

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

HARTFORD FIRE INSURANCE COMPANY : CIVIL ACTION
 :
v. :
 :
B. BARKS & SONS, INC., :
THE MARAMONT CORPORATION, and :
OCEAN SPRAY CRANBERRIES, INC. : NO. 97-7919

MEMORANDUM AND ORDER

HUTTON, J.

May 27, 1999

Presently before the Court are the Motion of Defendant B. Barks & Sons, Inc. ("Barks") for Partial Summary Judgment (Docket No. 30) and Plaintiff Hartford Fire Insurance Company's ("Plaintiff's" or "Hartford's") Response thereto (Docket No. 34), Defendant Ocean Spray Cranberries, Inc.'s ("Ocean Spray's") Motion for Partial Summary Judgment Joining Barks' Motion for Partial Summary Judgment (Docket No. 37), and Hartford's Response thereto (Docket No. 41), Hartford's Motion for Summary Judgment (Docket No. 48), Barks' Response thereto (Docket No. 56), and Hartford's Reply thereto (Docket No. 65), Ocean Spray's Motion for Partial Summary Judgment Against Barks (Docket No. 49), Barks' Response thereto (Docket No. 53), and Ocean Spray's Reply thereto (Docket No. 59). For the reasons stated below, Barks' Motion for Partial Summary Judgment is **GRANTED**, Ocean Spray's Motion for Partial Summary Judgment Against Hartford is **GRANTED**, Hartford's Motion for Summary

Judgment is **GRANTED in part** and **DENIED in part**, Ocean Spray's Motion for Partial Summary Judgment Against Barks is **DENIED**.

I. BACKGROUND

This is an insurance coverage case. Plaintiff, Hartford Insurance Company ("Plaintiff" or "Hartford"), commenced a declaratory judgment action against its insured, B. Barks & Sons, Inc. ("Barks" or "Defendant"), as well as other potentially interested parties: namely, Maramont Corporation ("Maramont"), Clement Pappas & Company ("Clement Pappas"), and Ocean Spray Cranberries, Inc. ("Ocean Spray"). Clement Pappas has since been dismissed from this action. Now, Defendant Barks moves for partial summary judgment on Counts I and II of Barks's Amended Counterclaims.

Barks is a corporation, which is in the business of freezing and maintaining perishable food items in its refrigerated warehouse for its customers. Warehousing operations at the facility are conducted by Barks' fully owned subsidiary, B. Barks Refrigerated Warehouse, Inc. ("Barks Refrigerated Warehouse"). Barks purchased from Hartford a Commercial General Liability Policy and a Commercial Inland Marine Policy. Barks' Commercial General Liability Policy was in effect from September 20, 1996, to September 20, 1997, and has policy number 39 UUN LA 2620. Barks' Commercial Inland Marine Policy was also in effect from September

20, 1996, to September 20, 1997, and has policy number 39 MS KS 3108.

The Commercial Inland Marine Policy provides Warehouseman's Legal Liability Coverage (Form MS 00 47 07 86). This coverage provides that Hartford "will pay those sums [Barks] become[s] legally obligated to pay as damages, imposed on [Barks] as a warehouseman, for direct physical "loss" to Covered Property caused by a Covered Cause of Loss while such property is located at the "premises" listed in the Declarations or Schedule" Covered Property under the policy is "tangible personal property of others in [Barks'] care, custody or control as a warehouseman, while located on the "premises" listed in the Declarations or Schedule." The Schedule describes Barks' address, 9500 Bluegrass Road, Philadelphia, PA 19114, as the property covered. Covered Causes of loss is defined as "RISK OF DIRECT PHYSICAL LOSS" to Covered Property from any external cause except those causes of "loss" listed in the Exclusions." Loss caused by mechanical breakdown or failure, including breakdown of heating or refrigerating systems are excluded. Loss caused by spoilage is also excluded.

