IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA

CIVIL ACTION

ANGELINA M. INGRASSIA,	:	
Plaintiff	:	
	:	
v.	:	**No. 08-1758**
	:	
ERIE INSURANCE EXCHANGE,	:	
Defendant	:	

Alan C. Milstein, Esquire — **Counsel for Plaintiff**
Robert M. Runyon, III, Esquire — **Counsel for Defendant**

MEMORANDUM OPINION

Nanovic, P.J. – June 16, 2011

On July 1, 2006, a fire damaged Plaintiff Angelina M. Ingrassia's ("Ingrassia") home located at 233 Center Street, Jim Thorpe, Carbon County, Pennsylvania (the "Property"). The Property is the site of an Episcopal church, built in 1867, and used as a church for more than a century. Ingrassia has resided in the former church building since 1999 and is either the second or third residential occupant since the church closed in 1984.

Ingrassia's claims for loss of use and personal property damage have previously been resolved with Defendant Erie Insurance Exchange ("Erie"), the insurer of the Property. In these proceedings, Ingrassia seeks additional compensation for damage to the building. The only remaining dispute between the parties centers on two unique features of the church, its

stained glass windows and a pipe organ, custom built in 1929 and installed as a fixture. Both were damaged in the fire.

Ingrassia seeks full restoration of the eighty-two-year-old pipe organ and replacement of the stained glass windows with stained glass windows of like kind and quality to those custom made for the church before the fire; Erie contends these items are subject to repair and replacement in accordance with the insurance policy's Functional Replacement Cost ("FRC") provision. This coverage, according to Erie, allows the stained glass windows and pipe organ to be replaced and/or repaired with less expensive, more modern state-of-the-art work, such as replacement of the stained glass windows with clear, thermal-pane, glass panels and a new electric organ in place of the pipe organ which, Erie contends, had exceeded its useful life and was in need of major restoration work even before the fire. Having precedence to this question of coverage is whether Ingrassia's claim is barred by the one-year suit limitation clause contained in her insurance policy. Also at issue is whether Erie engaged in bad faith insurance practice. Pending before us is Erie's Motion for Summary Judgment on both counts of Ingrassia's Complaint: Count I, for breach of contract, and Count II, for statutory bad faith.

PROCEDURAL AND FACTUAL BACKGROUND

In November of 2003, Ingrassia applied for and received a homeowner's insurance policy, policy number Q59 1408158 A, issued by Erie (the "Policy"). The Policy includes a FRC Loss Settlement Endorsement which contains the following definitions:

> **"functional actual cash value" means we will deduct for depreciation on the amount which it would cost to repair or replace the damaged building with less costly common construction materials and methods which are functionally equal to obsolete, antique or custom construction materials and methods used in the original construction of the building.**
>
> **"functional replacement cost" means the amount which it would cost to repair or replace the damaged building with less costly common construction materials and methods which are functionally equal to obsolete, antique or custom construction materials and methods used in the original construction of the building.**

(Insurance Policy, Functional Replacement Cost Loss Settlement Endorsement). This endorsement was selected by Ingrassia over traditional replacement cost insurance to save money on her policy premiums due to the age and unique features of the building. Ingrassia's insurance agent, William Fernald, used the following example in explaining this form of coverage to her: if the building burned down and it had plaster walls, Ingrassia would be entitled to drywall to replace the walls, not plaster. (Erie Exhibits B (Ingrassia Deposition), pp.123-124

and G (Fernald Deposition), p.33).[1] The Policy also includes the following limitation on filing suit:

> **SUIT AGAINST US**
> **We may not be sued unless there is full compliance with all the terms of this policy. Suit must be brought within one year (Maryland – three years) after the loss or damage occurs.**

(Insurance Policy, p.16).

On Saturday, July 1, 2006, a fire damaged the Property and its contents. Erie received Ingrassia's claim that same date and the Property was inspected on July 4, 2006. At first, because of what was observed during the initial inspection and what Ingrassia told the property specialist assigned to the claim, Erie questioned whether the Property was being used for business purposes, an antique internet sales business, and whether Ingrassia's claim for contents damage included business property held for sale. (Erie Exhibit E (letter dated July 11, 2006)).

On July 11, 2006, Erie sent Ingrassia a Reservation of Rights letter stating that business personal property may not be covered under her Policy, or may be subject to limited coverage, and noted the Policy's $2,500.00 limitation for business property. (Erie Exhibit E (letter dated July 11, 2006)). This letter further advised Ingrassia of both the one-year suit

[1] Unless otherwise indicated, the exhibits identified in this opinion refer to those attached to Erie's Motion for Summary Judgment and Ingrassia's Answer to that Motion.

limitation and the FRC provisions of the Policy. After Ingrassia expressed some concern over mold on the Property, Erie sent a supplemental Reservation of Rights letter dated July 13, 2006, discussing the Policy's provisions applicable to mold.

Ingrassia retained Young Adjustment Company, Inc. ("Young") to act as her public adjuster and agent in recovering for her loss. Young sent Ingrassia a letter dated July 21, 2006, in which it also informed her of the Policy's suit limitation period. (Erie Exhibit M).

