STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF LEELANAU

SISSON'S COUNTRY INN, INC., d/b/a LEELANAU COUNTRY INN, a Michigan corporation; SISSCO, INC., a Michigan corporation; JOHN E. SISSON; and LINDA A. SISSON,

Plaintiffs,

v

File No. 98-4348-CK
HON. PHILIP E. RODGERS, JR.

FIREMAN'S FUND INSURANCE COMPANY, a California insurance corporation, GAB ROBINS NORTH AMERICA, INC., a Delaware corporation, and KENNETH R. VLASBLOM,

Defendants.
_____/

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DECISION AND ORDER

The Defendant Fireman's Fund Insurance Company has filed a Motion for Summary Disposition pursuant to MCR 2.116(C)(8) and (10). For similar and additional reasons, the Defendants GAB Robins North America, Inc., and Kenneth R. Vlasblom have also moved for summary disposition. The Court has had the opportunity to review the parties' briefs and to entertain their oral arguments on December 28, 1998 in Leland, Michigan. The Court is fully advised in the premises and, for reasons that will now be described, grants the motions in part and denies them in part.

This cause of action arises out of a fire which destroyed a portion of the Leelanau Country Inn on May 30, 1996. The Inn is a historic structure in which a restaurant and bed and breakfast business operate. The Plaintiffs John and Linda Sisson (the "Sissons") are the owners/operators of the Inn. Fireman's Fund Insurance Company ("Fireman's Fund") is their insurer. Defendant GAB Robins North America, Inc. ("GAB") is an independent insurance adjusting company with offices in Traverse City which was retained by Fireman's Fund to adjust the Plaintiffs' loss. Defendant Kenneth R. Vlasblom ("Vlasblom") is an insurance adjustor and employee of GAB. At all times, Vlasblom and GAB acted as agents of Fireman's Fund in adjusting the Plaintiffs' fire loss.

The dispute between the parties arose following what all parties agree was a Herculean effort by Plaintiffs to reopen the Inn in 45 days rather than the six months initially estimated. In the course of rebuilding the Inn, numerous construction code defects were required to be corrected and brought into compliance with current building codes. Insurance coverage for such repairs is generally referred to as "ordinance or law" coverage. While the Plaintiffs had a very broad policy of fire insurance, they had not purchased "ordinance or law" coverage.

After the Plaintiffs had called upon contractors who were friends to help them reopen the Inn as soon as possible and the final payment was due, Plaintiffs were first advised by Fireman's Fund that there would be no "ordinance or law" coverage. Efforts to negotiate the coverage, in consideration of the substantial savings Fireman's Fund realized on the business interruption portion of the policy, were unsuccessful. This complaint followed those unsuccessful negotiations.

Plaintiffs' complaint contains seven counts. The Defendants' motions are predicated upon MCR 2:116(C)(8) and (10).

The standard of review for a (C)(8) motion is set forth in *Mitchell* v *General Motors Acceptance Corp,* 176 Mich App 23 (1989).

> A motion for summary disposition brought under MCR 2.116 (C)(8), failure to state a claim upon which relief can be granted, is tested by the pleadings alone and examines only the legal basis of the complaint. The factual allegations in the complaint must be accepted as true, together with any inferences which can reasonably be drawn therefrom. Unless the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify recovery, the motion should be denied. *Beaudin* v *Michigan Bell Telephone Co*, 157 Mich App 185, 187; 403 NW2d 76 (1986). However, the mere statement of the pleader's conclusions, unsupported by allegations of fact upon which they may be based, will not suffice to state a cause of action. *NuVision* v *Dunscombe*, 163 Mich App 674, 681; 415 NW2d

234 (1988), lv den 430 Mich 875 (1988). [*Roberts* v *Pinkins*, 171 Mich App 648, 651; 430 NW2d 808 (1988).]

See also, *Brown* v *Michigan Bell Telephone Inc*, 225 Mich App 617, 621; 572 NW2d 33, 35 (1997).

