SUPERIOR COURT
OF THE
STATE OF DELAWARE

T. HENLEY GRAVES
RESIDENT JUDGE

SUSSEX COUNTY COURTHOUSE
ONE THE CIRCLE, SUITE 2
GEORGETOWN, DE 19947

June 20, 2008

H. Clay Davis, III, Esquire
Henry Clay Davis, III, P.A.
303 North Bedford Street
P.O. Box 744
Georgetown, Delaware 19947

Ronald W. Hartnett, Jr., Esquire
Reger, Rizzo, Kavulich & Darnall, LLP
1001 Jefferson Plaza, Suite 202
Wilmington, Delaware 19801

Re: Hanna Enterprises, Inc. v. The Travelers Indemnity Company of America
C.A. No. 07C-09-001 THG

Submitted: May 2, 2008
Decided: June 20, 2008

On Plaintiff Hanna Enterprises, Inc.'s
Motion for Summary Judgment
DENIED

On Defendant The Travelers Indemnity Company of America's
Motion for Summary Judgment
GRANTED

Dear Counsel:

Pending before the Court are Plaintiff's Motion for Summary Judgment and Defendant's Motion for Summary Judgment. For the reasons stated below, Defendant's Motion for Summary Judgment is granted and Plaintiff's Motion for Summary Judgment is denied.

Statement of Facts and Procedural History

Based upon the pleadings, the facts are as follows. On or about June 26, 2006, Hanna Enterprises, Inc. ("Plaintiff") suffered a loss due to flood waters, a sewer back up, or a combination of both. At the time Plaintiff incurred the loss, it had a policy of insurance ("the Policy"), issued by

The Travelers Indemnity Company of America ("Defendant"). A "Broad Form Flood" endorsement ("the Endorsement") was attached to the Policy. Plaintiff sought reimbursement for the damage from Defendant pursuant to the Endorsement. Defendant demanded payment of a deductible in the amount of $25,000.00 prior to reimbursing Plaintiff for its loss.

On September 5, 2007, Plaintiff filed a Complaint with this Court, alleging the Endorsement explicitly excluded the requirement that a deductible be paid for claims brought pursuant to the Endorsement. Plaintiff sought $69,000 in damages. In addition, Plaintiff alleged Defendant acted in bad faith and sought an award of punitive damages. Finally, Plaintiff sought interest from the date of the loss, attorney's fees, and costs. Defendant timely filed an Answer.

On March 28, 2008, Plaintiff filed a Motion for Summary Judgment in which Plaintiff argues that the Endorsement does not require the payment of a deductible.[1] Defendant filed a Response to the Motion as well as its own Motion for Summary Judgment. Defendant argues the policy language cited by Plaintiff is taken out of context; Defendant counters that the Endorsement clearly indicates that a deductible is due and payable before any duty Defendant may have to reimburse Plaintiff for its loss arises.

The Court heard oral argument on this issue on April 30, 2008. At that time, the parties confirmed that they have agreed Plaintiff has suffered $24,571.76 in damages. Thus, the sole issue in this case is whether the $25,000 deductible set forth in the Endorsement applies to Plaintiff's claim. The Court finds that the deductible provision does apply for the reasons set forth herein.

[1] Plaintiff withdrew its bad faith claim for punitive damages in its Motion for Summary Judgment.

Discussion

Standard of Review

This Court will grant summary judgment only when no material issues of fact exist, and the moving party bears the burden of establishing the non-existence of material issues of fact. *Moore v. Sizemore,* 405 A.2d 679, 680 (Del. 1979). Once the moving party has met its burden, the burden shifts to the non-moving party to establish the existence of material issues of fact. *Id.* at 681. Where the moving party produces an affidavit or other evidence sufficient under Superior Court Civil Rule 56 in support of its motion and the burden shifts, the non-moving party may not rest on its own pleadings, but must provide evidence showing a genuine issue of material fact for trial. Super. Ct. Civ. R. 56(e); *Celotex Corp. v. Catrett,* 477 U.S. 317, 322-323 (1986). If, after discovery, the non-moving party cannot make a sufficient showing of the existence of an essential element of his or her case, summary judgment must be granted. *Burkhart v. Davies,* 602 A.2d 56, 59 (Del. 1991), *cert. denied,* 504 U.S. 912 (1992); *Celotex Corp., supra.* If, however, material issues of fact exist, or if the Court determines that it does not have sufficient facts to enable it to apply the law to the facts before it, summary judgment is inappropriate. *Ebersole v. Lowengrub,* 180 A.2d 467, 470 (Del. 1962).

