

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS**

DANNY LEWIS,)	
)	
Plaintiff,)	Case No. 1:24-CV-02697
)	
)	Judge Andrea R. Wood
)	
v.)	
)	
FOREMOST INSURANCE COMPANY)	
GRAND RAPIDS, MICHIGAN,)	
)	
Defendants.)	

DEFENDANT’S MEMORANDUM OF LAW

Defendant, Foremost Insurance Company Grand Rapids, Michigan (“Foremost”), pursuant to Fed. R. Civ. P. 56 and Local Rule 56.1(a)(2), submits the following Memorandum of Law in support of its Motion for Summary Judgment.

I. INTRODUCTION

This Motion for Summary Judgment is simple. Plaintiff seeks to recover the fee of his appraiser, pursuant to the terms of the Appraisal clause in the policy of insurance entered into between Plaintiff and Defendant. The Appraisal clause provides that, when the parties disagree, the amount of loss for damage to the insured property will be determined by the appraisers appointed by the parties, acting together if they can agree. If the appraisers cannot agree, they appoint an umpire and the amount of loss for damage to the insured property will be determined by agreement of any two of those three, the two appraisers and the umpire.

The circumstances under which the insured party is entitled to recover the fee of his or her appraiser are also clearly set forth in in the Appraisal clause. The clause provides that the insured will recover the appraiser’s fee “[i]f the amount of loss is determined to equal or exceed the full

amount which you demanded prior to the appraisal.” Plaintiff is not entitled to recover the fee purportedly charged by his appraiser, because before the appraisal he stated in a sworn statement in proof of loss that the amount claimed under the Foremost policy was \$1,808,702.80, while the appraisers entered an award totaling \$1,308,622.11. Because the appraisers’ award was less than the amount Plaintiff demanded prior to the appraisal, Plaintiff cannot recover his appraiser’s fee from Foremost and Foremost is entitled to summary judgment.

II. ARGUMENT

A. Summary Judgment Standard.

Summary Judgment is proper when “there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(a). Such is the case here. Foremost bears the initial responsibility to show the court that there are no genuine issues of material fact to be decided at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). With that done, Plaintiff “may not rest upon the mere allegations or denials” of its pleadings, but rather must point to specific evidentiary support in the record to demonstrate the existence of a genuine issue of *material* fact for trial. Fed. R. Civ. P. 56(e); *Celotex Corp.*, 477 U.S. at 324. To avoid summary judgment, Plaintiff “must do more than simply show that there is some metaphysical doubt as to the material facts, as a “scintilla of evidence” to support its position will not do. *Pugh v. City of Attica*, 259 F.3d 619, 625 (7th Cir. 2001). Instead, there must be a sufficient showing that the jury could reasonably find for Plaintiff. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986).

B. The Policy Language.

Under Illinois law, insurance policies are contracts, subject to normal rules of contract interpretation. *ABW Dev., LLC v. Cont’l Cas. Co.*, 2022 IL App (1st) 210930, ¶ 26. The primary objective of the Court is to ascertain and give effect to the intent of the parties based on the

language used in the contract of insurance and clear and unambiguous language will be enforced as written. *Kuhn v. Owners Ins. Co.*, 2024 IL 129895, ¶ 15, 241 N.E.3d 397, 402 and *Founders Ins. Co. v. Munoz*, 237 Ill. 2d 424, 433, 930 N.E.2d 999, 1003–04 (2010).

Policy language is only ambiguous when it is subject to more than one *reasonable* meaning, *Hobbs v. Hartford Ins. Co. of the Midwest*, 214 Ill. 2d 11, 17, 823 N.E.2d 561, 564 (2005), and the Court will not strain to find ambiguity where none exists. *State Farm Mut. Auto. Ins. Co. v. Elmore*, 2020 IL 125441, ¶ 21, 181 N.E.3d 865, 871. Finally, the construction of insurance policy language is a question of law for resolution by the Court. *Firebirds Int'l, LLC v. Zurich Am. Ins. Co.*, 2022 IL App (1st) 210558, ¶ 17, 208 N.E.3d 1187, 1192.

