IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

THERESA MCMAHON and KEITH MCMAHON,	:	
Plaintiffs,	:	CIVIL ACTION
v.	:	
	:	No. 06-3408
STATE FARM FIRE AND CASUALTY COMPANY,	:	
Defendant.	:	

MEMORANDUM

ROBERT F. KELLY, Sr. J. **MAY 8, 2007**

Before this Court is a Motion for Summary Judgment filed by Defendant State Farm Fire and Casualty Company, and a Cross Motion for Summary Judgment filed by Plaintiffs Theresa and Keith McMahon. For the following reasons, Defendant's Motion for Summary Judgment is granted, and Plaintiffs' Cross Motion is denied.

I. BACKGROUND

Theresa McMahon and her son Keith own a home in Croydon, Pennsylvania, which they purchased in February, 2005. When they bought the house, they also purchased a homeowners insurance policy from Defendant State Farm. This policy insured Plaintiffs against "accidental direct physical loss" to their home. (Def. Mot. Summ. J. Ex. D at 10.) The present action arises out of State Farm's denial of a claim Plaintiffs made under the policy.

Plaintiffs made a claim for water damage after learning that they needed to replace a drain pipe in their bathroom. During July, 2005, Plaintiffs noticed little bugs and a strong odor coming

from the closet in the front bedroom. Keith McMahon looked in the closet to see if he could find the problem. Inside the closet, he removed a panel on the wall which gave him access to the plumbing for the bathtub. When he removed the panel, he found that water had filled the pit underneath the bathtub. This pit was a depression in the concrete slab foundation of the house in which the plumbing for the tub was contained. Plaintiffs' house is built on a concrete slab, and has no basement. This pit created room for the drain plumbing located on the bottom of the tub. As the pit was nearly filled with water, Keith drained it. He continued to drain it every few days thereafter until the leak was repaired. Water never flowed out of the pit, and neither the carpet in the closet nor in the bedroom ever got wet.

In addressing the problem, Plaintiffs first called the water department to find out if the city water service was the culprit. A technician came to the house and determined that the water supply was fine. Plaintiffs then called a plumber, Charles Kensil, who was unable to find the cause of the problem. Subsequently, Plaintiffs contacted Zoom Plumbing on August 1, 2005. Zoom advised Plaintiffs that they would need to break up the concrete floor slab to get to the pipes before the problem could be located. Zoom provided an estimate for that demolition work. On August 2, 2005, Plaintiffs enlisted Michael Bruckner, an independent adjuster, to help them file a claim under their homeowners insurance policy for this impending repair.

Michael Bruckner faxed a notice to State Farm on August 3, 2007, notifying them that Plaintiffs were submitting a claim under the homeowners policy for water damage in relation to this repair work. (Def. Mot. Summ. J. Ex. I.) Consequently, State Farm sent an adjuster to the house on August 12, 2005 to assess the dwelling. At an unspecified time, Zoom determined that the drainage pipe running underneath the floor in Plaintiffs' living room was the source of the

leak. Zoom had to rip up the carpet, jack-hammer through part of the concrete slab, and expose the pipe to determine the location of the problem. Thereafter, Zoom replaced the drainage pipe and repaired the hole in the concrete foundation. The job took five days to complete, and Zoom cleaned up their mess after they were finished. Following the repair work, Plaintiffs had an exterminator come and spray to get rid of the bugs.

State Farm denied Plaintiffs' insurance claim for water damage on October 17, 2005. In its letter to Plaintiffs, State Farm said that coverage was denied because the insurance policy did not extend to plumbing that was being replaced due to wear, tear, or deterioration. (Def. Mot. Summ. J. Ex. J.) State Farm also said that the policy excluded from coverage damage caused by water entering the home from below the surface of the ground. This provision applied as State Farm believed that the pipe was located under the foundation. Plaintiffs disagreed, believing that the pipe was encased in the concrete slab. This dispute is not determinative in this case, as the claim was denied primarily because the leak resulted from wear, tear, and deterioration. State Farm denied the claim after one of its adjusters viewed the property and another reviewed the invoices and spoke directly with Zoom Plumbing.

