IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

MICHAEL J. CARLOZZI and PATRICIA B. CARLOZZI,	)	
Plaintiffs,	)	
v.	)	C.A. No. 99C-03-083-JRS
FIDELITY AND CASUALTY COMPANY,	)	
Defendant.	)	

Date Submitted: March 13, 2001
Date Decided: May 3, 2001

MEMORANDUM OPINION

Defendant's Motion for Summary Judgment. **DENIED.**
Plaintiffs' Cross-Motion for Partial Summary Judgment. **DENIED.**
Defendant's Cross-Motion for Summary Judgment. **GRANTED.**

Richard L. Abbott, Esquire, THE BAYARD FIRM, Wilmington, Delaware, 19899. Attorney for Plaintiffs.

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SLIGHTS, J.

I. INTRODUCTION

Michael and Patricia Carlozzi ("Plaintiffs") filed this action seeking a declaratory judgment against Fidelity and Casualty Co. ("Fidelity"), their homeowner's insurance carrier, for coverage of certain structural damage to their home. Plaintiffs procured two policies of insurance from Fidelity; one covering their home during 1996 (the "1996 Policy"), and the second providing coverage for 1997 (the "1997 Policy"). Plaintiffs contend that the 1997 Policy provides coverage for the repair costs associated with the damage. Fidelity claims there is no coverage under either Policy. Presently before the Court are Defendant's Motion for Summary Judgment, which argues that Plaintiffs' claims are time barred by a contractual limitations provision, Plaintiffs' Cross-Motion for Partial Summary Judgment on coverage, and Defendant's Cross-Motion for Summary Judgment on coverage. For the reasons discussed below, Defendant's Cross-Motion on coverage is **GRANTED.** The Defendant's Motion on limitations grounds and Plaintiffs' Cross-Motion on coverage are **DENIED** as moot.

II. FACTS

A. The Progressive Damage to Plaintiffs' Home

Plaintiffs first moved into their Newark, Delaware home in 1991. As early as 1992, Plaintiffs began to notice problems with their home's construction. The problems first manifested as "hairline" cracks in a bathroom floor. By the winter of

1993, the problems began to worsen. The cracks in the bathroom floor had grown, and Plaintiffs also noticed tearing in wallpaper around a door frame. Plaintiffs attributed both of these problems to "settling" of the home's foundation. During the summer of 1994, Plaintiffs noticed that the grass adjacent to their home was "swampy . . . particularly in [the] area to [the] rear of [the] bathroom and laundry room." (D.I. 21, Ex. D) By the winter of 1994, the bathroom cracks had grown even larger and a new crack began to form in the laundry room floor.

Fidelity wrote the Plaintiffs' homeowner's insurance for the years 1996 through 1998. In early 1996, Plaintiffs were under the mistaken impression that a spring located beneath their home was causing the foundation to settle. They were informed by Fidelity that their homeowner's policy did not cover problems caused by "natural water sources." Also during that Spring season, Plaintiffs contacted the Department of Natural Resources in an attempt to determine whether a water source in fact existed under their home. Upon inspection, the Department determined that there was water under the house, and that it was likely caused by either poor drainage or an underwater spring. In May, 1996, Plaintiffs installed corrugated piping in their backyard to facilitate better drainage. They also discovered that an excessive amount

of water had saturated the ground immediately adjacent to the problematic first floor bathroom.

B. Plaintiffs' Claims for Coverage

On May 17, 1996, Plaintiffs made the first of two claims against their homeowner's insurance policy concerning the structural damage to their home ("1996 claim"). Evidence of this claim is provided to the Court in the form of a "Property Loss Notice" which characterized the damage as follows: "the foundation walls are cracking and leaking due to water." (D.I. 21, Ex. C)

Fidelity denied the 1996 claim on the basis of language in the 1996 Policy which excluded any loss "caused by rust, corrosion, or settling . . . including resultant cracking of walls, floors [or] foundations . . . ." (D.I. 21, Ex. A at 19) Plaintiffs submitted no further claims in 1996.