In addition to the Property's unique structure and fixtures, several factors complicated and delayed the investigation and adjustment of Ingrassia's claim. When it was learned early in Erie's investigation of the claim that the Property was used, to some extent, for business purposes and might contain items held for sale, Erie requested further information about the nature and extent of this business, including when it began in reference to Ingrassia's application for insurance, and sought to determine, in light of the coverage ceiling for business property, which items, if any, at the Property were business property and which were Ingrassia's personal property, many of which, like the items offered for sale in the business, were also antiques. (Erie Exhibits B (Ingrassia Deposition), pp.78, 85-87, 96; E (letter dated July 11, 2006); and H (Erie Claim Log Notes dated July 4, 5, and 6,

2006)). These inquiries were appropriate since Ingrassia had represented in her application for the Policy that "no business pursuits are conducted at the premises." (Erie Exhibit E (Insurance Application), p.2, question (g)).

Erie, through its counsel, attempted to secure Ingrassia's examination under oath by letter dated August 9, 2006, in order to investigate her claim further, in part to delineate her personal from her business property. (Erie Exhibit N). This letter again reserved all of Erie's rights under the Policy, as did follow-up letters dated October 4, 2006, October 10, 2006, February 8, 2007, February 19, 2007, and March 2, 2007, which Erie's counsel sent to Ingrassia related to scheduling the examination and obtaining documentation. (Erie Exhibit N). Similar letters also reserving Erie's rights were sent from Erie's counsel to Ingrassia's counsel on March 8, 2007,[2] March 12, 2007, March 19, 2007, and March 28, 2007. (Erie Exhibit N).

Following, Ingrassia's examination under oath on April 12, 2007, Erie's counsel requested additional documentation, as well as a signed errata sheet, and again reserved all of Erie's rights under the Policy by letters dated April 18, 2007, May 2, 2007, and June 28, 2007. (Erie Exhibit N). On July 20, 2007, Erie sent Ingrassia's counsel a letter which advised that it had

[2] Ingrassia's counsel first formally notified Erie's counsel of his representation of Ingrassia on or about March 8, 2007. (Erie Motion, ¶27).

concluded its investigation into the items of personal property in dispute, had decided to extend coverage for those items, was in the process of adjusting the loss, and would be in contact to discuss the specifics once it had determined the fair value of the items. (Ingrassia Exhibit H). The personal property portion of Ingrassia's claim was paid by Erie by checks dated August 28, 2007 and October 30, 2007, in the amounts of $159,997.00 and $48,505.00, respectively. (Erie Exhibit J).

Prior to extending coverage for Ingrassia's personal property claim, on November 7, 2006, Erie provided Young with a detailed estimate of the building damage prepared in accordance with the FRC endorsement. This estimate was accompanied by a $184,351.77 payment for the undisputed functional actual cash value, less the deductible. (Erie Exhibits I (letter dated January 11, 2010), p.5 and S). In this estimate, Erie estimated the damages to the windows at $13,948.35 and provided no figure for the organ.

On August 14, 2007, Young sent Erie its estimate of damages dated January 4, 2007. (Erie Exhibits I (letter dated January 11, 2011), p.5 and U). This estimate includes a figure of $95,620.00 for damage to the stained glass windows and estimates the cost to restore the organ at $101,450.00. (Erie Exhibit U, p.20). This latter figure relies upon an estimate prepared by Patrick Murphy, an outside consultant, who inspected

and assessed the damage to the organ.[3] None of Young's estimates provide a functional replacement cost evaluation of the covered loss and damage.

Erie took the position that both the stained glass windows and pipe organ were subject to the Policy's FRC endorsement, and that this coverage limited its obligation to replacing the stained glass windows with clear, thermal-pane, glass panels and replacing the pipe organ with a functionally equivalent new electric organ. This was unacceptable to Ingrassia who insisted that Erie was obligated to fully refurbish the pipe organ and replace the stained glass windows with stained glass windows. When the parties were unable to agree upon the application and interpretation of the FRC endorsement as it pertains to the stained glass windows and pipe organ, Ingrassia, on January 3, 2008, demanded that this damage

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[3] Although no direct fire damage occurred to the organ, damage was sustained from smoke and soot. Erie proposed having the organ professionally cleaned by a service familiar with fire restoration cleaning, however, this was refused by Ingrassia who demanded that the organ be fully restored. This notwithstanding that the organ had a useful life of approximately sixty-five to seventy years, had not been maintained for many years prior to the fire, and had significant deterioration which existed and was wholly unrelated to the fire. In an effort to resolve this portion of the claim, Erie offered $9,000.00 toward the purchase of an electric organ that was functionally equivalent. (Erie Exhibits D (letter of Schantz Organ Company dated November 25, 2009) and I (letter dated January 11, 2010)).