Plaintiffs filed the present action in the Philadelphia County Court of Common Pleas on June 7, 2006. The complaint alleged that State Farm acted in bad faith in violation of 42 Pa. Cons. Stat. § 8731 (count I), engaged in violations of the Pennsylvania Unfair Trade Practices and Consumer Protection Law (count II), and breached the insurance contract entered into with Plaintiffs (count III). State Farm removed the action to this Court on August 2, 2006. Count II was dismissed by Order of this Court on September 12, 2006. Plaintiffs and Defendant now each seek summary judgment in their favor on counts I and III.

II. STANDARD OF REVIEW

Federal Rule of Civil Procedure 56(c) states that summary judgment is proper "if there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." See also Hines v. Consol. Rail Corp., 926 F.2d 262, 267 (3d Cir. 1991). The Court must ask "whether the evidence presents a sufficient disagreement to require submission to the jury or whether . . . one party must prevail as a matter of law." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-52 (1986). The moving party has the initial burden of informing the court of the basis for the motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986).

Summary judgment must be granted "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex, 477 U.S. at 322. The non-moving party must go beyond the allegations set forth in its pleadings and counter with evidence showing that there is a genuine factual dispute requiring a trial. Fed. R. Civ. P. 56(e); see Big Apple BMW, Inc. v. BMW of N. Am. Inc., 974 F.2d 1358, 1362-63 (3d Cir. 1992). A genuine factual dispute exists when "a reasonable jury could return a verdict in favor of the non-moving party." Embrico v. U.S. Steel Corp., 404 F. Supp. 2d 802, 817 (E.D. Pa. 2005). When a party fails to establish an element of their case, summary judgment must be granted. Celotex, 477 U.S. at 322.

III. DISCUSSION

Pennsylvania law applies in this diversity action. Generally, a federal court in diversity applies the choice of law rules of the state in which it sits. Regents of Mercersburg College v. Rep. Franklin Ins. Co., 458 F.3d 159, 163 (3rd Cir. 2006). Pennsylvania's choice of law rules are

unclear as to whether an insurance contract is governed by the law of the state in which the contract was made, or whether an insurance contract is governed by the law of the state with the most significant relationship with the contract. See id. The question is irrelevant in this action as the parties have relied primarily on the laws of the Commonwealth in their pleadings, and have not raised an objection to the application of Pennsylvania law. Therefore, I will consider the parties to have waived any objections to the application of Pennsylvania substantive law. See I.C.D. Indus. , Inc. v. Federal Inc. Co. 879 F. Supp. 480, 483-84 (E.D. Pa. 1995).

A. Breach of Contract (count III)

Plaintiffs have not presented evidence showing that Defendant breached the insurance contract. In Pennsylvania, the task of interpreting an insurance contract is a question of law to be resolved by a court. PECO Energy Co. v. Boden, 64 F.3d 852, 855 (3d Cir. 1995). The goal of that task is to ascertain the intent of the parties as manifested by the language of the written instrument. Gene & Harvey Builders, Inc. v. Penn. Mfrs. Ass'n. Ins. Co. 517 A.2d 910, 913 (Pa. 1986). Whether a claim is within a policy's coverage or barred by an exclusion is a question of law that may be decided on motion for summary judgment. Butterfield v. Giuntoli, 670 A.2d 646, 651 (Pa. Super. Ct. 1995). **In ascertaining the parties' intent, a court must consider the entire contractual provision at issue and not simply individual terms utilized in the insurance contract. 401 Fourth Street, Inc. v. Investors Ins. Group, 879 A.2d 166, 171 (Pa. 2005).**

Any analysis must begin with the language of the contract. "Where . . . the language of [an insurance] contract is clear and unambiguous, a court is required to give effect to that language." Standard Venetian Blind Co. v. Am. Empire Ins. Co., 469 A.2d 563, 566 (Pa. 1983). **A contract provision is ambiguous if it is reasonably susceptible of different constructions and**

capable of being understood in more than one sense. Steele v. Statesman Ins. Co., 607 A.2d 742, 743 (Pa. 1992). The courts "should read policy provisions to avoid ambiguities if possible and should not torture the language to create them." Spezialetti v. Pac. Employers Ins. Co., 759 F.2d 1139, 1142 (3d Cir. 1985).