By March of 1997, Plaintiffs noted that the cracking problems in their bathroom and laundry room were causing the floors to deteriorate. They solicited repair estimates from several contractors. One of the contractors informed Plaintiffs that the cracking appeared to be occurring along water lines, indicating a plumbing problem as opposed to a seepage problem. Coincidentally, during that Summer, Plaintiffs were advised by a neighbor that he had noticed severe cracking in the floors of one of his bathrooms and that the problem was traced to a leaking drain pipe in the

bathroom. With this information in hand, Plaintiffs investigated and discovered that the drainpipe leading away from the bathtub in their problematic bathroom looked as if it had "rotted away."

Plaintiffs made a second claim on their homeowner's policy on July 16, 1997 (the "1997 claim"). This time the claim described the problem as "water damage," and explained: "[d]rain from tub rotted. As a result water leaked from underneath tub . . . [c]ausing damage to the concrete pad under the house. Concrete is cracked." (D.I. 24, Ex. 1) On July 24, 1997, Plaintiffs' home was inspected on behalf of Fidelity by Sinan Jawad, a structural engineer. In a letter dated August 13, 1997, Fidelity denied coverage of the 1997 claim based on Mr. Jawad's opinion that the cracking in both the bath and laundry rooms was caused by general settlement in the concrete foundation. Fidelity concluded that the damage to the bathroom drainpipe likely was caused by the settlement problem. According to Fidelity, Mr. Jawed's damage analysis established that leakage from the bathtub drainpipe could not have caused such extensive damage to the foundation. Fidelity's denial letter closed with the following statement: "[W]e must remind you that there is a two year suit

limitations period in your policy and no additional information can be considered after April 16, 1999."[1] (D.I. 21, Ex. E)

Fidelity's denial of coverage was followed by an extended sequence of communications between Fidelity and the Carlozzi's attorney. To bolster their claim for coverage, the Carlozzis sought and obtained a report from a second structural engineer indicating that the structural damage was caused by water from the corroded drainpipe, as opposed to unprovoked settlement of the home. The report concluded that water emanating from the corroded drainpipe caused the ground under the foundation to become saturated with water. This saturation, over a long period of time, caused the foundation of the home to settle and crack.

By letter dated November 23, 1998, Fidelity renewed its denial of coverage. The last paragraph of that letter declares: "Lastly, the [S]tate of Delaware has a one year suit limitations provision. Providing we allow the date of loss as the date this claim was reported, July 16, 1997, the one year suit limitations period has expired."[2] (D.I. 24, Ex. 12 at 2)

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[1]This statement was erroneous; both insurance policies contain a one year suit limitations provision.

[2]This statement again appears to be a mistake made by Fidelity's claims representative.

III. DISCUSSION

A. Summary Judgment Standard

In considering a motion for summary judgment, the Court is required to examine the record, all pleadings, affidavits and discovery.[3] The Court must view this evidence in the light most favorable to the non-moving party.[4] Summary judgment may be granted only when the Court's review of the record reveals that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law.[5]

The standard for summary judgment "is not altered because the parties have filed cross-motions for summary judgment."[6] Moreover,

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[3] *Oliver B. Cannon & Sons, Inc. v. Dorr-Oliver, Inc.*, Del. Super., 312 A.2d 322, 325 (1973).

[4] *See United Vanguard Fund, Inc. v. Takecare, Inc.,* Del. Supr., 693 A.2d 1076, 1079 (1997); *Brzoska v. Olson*, Del. Supr., 668 A.2d 1355, 1364 (1995).

[5] *Dale v. Town of Elsmere*, Del. Supr., 702 A.2d 1219, 1221 (1997).

[6] *Haas v. Indian River Vol. Fire Co.,* Del. Ch., C.A. No. 1785, Steele, V.C. (Aug. 14, 2000), Mem. Op. at 10 (citing *United Vanguard*, 693 A.2d at 1079).