The estimate prepared by Mr. Murphy, included not only cleaning those areas of the organ damaged by smoke and soot, but also restoration work which included repair or replacement of portions of the organ that had deteriorated long before the fire and were not related to it, such as the leather diaphragm valves, the heart of the organ. (Erie Exhibits D and DD (Murphy Deposition), pp.58-59).

issue be submitted for appraisal under the Policy. (Erie Exhibit CC).[4]

Erie rejected this demand by letter dated January 15, 2008, on the basis that "[t]he appraisal process is not the forum to argue coverage interpretation nor determination of the scope of the loss." (Erie Exhibit CC). In this same letter, Erie agreed to submit the damage issue to the appraisal process, if agreement was first able to be reached on the scope of the building damages to be appraised. By letter dated April 17, 2008, Erie summarized the impasse over the issue of damages to the windows and organ as "primarily due to the fact that [Young's] estimate does not take into account the provisions

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[4] The Policy contains the following provision pertaining to appraisal:

> **(2) APPRAISAL**
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> **If you and we fail to agree on the *amount of loss*, on the written demand of either, each party will choose a competent appraiser and notify the other of the appraiser's identity within 20 days after the demand is received. The appraisers will select a competent and impartial umpire. If the appraisers are unable to agree upon an umpire within 15 days after both appraisers have been identified, you or we can ask a judge of a court of record in the state where your residence premises is located to select an umpire.**
>
> **The appraisers shall then set the *amount of loss*. If the appraisers submit a written report of an agreement to us, the amount agreed upon shall be the *amount of loss*. If they cannot agree, they will submit their differences to the umpire. A written award by two will determine the *amount of loss*.**
>
> **Each party will pay the appraiser it chooses, and equally bear expenses for the umpire and all other expenses of the appraisal. However, if the written demand for appraisal is made by us, we will pay for the reasonable cost of your appraiser and your share of the cost of the umpire.**
>
> **We will not be held to have waived any rights by any act relating to the appraisal.**

(Insurance Policy, p.14) (emphasis added).

found in the Functional Replacement Cost Loss Settlement Endorsement." (Ingrassia Exhibit K (letter dated April 17, 2008), p.2).[5]

To date, Erie has paid Ingrassia $429,353.77 on her claim. The date, purpose and amount of these payments is as follows:

DATE	PURPOSE	AMOUNT
July 6, 2006	Advance payment	$3,000.00
July 7, 2006	Advance payment	$4,000.00
July 21, 2006	Advance payment	$500.00
July 26, 2006	Advance payment	$10,000.00
October 4, 2006	Advance payment	$10,000.00
November 7, 2006	Building actual cash value, less deductible payment	$184,351.77
November 20, 2006	Agreed upon balance for alternative living expenses	$9,000.00
August 28, 2007	Partial payment - contents	$159,997.00
October 30, 2007	Additional payment - contents	$48,505.00

(Erie Exhibit I (letter dated January 11, 2010), p.4).

At no time prior to July 1, 2007, the date one year after the date of loss, did Ingrassia request or receive an extension of the suit limitation period; nor did she file suit. Ingrassia's suit against Erie was commenced by complaint filed on July 11, 2008.

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[5] In her complaint, Ingrassia incorrectly stated the date of this letter to be April 17, 2007, failed to accurately state its contents, and failed to attach a copy, notwithstanding basing a portion of her claim on this writing. (Complaint, ¶14; Ingrassia Answer to Erie Motion, ¶43). In consequence, there has been unnecessary confusion over whether the document existed and what it provides. (Erie Motion, ¶¶61-64).

The letter of April 17, 2008, lists seventeen separate items totaling $118,231.16 which the parties had reached agreement on. The letter also listed ten items on which the parties had not agreed. At this time, the only remaining two items in dispute are the stained glass windows and pipe organ. (Complaint, ¶15; Ingrassia Answer to Erie Motion, ¶¶46 and 73).

The Complaint contains two counts: Count I is for breach of contract and Count II is for statutory bad faith. Both counts center on Erie's application and interpretation of the Policy's FRC endorsement to Ingrassia's damage claim for the stained glass windows and pipe organ, and Erie's subsequent refusal to proceed to appraisal to resolve this dispute.

Erie filed its Answer and New Matter on January 22, 2009, to which Ingrassia filed a Reply on February 12, 2009. Erie previously filed a Motion for Judgment on the Pleadings which was denied by Order dated August 31, 2009. Now before us is Erie's Motion for Summary Judgment. In this Motion, Erie argues that Ingrassia's cause of action is barred by the Policy's one-year limitation on the filing of lawsuits, that Erie has not breached the terms of the policy, and that there is no factual basis for Ingrassia's claim of bad faith conduct.

DISCUSSION

1) *Standard*

In Pennsylvania, a party may move for summary judgment after the pleadings are closed in two situations. First, when there is no genuine issue of material fact that could be established by additional discovery, and second, after discovery, if an adverse party bearing the burden of proof has failed to produce evidence of essential facts so as to warrant the

submission of the issue to a jury. Pa.R.C.P. 1035.2; Fazio v. Fegley Oil Co., Inc., 714 A.2d 510, 512 (Pa.Cmwlth. 1998).