The standard of review for a (C)(10) motion is set forth in *Ashworth* v *Jefferson Screw*, 176 Mich App 737, 741; 440 NW2d 101 (1989).

> A motion for summary disposition brought under MCR 2.116 (C)(10), no genuine issue as to any material fact, tests whether there is factual support for the claim. In so ruling, the trial court must consider the affidavits, pleadings, depositions, admissions and other documentary evidence submitted by the parties. MCR 2.116 (G)(5). The opposing party must show that a genuine issue of fact exists. Giving the benefit of all reasonable doubt to the opposing party, the trial court must determine whether the kind of record that might be developed would leave open an issue upon which reasonable minds could differ. *Metropolitan Life Ins Co* v *Reist*, 167 Mich App 112, 118; 421 NW2d 592 (1988). A reviewing court should be liberal in finding that a genuine issue of material fact exists. A court must be satisfied that it is impossible for the claim or defense to be supported at trial because of some deficiency which cannot be overcome. *Rizzo* v *Kretschmer*, 389 Mich 363, 371-372; 207 NW2d 316 (1973).
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> The party opposing an MCR 2.116 (C)(10) motion for summary disposition bears the burden of showing that a genuine issue of material fact exists. *Fulton* v *Pontiac General Hospital*, 160 Mich App 728, 735; 408 NW2d 536 (1987). The opposing party may not rest upon mere allegations or denials of the pleadings but must, by other affidavits or documentary evidence, set forth specific facts showing that there is a genuine issue for trial. MCR 2.116 (G)(4). If the opposing party fails to make such a showing, summary disposition is appropriate. *Rizzo*, p 372.
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> See also, *Patterson* v *Kleiman*, 447 Mich 429, 431-432; 447 NW2d 429 (1994).

The Michigan Supreme Court has commented upon the variation in analysis required with respect to these rules in *Radtke v Everett*, 442 Mich 368, 373-374; 501 NW2d 155 (1993) where it wrote as follows:

> MCR 2.116(C)(8) permits summary disposition when the "opposing party has failed to state a claim on which relief can be granted." MCR 2.116(C)(8), therefore, determines whether the opposing party's pleadings allege a prima facie case. *Marrocco v Randlett*, 431 Mich 700, 707; 433 NW2d 68 (1988). Hence, the court "does not act as a fact finder," but "accepts as true all well-pleaded facts." *Abel v Eli Lilly & Co*, 418 Mich 311, 324; 343 NW2d 164 (1984). Only if the allegations fail to state a legal claim will summary disposition pursuant to MCR 2.116(C)(8) be valid. *Macenas v Village of Michiana*, 433 Mich 380, 387; 446 NW2d 102 (1989).

> While MCR 2.116(C)(8) tests the legal sufficiency of the pleadings, MCR 2.116(C)(10) tests the factual basis underlying a plaintiff's claim. *Velmer v Barage Area Schools*, 430 Mich 385, 389-390; 424 NW2d 770 (1988). MCR 2.116(C)(10) permits summary disposition when "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law.[1] A court reviewing such a motion, therefore, must consider the pleadings, affidavits, depositions, admissions, and any other evidence in favor of the party opposing the motion, and grant the benefit of any reasonable doubt to the opposing party. *Stevens v McLouth Steel*, 433 Mich 365, 370; 446 NW2d 95 (1989).

