VERMONT SUPERIOR COURT
Windham Unit
7 Court Street
Newfane VT 05345
802-365-7979
www.vermontjudiciary.org

CIVIL DIVISION
Case No. 195-6-19 Wmcv

Amy Morneault-Mentz v. Lyman Tefft, III et al

Decision on Concord's Motion for Partial Summary Judgment on Plaintiff's Count II

Defendant Concord General Mutual Ins. Co. has moved for partial summary judgment in plaintiff's action to recover homeowner insurance proceeds from her insurer after a fire destroyed her home. Plaintiff opposes the motion.

Undisputed Material Facts

Plaintiff commenced this action against her insurer, Defendant Concord General Mutual Insurance Co., after her home was damaged by a fire that began in her neighbor's barn. Plaintiff's June 2019 complaint alleged defendant failed to pay her reasonable and appropriate damages within the monetary limits of her insurance policy. The complaint referenced a total fire rehabilitation budget of $443,605.95.

In December 2019, attorney Thomas C. Nuovo, of the firm Bauer Gravel Farnham LLP, contacted plaintiff's attorney David Reid to alert him that his client, Concord, would be sending out a Rule 17(c) letter to plaintiff. Bauer Gravel subsequently mailed plaintiff a letter indicating that Concord had paid for damages incurred by the fire in 2017, and that plaintiff's insurance policy gave Concord a right to collect reimbursement of amounts paid to plaintiff from the responsible party. A notice of subrogation claim attached to the letter indicated that Concord's attorneys, Bauer Gravel, intended to commence an action for damages in plaintiff's name.

Over the next several months, attorneys Reid and Nuovo exchanged numerous emails about the case. Some of the emails include attorney Daniel Burchard, of the firm McCormick, Fitzpatrick, Kasper & Burchard, P.C., who also represents Concord in this action.

On December 29, 2019, Nuovo wrote to Reid that "[i]n filing suit against the neighbors, Concord will only be seeking compensation for money Concord is found liable to pay to your clients. Essentially a pass through. If there are claims you believe your clients have against the neighbors, such as personal injury damages caused by the fire which are not a part of your insurance policy with Concord, you can assert those as well against the neighbor, as they will not be part of the damages that Concord will be seeking. Also, if there are damages that exceed Concord's policy limits, you can also include a direct action for your clients after we file." Nuovo also mentioned that the neighbor was insured by The Hartford, but he had not yet learned the policy limits.

Reid responded the same day with his own thoughts about the case. He copied Burchard. Reid was pleased that both Concord and plaintiff would be on the same side in going after the neighbor for

damages. He said he thought it would be advantageous for plaintiff and Concord to bring the neighbor and the neighbor's insurance company into the action.

On December 30, 2019, Nuovo responded to Reid, "First, I do want to make it clear that I represent Concord. My goal is to recover any money that Concord pays your client from its policy. We cannot sue The Hartford directly…. Rather, we sue the neighbors for what Concord paid and that is all that we can claim. You are suing Concord for what is owed under the policy. Dan [Burchard] is defending that claim. The goal would be one trial. We would be filing a motion for joinder and you could, if you chose, to add a claim directly against the neighbors." Nuovo stated that his "role is mostly to prove the neighbor is responsible for the fire." Burchard was copied on the email.

The next day, Reid acknowledged the email, but asked Nuovo to resend it because he had accidentally deleted it. He wrote, "I did, however read it before I lost it. I think we are on the same page as far as the neighbor and Hartford, but I just want to make sure I understand what comes next. Is Concord going to file a third party complaint against the neighbor in our pending action…?"

In emails dated January 3 and January 7, 2020, Reid and Nuovo debated whether Concord could directly sue The Hartford. Burchard was copied. Nuovo said he saw no basis for Concord to bring a direct action against The Hartford. Reid stated he understood that Concord would "be allies with Hartford in the effort to reduce the value of the plaintiff's damage claim."

On January 10, 2020, Concord filed a third-party complaint—in its own name—against Plaintiff's neighbors, Lyman "Levi" Tefft, III and his parents and guardians Lyman and Rosemary Tefft. The third-party complaint alleges that Levi Tefft negligently caused the barn fire and demands judgment for all amounts Concord is deemed to owe plaintiff pursuant to her insurance policy.

Emails between Reid and Nuovo on March 20 and 21, 2020, are at the crux of the Count II claim. On March 20, Nuovo wrote,

I have been working with the Teffts' carrier and Concord to see if I can work out an agreement with them. I will tell you that the Teffts only have $200,000 worth of insurance and typically Concord does not pursue claims beyond the liability of the carrier. As such it looks like it may be possible to settle this claim with the Teffts, but we would need your client's cooperation to do that.