The burden of proving that there exists no genuine issue of material fact is upon the moving party. Butterfield v. Giuntoli, 670 A.2d 646, 651 (Pa.Super. 1995), *appeal denied*, 683 A.2d 875 (Pa. 1996). Where a motion for summary judgment has been properly supported with corroborating documentation, the non-moving party must demonstrate by specific facts contained within its depositions, answers to interrogatories, admissions or affidavits that there is a genuine issue of material fact for trial. Sovich v. Shaughnessy, 705 A.2d 942, 944 (Pa.Cmwlth. 1998) (citing Marks v. Tasman, 589 A.2d 205, 206 (Pa. 1991)). To meet this hurdle, the non-moving party may not rely solely upon the averments contained in its pleadings, but must demonstrate that there is a genuine issue for trial. Accu-Weather, Inc. v. Prospect Communications, Inc., 644 A.2d 1251, 1254 (Pa.Super. 1994).

To be deemed a material fact, the fact must be both material in the sense of bearing on an essential element of the plaintiff's claim and genuine in the sense that a reasonable jury could find in favor of the non-moving party. U.S. ex rel. Cantekin v. University of Pittsburgh, 192 F.3d 402, 408 (3d. Cir. 1999) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-251. (1986)). A fact is material if it directly affects the

disposition of the case. *See* Ryan v. Furey, 262 A.2d 305, 308-09 (Pa. 1970). In ruling upon a motion for summary judgment, we are not to decide issues of fact, but rather determine whether there exists a genuine issue of material fact to be tried. Ritmanich v. Jonnel Enterprises, Inc., 280 A.2d 570, 573 (Pa.Super. 1971). ("all doubts as to the existence of a genuine issue as to a material fact must be resolved against the party moving for summary judgment").

"Bold unsupported assertions of conclusory accusations cannot create genuine issues of material fact." McCain v. Pennbank, 549 A.2d 1311, 1313-14 (Pa.Super. 1988). Furthermore, any assertion of fact made by a party that is not supported by the record is to be ignored by the court. Erie Idem. Co. v. Coal Operators Case Co., 272 A.2d 465, 466 (Pa. 1971).

"Summary judgment is appropriate only when, after examining the record in the light most favorable to the non-moving party, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Guy M. Cooper, Inc. v. East Penn Sch. Dist., 903 A.2d 608, 613 (Pa.Cmwlth. 2006), *appeal denied*, 918 A.2d 748 (Pa. 2007). It is appropriate only when the moving party's "right to succeed is certain and the case is so free from doubt that trial would be a fruitless exercise." Id. at 613 n.6. On appeal, a trial court's grant of summary judgment will only be overturned if an

error of law was committed or the trial court abused its discretion. *See* id.

2) *Breach of Contract*

Count I of Ingrassia's Complaint is a claim for breach of contract. Ingrassia claims that Erie breached its duty to appraise the amount of loss for the stained glass windows and pipe organ once requested by her. Before addressing this issue, however, we must first determine whether Ingrassia's suit was timely filed under the terms of the Policy.

"Interpretation of an insurance policy is a question of law that a court may resolve on a motion for summary judgment." Harleysville Ins. Companies v. Aetna Cas. and Sur. Ins. Co., 795 A.2d 383, 385 (Pa. 2002). "When interpreting an insurance policy, a court must ascertain the intent of the parties as manifested by the language of the written agreement. When the policy language is clear and unambiguous, the court must give effect to the language of the contract." Id. at 386. "[T]he standard for interpreting insurance policies does not allow us to focus solely on the nature of the policy and ignore the plain meaning of the policy terms. To the contrary, [t]he polestar of our inquiry . . . . is the language of the insurance policy." Id. at 386-87 (internal quotation marks omitted).

An insurance policy's suit limitation clause "is not a statute of limitation imposed by law; it is a contractual undertaking between the parties and the limitation on the time for bringing suit is imposed by the parties to the contract." Lardas v. Underwriters Ins. Co., 231 A.2d 740, 741-42 (Pa. 1967). The legality and enforceability of such provisions is well established. General State Auth. V. Planet Ins. Co., 346 A.2d 265, 267 (Pa. 1975) ("The law is clear that such a clause, setting time limits on the commencement of suits to recovery on a policy, is valid and will be sustained."). As previously stated, Ingrassia's policy contains a one-year limitation on filing suits against Erie after the loss or damage occurs. In fact, one-year suit limitation clauses are statutorily mandated to be included in all fire insurance policies issued in this Commonwealth. *See* 40 P.S. § 636(2).

Here, there is no question that Ingrassia's suit was filed more than one year after the loss. Ingrassia's loss occurred on July 1, 2006, and suit was commenced on July 11, 2008, more than two years later. Because a "one-year suit limitation clause [is] valid and enforceable absent waiver or estoppel," Petraglia v. Am. Motorists Ins. Co., 424 A.2d 1360, 1364 (Pa.Super. 1981), *affirmed*, 444 A.2d 653 (Pa. 1982), unless Erie has waived or, by its conduct, is estopped from enforcing the Policy's contractual limitations, Ingrassia's claim is

untimely and cannot proceed. That Erie may not be prejudiced by allowing a suit more than one year after the suit limitation clause is irrelevant to this determination. Id. at 1363-64.