Barks purchased an additional "Spoilage Coverage" endorsement to the Warehouseman's Legal Liability coverage (Form IH1201 (11/85)), which requires Hartford to indemnify Barks for:

DAMAGES, IMPOSED ON YOU AS A WAREHOUSEMAN, FOR DIRECT PHYSICAL "LOSS" TO COVERED PROPERTY CAUSED BY SPOILAGE RESULTING FROM:

1. A CHANGE IN TEMPERATURE OR HUMIDITY RESULTING FROM:
 - A. MECHANICAL BREAKDOWN OR FAILURE OF:
 - (1) STATIONARY HEATING PLANTS; OR
 - (2) REFRIGERATING, COOLING OR HUMIDITY CONTROL APPARATUS OR EQUIPMENT OR APPARATUS ARE AT THE DESCRIBED PREMISES

In the fall of 1996, Ocean Spray, Clement Pappas, and Maramont stored cranberries and turkey nuggets in Barks' warehouse. During the 1996 cranberry season, the temperatures inside Barks' warehouse allegedly increased. Ocean Spray, Clement Pappas, and Maramont subsequently notified Barks of claims for alleged spoilage losses suffered as a result of the alleged elevated temperature inside Barks' warehouse. Barks has sought indemnity from Hartford for the claims of Ocean Spray, Clement Pappas, and Maramont for food spoilage pursuant to its commercial general liability policy and its commercial inland marine policy. Hartford's position is that it does not have an obligation to indemnify Barks for spoilage claims under the commercial general liability policy or the commercial inland marine policy.

Prior to the commencement of this lawsuit, Hartford employed an investigator, Otis Wright, to examine the Barks warehouse. In reports dated July 11, 1997, and July 17, 1997, Wright concluded that the temperature inside Barks' warehouse increased because the heat emitted from the large quantity of

cranberries being stored inside the warehouse exceeded the capacity of the refrigeration system.

On August 21, 1997, Maramont sued Barks in the Eastern District of Pennsylvania for alleged spoilage of turkey nuggets, which were stored in the Barks warehouse ("the Maramont action"). On December 22, 1997, Hartford filed a complaint for declaratory and equitable relief seeking a declaration that Barks is not entitled to indemnification for potential losses suffered by Ocean Spray, Clement Pappas, and Maramont. On March 30, 1998, Clement Pappas filed a cross-claim against Barks, alleging that its cranberries were damaged while stored at Barks' warehouse during the fall of 1996 because of unduly high temperatures. On April 8, 1998, Barks filed a counterclaim against Hartford, requesting that the Court order Hartford to indemnify Barks for the claims brought by Ocean Spray, Clement Pappas and Maramont. On July 28, 1998, Ocean Spray filed a cross-claim against Barks, alleging that its cranberries were damaged while being stored at Barks' warehouse during the fall of 1996 because of high temperatures, which were the result of the breakdown or failure of Barks' refrigeration equipment. On October 1, 1998, Barks filed an Amended Answer and Counterclaims against Hartford asserting claims for bad faith, fraud, and negligent misrepresentation.

On November 10, 1998, Defendant Barks filed this motion moving for partial summary judgment under Counts I and II of Barks'

Amended Counterclaims and under Hartford's Complaint. On November 27, 1998, Hartford filed its Answer to Barks' motion. On December 21, 1998, Hartford filed its Motion for Summary Judgment. Barks filed a response on January 7, 1999. Hartford filed a Reply Brief on January 25, 1999. Because the motions are ripe for review, the Court now considers the motions for summary judgment.

II. SUMMARY JUDGEMENT STANDARD

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is No genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The party moving for summary judgment has the initial burden of showing the basis for its motion. See Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Once the movant adequately supports its motion pursuant to Rule 56(c), the burden shifts to the nonmoving party to go beyond the mere pleadings and present evidence through affidavits, depositions, or admissions on file to show that there is a genuine issue for trial. See id. at 324. A genuine issue is one in which the evidence is such that a reasonable jury could return a verdict for the nonmoving party. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

When deciding a motion for summary judgment, a court must draw all reasonable inferences in the light most favorable to the

non-movant. See Big Apple BMW, Inc. v. BMW of N. Am., Inc., 974 F.2d 1358, 1363 (3d Cir. 1992). Moreover, a court may not consider the credibility or weight of the evidence in deciding a motion for summary judgment, even if the quantity of the moving party's evidence far outweighs that of its opponent. See id. Nonetheless, a party opposing summary judgment must do more than rest upon mere allegations, general denials, or vague statements. See Trap Rock Indus., Inc. v. Local 825, 982 F.2d 884, 890 (3d Cir. 1992).