Count I: Breach of Contract

The Fireman's Fund policy purchased by the Plaintiffs was quite comprehensive. It included replacement cost and business interruption coverages but did not include "ordinance or law" coverage. Although Plaintiffs believe they had such coverage and dispute ever rejecting a recommendation to purchase it, they agree that the policy does not contain this specific provision. (See, Plaintiffs' brief, p 4 and Sisson deposition, p 41.) Rather, Plaintiffs state that coverage for those repairs which go beyond the replacement of prior existing facilities and are required for adherence to current building codes or zoning ordinances should be compensated under the provision for "extra and expediting expenses." This provision provides as follows:

> When a loss covered by this policy occurs, we will pay the extra expense you necessarily incur to continue or resume your normal business operation. We will pay only that part of the total expense that exceeds the amount which ordinarily would have been incurred to conduct your business. We will not be liable for any longer period of time than is necessarily required to rebuild, repair or replace the damaged property. This period of time is not limited by the expiration date of the policy.
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> We will also pay the reasonable cost you incurred to expedite repairs to covered property . . . . The special exclusions that apply to the extra expense coverage form shall apply to this coverage.

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[1]In other words, the "court must be satisfied . . . that 'it is impossible for the claim or defense to be supported at trial because of some deficiency which cannot be overcome.'" *Stevens v McLouth Steel*, 433 Mich 365, 370; 446 NW2d 95 (1989), quoting *Rizzo v Kretschmer*, 389 Mich 363, 372; 207 NW2d 316 (1973).

The exclusions to the Plaintiffs' policy provide that the carrier will not pay for certain "ordinance or law" expenses in the event of a fire loss.

Exclusions

a. Ordinance or Law

(1) The enforcement of any ordinance or law:

(a) Regulating the construction, use or repair of any property; or

(b) Requiring the tearing down or removal of any property, including the cost of removing its debris.

(2) The increased costs of repairs due to the enforcement of any ordinance or law that:

(a) Requires the demolition of parts of the same property not damaged by a Covered Cause of Loss; or

(b) Regulates the construction or repair of buildings, or establishes zoning or land use requirements at the premises described in the Declarations.

The rules of construction which pertain to insurance policies were set forth by the Michigan Supreme Court in *Fresard v Michigan Millers Mutual Ins Co*, 414 Mich 686, 694; 327 NW2d 286 (1982). There the Court wrote as follows:

> When examining the language of this or any other insurance policy, we are mindful of several other principles of construction so rudimentary as to be axiomatic:
>
> The contract should be viewed as a whole.
>
> The intent of the parties should be given effect.
>
> An interpretation of the contract which would render it unreasonable should be avoided.

> Meaning should be given to all terms.
>
> Ambiguities should not be forced.
>
> Conflicts among clauses should be harmonized.
>
> The contract should be viewed from the standpoint of the insured.
>
> The insurer should bear the burden of proving an absence of coverage. *Id.*, p 694.

Recognizing these principles of construction, the issue before the Court is whether or not any factual issues existed with regard to a potential ambiguity in the interpretation of the clauses described above. The issue of ambiguity in the interpretation of insurance contracts was discussed by the Michigan Supreme Court in *Raska v Farm Bureau Ins Co*, 412 Mich 355 (1982). There, the *Raska* Court wrote as follows:

> The only pertinent question, therefore, is whether the exclusionary clause in this contract is ambiguous, for if it is not ambiguous we are constrained to enforce it. A contract is said to be ambiguous when its words may be reasonably understood in different ways. If a fair reading of the entire contract of insurance leads one to understand that there is coverage under particular circumstances, and under another fair reading of it leads one to understand there is no coverage under the same circumstances, the contract is ambiguous and should be construed against its drafter and in favor of coverage. Yet if a contract, however in artfully worded or clumsily arranged, fairly admits of but one interpretation it may not be said to be ambiguous or, indeed, fatally unclear. *Id.*, p 362. See also, *Allor v Dubay*, 317 Mich 281 (1947).

In consideration of the long standing rules of construction which pertain to insurance policies, it is clear that "ordinance or law" coverage was expressly excluded from this policy and from any coverage which would otherwise be afforded to "extra and expediting expenses." The policy is not ambiguous. The coverage simply does not exist. All Defendants are entitled to the dismissal of Count I of the Plaintiffs' complaint. MCR 2.116(C)(10).