Unfortunately, Ingrassia, in her pleadings, has not preserved this question for our review. "The affirmative defense of a suit limitation clause is properly raised in new matter." Prime Medica Associates v. Valley Forge Insurance Co., 970 A.2d 1149, 1156 (Pa.Super. 2009). Erie has done so. (*See* Answer and New Matter, ¶36).

"Even when properly pled, a suit limitation clause can be subject to the defenses of waiver and estoppel. Pa.R.C.P. 1029 (b)." *Id.* These defenses, however, were required to be raised in Ingrassia's reply to new matter.

> **A party waives all defenses and objections which are not presented either by preliminary objection, answer or reply, except a defense which is not required to be pleaded under Rule 1030(b), the defense of failure to state a claim upon which relief can be granted, the defense of failure to join an indispensable party, the objection of failure to state a legal defense to a claim and any other nonwaiveable defense or objection. Pa.R.C.P. 1032(a). *Defenses to the statute of limitations, such as estoppel, agreement, agency, apparent authority, fraud, or concealment are waiveable defenses and must be raised in a reply to new matter asserting the statute of limitations as an affirmative defense.***

Id.* (*emphasis added*) (quoting Devine v. Hutt, 863 A.2d 1160, 1168-69 (Pa.Super. 2004). This Ingrassia failed to do. (*See

Ingrassia's Answer to Erie Motion, ¶49). Therefore, neither defense has been properly preserved. *See* Pa.R.C.P. 1032(a).[6]

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[6] Were we to substantively decide this issue, there is no evidence of waiver under a strict contractual analysis.

> Waiver is the voluntary and intentional abandonment or relinquishment of a known right. Waiver may be established by a party's express declaration or by a party's undisputed acts or language so inconsistent with a purpose to stand on the contract provisions as to leave no opportunity for a reasonable inference to the contrary.

Prime Medica Associates v. Valley Forge Insurance Co., 970 A.2d 1149, 1156-57 (Pa.Super. 2009) (citations and quotation marks omitted).

The question of estoppel, we believe, is a much more difficult one.

> Equitable estoppel is a doctrine that prevents one from doing an act differently than the manner in which another was induced by word or deed to expect. A doctrine sounding in equity, equitable estoppel recognizes that an informal promise implied by one's words, deeds or representations which leads another to rely justifiably thereon to his own injury or detriment may be enforced in equity.
>
> The party asserting estoppel bears the burden of establishing estoppel by clear, precise and unequivocal evidence. [M]ere silence or inaction is not a ground for estoppel unless there is a duty to speak or act.

Id. (citations and quotation marks omitted).

Ingrassia contends that she was induced by Erie's actions to delay bringing suit. Specifically, Ingrassia argues that her suit is "not barred by the suit limitation clause because she was allowed to rely on the insurer's continued negotiations over the amount of the loss." (Ingrassia Brief contra Erie's Motion, p.14). When viewed most favorably to Ingrassia, there is support in the record for this assertion.

Final decisions on neither Ingrassia's contents claim nor building claim were made within one year of the loss. Not until July 20, 2007, did Erie confirm that it was accepting coverage of various items of personal property that had been in dispute, whose status Erie wanted to determine as being either Ingrassia's personal property or business items held for sale. Likewise, with respect to the building claim, while Erie's initial estimate was dated November 7, 2006, and Ingrassia's August 14, 2007, the record supports that the parties continued to negotiate over their differences and continued to make progress in reconciling these differences in the process. In Erie's letter of April 17, 2008, Erie expressly noted those areas in which the parties had reached agreement and those still in dispute, at the same time urging Ingrassia to review and revise her estimate of the items in dispute to take into account the FRC endorsement. This is not a letter terminating negotiations but one seeking to reach final agreement on the items still in dispute.

The law of this Commonwealth holds insurers "to high standards of fairness in their dealings with their insureds." Brooks v. St. Paul Insurance Company, 399 A.2d 714, 718 (Pa.Super. 1979) (Spaeth, J., dissenting). "Where the insurer affirmatively misleads the insured about the possibility of settlement, dissuades him from filing suit or induces him to believe that it will not enforce the limitations period, courts construe this conduct as violative of the insurer's duty of utmost good faith and fair dealing." Pini v. Allstate Ins. Co., 499 F.Supp. 1003, 1004 (E.D.Pa. 1980),

3) *Application and Interpretation of FRC Endorsement; Propriety of Request for Appraisal*

In its evaluation of Ingrassia's claim, Erie concluded that clear, thermal-pane, glass panels were functionally equivalent to the stained glass windows damaged at the time of the fire and that replacement of the pipe organ with a functionally equivalent electric organ was appropriate. This reading of the FRC endorsement is consistent with well-established principles of contract construction: "When a written contract is clear and unequivocal, its meaning must be determined by its contents alone. It speaks for itself and a meaning cannot be given to it other than that expressed." O'Connor-Kohler v. United States Auto. Ass'n, 883 A.2d 673, 679 (Pa.Super. 2005) (quoting Steuart v. McChesney, 444 A.2d 659, 661 (Pa. 1982) (citation omitted)).