III. DISCUSSION

A. Standard of Review of Insurance Policy

An insurer owes a duty to defend an insured whenever the allegations in a complaint, taken as true, set forth a claim which potentially falls within the coverage of the policy. See Visiting Nurse Ass'n of Greater Phila. v. St. Paul Fire & Marine Ins. Co., 65 F.3d 1097, 1100 (3d Cir. 1995); Cadwallader v. New Amsterdam Cas. Co., 152 A.2d 484, 487 (Pa. 1959); Germantown Ins. Co. v. Martin, 595 A.2d 1172, 1174 (Pa. Super. Ct. 1991). The insurer has the burden of establishing the applicability of an exclusion. See Allstate Ins. Co. v. Brown, 834 F. Supp. 854, 857 (E.D. Pa. 1993). An insurer owes a duty to indemnify an insured only if liability is established for conduct which actually falls within the scope of the policy coverage. See Caplan v. Fellheimer Eichen Braverman & Kaskey, 68 F.3d 828, 831 n. 1 (3d Cir. 1995). The insured has the burden to establish coverage under an insurance policy. See Erie

Ins. Exch. v. Transamerica Ins. Co., 533 A.2d 1363, 1366-67 (Pa. 1987); Benjamin v. Allstate Ins. Co., 511 A.2d 866, 868 (Pa. Super. Ct. 1986).

The principles governing the interpretation of an insurance contract under Pennsylvania law are well settled. See Altipenta, Inc. v. Acceptance Ins. Co., No. CIV.A.96-5752, 1997 WL 260321, at *2 (E.D. Pa. May 14, 1997), aff'd, 141 F.3d 1153 (3d Cir. 1998) (unpublished table decision). The court generally performs task of interpreting an insurance contract. See Allstate, 834 F. Supp. at 856. The court must read the policy as a whole and construe it according to the plain meaning of its terms. See Bateman v. Motorists Mut. Ins. Co., 590 A.2d 281, 283 (Pa. 1991). In determining whether a claim falls within the scope of coverage, the court compares the language of the policy and the allegations in the underlying complaint. See Gene's Restaurant, Inc. v. Nationwide Ins. Co., 548 A.2d 246, 246-47 (Pa. 1988); Biborosch v. Transamerica Ins. Co., 603 A.2d 1050, 1052 (Pa. Super. 1996).

Whether the provisions of a contract are clear and unambiguous is a matter of law to be determined by the court. See Allegheny Int'l Inc. v. Allegheny Ludlum Steel Corp., 40 F.3d 1416, 1424 (3d Cir. 1994). "A term is ambiguous if reasonable people, considering it in the context of the entire policy, could fairly ascribe different meanings to it." See Altipenta, Inc., 1997 WL 260321, at *2; see also Northbrook Ins. Co. v. Kuljian Corp., 690

F.2d 368, 372 (3d Cir. 1982); United Servs. Auto. Ass'n v. Elitzky, 517 A.2d 982, 986 (Pa. Super. Ct. 1986). If a provision is ambiguous, it is construed against the insurer as the drafter of the agreement. See Lazovick v. Sun Life Ins. Co. of Am., 586 F. Supp. 918, 922 (E.D. Pa. 1984). Nevertheless, a court should not torture the language of a policy to create ambiguities. See Eastern Assoc. Coal Corp. v. Aetna Cas. & Surety Co., 632 F.2d 1068, 1075 (3d Cir. 1980).

B. Barks' Motion for Partial Summary Judgment Against Hartford

Barks claims that it is entitled to a declaration that Hartford must indemnify Barks for all claims asserted against Barks for food spoilage in this case. Barks alleges that it purchased from Hartford insurance to protect itself from claims for spoilage from its customers when its refrigerating equipment fails. In the fall of 1996, Barks' refrigerating equipment allegedly failed, and food stored in the warehouse allegedly spoiled.¹ Barks made a claim under a "Spoilage Coverage" endorsement to its Warehouseman's Legal Liability Coverage to indemnify Barks pursuant to the policy. Barks asserts that since it is insured for these alleged losses under the "Spoilage Coverage," Barks is entitled to a judgment as a matter of law.

