IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

FRANKFORD CANDY & CHOCOLATE COMPANY, INC.,	:	August Term 2004
Plaintiff,	:	No. 01534
v.	:	
VALIANT INSURANCE COMPANY,	:	COMMERCE PROGRAM
Defendant.	:	
	:	Control Numbers 090957/090927

ORDER

AND NOW, this 24TH day of January, 2006, upon consideration of the parties' Cross Motions for Summary Judgment, all responses in opposition, Memoranda, all matters of record and in accord with the attached Memorandum Opinion to filed forthwith, it hereby is **ORDERED** that

1. Defendant Valiant Insurance Company's Motion for Summary Judgment (cn 090927) is **granted** as to the equipment claim and **denied** as to the spoliation claim.

2. Plaintiff Frankford Candy & Chocolate Company, Inc.'s Motion for Summary Judgment (cn 090957) is **granted** as to the spoliation claim and **denied** as to the equipment claim.

3. The parties' motion for summary judgment to Count III (bad faith) is **denied**.

BY THE COURT,

HOWLAND W. ABRAMSON, J.

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OPINION

ABRAMSON, J.

This action arises from Defendant Valiant Insurance Company's ("Valiant") denial of an insurance claim submitted by Plaintiff Frankford Candy & Chocolate Company ("Frankford") for spoilage of over 15,000 cases of Beatrix Potter ™ chocolate Easter bunnies and for the replacement of defective air conditioner compressors. Presently before the court are the parties' cross motions for summary judgment. As will be discussed below the motions for summary judgment are granted in part and denied in part.

BACKGROUND

Frankford is in the business of manufacturing and selling, among other things, chocolate candy and confectionary products including Beatrix Potter ™ hollow chocolate Easter Bunnies. In or about August 2002, Frankford alleges that there was a simultaneous failure of air conditioning units on the roof of Frankford's warehouse located at Tulip Street and Castor Avenue in Philadelphia. At the time of the failure approximately 30,000 cases of Beatrix Potter ™ hollow chocolate bunnies were being stored at the Tulip Street warehouse for the upcoming Easter holiday.

As a result of the alleged air conditioning failure the facility became very warm and approximately 15, 000 cases of Beatrix Potter ™ hollow chocolate Easter bunnies were damaged by the increase in temperature.[1] Because warm temperatures give rise to the potential for bloom, Frankford allegedly set aside the chocolate bunnies and began a monthly process of inspection.

In March 2003, Frankford's Quality Control Manager allegedly discovered that approximately 15,000 cases of the Beatrix Potter ™ hollow chocolate bunnies had developed bloom. As a result of this determination, Frankford decided to melt the chocolate bunnies and reuse the chocolate.[2] Frankford retained two samples of the bloomed bunnies.

In April 2004, Frankford submitted a claim to Valiant for property damage to the compressors as well as the 15,000 cases of chocolate bunnies. Valiant denied coverage on the claim on September 16, 2004 stating the claim was untimely and that it was substantially prejudiced in its ability to confirm the legitimacy of the claim.

On August 12, 2004, Frankford commenced this action by writ of summons. On December 2, 2004, Frankford filed a complaint alleging breach of contract (Count I), declaratory judgment (Count II) and bad faith (Count III). The parties have now filed cross motions for summary judgment.

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[1] According to Frankford, if chocolate is not stored at the proper temperature and humidity, it can develop a condition over time known as "bloom". There are two types of "bloom" "fat bloom" and "sugar bloom". Fat bloom is when the oils in the chocolate separate and migrate to the surface. Sugar bloom is the visible crystallization of sugar that is drawn to the surface, often caused by high humidity and the formation of condensation when a cold product is subjected to an increase in ambient temperature. (Plts. Mt. for SJ. p. 3). There is no set time frame for the development of sugar bloom. Id.

[2] If a product develops sugar bloom the only options are to either melt down the chocolate and reuse it or simply throw it away.