I have some ideas which I would like to discuss with you and see if we can come up with something that works for everyone.

Reid responded that he liked Nuovo's thinking, and "[n]eedless to say, the closer we can get to the [rehabilitation] estimate, the better the chance that [plaintiff] would accept a settlement." He continued,

But having a potential $200,000 additional coverage from the neighbor's insurance seems like a tremendous opportunity. Perhaps, it would be a good time for a three way mediation? Or if you are making progress through direct negotiations with Hartford, maybe you should just keep pursuing that and when Concord knows what Hartford will contribute, we can try to figure out what Concord will contribute and whether it is enough. Remember there are also outstanding claims for additional personal property loss and a claim that the rental of the son's temporary apartment and personal property storage costs were cut off prematurely; so hopefully Concord would be at least willing to match, if not exceed, what Hartford is putting in.

Nuovo responded to this email, "I think it might be best if we talk, since I am not talking about a global settlement. Give me a call if you can."

The following day, Saturday, March 21, Reid wrote back to Nuovo:

Tom, I spoke at length with Amy Morneault this morning. If Hartford agrees to pay it's liability policy limit of $200,000 to Amy, either as a credit against her claim against Concord and/or Concord passes this $200,000 payment through to Amy, as a credit (however the mechanics would work) Amy is willing to sign off on any necessary papers to release the Teffts, Hartford, etc., such that we would be in the same position we were in with our case against Concord, before the complaint against the Teffts was filed, except that Concord would receive a full credit for the $200,000 paid by Hartford, considered as an advance against any future settlement or verdict on behalf of Amy in her case against Concord. If I fully understood our conversation yesterday, that is what you are proposing and we would accept that proposal, subject, I know, to your ability to finalize that $200,000 deal with Hartford. The Teffts would be dismissed from our case, with prejudice, upon payment of the $200,000.

On March 24, Reid followed up with Nuovo. "Just checking in to make sure you received my email sent Saturday, basically advising the Amy Morneault would accept the $200,000 as an 'advance,' if you are able to put that together. If you did not get the email, let me know and I'll resend it." Nuovo responded that he had received the email and would get back to him.

Nuovo followed up with a substantive response on March 27. His email stated:

I just went through the numbers with Joe Wheeler and apparently I was confused about what has been paid and what check was refused. I thought there was still outstanding funds owed on the personal property as well as the house. Per my conversation with Joe Wheeler, they have paid what they believe is owed on the personal property to date and the only outstanding amount owed is money for reconstruction of the home. There is no dispute that $120,046.13 is owed for the damages to the Morneault's home. This figure is based on depreciated value, not the reconstruction value. Per the policy, they are only entitled to a [higher] amount if they actual do the reconstruction. Since there is a dispute over this amount, and the reconstruction has not begun, they can only offer the monies owed for the depreciated value.

So at this time Concord is willing to reissue a check in the [amount] of $120,046.13 to the Morneaults without prejudice. With this payment the Morneaults will have received a total of $274,815[.]43, more than the $200,000 that is recoverable from the Teffts' insurance provider. Again, this will be seen only as a credit and all parties agree that there would be prejudice to your clients in accepting this amount.[1] If at trial a court or jury determines that they are entitled to more money, this will just be a credit against the judgment.

As you know your clients are required to cooperate in with Concord in its subrogation efforts under their insurance policy and thus we hope they will agree to sign any documents, specifically a general release for the Teffts. Let me know if this is something your clients will agree to. I understand they wish more money from Concord, but this resolution with the Teffrts does not change your ongoing claim against

[1] Given the context and other statements in this email, the court assumes Attorney Nuovo meant to say that plaintiff's claim against Concord would *not* be prejudiced by accepting the $120,046.13, since his email states she would be able to accept these funds and still pursue her claim against Concord. The court's decision, however, does not depend on this interpretation.

Concord, rather all it does is provide your clients with an advance on any funds they may be entitled to receive in the future.

Feel free to give me a call to discuss.

Reid sent a response less than two hours later:

Tom,

The personal property loss claim remains open. I believe we offered to settle that some time back with a compromised payment by Concord of $40,000 which Concord declined; pending their request for further documentation of the claimed personal property loss, so, that aspect of the case remains open, with the amount claimed on the remaining personal property being $50,000 (there was a $25[,]000 "advance" paid on the personal property claim in January, 2019, but that did not close the personal property loss claim).

There is also an open claim for the premature termination of temporary benefits available to Amy's son under the "loss of use" claim. Concord was paying his rent in an off site rental unit (he lived in a unit of the house that was totally destroyed) and Concord cut those rental payments off, when the disputes arose around the costs of reconstruction could not be resolved. Concord also stopped paying the storage costs for personal property that was salvaged and cleaned after the fire and had been in storage with Servpro, the costs of which were being paid by Concord.