¹Barks states that for purposes of its motion for partial summary judgment, it assumes that "mechanical breakdown" did not cause the spoilage. Rather, Barks contends that it was failure in the refrigerating, cooling equipment that caused the abnormally high temperatures and ultimately the spoilage alleged by Ocean Spray, Clement Pappas, and Maramont.

Hartford, on the other hand, has denied coverage. Hartford asserts that the claims against Barks are not covered by the Policy because there has been no "mechanical breakdown" or "failure of refrigerating, cooling or humidity control apparatus or equipment." Hartford contends that the temperatures in the warehouse resulted from the cooling capacity of the refrigeration system being exceeded by the amount of heat brought into the warehouse in the cranberries during the 1996 cranberry season as well as the heat load of the building itself. Hartford has also stated that the term "failure of refrigerating apparatus or equipment" is clear and unambiguous, and does not need to be defined beyond its common and ordinary meaning.

1. Coverage Under the "Spoilage Coverage" Endorsement

Assuming for purposes of this motion that "mechanical breakdown" did not cause the spoilage, this Court still finds that the "Spoilage Coverage" policy covers Barks' underlying action. It is undisputed that the "Spoilage Coverage" policy was in effect when the underlying events occurred. The Spoilage Coverage policy states that the insurance applies to damage "to covered property caused by spoilage resulting from ... [a] change in temperature or humidity resulting from ... Mechanical breakdown or failure of ... (2) Refrigerating, cooling or humidity control apparatus or equipment" Hartford claims that no difference exists between the terms "mechanical breakdown" and "failure." The Court finds,

however, that the provisions in the warehouseman's legal liability coverage form and the "spoilage coverage" endorsement regarding "mechanical breakdown" and "failure" are vague and ambiguous, and therefore, not enforceable.

This Court finds that from a grammatical sense the adjective "mechanical" does not modify "failure." The use of the disjunctive indicates alternatives and requires that those alternatives be treated separately. Quindlen v. Prudential Ins. Co., 482 F.2d 876, 878 (5th Cir. 1973). Here, the disjunctive "or" sets off "mechanical" from "failure." The Court is not persuaded by the cases relied on by Hartford for the contrary position. See, e.g., Radella v. Bankers Mutual Fire Insurance Company of Lancaster, 165 Pa.Super. 633, 636 (1950) (interpreting exclusion for "mechanical or electrical breakdown, or failure"); Harris v. United States Fidelity & Guaranty Company, 409 So.2d 1210 (Fla. App. 1982) (same). Those cases are not on point as the exclusion language and the general content of those policies are materially different from the "Spoilage Coverage" endorsement in this case.

This Court's conclusion is buttressed by the overall scheme of the Commercial Inland Marine Policy. Under the terms of the Commercial Inland Marine Policy issued to Barks, the Exclusion section of the policy states that Hartford will not defend against any claim or "suit" arising out of, or pay any damages for, "loss" caused by or resulting from mechanical breakdown or failure,

including breakdown of heating or refrigerating systems. Loss caused by or resulting from "spoilage" is also excluded. Thus, Barks does not claim that it is covered for spoilage loss under the Commercial Inland Marine Policy.

Subsequently, Barks purchased a specific "Spoilage Coverage" endorsement to the Warehouseman's Legal Liability Coverage. Neither "mechanical breakdown" nor "failure" are terms defined by the Policy. A reasonable intelligent person could honestly conclude that "failure" as used in the Policy could mean that Barks' refrigeration equipment can "fail" to achieve the desired end, or be insufficient to achieve the desired end, without experiencing a mechanical malfunction or breakdown. As such, it is undisputed that all claims against Barks for food spoilage allege that Barks' refrigeration system failed to achieve its desired and expected objective. Barks is, therefore, entitled to indemnification from Hartford for these spoilage claims as a matter of law.