DISCUSSION

I. Standard of Review

In determining whether to grant summary judgment, the trial court must view the record in the light most favorable to the non-moving party and must resolve all doubts as to the existence of a genuine issue of material fact against the moving party. Potter v. Herman, 762 A.2d 1116, 1117-18 (Pa. Super. 2000). Summary judgment is proper only when the uncontraverted allegations in the pleadings, depositions, answers to interrogatories, admissions of record, and submitted affidavits demonstrate that no genuine issue of material fact exists, and that the moving party is entitled to judgment as a matter of law. Id. In sum, only when the facts are so clear that reasonable minds cannot differ, may a trial court properly enter summary judgment. Basile v. H & R Block, Inc., 761 A.2d 1115, 1118 (Pa. 2000).

II. Valiant has demonstrated prejudice with the compressor claim but has failed to show prejudice with the spoilage claim.

Interpretation of an insurance contract is a matter of law and is therefore generally performed by a court rather than by a jury. Wagner v. Erie Ins. Co., 801 A.2d 1226, 1231 (Pa. Super. 2002). Where the language of an insurance contract is clear and unambiguous, a court must give effect to that language. Id. Where terms are not defined, the court must construe the words in accordance with their natural, plain and ordinary meaning. Cordero v. Potomac Ins. Co., 794 A.2d 897, 900 (Pa. Super. 2002). The court may inform its understanding of these terms by considering their dictionary definitions. Wagner, 801 A.2d at 1231. An insurance contract provision is to be construed in favor of the insured and against the insurer. Id.

In the case *sub judice*, Valiant argues that Frankford is not entitled to coverage under the policy since the claims were untimely and the delay caused actual prejudice. As set forth in Brakeman v. Potomac Insurance Co., 472 Pa. 66, 371 A.2d 193 (1977), Pennsylvania employs a two-prong test to determine whether late notice permits an insurance company to reject an otherwise legitimate claim:

> We therefore hold that where an insurance company seeks to be relieved of its obligations under a liability insurance policy on the ground of late notice, the insurance company will be required to prove that the notice provision was in fact breached and that the breach resulted in prejudice to its position.

472 Pa. at 76-77, 371 A.2d at 198.

The timeliness of such notice depends on the facts and circumstances of each case. Id. The purpose of these provisions is to prevent the insurer from being prejudiced, not to provide a technical escape-hatch by which to deny coverage in the absence of prejudice nor to evade the fundamental protective purpose of the insurance contract to assure the insured and the general public that liability claims will be paid up to the policy limits for which the premiums were collected. Therefore, unless the insurer is actually prejudiced by the insured's failure to give notice immediately, the insurer cannot defeat its liability under the policy because of the non-prejudicial failure of its insured to give immediate notice of an accident or claim as stipulated by a policy provision. Rohm & Haas Co. v. Cont'l Cas. Co., 781 A.2d 1172 (Pa. 2001).

The notice provision in the Valiant policy requires Frankford to provide "prompt" notice of the loss or damage. (Dft. Valiant Mt. for SJ Exhibit "H"). The record evidence demonstrates a delay of two years in making the claim regarding the air conditioning compressors and a delay of thirteen months in making the claim for the chocolate

bunnies. As it pertains to the air conditioning compressors, the court finds as a matter of law that Frankford's failure to give notice of a loss two years after discovery of the loss to be untimely.

Similarly, the court also finds as a matter of law that Frankford's failure to give notice of the spoilage loss thirteen months after discovery to be untimely as well. Although Frankford attempts to rely upon a provision of the policy which excuses late notice where "an agent, servant or one of its employees" fails to notify the insurance company of any loss or damage, the court finds that Frankford's reliance upon said provision is misplaced in light of managements knowledge of the loss.[3] (Dft. Valiant's Mt. for SJ Exhibit "B"). Accordingly, the court finds that Frankford's notice of the claims was untimely.

Untimeliness alone however is insufficient to deny coverage. As set forth in Brakeman, Valiant must demonstrate that it has been actually prejudiced by the untimeliness. The requirement of actual prejudice means that an insurer may not disclaim coverage on the basis of prejudice that is only possible, theoretical or hypothetical. General Accident Ins. Co. v. Scott, 669 A.2d 773, 779 (MD. App.1996). Nor can an insurer surmise the harm that may have occurred by virtue of the passage of time; prejudice cannot be presumed from the length of the delay. Id.