In Pennsylvania, the insured has the burden of proving facts that bring its claim within the policy's affirmative grant of coverage. Koppers Co., Inc. v. Aetna Cas. and Sur. Co., 98 F.3d 1440, 1446 (3d Cir. 1996). By contrast, the insurer bears the burden of proving the applicability of any exclusions or limitations on coverage, since disclaiming coverage on the basis of an exclusion is an affirmative defense. Id.; see also Madison Constr. Co. v. Harleysville Mut. Ins. Co., 735 A.2d 100, 106 (Pa. 1999).

The insurance policy State Farm issued to the Plaintiffs insured against "accidental direct physical loss to the property." (Def. Mot. Summ. J. Ex. D at 10.) The policy insured both the dwelling as well as Plaintiffs' personal property. These two items are addressed separately in the policy with individualized provisions addressing coverage and exclusions for each. "Accidental direct physical loss" is not defined in the agreement. Therefore, I must use the plain and ordinary meaning of these words to determine the intentions of the parties as embodied in this policy. A "loss" is the deprivation or damage of something, and in this case applies to the Plaintiffs' house or personal property. Black's Law Dictionary 945 (6th ed. 1990). "Accidental" is an adjective meaning happening by chance, unexpectedly, not in the usual course of things. Id. at 16. Here, it refers to an occurrence which is unusual and not expected by the person to whom it happens. "Direct" and "physical" modify loss and impose the requirements that the damage be actual and caused by the accidental cause. The insurance contract was intended to insure Plaintiffs against

unexpected physical damage to their house and personal property.

Plaintiffs have not presented facts showing that they experienced an accidental direct physical loss. They have shown that they incurred expenses in replacing a broken drain pipe, but they have not shown that this loss was anything other than a normal repair. In her deposition, Theresa McMahon stated that Zoom Plumbing replaced a broken pipe in her home. (McMahon Dep. 34-37.) A broken pipe is not an unusual or unexpected loss for a homeowner. Plumbing does not last indefinitely, and pipes need to be replaced when they wear out. Plaintiffs' repair may have been costly because of the method of construction used in building their house, but a repair like this one is not something that this policy was intended to insure against. The policy covers accidental direct physical losses, not the costs of normal repairs. Plaintiff has not shown facts which establish that their claim falls within the policy's grant of coverage.

State Farm has established that Plaintiffs' claim is not covered because it falls under one or more of the exclusions of the policy. Section 1—losses not insured, subsection 1.g., states that Plaintiffs are not insured against losses to the residence which are caused by "wear, tear, marring, scratching, deterioration, inherent vice, latent defect or mechanical breakdown[.]" Subsection 1.m. excludes losses caused by insects. Subsection 1.f. states that Plaintiffs are not protected against damage to their house that is caused by "continuous or repeated seepage or leakage of water or steam from a: . . . (3) plumbing system, including from, . . . tub installation[.]"

The evidence shows that Plaintiffs had a leak in a drain pipe which resulted in water collecting underneath their bathtub. The leak was large enough that a pit about 1–2 feet deep beneath the bathtub filled every few days and needed to be pumped out. Plaintiffs incurred considerable expense in repairing the leak, because the concrete floor in their home needed to be

removed to gain access to the pipes below the floor's surface. However, even giving Plaintiffs the benefit of all reasonable inferences, the facts still show only that Plaintiffs' loss was caused by normal wear and tear of the plumbing. A leaking pipe is not an accidental direct physical loss. The costs of repairing a broken pipe was not covered by this insurance policy which specifically excluded losses resulting from normal wear, tear, and deterioration. Since the water collecting in the pit was leaking from a plumbing system, this damage is also excluded under section I—losses not insured, subsections 1.f. of the policy. Finally, Plaintiffs cannot make a claim for the cost of getting the exterminator because the policy also excludes losses from insects in subsection 1.m.

Plaintiffs believe that the policy does insure them against the peril of having to replace a leaking drain pipe. While they cite provisions of the contract in support of this contention, the provision they cite seems inapplicable. Plaintiffs reference contract provisions applicable to personal property only, specified as coverage B property in the contract. These provisions do not apply to the dwelling itself, identified as coverage A property. The policy insures both coverage A and B property against accidental direct physical losses, but the terms and exclusions are specific to either the dwelling or the personal property. Plaintiffs are arguing that provisions applicable to coverage B property should be extended to the dwelling, coverage A property.