**C. Ocean Spray's Motion for Partial Summary Judgment
Against Hartford**

Defendant Ocean Spray joins Barks' Motion for Partial Summary Judgment under Counts I and II of Barks' Amended Counterclaims. This Court has already found that Hartford is liable to indemnify Barks pursuant to the commercial inland marine

policy for potential spoilage losses. Thus, for the reasons stated above, this Motion is granted. See supra Part III.B.1.

D. Hartford's Motion for Summary Judgment

Hartford moves for summary judgment on four issues in this case. First, defendant Barks is not entitled to indemnity coverage under a commercial general liability policy issued by Hartford because the claims arising from the alleged damage to food products being stored in its commercial warehouse fall within one of the "Exclusions" provision. Second, Barks is not entitled to indemnity coverage under an inland marine insurance policy because the spoilage did not result from "mechanical breakdown or failure of ... [r]efrigerating ... equipment" Third, Hartford's business income loss claim is not covered because it allegedly arises from damage to personal property resulting from "[c]hanges in or extremes in temperatures", [sic] an excluded peril in the special income and expense coverage form. Fourth, Hartford is entitled to summary judgment on Barks' claim for bad faith.

The Court has already found that Barks is entitled to indemnity coverage under the "Spoilage Coverage" endorsement of the inland marine insurance policy because the spoilage did result from "failure of ... [r]efrigerating ... equipment" Thus, the Court need not address that issue here. The Court will now consider Hartford's first, third and fourth issues raised in its motion for summary judgment.

1. Commercial General Liability Policy

In its motion for summary judgment, Hartford maintains that Barks' is not entitled to coverage under the commercial general liability ("CGL") policy. This Court agrees. The CGL policy excludes from coverage any "[p]roperty damage to ... a [p]ersonal property in the care, custody or control of the insured" The Policy defines "property damage" to mean:

- a. Physical Injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or
- b. Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of "occurrence" that caused it.

See form CG 0001 (1/96), § V-Definitions, ¶ 15, P. 12 of 13. In Pennsylvania, the "care, custody or control" exclusion has been found to unambiguously apply to property being stored by an insured under contract, or property being possessed by an insured as a bailee. See Warner v. Employers' Liability Assurance Corp., 390 Pa. 62, 133 A.2d 231, 233 (1957); Slate Construction Co., v. Bituminous Casualty Corp., 228 Pa. Super. 1, 5, 323 A.2d 141, 144 (1974); Hertz Corp. v. Gray Smith, 441 Pa. Super. 575, 582, 657 A.2d 1316, 1319 (1995); Int'l Derrick & Equipment Co., v. Buxbaum, 240 F.2d 536, 538 (3d Cir. 1957).

In Slate Construction, the Court noted that:

With respect to the exclusion from coverage of property damage to property in the 'care, custody or control' of the insured, one commentator has noted: 'There are

several different reasons for such an exclusion in the policy. Fundamentally, were it not for the exclusion there would be a greater moral hazard as far as the insurance company is concerned. It also eliminates the possibility of the insured making the insurance company a guarantor of its workmanship.

'The liability policy contemplates payment generally in situations where the ordinary degree of care is the measure of liability. The premium is determined on that basis. Liability for damage to property in charge of or in the care, custody or control of the insured where there is a bailment is controlled by different rules of law, and as a practical result the hazard is greatly increased.

'There is usually some form of insurance available to cover injury to or destruction of the excluded property at a higher premium which is commensurate with the risk. The exclusion is to eliminate securing the same coverage under a liability policy at cheaper rates.' Cooke, Jr., Care, Custody or Control Exclusions, 1959 Ins.L.J. 7, 9.

The clarity or ambiguity of such an exclusion clause obviously varies with the factual situation to which it must be applied. Huntingdon Indus., Inc. v. Pennsylvania Mfrs.' Ass'n Cas. Ins. Co., 49 Pa.D. & C.2d 35 (1969). It has been held or stated that property being moved by an insured under contract, property being put into place by an insured under contract, and property being possessed by an insured as bailee is in the insured's care, custody or control for purposes of the exclusion.