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aff'd 659 F.2d 1070 (3d.Cir. 1981). In this regard, while the record does not support that Erie deliberately misled Ingrassia into delaying suit, by the same token the record does support a finding that both were negotiating in good faith and that Ingrassia had "reasonable grounds for believing that the time limit would be extended or that such provision would not be strictly enforced. . . ." Petraglia v. Am. Motorists Ins. Co., 424 A.2d 1360, 1364 (Pa.Super. 1981) (quoting McMeekin v. Prudential Insurance Co., 36 A.2d 430, 432 (Pa. 1944)), *affirmed*, 444 A.2d 653 (Pa. 1982).

This is not a case, as in Lardas v. Underwriters Insurance Company, 231 A.2d 740 (Pa. 1967), where the parties' negotiations broke off eight months after the loss, with four months still remaining for Lardas to commence suit and still be within the policy's one-year period of limitations. Likewise, in Petraglia, the insured had a reasonable period of time after contact between the insured and insurer ceased (i.e., almost five months) before the running of the one-year suit limitation provision during which to file his claim. To the contrary, in this case, during the course of the parties' on-going negotiations the period of limitations contained in the Policy expired.

The FRC endorsement in Ingrassia's policy replaced the Policy's standard replacement cost settlement provisions with one, at a lower premium, which modified the coverage to allow for the replacement of obsolete, antique or custom construction materials and methods with less costly, commonly available, but functionally equivalent, construction materials and methods. Functional replacement cost allows replacement of expensive and obsolete items with less expensive, more modern, and state-of-the-art work. (Erie's Exhibit V, Dudley, Paul O., "Functional Replacement Cost: History and Application of Available Coverages," Adjusting Today, p.3).

The distinction between traditional replacement cost insurance and that provided under a functional replacement cost endorsement is made clear in the following Massachusetts Office of Consumer Affairs and Business Regulation:

> **Replacement Cost is the amount to repair or replace the damaged property using materials of like kind and quality, without deduction for depreciation. Depreciation is the loss of value that develops as an item ages or wears. Actual Cash Value is the replacement cost of an item, less the amount for depreciation. A new option available to consumers is modified or functional replacement cost. At the time of a loss, modified replacement cost will restore the home to a functional condition. This may mean that unique features in your home prior to a loss will be replaced with items that serve the same function, but are not aesthetically the same.**

See Massachusetts Office of Consumer Affairs & Business Regulation, http://www.mass.gov/?pageID=ocaterminal&L=4&L0=Home&L1=Consumer&L2=Insurance&L3=Homeowners+Insurance&sid=Eoca&b=terminalcontent&f=doi_Consumer_css_homeowners_qa&csid=Eoca#q2 (last visited June 15, 2011).

Both the stained glass windows and pipe organ were custom made for the building in which Ingrassia's home is located. The windows proposed by Erie have neither the beauty, nor the inspirational nor artistic value of those which existed prior to the fire, but they do serve the same functional purpose: protection from the elements, ventilation and allowing day light to enter. (Erie Exhibit I (letter dated January 11, 2010), p.7). Similarly, the organ proposed, while not physically the same size as the antique pipe organ built to match the gothic-style church of which it is a part, matches the musical capacity of that organ: a two-manual, twelve stop instrument. (Erie Exhibit D (letter dated November 25, 2009)).

Significantly, this dispute between Erie and Ingrassia over Erie's interpretation and application of the FRC endorsement to Ingrassia's claim for replacement of the stained glass windows and pipe organ raises a question of insurance coverage, not one of valuation. A dispute over the standard by which a loss is to be measured is conceptually different than a dispute over the measurement of that loss under an agreed upon standard. Although we have not found a case which interprets the language of the FRC Endorsement found in Ingrassia's Policy,

we believe Erie's interpretation to be reasonable. *See*, e.g., Brown v. Progressive Ins. Co., 860 A.2d 493, 505 (Pa.Super. 2004) ("We also note that insurers should not be faulted for taking a reasonable legal position when the state of the law in a particular area is unclear or in flux."), appeal denied, 872 A.2d 1197 (Pa. 2005). Based on this interpretation, Erie was not obligated to pay Ingrassia the cost to install new stained glass windows or refurbish the pipe organ.

Moreover, because the dispute between Erie and Ingrassia centers on a question of coverage, the scope of the loss rather than the amount of loss, the dispute is not the proper subject of resolution by appraisal as requested by Ingrassia. An appraisal proceeding is both conceptually and procedurally distinct from a dispute submitted to arbitration or to the court for resolution. Disputes subject to appraisal are narrowly limited to determining the amount of the loss, whereas those which are the subject of arbitration "seek to substitute tribunals other than courts to determine an entire controversy." Ice City, Inc. v. Ins. Co. of North America, 314 A.2d 236, 240 n.12 (Pa. 1974).

