – because the insured "merely speculate[d]" that the additional interviews would have proved useful without offering actual evidence.). Thus, Plaintiff's claim of bad faith (i.e. failure to pay or investigate) fails as a matter of law.

## CONCLUSION

The policy issued to Plaintiff provides no coverage and Frankenmuth is entitled to summary judgment as a matter of law.

/s/ Kori L. Clement
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CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of September, 2025, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, and placed a copy of same via U.S. Mail addressed to the following:

R. Leland Lesley, Esquire
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/s/ Kori L. Clement
Of Counsel