Clerk of the Superior Court
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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2018-004741 06/18/2019

HON. SHERRY K. STEPHENS

CLERK OF THE COURT
T. DeRaddo
Deputy

KLONDIKE BULLHEAD L L L P MICHAEL J PONZO

v.

MID-CENTURY INSURANCE COMPANY, et al. PATRICK C GORMAN

JUDGE STEPHENS

MINUTE ENTRY - RULING

The Court has considered Plaintiff's Motion for Partial Summary Judgment filed March 8, 2019, Plaintiff's Statement of Facts in Support of Its Motion for Partial Summary Judgment filed March 8, 2019, Defendants' Response to Plaintiff's Motion for Partial Summary Judgment Re: Validity of the Policy's O&P Endorsement filed April 29, 2019, Defendants' Controverting Statement of Facts in Response to Plaintiff's Motion for Partial Summary Judgment Re: Validity of the Policy's O&P Endorsement filed April 29, 2019, Plaintiff's Reply in Support of Its Motion for Partial Summary Judgment filed June 11, 2019, and Plaintiff's Notice of Filing Additional Exhibits to Its Reply in Support of Its Motion for Partial Summary Judgment filed June 14, 2019. Oral argument was not requested.

Plaintiff does business as Gold Rush Apartments in Mohave County. The property consists of 39 structures. In April 2017, the property was damaged in a wind storm causing significant roof damage. The property was insured by Defendants under a policy in effect February 18, 2017 through February 18, 2018. Defendants appointed a third party to inspect the property. Defendants offered a settlement amount for damage to 23 roofs in the amount of $266,064.25 (the replacement cost value of $398,882.95 less depreciation of $127,818.70 and less the policy deductible of $5,000.00). In June 2017, Defendants issued a check to Plaintiff in that amount. Plaintiff retained a public adjuster. The adjuster submitted a scope of loss report estimating the replacement cost value of $901,954.94. The public adjuster's report stated there

was damage to all 39 roofs. Defendants refused to make payment to Plaintiff for the full amount requested by Plaintiff.

The complaint alleges claims for: Count 1, Breach of Insurance Contract, Breach of Implied Duty of Good Faith and Fair Dealing (all defendants); and Count 2, Tortious Bad Faith Claims Handling (all defendants). The answer denies liability and alleges numerous affirmative defenses, including: failure to mitigate damages; Plaintiff has been paid all monies due under the insurance policy; Plaintiff's claims are subject to appraisal, Plaintiff failed to comply with all provisions of the insurance contract (to document, cooperate, provide notice and information); Plaintiff is not entitled to prejudgment interest on damages; Plaintiff's injuries were proximately caused in whole or party of other parties; and the imposition of punitive damages violates various constitutional provisions of the United States Constitution.

In Plaintiff's motion for partial summary judgment, Plaintiff seeks summary judgment on the issue of whether a provision in the insurance policy is enforceable under Arizona law. Specifically, Plaintiff contends the Provision 7122 states Defendants may refrain from paying Plaintiff for a general contractor's overhead or profit unless and until such costs are actually incurred and paid by Plaintiff (Provision 7122). Plaintiff contends Provision 7122 conflicts with the provisions in the New York standard policy and thus violates Arizona law, citing to A.R.S. § 20-1503(A). Further, Plaintiff argues that if the insurance company does not repair the property, an insured is eligible to receive the actual cash value of the damage sustained to their properties. If the cost to repair or replace the damaged property would likely require the services of a general contractor, the overhead and profit for that contractor should be included in the actual cash value, even if the insured elects to complete the repairs personally, citing to *Tritschler v. Allstate Ins. Co.*, 213 Ariz. 505 (App. 2006). Plaintiffs assert Defendants may not withhold payment of the overhead and profit on the ground the expenses have not been actually incurred and paid by Plaintiff as Provision 7122 provides.

Defendants respond that the motion should be denied on standing, mootness, and ripeness grounds since Plaintiff cannot show the coverage decision is traceable to Provision 7122. Defendants contend Provision 7122 did not play any role in their decisions and thus Defendants cannot challenge its validity. Further, the validity is not ripe for a judicial decision because Plaintiff's coverage claim may never occur since Defendants assert Plaintiff was never entitled to coverage. Defendants argue entitlement to overhead and profit coverage is a factual dispute to be decided by the trier of fact after the trier of fact determines whether the need for a general contract was reasonably likely under the facts and circumstances.

Summary judgment is appropriate only if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Rule 56, Ariz.R.Civ.P., *MacKinney v. City of Tucson*, 231 Ariz. 584 (App. 2013), *Nat'l Bank of Ariz. v. Thruston*, 218 Ariz. 112 (App.