Slate Construction, 228 Pa. Super. at 5-6 (footnotes omitted).

In this case, the third-party claimants allege that Barks possessed their property (turkey nuggets and cranberries) in its warehouse as a bailee. Furthermore, Linda McNulty, the president of Barks, testified in her deposition that the property of the third-party claimants was placed into the warehouse under contract, i.e., non-negotiable warehouseman's receipts. Thus, under the

facts alleged in this case, the "care, custody or control" exclusion is unambiguous.

Similarly, the term "personal property" as used in the "care, custody or control" exclusion is unambiguous. Personal property means "everything that is the subject of ownership, not coming under the denomination of real estate." Rousseau v. City of Philadelphia, 100 Pa. Commw. 173, 179, 514 A.2d 649, 652 (1986). Personal property also generally means "all property other than real estate." Blacks Law Dictionary 636 (5th ed. 1983); see Estate of MacFarlane, 313 Pa. Super. 397, 402, 459 A.2d 1289, 1291 (1983) (tangible personal property means "[p]roperty such as a chair or a watch which may be touched or felt in contrast to a contract."). Moreover, "growing crops, unlike trees or other natural products of the earth, are personal property." Langley v. Tiberi, 364 Pa. Super. 378, 382, 528 A.2d 207, 209 (1987) (quoting Commonwealth v. Peterman, 130 Pa. Super. 497, 499, 198 A. 687, 688 (1938). See also 68 Pa.S. § 250.102(4) (Pennsylvania Landlord--Tenant Act defines agricultural crops, whether harvested or growing, as personal property).

Thus, the Court finds that the term "personal property" is clear and unambiguous, and it applies to the cranberries and turkey nuggets which are the subject of the third-party claims. Since the alleged claims by the third-party claimants are for damage to their personal property while in Barks care or custody,

the "care, custody, or control" exclusion applies. Therefore, Hartford is not required to indemnify Barks under the CGL policy, and Hartford is entitled to summary judgment on this issue.

2. Business Income Loss Claim

In its motion for summary judgment, Hartford maintains that the Barks' is not entitled to coverage for any alleged business income loss. This Court agrees. The business income coverage under the commercial property insurance policy provides:

We will pay for the actual loss of Business Income and Extra Expense you sustain due to the necessary suspension of your "operations" during the "period of restoration." The suspension must be caused by direct physical loss of or damage to property at the premises described in the Declarations, including personal property in the open (or in a vehicle) within 100 feet, caused by or resulting from any Covered Cause of Loss.

See form HP 1501 (12/86), "A. Coverage," p.1 of 4. The form further adopts the "causes of loss--special property form," which provides "all risk" coverage. See form HM 3009 (9/88). The policy also contains, however, the following exclusion:

We will not pay for loss or damage caused by or resulting from any of the following:

- (6) Mechanical breakdown, including rupture or bursting caused by centrifugal force ...
- (7) (a) Dampness or dryness of atmosphere;
(b) Changes in or extremes in temperatures; or
(c) Marring or scratching;
if loss is to personal property

See Form HM 3009 (9/88), "B. Exclusions," ¶ 2(d), p.2 of 4.

By its terms, the business income coverage is limited to the suspension of Barks' business operations "caused by direct physical loss or damage to property at the premises described in the Declarations, including personal property in the open" The only "property" claimed to have suffered "physical loss or damage" are the food products of Ocean Spray, Clement Pappas, and Maramont. Furthermore, in order for there to be coverage for resulting business income loss to Barks, the physical loss or damage to those food products must have been "caused by or resulting from any Covered Cause Loss."

The alleged physical loss or damage to the food products did not result from a "Covered Cause of Loss." Ocean Spray, Clement Pappas, and Maramont all claim that the damage to their food products was caused by or resulted from being exposed to elevated temperatures in Barks' warehouse for a prolonged period of time. Therefore, these alleged losses come within the exclusions for "loss or damage caused by or resulting from ... (b) Changes in or extremes in temperatures ... if the loss is to personal property." Since the alleged loss, which caused the suspension of Barks' operations did not result from a covered peril, Barks is not entitled to coverage for any alleged resulting business income loss.