Count II: Uniform Trade Practices Act

Defendants would have the Court dismiss Plaintiffs' claim under the Uniform Trade Practices Act ("UTPA"). MCLA 500.2006. The Court must disagree. While the UTPA does not provide for

an independent cause of action, it does provide a claim for penalty interest. *Young v Michigan Mutual Ins Co*, 139 Mich App 600; 362 NW2d 844 (1984), and *Isagholian v Transamerica Ins Corp,* 208 Mich App 9; 527 NW2d 13 (1994). In fact, the resort to penalty interest under the UTPA has long been recognized as the remedy to which insureds are limited for bad faith in claims processing. *Kassab v Michigan Property Ins*, 441 Mich 433, 444; 491 NW2d 545 (1992).

The Court reads Count II solely as a claim for penalty interest. Defendants' motion on such a claim is denied. To the extent Count II may be argued to exceed such a limitation, it is otherwise dismissed. MCR 2.116(C)(10).

Count III: Promissory Estoppel

The Defendants argue that equitable estoppel cannot be applied create coverage for a risk otherwise expressly excluded by an insurance policy. While it is generally true that equity is not used to expand an insurance policy to create a liability expressly excluded by the policy, *Lee v Evergreen Regency Co-op Mgmt Systems, Inc.,*151 Mich App 281; 390 NW2d 183 (1986); *Smit v State Farm Ins Co,* 207 Mich App 674; 525 NW2d 528 (1995), estoppel may be applied to provide coverage otherwise excluded where the insurance company has misrepresented the policy terms to the insured. See, *Lee, supra*, p 287, and *Parmet Homes v Republic Ins Co*, 111 Mich App 140, p 148; 314 NW2d 453 (1981).

The elements of promissory estoppel are as follows:

(1) A promise that the promisor should reasonably have expected to induce action of a definite and substantial character by the promisee;

(2) Which in fact produced reliance or forbearance of that nature;

(3) In circumstances such that the promise must be enforced if injustice is to be avoided.

Marrero v McDonnel Douglas, 200 Mich App 438, 442; 505 NW2d 275 (1993).

The existence and nature of the alleged promises create questions of material fact for the jury. *State Bank of Standish v Curry,* 442 Mich 76, 84; 500 NW2d 104 (1993). In view of the deposition testimony of Defendant Vlasblom and Frank Sisson, Frank Sisson's affidavit and the documentary evidence to which the Court was referred, the Court must find that there are sufficient facts in

evidence which may be accepted by a reasonable jury and used to create coverage where it has otherwise been excluded.

Simply stated, if the jury accepts that affirmative representations of "ordinance or law" coverage were made to the Plaintiffs in the midst of a fire disaster and, in reliance upon those representations, Plaintiffs' incurred expenses for non-covered repairs which they could not otherwise afford and which allowed them to reopen the restaurant in 45 days rather than the projected six months and Plaintiffs saved the insurance company substantially more in business interruption claims than the cost of the ordinance repairs, then equity would not only support a finding of coverage but compel it. It is ironic that Fireman's Fund seeks to avoid estoppel by arguing the insured's obligation to be familiar with the terms of an insurance policy when its professional claims manager did not review the policy and apparently made mistaken affirmative representations which have caused Plaintiffs serious financial consequences. The motion as to Count III is denied.

Count IV: Intentional Misrepresentation

There is no need for a protracted discussion of Count IV as Plaintiffs' counsel candidly acknowledged during the oral argument on this motion that the facts do not support an intentional misrepresentation, i.e., a knowing false statement made with the intent to be relied upon. Accordingly, Count IV of the Plaintiffs' complaint will be dismissed as to all Defendants. MCR 2.116(C)(10).