A condition precedent to appraisal is the admission of liability and a dispute only as to the dollar amount of the loss. Banks v. Allstate Ins. Co., 1992 WL 102885, *2 (E.D.Pa. 1992) (interpreting Ice City, Inc. v. Ins. Co. of North America,

314 A.2d 236, 240 (Pa. 1974) and Mentz v. Armenia Fire Ins. Co., 1876 WL 13778 (Pa. 1875)). "Both Ice City and Mentz require that liability be admitted before appraisal can be demanded." Id. Conversely, where the type of coverage is in dispute, where the parties fundamentally disagree on how the damages are to be computed - in contrast to what they are - liability is in issue and the question is not one for appraisal.

4) *Bad Faith*

Count II of Ingrassia's Complaint is a claim for bad faith, which is not barred by the Policy's one-year suit limitation clause. *See* March v. Paradise Mut. Ins. Co., 646 A.2d 1254, 1256 (Pa.Super. 1994), *appeal denied*, 656 A.2d 118 (Pa. 1995). It can, nonetheless, be decided on a motion for summary judgment when there are no genuine issues of material fact as to whether Erie exhibited bad faith in processing Ingrassia's claim. *See*, *e.g.*, Johnson v. Progressive Ins. Co., 987 A.2d 781, 783 (Pa.Super. 2009). Johnson is instructive:

> **Common law does not provide for a bad faith cause of action against an insurance company, but § 8371, actions on insurance policies, creates a statutory remedy for such conduct. It states:**
>
> > **In an action arising under an insurance policy, if the court finds that the insurer has acted in bad faith toward the insured, the court may take all of the following actions:**

> (1) Award interest on the amount of the claim from the date the claim was made by the insured in an amount equal to the prime rate of interest plus 3%.
>
> (2) Award punitive damages against the insurer.
>
> (3) Assess court costs and attorney fees against the insurer.

42 Pa.C.S.A. § 8371.

While the statute itself does not include a definition of bad faith, this Court has had occasion to interpret that term. In Condio v. Erie Ins. Exchange, 899 A.2d 1136, 1142 (Pa.Super. 2006), we observed that bad faith is present if "the insurer did not have a reasonable basis for denying benefits under the policy and . . . the insurer knew of or recklessly disregarded its lack of reasonable basis in denying the claim." Id. (quoting O'Donnell v. Allstate Ins. Co., 734 A.2d 901, 906 (Pa.Super. 1999)). "Bad faith conduct also includes 'lack of good faith investigation into facts, and failure to communicate with the claimant.'" Condio, *supra* at 1142 (quoting in part Romano v. Nationwide Mut. Fire Ins. Co., 646 A.2d 1228, 1232 (Pa.Super. 1994)). Bad faith must be established by clear and convincing evidence. Condio, *supra*.

As we noted in Condio, bad faith is not present merely because an insurer makes a low but reasonable estimate of an insured's damages. Negligence or bad judgment will not support a bad faith cause of action. Id. Rather, the insured must demonstrate that the insurer "breached its duty of good faith through some motive of self-interest or ill-will." Id. at 1143 (quoting Brown v. Progressive Ins. Co., 860 A.2d 493, 501 (Pa.Super. 2004)).

Id. at 783-84.[7]

[7] *See also*, O'Donnell ex rel. Mitro v. Allstate Ins. Co., 734 A.2d 901, 910 (Pa.Super. 1999) (citing: D'Ambrosio v. Pennsylvania Nat. Mut. Cas. Ins. Co., 431 A.2d 966, 971 (Pa. 1981) (observing that "those jurisdictions which have recognized a cause of action for bad faith conduct have cautioned that '[i]f

The burden is upon the insured to evince through clear and convincing evidence, and not mere insinuation, that "the insurer did not have a reasonable basis for denying benefits under the policy and that the insurer knew of or recklessly disregarded its lack of reasonable basis in denying the claim." Terletsky v. Prudential Prop. and Cas. Ins. Co., 649 A.2d 680, 688 (Pa.Super. 1994), *appeal denied*, 659 A.2d 560 (Pa. 1995). An insured's burden in opposing a motion for summary judgment is consequently "commensurately high because the court must view the evidence presented in light of the substantive burden at trial." Northwestern Mutual Life Ins. Co. v. Babavan, 430 F.3d 121, 137 (3d.Cir. 2005).[8]

In reviewing the record in the light most favorable to Ingrassia as the non-moving party, there are no facts suggesting Erie failed to make a fair and objective investigation of the claim. Under the language of the Policy, Erie could reasonably conclude that the FRC endorsement applied to Ingrassia's claim over the stained glass windows and organ, that under this

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the claim is 'fairly debatable,' no liability in tort will arise.'"), *superseded by* 42 Pa.C.S.A. § 8371 (creating private cause of action for the bad faith conduct of insurers); Horowitz v. Federal Kemper Life Assur. Co., 57 F.3d 300, 307 (3d Cir. 1995) (interpreting section 8371 and finding no bad faith where insurer had reasonable basis to deny claim); and Jung v. Nationwide Mut. Fire Ins. Co., 949 F.Supp. 353, 360 (E.D.Pa. 1997) (granting summary judgment on section 8371 bad faith claim, reasoning that in absence of evidence revealing dishonest purpose, it is not bad faith for insurer to aggressively investigate and protect its interests)).