2008), *Colonial Tri-City Ltd. P'ship v. Ben Franklin Stores, Inc.,* 179 Ariz. 428, 432 (App. 1993) and *Johnson v. Earnhardt's Gilbert Dodge, Inc.*, 212 Ariz. 381, 385, 132 P.3d 825, 829 (2006). Thus, a motion for summary judgment should only be granted if the acts produced in support of the claim or defense have so little probative value, given the quantum of evidence required, that reasonable people could not agree with the conclusion advanced by the proponent of the claim or defense. *Orme Sch. v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990). The facts must be viewed in a light most favorable to the party against whom it was direct and summary judgment is inappropriate if there is any doubt as to whether an issue of material fact exists. *Lennar Corp. v. Transamerica Ins. Co.*, 227 Ariz. 238, 242 (App. 2011), *Andrews v. Blake*, 205 Ariz. 236 (2003), and *Joseph v. Markovitz*, 27 Ariz.App. 122, 125, 551 P.2d 571, 574 (1976). A statement of facts is the only means by which a party opposing summary judgment may create a record showing the existence of those facts which establish a genuine issue of material fact or otherwise preclude summary judgment in favor of the moving party. See Rule 56, Ariz.R.Civ.P.

When a plaintiff moves for summary judgment, it may challenge the legal sufficiency of an affirmative defense on which the defendant bears the burden of proof at trial, by explaining to the court the defendant does not have any evidence to support the defense. *National Bank of Ariz. v. Thruston*, 218 Ariz. 112, 119 (App. 2008).

The opponent of a motion for summary judgment does not raise a genuine issue of fact by merely stating in the record that such an issue exists. The party must show that competent evidence is available which will justify a trial on the issue. *Flowers v. K-Mart Corp*. 126 Ariz. 495, 499 (App. 1980). An unsupported contention that a dispute exists is insufficient to defeat a motion for summary judgment. *Sewell v. Brookbank*, 119 Ariz. 422, 426 (App. 1978). A nonmoving party may not rest on allegation in its pleadings. See Rule 56, Ariz.R.Civ.P. and *MacConnell v. Mitten*, 131 Ariz. 22, 25 (1982). Vague or generalized unsupported statements are not sufficient to withstand a motion for summary judgment. *Burrington v. Gila County*, 159 Ariz. 320, 767 P.2d 43 (App. 1988).

When deciding a motion for summary judgment, credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge. *Allstate Indem. Co. v. Ridgely*, 214 Ariz. 440, 444, ¶ 19, 153 P.3d 1069, 1073 (App. 2007) (quoting *Thomspon v. Better-Bilt Aluminum Prds. Co*., 171 Ariz. 550, 558, 832 P.2d 203, 211 (1992)). Summary judgment is inappropriate where the facts, even if undisputed, would allow reasonable minds to differ. *Nelson v. Phoenix Resort Corp.*, 181 Ariz. 188, 191, 888 P.2d 1375, 1378 (App. 1994). Where the evidence or inferences would permit a jury to resolve a material issue in favor of either party, summary judgment is improper. *Comerica Bank v. Mahmoodi*, 224 Ariz. 289, 292 (App. 2010).

To initiate a claim in Arizona, a party must have standing—

that is, a plaintiff must allege a "distinct and palpable injury." *See Sears v. Hull*, 192 Ariz. 65, 69, ¶ 16 (1998) (citation omitted); *see also Workman v. Verde Wellness Ctr., Inc.*, 240 Ariz. 597, 603, ¶ 17 (App. 2016). "[T]he question of standing in Arizona is not a constitutional mandate . . . [and] [i]n addressing the question of standing, therefore, we are confronted only with questions of prudential or judicial restraint." *Armory Park Neighborhood Ass'n v. Episcopal Cmty. Serv. in Ariz.*, 148 Ariz. 1, 6 (1985). Stated differently, "[t]he issue in Arizona is whether, given all the circumstances in the case, the [plaintiff] has a legitimate interest in an actual controversy . . . and whether judicial economy and administration will be promoted by allowing representational appearance." *Monroe v. Arizona Acreage LLC*, Court of Appeals May 2019. Ripeness is closely related to standing in that enforcement of the principle "prevents a court from rendering a premature judgment or opinion on a situation that may never occur." Winkle v. City of Tucson, 190 Ariz. 413, 415, 949 P.2d 502, 504 (1997). In order for a justiciable issue or controversy to exist, there must be adverse claims asserted by the plaintiff upon present existing facts, which have ripened for judicial determination. *Am Fed'n of State, Cty, & Mun. Employees, AFL-CIO, Council 97 v. Lewis*, 165 Ariz. 149 (App. 1990).

Plaintiff has the burden of establishing a contract, its breach, and damages that resulted from the breach. *Savoca Masonry Co. v. Homes & Son Const. Co.*, 112 Ariz. 392, 542 P.2d 817 (1975) and *Graham v. Asbury*, 112 Ariz. 184 (1975).

The Court finds Plaintiff has standing to raise the issue of whether Provision 7122 complies with Arizona law on summary judgment and this issue is ripe for the Court's consideration. The Court agrees with Defendants that whether the cost to repair or replace the damaged property would likely require the services of a general contractor is a factual issue for the jury to decide. The Court further finds Provision 7122 is inconsistent with Arizona law and is not enforceable.

Accordingly,

IT IS ORDERED granting Plaintiff's Motion for Partial Summary Judgment on the issue of the enforceability of Provision 7122.