3. Bad Faith

In its motion for summary judgment, Hartford maintains that the Barks' bad faith claim should be dismissed because it has agreed to defend Barks against the third-party claims asserted by Maramont, Ocean Spray and Clement Pappas. This Court agrees. Hartford has defended Barks under a reservation of rights regarding its duty to indemnify Barks against those claims. This cannot be considered bad faith conduct. See Cay Divers, Inc. v. Raven, 812 F2d. 866, 871 (3d Cir. 1987) ("providing a defense under reservation of a right to deny coverage as a defense to liability for indemnification does not breach a duty to the insured"). Moreover, even though the Court has found that Hartford's interpretation of the policy provision in question is incorrect, bad faith cannot be found. See J.H. France Refractories Co., v. Allstate Ins. Co., 534 Pa. 29, 626 A.2d 502, 510 (1993). Therefore, the Court grants summary judgment in Hartford's favor on Barks' bad faith claim.

E. Ocean Spray's Motion for Partial Summary Judgment Against Barks

Ocean Spray moves the Court for an Order granting Ocean Spray partial summary judgment on liability against Barks under Counts I and II of Ocean Spray's cross claim against Barks. Ocean Spray is seeking compensation for spoilage to its cranberries, which were being stored at defendant Barks' warehouse in September of 1996 through June of 1997. Ocean Spray filed a cross claim

against Barks on July 28, 1998, setting forth counts for breach for bailment agreement and negligence.

1. Breach of Bailment

Ocean Spray contends that Barks breached its bailment agreement with Ocean Spray as a matter of law and, therefore, judgment should be entered against Barks and in favor of Ocean Spray. Bailment involves "delivery of personalty for the accomplishment of some purpose upon a contract, express or implied, that after the purpose has been fulfilled, it shall be redelivered to the person who delivered it, otherwise dealt with according to his directions or kept until he re-claims it." Price v. Brown, 545 Pa. 216, 680 A.2d 1149, 1151 (1996) (citation omitted). A cause of action for breach of a bailment agreement involves a shifting burden of proof. First, Ocean Spray, as bailor, must put forth evidence of a prima facie case: that it delivered personalty to Barks, the bailee; that it made a demand for return of the property; and the bailee failed to return the property, or returned it in damaged condition. Id. 680 A.2d at 1152. Once the prima facie case is met, Barks, the bailee, must come forward with evidence "accounting for the loss." Id. If the bailee fails to do so, it is liable for the loss because it is assumed the bailee failed to exercise reasonable care required by the agreement. Id. If the bailee successfully puts forth "evidence showing that the personalty was lost and the manner in which it was lost, and the

evidence does not disclose a lack of due care on his part, then the burden of proof again shifts to the bailor who must prove negligence on the part of the bailee." Id.

Although not clearly spelled out, case law indicates the bailee's burden of "accounting for the loss" encompasses a showing the bailee was not negligent and/or his actions were not the cause of the loss. See e.g., E.I. duPont de Nemours & Co. v. Berm Studios, Inc., 211 Pa. Super. 352, 236 A.2d 555, 557 (1967) (holding the bailee must show "the cause of the damage or loss, if possible ..."). Accordingly, on Ocean Spray's bailment claim, Barks bears an initial burden of putting forth evidence it was not negligent and/or that it did not cause the damage to Ocean Spray's cranberries.

Ocean Spray satisfies the prima facie case. No dispute exists regarding whether Ocean Spray's cranberries were in Barks' care, that Ocean Spray made a demand for their return, and the cranberries were damaged. Also no dispute exists that the cranberries were damaged by elevated temperatures.

Nonetheless, Barks has produced evidence of Ocean Spray's own negligence in causing the spoilage of the cranberries. Evidence shows that Ocean Spray delivered cranberries to Barks straight from the bog. The cranberries were moist and warm when they arrived on the dock at Barks, two conditions that made it more difficult to bring down the temperature of the cranberries in the

freezer. Ocean Spray did not take precautions by shipping its cranberries in refrigerated tractor-trailers.