[8] The stringent "clear and convincing" standard requires a showing by Plaintiffs that the evidence "is so clear, direct, weighty and convincing as to enable a clear conviction, without hesitation, about whether or not the defendants acted in bad faith." Bostick v. ITT Hartford Group, 56 F.Supp.2d. 580 (E.D.Pa. 1999) (citing Stafford v. Reed, 70 A.2d 345, 348 (Pa. 1950)).

provision she was not entitled to new stained glass windows or complete refurbishment of the original organ, and that the parties' dispute concerning the proper application and interpretation of the endorsement did not entitle Ingrassia to proceed to appraisal.

Erie's retention of counsel to assist it in resolving Ingrassia's claim is not evidence of bad faith as Ingrassia asserts; it in fact lends support to the reasonableness of Erie's actions. *See*, *e.g.*, Terletsky, 649 A.2d at 690. Ingrassia points to the length of time Erie spent investigating the extent of the business it suspected she was conducting from the Property as evidence of its alleged bad faith in handling her claim and states that "Erie delayed the claim for almost ten months exploring this issue." (Ingrassia Brief contra Erie's Motion, p.18). However, the record belies this assertion by showing that Erie paid Ingrassia $17,500.00 within one month of the loss: $3,000.00 of this amount was paid just five days after the loss, on July 6, 2006, and another $4,000.00 on July 7, 2006. (Erie Exhibit I (letter dated January 11, 2010), p.4). Further, Erie had a reasonable basis for inquiring about the use of Ingrassia's property for business purposes and about whether personal items on the property at the time of the fire were business related. In addition, much of the delay in obtaining the information Erie requested was attributable to Ingrassia.

This hardly evidences an intentional delay in handling the claim.

Erie's rejection of Ingrassia's demand for appraisal was not because she failed to make that demand prior to the one-year deadline, as Ingrassia argues. (Ingrassia Brief contra Erie's Motion, p.19). Ingrassia's demand was instead rejected on the basis that "[t]he appraisal process is not the forum to argue coverage interpretation nor determination of the scope of the loss." (Erie Exhibit CC). Moreover, there are no facts suggesting Erie denied the claim for its own benefit or out of ill will, particularly as Erie paid out nearly half a million dollars to Ingrassia, despite the fact that Ingrassia was to some extent conducting a business out of the Property, which may have been grounds to deny the claim in its entirety.

The types of conduct which point toward evidence of bad faith on an insurer's part include lack of timely or good faith investigation into the facts of the claim, failure to communicate or to communicate promptly with the insured, misrepresenting information such as the amount of coverage at issue to the insured, refusing without basis to accept evidence submitted by the insured, and an arbitration award nearly thirty times the size of the insurer's settlement offer. *See*, *e.g.*, Johnson, 987 A.2d at 784-85. Ingrassia's allegation of bad faith insurance practices against Erie is unfounded; there is no

genuine issue of material fact over whether Erie displayed bad faith in the processing of Ingrassia's claim, much less any clear and convincing evidence tending to show that it did. Ingrassia has not proven that Erie: (1) did not have a reasonable basis for its claim decisions, and (2) recklessly disregarded its lack of reasonable basis. At worst, Erie's decision to deny Ingrassia new stained glass windows or complete refurbishment of the original organ could be viewed as bad judgment, but certainly not of the sort which would rise to the level of bad faith. Under the facts of record, Erie is entitled to summary judgment in its favor on Ingrassia's claim for bad faith.

CONCLUSION

In accordance with the foregoing, we find that Ingrassia's claim for breach of contract, Count I of the Complaint, is barred by the Policy's one-year suit limitation clause. We further find that Ingrassia has not established a breach of the policy by Erie and that, as a matter of law, Ingrassia cannot recover for statutory bad faith, Count II of the Complaint. Therefore, Erie's Motion for Summary Judgment will be granted.

BY THE COURT:

_____

P.J.

IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA

CIVIL ACTION

ANGELINA M. INGRASSIA,	:	
Plaintiff	:	
	:	
v.	:	**No. 08-1758**
	:	
ERIE INSURANCE EXCHANGE,	:	
Defendant	:	

Alan C. Milstein, Esquire — **Counsel for Plaintiff**
Robert M. Runyon, III, Esquire — **Counsel for Defendant**

ORDER OF COURT

AND NOW, this 16th day of June, 2011, upon consideration of Defendant's Motion for Summary Judgment, Plaintiff's response thereto, and counsels' submissions and argument thereon, and in accordance with our Memorandum Opinion of this same date, it is hereby

ORDERED and DECREED that Summary Judgment is GRANTED on Count I (breach of contract) of Ingrassia's Complaint, this claim being time barred and Ingrassia having further failed to establish such a breach, and on Count II (bad faith) of the Complaint, there being insufficient evidence to support a finding of bad faith pursuant to 42 Pa.C.S.A. §8371. Summary Judgment is hereby entered in favor of the Defendant, Erie Insurance Exchange, and against the Plaintiff, Angelina M. Ingrassia, on all counts of the Plaintiff's Complaint.

BY THE COURT:

_____

P.J.