C. The Undisputed Material Facts.

The Appraisal Clause of the Foremost policy provides as follows:

REQUIRED CHANGE – ILLINOIS 11175 10/18

5. Appraisals is changed to read:

Appraisals. If you and we fail to agree on the amount of the loss, then both you and we have the right to select a competent and disinterested appraiser within 20 days from the day of disagreement. The appraisers will determine the amount of the loss. If they do not agree, then the appraisers will choose an umpire. Then each appraiser will submit his amount of the loss to that umpire. The agreement of any two will determine the amount of loss for damage to your property. If the amount of loss is determined to equal or exceed the full amount which you demanded prior to the appraisal, then we will pay your appraiser's fee and the umpire's fee. Otherwise, you pay your appraiser, and we pay our appraiser. You and we share equally the expenses of the umpire and all other expenses of the appraisals.

In no event will an appraisal be used for the purpose of interpreting any policy provision, determining causation or determining whether any item or loss is insured by this policy. If there is an appraisal, we still retain the right to deny the claim. (Ex. 2 to Foremost's Statement of Undisputed Facts, at p. 47)

On March 1, 2022, Plaintiff submitted a sworn statement in proof of loss stating that “the amount claimed under the [Foremost] . . . policy is \$1,808,702.80”. (Ex. 3 to Foremost's Statement of Undisputed Facts).

On March 4, 2022, Plaintiff sent an appraisal demand to Foremost, naming his appraiser. (Ex. 4 to Foremost's Statement of Undisputed Facts).

On March 8, 2022, Foremost responded to Plaintiff's appraisal demand, naming its appraiser. (Paragraph 8 of Foremost's Statement of Undisputed Facts).

On September 15 & 21, 2022, Plaintiff's appraiser and Foremost's appraiser entered an award totaling \$1,308,622.11 in which they certified and agreed that the amount of the loss was \$1,308,622.11 at RCV (replacement cost value) and \$1,212,663.13 at ACV (actual cash value). (Ex. 5 to Foremost's Statement of Undisputed Facts).

\$1,308,622.11 is more than \$500,000.00 less than \$1,808,702.80.

D. The Amount of the Appraisal Award is Less Than Plaintiff's Demand Prior to the Appraisal and Plaintiff is Therefore Not Entitled to Payment of His Appraiser's Fee Under the Policy.

There is nothing ambiguous about the language of the appraisal clause or when the insured party is entitled to recover the fee charged by his or her appraiser. When the amount of loss is determined to be equal to or more than the full amount the insured demanded prior to the appraisal, the insured can recover the appraiser's fee. Here it was not, so no recovery is allowed and Foremost is entitled to judgment on Counts I and II, the breach of contract claims.

E. Because Plaintiff Cannot Prove Foremost Breached the Insurance Contract, Plaintiffs Cannot Recover Under Section 155 of the Illinois Insurance Code

Illinois law is clear that a valid breach of contract claim is an essential predicate to proving liability for vexatious and unreasonable conduct under Section 155 of the Illinois Insurance Code. If the insured cannot prove the insurer breached the contract of insurance, the insured cannot recover under Section 155 of the Illinois Insurance Code. *Moles v. Illinois Farmers Ins. Co.*, 2023 IL App (1st) 220853, ¶ 19, 229 N.E.3d 856, 861–62 and *Hoover v. Country Mutual Insurance Co.* 2012 IL App (1st) 110939, ¶ 40, 975 N.E.2d 638.

As Plaintiff cannot prove a breach of contract claim against Foremost, Plaintiff cannot prove a Section 155 claim against Foremost and Foremost is entitled to summary judgment on Count III of Plaintiff's Complaint.

III. CONCLUSION

Wherefore, Defendant, Foremost Insurance Company Grand Rapids, Michigan respectfully requests that this Honorable Court enter an order granting Defendant's Motion for Summary Judgment, entering judgment in its favor and against Plaintiff on all counts of Plaintiff's Complaint, and for such other and further relief the Court deems just and appropriate.

Dated: December 10, 2024

Respectfully submitted,

/s:/ Michael L. Foran

Michael L. Foran (mforan@fgppr.com)

Foran Glennon Palandech Ponzi & Rudloff, P.C.

222 North LaSalle Street, Suite 1400

Chicago, Illinois 60601

Tel: (312) 863-5000

Fax: (312) 863-5099

Attorneys for Foremost Insurance Company Grand Rapids, Michigan

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above document was filed electronically with the above-captioned court, with notice of case activity to be generated and sent electronically by the Clerk of said court (with a copy to be mailed to any individuals who do not receive electronic notice from the Clerk) this 10th day of December, 2024.

Attorney for Petitioner

Steve McCann (Steve@BallMcCannLaw.com)

Ball & McCann, P.C.

161 N. Clark Street, Suite 1600

Chicago, IL 60601

872-205-6556

/s/ Michael Foran

Michael L. Foran