In the event that parties file cross-motions for summary judgment, "the parties implicitly concede the absence of material factual disputes and acknowledge the sufficiency of the record to support their respective motions." *Browning-Ferris v. Rockford Enters.,* 642 A.2d 820, 823 (Del. Super. 1993); *see also* Super. Ct. Civ. R. 56(h).

Merits

On the first page of the Endorsement, Paragraph A ("Schedule") sets forth the occurrence and annual aggregate limits of the Policy. Paragraph A also lists a $25,000 deductible. On the

second page of the Endorsement, Paragraph E ("Provisions that do not apply to this endorsement") reads as follows:

> The following provisions of forms and endorsements that may be attached to this policy do not apply to this endorsement:
>
> 1. The Additional Condition - Coinsurance;
>
> 2. Deductible; or
>
> 3. Limits of Insurance.

Broad Form Flood Endorsement, at ¶ E.

Plaintiff argues the above-cited language renders the deductible listed in Paragraph A inapplicable; in the alternative, Plaintiff posits that the language is ambiguous. If the language is ambiguous, it must be construed against Defendant and, Plaintiff asserts, the Court must conclude that the deductible listed in Paragraph A does not apply to a claim filed under the Endorsement. Defendant counters that the cited language is clear: any deductible set forth in any *attachment* to the Endorsement does not apply to Plaintiff's claim but the deductible set forth in Paragraph A of the Endorsement, itself, *does* apply.

The Supreme Court recently has summarized the manner in which a reviewing court should construe an insurance contract:

> Insurance contracts, like all contracts, are construed as a whole, to give effect to the intentions of the parties. Where the contract language is clear and unambiguous, the parties' intent is ascertained by giving the language its ordinary and usual meaning. The fact that the parties disagree on the meaning of a term does not render that term ambiguous. Rather, a contract is ambiguous only when the provisions in controversy are reasonably or fairly susceptible of different interpretations or may have two or more different meanings.

AT&T Corp. v. Faraday Capital Ltd., 918 A.2 1104, 1108 (Del. 2007). When contract language is clear on its face, the Court will afford the language of the contract its plain and ordinary meaning.

Universal Studios, Inc. v. Viacom, Inc., 705 A.2d 579 (Del. Ch. 1997). On the other hand, if policy language is found to be ambiguous, such language will be construed against the insurer and in favor of the insured. *Jones v. State Farm Mut. Auto. Ins. Co.*, 610 A.2d 1352, 1353-54 (Del. 1992).

After reviewing the Endorsement, the parties' arguments, and the applicable case law, the Court finds the language of Paragraph E is clear on its face and, accordingly, the language will be given its plain and ordinary meaning. The word "that" is used to introduce an essential, or restrictive, clause. *The Blue Book of Grammar and Punctuation*, http://www.grammarbook.com/grammar/whoVwhVt.asp (last visited June 17, 2008); William Strunk, Jr. & E.B. White, *The Elements of Style* 59 (3d ed. 1979). In other words, "that" is used to introduce a clause that is "essential to the meaning of the noun it belongs to". *The Chicago Manual of Style* ¶ 6.31 (15th ed. 2003). Applying these principles, the phrase "that may be attached to this policy" clarifies which deductibles do not apply: any deductible listed in any attachment to the Endorsement does not apply to a claim filed under the Endorsement. Logically, something cannot be "attached to" itself; it follows that the deductibles excluded pursuant to Paragraph E are those found in documents other than the Endorsement.

The Court makes three additional observations. First, the Endorsement is not the only endorsement attached to the Policy; thus, the language rendering irrelevant any deductibles set forth in attachments to the Endorsement makes sense in context. Second, the following language is printed in capital letters at the top of the Endorsement, "THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY." This language clearly indicates the Policy is to be read as a whole. Third, it simply would not make sense to have a document set forth a deductible schedule on the first page and then, on the second page, use boilerplate language to render the schedule moot.

With no issues of material fact outstanding and the language of the Endorsement clear on its face, Defendant's Motion for Summary Judgment must be granted.

Conclusion

For the reasons set forth above, Plaintiff's Motion for Summary Judgment is denied and Defendant's Motion for Summary Judgment is granted.

IT IS SO ORDERED.

Very truly yours,

/s/ T. Henley Graves

T. Henley Graves

oc: Prothonotary