There is also a claim for loss of rental value for the section of the house destroyed by the fire. The house was designed to accommodate a rental unit at the time of the fire and that part of the house, (which Amy's son was living in at the time of the fire) was totally destroyed. Paul Barrett and Dan Burchard are fully aware of all the details of these open disputes with Concord, so you were right- those claims remain open, in addition to the dispute over the dwelling loss.

As I understood our conversation last week, Hartford would pay the [Teffts'] $200,000 policy limit to Concord, who would pass that $200,000 on to Amy as an advance and Amy would agree to release the [Teffts], with prejudice, in regard to her claims against the [Teffts], claims which substantially exceed the Hartford policy limit. Concord would, in turn, get a credit for the $200,000, considered an "advance." We didn't, to my recollection, discuss Amy taking less than the $200,000 Hartford policy limit.

In order to facilitate this settlement with Hartford, I would ask Amy to consider $50,000 of this money to close out the personal property claim, with prejudice $29,954 to close out the loss of use claim (including her son's claim for failure to pay his ongoing rental- and include in that Amy's claim for loss of rental income on this unit) all those claims dismissed, with prejudice and then $120,046 considered as an advance on the then only remaining claim, the dwelling/other structures claim. That $120,046 would be in addition to other advances Concord has paid on the dwelling/other structures claim of $947.72, $2,845.05, and $9,126.20. In addition, we would consider the $25,000 paid in January 2019 as an advance on the dwelling loss, although, at the time it was designated as an advance on the personal property loss claim.

Quite frankly, however, Concord should match this $200,000 "found money" of Hartford, pay a total of $200,000 new money to Amy and this entire case could be dismissed with prejudice. Concord's exposure is, of course, at least $443,000, if the jury accepts the Naylor/Breen appraisal and also the architect's fee and the Naylor/Breen fee totaling $9,500 which Amy paid out of pocket and has not been reimbursed.

As far as Amy's duty to cooperate in Concord's subrogation efforts, do you interpret that clause of the policy to require her to release the Teffts for $200,000 when her losses exceed that amount? I don't but, am willing to listen to your logic on point of that issue[.]

In Count II of a second amended complaint filed September 25, 2020, plaintiff asserted that defendant breached a March 2020 settlement agreement, the insurance contract, and the duty of fair dealing and good faith defendant owes to its insureds under Vermont and federal law.

Legal Conclusions

Under V.R.C.P. 56, the court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. "Summary judgment is appropriate when, construing the facts as alleged by the nonmoving party and resolving reasonable doubts and inferences in favor of the nonmoving party, there are no genuine issues of material fact and judgment is appropriate as a matter of law." *Newton v. Preseau*, 2020 VT 50, ¶ 4.

"An enforceable contract must demonstrate a meeting of the minds of the parties: an offer by one of them and an acceptance of such offer by the other." *Starr Farm Beach Campowners Ass'n, Inc. v. Boylan*, 174 Vt. 503, 505 (2002) (mem.). "To be valid, an offer must be one which is intended of itself to create a legally binding relationship on acceptance." *Starr Farm*, 174 Vt. at 505. Further, a mere expression of a general willingness to do something is not an offer. *Id.* An acceptance must "meet and correspond" with the offer, "neither falling short of nor going beyond the terms proposed." *Id.*

Plaintiff contends a contract was formed pursuant to attorney Nuovo's offer made on March 20, and plaintiff's acceptance of that offer on March 21. Nuovo's initial March 20 email, however, is not an offer to settle Concord's claims with plaintiff.

Nuovo's initial March 20 email does not offer to provide plaintiff with $200,000 in partial settlement of her claims against Concord. Rather, the email provides the information that the Teffts' policy is worth $200,000. And, the email references the possibility that Concord might be able to settle its claim with the Teffts.[2] As Nuovo had previously explained, Concord could only sue the Teffts for monies it paid out to plaintiff under her insurance policy. The Nuovo email does not promise to pay plaintiff $200,000, it merely indicates that such funds are potentially available from the Teffts' insurer.

Further, the language Nuovo used in his email reflects a general interest in settling Concord's claim with The Hartford and an interest in discussing this potential resolution with attorney Reid, since his client would need to sign a release for The Hartford to issue funds.

Nuovo's references to a "possible" settlement and "ideas which I would like to discuss with you and see if we can come up with something that works for everyone" do not reflect any intent on his part to be bound.

When Reid responded to Nuovo with discussion about the resolution of plaintiff's claims against Concord, including for personal property loss and rental and storage costs, Nuovo suggested they talk, because he was "not talking about a global settlement." He asked that Reid call him.