In this regard, the court finds as a matter of law that Valiant is prejudiced by the untimely loss claim for the air conditioning compressors. The record demonstrates that the loss occurred approximately two years before Frankford gave notice of the claim and

[3] The provision in question reads as follows:

Failure of an agent, servant or one of your "employees", other than an officer, partner or manager, to notify us of any loss or damage that is known about will not affect the insurance afforded by this policy." (Dft. Valiant's Mt. for SJ Exhibit "B").

that Frankford discarded the compressors without giving Valiant an opportunity to inspect and investigate the cause of the compressors failure. As such Valiant was precluded from investigating the cause of the air conditioning failure to determine whether the units were a covered loss under the policy or subject to an exclusion in the policy such as wear and tear, rust and corrosion. Although Frankford's HVAC contractor who replaced the air conditioning compressors submitted a report stating that the cause of the equipment failure was an electrical event which affected the entire building, Valiant was deprived an opportunity to have the compressors independently examined to determine the cause of loss. (Dft. Mt. for SJ Exhibit "C"). Evidence exists in the record that the compressors were at least thirty years old and that two of the compressors were not working at their full capacity during an inspection in April and May 2002. (Dfts. Mt. for SJ. Exhibit "C" and Exhibit "L".). Consequently, the court finds that Valiant has suffered actual prejudice as a result of the untimely air conditioning claim. Accordingly, Valiant's motion for summary judgment is granted and Frankford's motion for summary judgment is denied.[4]

On the other hand, Valiant has failed to demonstrate that it has suffered actual prejudice as it pertains to the spoilage claim. The facts of record demonstrate that Valiant had an opportunity to investigate the facts and circumstances surrounding the spoilage claim. Valiant retained an independent adjuster to investigate the claim. The adjuster interviewed witnesses and reviewed documentation concerning specifications and spreadsheets evidencing Frankford's loss. Additionally, although Frankford discarded approximately 15,000 cases of the chocolate bunnies, Frankford retained two chocolate bunnies as samples. Although unable to examine all 15, 190 cases of chocolate bunnies,

[4] As a result, the bad faith claim as it pertains to the equipment loss is moot.

unlike the air conditioning compressors, Valiant was given the opportunity to observe, inspect and examine two samples of same in an effort to gather information concerning the spoilage loss. Absent from the record is any evidence to suggest that the retained samples were not a representative sample of the discarded bunnies. Based on the foregoing, the court finds that Valiant did not suffer actual prejudice due to the untimely notice of the claim.

The court further finds that Valiant's argument that its ability to determine whether the spoiled chocolate was a covered loss was affected by its inability to inspect the air conditioning units and determine the cause of loss is misplaced. The language of the spoilage provision states:

> 1. We will pay for loss or damage to Personal Property that is "stock" within the "described premises" caused by:
>
> a. Change in temperature or humidity resulting from:
>
> (1) Breakdown in machinery; or
> (2) Failure of heating, refrigerating, cooling or humidity control equipment.

Based on the foregoing policy language it is clear that whether coverage existed for the air conditioning compressors is independent of whether coverage existed for the spoilage claim. Instead, Frankford need only prove that the loss or damage to the chocolate bunnies was caused by a change in temperature or humidity resulting from breakdown or failure of equipment. Frankford need not prove why the air conditioning compressors failed for coverage under the spoilage claim. Based on the foregoing, Valiant has not demonstrated as a matter of law that it suffered actual prejudice.

Consequently, Valiant's motion for summary judgment on the spoilage claim is denied and Frankford's motion for summary judgment is granted.[5]

CONCLUSION

Based on the foregoing, the parties' respective motions for summary judgment are granted in part and denied in part and Frankford's motion for summary as to the equipment claim is denied and its motion for summary judgment as to the spoliation claim is granted. Valiant's motion for summary judgment as to the equipment claim is granted and its motion for summary judgment as to the spoliation claim is denied. The parties' motion with respect to the bad faith claim is denied.

An order consistent with this opinion will follow.

BY THE COURT,

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HOWLAND W. ABRAMSON, J.

[5] As for the bad faith claim (Count III) pertaining to the spoliation claim, the court finds that genuine issues of material fact exist as to whether Valiant conducted a reasonable investigation into the claim. Based on the forgoing, the parties' motions for summary judgment are denied.