Counts V and VI: Negligent Misrepresentation and Negligence in Claims Handling

The Court believes that the same operative facts which support the claim of promissory estoppel are those relied upon by Plaintiffs to recast the estoppel claim in the form of negligent misrepresentation or negligence in claims handling. Plaintiffs' theory is that Fireman's Fund was asked a direct question regarding coverage, failed to properly review the policy and provided an erroneous answer. In reasonable reliance upon that answer and a process for approving claims which had been arranged with Fireman's Fund independent adjustor, Plaintiffs made an outstanding effort to rapidly reopen their business. Indeed, it is undisputed that the final check had been prepared but was not mailed when this error was discovered at the last moment.

The Michigan Supreme Court has acknowledged the obligation of an insurance carrier to provide accurate information. *United States Fidelity and Guarantee Co v Black*, 412 Mich 99, 127; 313 NW2d 77 (1981). The *United States Fidelity and Guarantee Co* Court further noted there was an obligation on the part of an insurance carrier to disclose subsequently acquired information that would make earlier representations untrue or misleading even if they were believed to be true when made. Here, there is no evidence that a timely disclosure of a prior error was ever made.

While Plaintiffs have cloaked these operative facts in several legal forms, they only support a claim for bad faith in claims handling and no independent tort. *Hearn v Rickenbacker*, 428 Mich 32, 37; 400 NW2d 90 (1987). While the focus of the Michigan Supreme Court opinion in *Hearn* was on a statute of limitations analysis and while the Court did discuss and differentiate the statute of limitations in an action for fraud as opposed to one on the policy, the Court specifically noted that its opinion was limited to a discussion of the various statutes of limitations without assessing the substantive viability of those claims. *Id.*, p 40, n 4. In fact, Justice Brickley wrote that, " Identical arguments in alternative theoretical forms, one valid and one imaginative, should not be encouraged." *Id.*, p 41.

In *Crossley v Allstate Ins*, 155 Mich App 694; 400 NW2d 625 (1986), the Court of Appeals also stated that negligence in claims handling is subsumed within the theory of a breach of contract on the policy and that the tort claims should be the subject of summary disposition. The *Crossley* Court wrote as follows:

> Finally, to the extent plaintiff's complaint alleges "negligence" and defendants' refusal to pay, or failure to more properly investigate and assess the merit of plaintiff's claim, the complaint merely alleges a breach of contract, and summary disposition would properly have been granted with regard to such a "negligence" claim. *Hart v Ludwig*, 347 Mich 559, 565; 79 NW2d 895 (1956).
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> *Crossley, supra*, pp 697-698.

The Court of Appeals' opinion in *Crossley* and that of the Michigan Supreme Court in *Hearn* both follow the prior Michigan Supreme Court decision in *Kewin v Massachusetts Mutual,* 409 Mich 401; 295 NW2d 50 (1980). There, in the context of a claim involving the failure to pay disability income protection benefits, the plaintiff asserted claims for intentional infliction of mental distress,

breach of contract, fraud and undue influence and invasion of privacy. The Michigan Supreme Court commented upon this complaint in the following language:

> The complaint does contain conclusory language to the effect that the defendant engaged in misrepresentation and deceit at handling the claim, that the facts alleged in the pleadings and established at trial would not support a finding of tortious conduct and merely demonstrate that the nature of the cause of action was for breach of contract, albeit a bad faith breach. . . . The plaintiff in this case alleged and proved no more than the failure of the defendant to discharge its obligations under the disability insurance contract.
>
> We decline to follow the California court and to declare the mere bad faith breach of an insurance indemnity contract an independent and separately actionable tort and to thereby open the door to recovery for mental pain and suffering caused by breach of a commercial contract.
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> *Kewin, supra,* pp 422-423.

Based upon the foregoing precedent, it is this Court's legal conclusion that Plaintiffs' sole compensation for bad faith claims handling is a claim for penalty interest under the UTPA. *Crossley, supra*, p 697. This claim has been made in Count II. Counts V and VI of the Plaintiffs' complaint will be dismissed as to all Defendants with prejudice. MCR 2.116(C)(10).