Plaintiffs' personal property is insured under the policy against accidental direct physical loss caused by a "[s]udden and accidental discharge or overflow of water or steam from within a plumbing, heating, air conditioning or automatic fire protective sprinkler system, or from within a household appliance." (Def. Mot. Summ. J. Ex. D at 11.) (section I—losses insured, coverage B, subsection 12). This provision insures Plaintiffs against damage to property like their furniture when those items are ruined by water overflow from a plumbing system. The provision

does not apply to the dwelling, which is coverage A. Most telling is the fact that this provision is contained in the section dealing exclusively with personal property. There is not a comparable provision under section A coverage. The language of the contract leads to the reasonable conclusion that this provision was not meant to extend to the dwelling.

Plaintiffs also argue that the exclusions State Farm used to deny coverage do not apply to their claim. They believe that they do not fall into the section I—losses not insured, subsection 1.f. exclusion. Rather, they read the language of this subsection as requiring State Farm to indemnify them for the costs incurred in replacing the broken drainage pipe. After the language stating that losses to the dwelling resulting from continuous or repeated seepage or leakage of water are excluded is the following sentence. "If loss to covered property is caused by water or steam not otherwise excluded, we will cover the cost of tearing out and replacing any part of the building necessary to repair the system or appliance." Plaintiffs cite this language as proof that State Farm must pay this claim.

The provision Plaintiffs cite does not apply to their situation, The water found in the pit beneath the bathtub resulted from a continuous leak in the plumbing and damages arising from this type of water are excluded. Because this type of damage is excluded under the first sentence of subsection 1.f., the remainder of the provision's language is inapplicable. Ultimately, Plaintiffs replaced a broken pipe, and a broken pipe does qualify as an accidental direct physical loss within the coverage of this policy. Therefore, since Plaintiffs have not established that State Farm breached the insurance policy, and State Farm has shown that certain exclusions in the policy are applicable to this situation, summary judgment must be granted in favor of State Farm and against Plaintiffs.

B. Bad Faith—42 Pa. Cons. Stat. § 8371 (count I)

Plaintiffs have not presented evidence showing that Defendant acted in bad faith. State Farm conducted an adequate investigation, and denied Plaintiffs' claim based on a reasonable interpretation of the policy language. The duty of fair dealing under Pennsylvania law requires the insurer to conduct its investigation in a fair and objective manner, and to deny an insured's claim only if good cause exists to do so. Parasco v. Pac. Indem. Co., 920 F. Supp. 647, 656 (E.D. Pa. 1996). Plaintiffs need to show that State Farm lacked a reasonable basis for denying their claim and disregarded their lack of a reasonable basis in order to recover under a bad faith claim. See Terletsky v. Prudential Prop. and Cas. Ins. Co., 649 A.2d 680, 689-90 (Pa. Super. Ct. 1994).

State Farm sent an adjuster to Plaintiffs' premises nine days after the notice of a claim was made for a water loss. State Farm reviewed invoices from Zoom Plumbing, and spoke with its plumbers to learn about the problem and the resolution. (Def. Mot. Summ. J. Ex. I.) Denial of the claim came only after State Farm had seen the property and discussed the circumstances with Plaintiffs' plumber. The letter sent to Plaintiffs stated that the claim was denied because the "insured's waste line had deteriorated from years of use." State Farm cited language in the policy which stated that losses caused by wear, tear, or deterioration were excluded from coverage under the policy. They mentioned other provisions that applied to exclude this loss from coverage as well. Plaintiffs have failed to show that State Farm lacked a reasonable basis in the language of the policy on which to deny their claim. Therefore, Plaintiffs have failed to establish a claim for bad faith, and summary judgment must be granted in favor of State Farm.

An appropriate Order follows.

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ORDER

AND NOW, this 8th day of May, 2007, upon consideration of Defendant's Motion for Summary Judgment filed pursuant to Federal Rule of Civil Procedure 56 (Doc. No. 9), and Plaintiffs' Cross Motion for Summary Judgment (Doc. 10) and the response thereto, it is hereby **ORDERED** that the Defendant's Motion for Summary Judgment is **GRANTED** while the Plaintiffs' Cross Motion is **DENIED**.

BY THE COURT:

/s/ Robert F. Kelly
ROBERT F. KELLY, Sr. J.