Ocean Spray has put forth evidence that the refrigeration unit at Barks' warehouse experienced failures during the relevant time. Thus, Ocean Spray contends that Barks' negligence caused the elevated temperatures, which resulted in the spoiled cranberries. This issue of comparative negligence of Ocean Spray shifts the burden back to Ocean Spray to demonstrate that it was Barks' negligence, and not Ocean Spray's own negligence, that caused the spoilage of the cranberries. In Johnson v. Mathia, 526 A.2d 404, 405 (1987), the Pennsylvania Superior Court stated as follows:

Admittedly, Pennsylvania case law remains undeveloped on the issue of termination of a bailment. However, it is the general consensus among our sister states that either the bailor or the bailee may terminate a bailment at will where the bailment is not for any particular time. 8 Am Jur 2d, Bailments § 292. In these cases, such as the instant, a bailee has the additional obligation to allow the bailor a reasonable time in which to retake possession of the property before the bailment can be regarded as terminated. Id. at § 294. "If the facts are in dispute as to whether the bailment has been terminated, or if different inferences may be drawn from the evidence, it is for the [fact finder] to say whether the bailment was terminated or continued and renewed." Id. at § 292.

Johnson, 526 A.2d at 405. The Johnson court acknowledged that termination of a bailment was a fact-sensitive issue.

No issue exists as to whether the cranberries were stored at Barks' facility and then spoiled. Many factual disputes exist as to why the cranberries spoiled. Under these circumstances,

issues of material fact exist as to whether a bailment was breached. Accordingly, Ocean Spray's motion for partial summary judgment on its breach of bailment agreement claim is denied.

2. Negligence

In order to sustain a cause of action in negligence, a plaintiff must show that: (1) defendant owed them a duty of care; (2) defendant breached that duty; (3) a causal link existed between the breach of duty and plaintiff's injury and harm; and (4) damages. See Markovich v. Bell Helicopter Textron, Inc., 805 F.Supp. 1231, 1236 (E.D.Pa.), aff'd, 977 F.2d 568 (3d Cir. 1992) (unpublished table decision). Pennsylvania courts hold that the existence of a duty " 'is predicated on the relationship existing between the parties at the relevant time.' " Zanine v. Gallagher, 345 Pa.Super. 119, 497 A.2d 1332, 1334 (1985) (quoting Morena v. South Hills Health Sys., 501 Pa. 634, 462 A.2d 680, 684 (1983)). For the reasons stated above, see supra Part III.E.1, the Court cannot find as a matter of law that Barks breached its duty of care to Ocean Spray. Accordingly, Ocean Spray's motion for partial summary judgment on its negligence claim is denied.

An appropriate Order follows.

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

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 :
 v. :
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 B. BARKS & SONS, INC., :
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 OCEAN SPRAY CRANBERRIES, INC. : NO. 97-7919

O R D E R

AND NOW, this 27th day of May, 1999, upon consideration of the Motion of Defendant B. Barks & Sons, Inc. ("Barks") for Partial Summary Judgment (Docket No. 30) and Plaintiff Hartford Fire Insurance Company's ("Plaintiff's" or "Hartford's") Response thereto (Docket No. 34), Defendant Ocean Spray Cranberries, Inc.'s ("Ocean Spray's") Motion for Partial Summary Judgment Joining Barks' Motion for Partial Summary Judgment (Docket No. 37), and Hartford's Response thereto (Docket No. 41), Hartford's Motion for Summary Judgment (Docket No. 48), Barks' Response thereto (Docket No. 56), and Hartford's Reply thereto (Docket No. 65), Ocean Spray's Motion for Partial Summary Judgment Against Barks (Docket No. 49), Barks' Response thereto (Docket No. 53), and Ocean Spray's Reply thereto (Docket No. 59), IT IS HEREBY ORDERED that Barks' Motion for Partial Summary Judgment is **GRANTED**, Ocean Spray's Motion for Partial Summary Judgment Against Hartford is **GRANTED**, Hartford's Motion for Summary Judgment is **GRANTED in**

part and **DENIED in part**, Ocean Spray's Motion for Partial Summary Judgment Against Barks is **DENIED**.

BY THE COURT:

HERBERT J. HUTTON, J.