Whether Reid understood Nuovo's meaning or not, Nuovo's second email reflects an attempt to clarify the options for possible settlement of plaintiff's claims against Concord. A "global settlement" typically

[2] At the time, Concord was the only party that had asserted a claim against the Teffts.

refers to settlement involving all parties and all claims involved in litigation. Nuovo's initial email, however, was notably devoid of any discussion about plaintiff's claims against Concord. In response to Reid, Nuovo immediately denied that his comments had anything to do with a global settlement, which would necessarily include a settlement between plaintiff and Concord.

This exchange lacks the meeting of the minds that is the prerequisite for a binding contract. Nuovo wanted to let Reid know that The Hartford could potentially provide up to $200,000 on behalf of the Teffts. Reid responded that plaintiff would like to have the $200,000 as an advance or credit and continue pursuing additional damages from Concord. There is plainly a disconnect because Nuovo and Reid are, at least in part, talking about the settlement of two different claims.

[Even if the attorneys' March 20–21 email exchange constituted an agreement that Concord would settle its claims against The Hartford for $200,000 and provide the $200,000 to plaintiff, this was not a binding, enforceable settlement agreement because the parties did not enter a complete written agreement.

"Parties are free to enter into a binding contract without memorializing their agreement in a fully executed document." *Catamount Slate Prod., Inc. v. Sheldon*, 2003 VT 112, ¶ 15, 176 Vt. 158. The moment of contract formation is determined by the intent of the parties, based on their words or deeds. *Catamount Slate Prod.*, 2003 VT 112, ¶ 17. When there is not a fully executed settlement agreement, four factors assist the court to determine whether there was an intent to be bound: (1) whether there has been an express reservation of the right not to be bound in the absence of a writing; (2) whether there has been partial performance of the contract; (3) whether all of the terms of the alleged contract have been agreed upon; and (4) whether the agreement at issue is the type of contract that is usually committed to writing. *Id.*

Applying the first factor, the court has not identified an express reservation not to be bound in the absence of a writing. For factor two, there is no evidence of partial performance, which favors defendant. Factor three also favors defendant. Nuovo's initial email indicated there was more to be worked out. Further, the attorneys' emails show the parties had not agreed on how the $200,000 would be applied to plaintiff's several outstanding claims for personal property, rental and storage costs, and the restoration of the real property. This was not something that Nuovo had addressed in his communications. A binding settlement agreement would normally have addressed how and when plaintiff's credit or advance would be applied. Finally, an agreement resolving plaintiff's claims in this kind of litigation would usually be memorialized in a fully executed agreement. *Catamount Slate Prod.*, 2003 VT 112, ¶ 24. These factors support a determination that defendant's attorney did not intend to be bound by the ideas he raised in his email, and that any such agreement, if one could be reached, would have been fully explicated in a written settlement agreement.

A party's ability to determine when an agreement becomes binding encourages candid negotiations. *Catamount Slate Prod., Inc. v. Sheldon*, 2003 VT 112, ¶ 16, 176 Vt. 158. Nuovo's March 20 email was nothing more than an attorney sharing information about potentially available insurance funds and expressing interest in further discussion. Nuovo did not issue an offer and there was no meeting of the minds sufficient to form a contract.

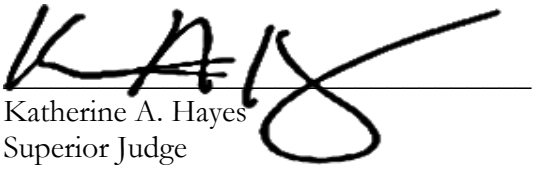
Since there was no offer, the court does not reach the issue of Nuovo's authority to settle or plaintiff's contention that more discovery is needed on that topic.

Finally, plaintiff's brief suggests defendant's negotiation was a fraudulent "bait and switch," but plaintiff has no fraud claim. The second amended complaint does not plead fraud, nor does the court perceive a basis for such a claim based on these facts.

Count II of the second amended complaint also contains general allegations that defendant breached its "duty of fair dealing, contractual and insurance claim honesty and good faith," and very generally refers to common law and state and federal insurance regulations and statutes. This aspect of plaintiff's count II is not sufficiently briefed as a separate claim in her opposition papers, and on that basis any such claim fails to survive summary judgment. It appears to be a part of and related to the breach of contract claim discussed above. Because, as stated above, the court concludes the undisputed facts show that there was no such contract, these claims are therefore also subject to summary judgment in Concord's favor.

Order

The motion for summary judgment in favor of Defendant Concord General Mutual Insurance Company as to Count II of the plaintiff's second amended complaint is granted.



Katherine A. Hayes
Superior Judge
December 9, 2021