Count VII: Emotional Injury

Both parties recognize that the existence of Plaintiff Frank Sisson's emotional injuries and their nature, extent and relationship to the claims processing at issue here raise questions of fact for the jury. However, the jury may only receive this evidence if it survives the general prohibition on the award of mental distress damages in cases involving the breach of a commercial insurance contract. *Kewin, supra,* p 423. The *Kewin* Court did recognize an exception to this general prohibition where there was proof of tortious conduct independent of the breach. *Id.*, pp 420-421. Although Plaintiffs argue that Frank Sisson's mental distress damages arise from tortious conduct independent of the breach, the Court can find no legal merit in the claim.

Absent the commercial contract of fire insurance, Fireman's Fund and Plaintiffs are strangers to each other. Their entire relationship was commercial. While the Court readily agrees that Plaintiffs' have established facts that would support a finding of bad faith claims handling and, upon Plaintiffs' stated facts, believes that equity compels the provision of coverage for "ordinance or law"

expenses, it does not find action independent of the contract which is different in any meaningful or substantive way from that rejected in *Kewin*.

This Court does not find that the facts in *Drouillard v Metropolitan Life*, 107 Mich App 608; 310 NW2d 15 (1981) detract from this conclusion. *Phillips v Butterball*, 448 Mich 239; 531 NW2d 144 (1995) did allow a recovery for mental distress damages. However, the right there arose from a retaliatory discharge for exercising rights under the Worker's Compensation Act. The breach of a statutory duty does allow for a tort remedy not otherwise available here. *Id.*, pp 248-249. For all the foregoing reasons, the Plaintiffs' complaint for mental distress damages shall be dismissed as to all Defendants. MCR 2.116(C)(10).

Defendants GAB and Vlasblom

In the Plaintiffs' post-hearing brief, Plaintiffs acknowledged that the agent of a disclosed principal is not generally liable to a third party absent actionable fraud. Here, there is no claim of fraud. See, discussion, supra, pp 8-9. Plaintiffs acknowledge that GAB and Vlasblom were agents of a disclosed principal and Fireman's Fund does not disagree.

In reviewing the materials presented to the Court in support of the Defendants' motion for summary disposition, the Court did not encounter any affidavit, deposition or documentary evidence from Fireman's Fund inconsistent with Vlasblom's testimony and the contemporaneous claims documents he prepared as he adjusted the loss. Nor has Fireman's Fund suggested that GAB or Vlasblom acted in an ultra-vires capacity. Given that Fireman's Fund acknowledges the preparation of a final check to transmit to Plaintiffs which would have compensated all "ordinance or law" expenses and withholding it only at the last moment when its contractual error was discovered, there appears to be no reasonable dispute that GAB or Vlasblom ever acted as other than authorized agents of Fireman's Fund. Finally, the Court notes that Fireman's Fund has raised no objections to the GAB and Vlasblom motion for summary disposition.

The time for Fireman's Fund to dispute the statements of GAB and Vlasblom has come and gone. MCR 2.116(G)(4). Having failed to do so, it is this Court's opinion that the Defendants GAB and Vlasblom must be dismissed as the acknowledged agents of the disclosed principal Fireman's Fund. MCR 2.116(C)(10).

Conclusion

Having reviewed the parties' briefs and oral arguments, it is this Court's conclusion that Count I of the Plaintiffs' complaint is dismissed as to all Defendants. Count II shall be considered only as a claim for penalty interest for bad faith claims handling under the Uniform Trade Practice Act. Count III states a viable cause of action upon which material factual questions remain to be resolved. Counts IV through VII are hereby dismissed as to all Defendants. Finally, the Defendants GAB and Vlasblom are dismissed as the acknowledged agents of the disclosed principal Fireman's Fund. MCR 2.116(C)(10).

IT IS SO ORDERED.

HONORABLE PHILIP E. RODGERS, JR.
Circuit Court Judge

Dated: 1/21/99