> the existence of cross motions for summary judgment does not act *per se* as a concession that there is an absence of factual issues. Rather, a party moving for summary judgment concedes the absence of a factual issue and the truth of the nonmoving party's allegations only for the purposes of its own motion, and does not waive its right to assert that there are disputed facts that preclude summary judgment in favor of the other party. Thus, the mere filing of a cross motion for summary judgment does not serve as a waiver of the movant's right to assert the existence of a factual dispute as to the other party's motion.[7]

B. The Parties' Contentions

Fidelity's initial Motion for Summary Judgment relied solely on the one year suit limitations provisions in both the 1996 and 1997 policies which purport to bar lawsuits filed more than one year after a claim for coverage has been submitted. Plaintiffs acknowledge that their complaint was not filed within one year of the submission of either the 1996 or 1997 claims. They argue, however, that the misstatements of the claims adjuster with respect to the limitations issue in written

[7] *United Vanguard*, 693 A.2d at 1079 (internal citations omitted).

correspondence precludes Fidelity from relying upon those contractual provisions to bar their claim for coverage. Fidelity responds that estoppel is not available to the Plaintiffs to excuse their late-filed complaint because both Plaintiffs and their attorney had the means (copies of the insurance policies at issue) to discover the inaccuracy of the claims adjuster's statements regarding the suit limitations issue.[8]

The Plaintiffs have filed a Cross-Motion for Partial Summary Judgment. In that Motion, they contend that the damage to their home is covered by the 1997 Policy. Specifically, they point to language in the 1997 Policy which they contend provides coverage for losses caused by water that escapes from a plumbing system, even if the plumbing fails as a result of an excluded event (e.g. settlement of the home).

[8]The record clearly suggests that either the Plaintiffs or their attorney (or both) possessed copies of the relevant policies at the time the claims adjuster's misstatements were made. *See Hallowell v. State Farm Mut. Auto. Ins. Co.,* Del. Supr., 443 A.2d 925, 928 (1982)(stating "an insured has a duty to read his insurance policy and he is bound by the provisions thereof if they are clear and unequivocal"); *First Fed. Sav. & Loan Ass'n v. Nationwide Mut. Fire Ins.,* Del. Supr., 460 A.2d 543, 545 (1983)("One who asserts an estoppel must show that he was ingnorant of the truth."); *Wilson v. Am. Ins. Co.*, Del. Supr., 209 A.2d 902, 904 (1965)("To establish an estoppel, it must appear that the party claiming the estoppel lacked knowledge and the means of knowledge of the truth of the facts in question. . . .").

Fidelity has answered Plaintiffs' Cross Motion with a Cross-Motion of its own in which it asserts that the entire course of Plaintiffs' property damage was a single event which began during the 1996 Policy period. Fidelity's effort, not clandestine, is meant to convince the Court that the 1996 Policy applies, thereby bolstering its suit limitations argument and, more importantly, eliminating the Plaintiffs' argument that the 1997 Policy offers a window through which coverage may be extended.[9] Fidelity argues, nevertheless, that even if the Court concludes that the 1997 Policy applies, the Plaintiffs' interpretation of that policy cannot be squared with its clear and unambiguous language.

[9]Both parties agree that coverage is not available under the 1996 Policy.

C. The Applicable Rules of Contract Construction

The Court turns first to well-settled principles of contract construction with particular attention to tenets governing the interpretation of insurance contracts. The language of the insurance policy will dictate the scope of coverage.[10] And when the language is "clear and unequivocal, a party will be bound by its clear meaning . . . ."[11] Furthermore,

> The proper construction of any contract, including an insurance contract, is purely a question of law . . . . Clear and unambiguous language in an insurance policy should be given its ordinary and usual meaning. Absent some ambiguity, Delaware courts will not twist policy language under the guise of construing it . . . .
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> A contract is not rendered ambiguous simply because the parties do not agree upon its proper construction. Rather, a contract is ambiguous only when the provisions in controversy are reasonably or fairly susceptible of different interpretations or may have two different meanings . . . . Courts will not torture contractual terms to impart ambiguity where ordinary meaning leaves no room for uncertainty.[12]

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[10] *Rhone-Polenc Basic Chems. Co. v. Am. Motorist Ins. Co.,* Del. Supr., 616 A.2d 1192, 1195 (1992)(citing *Hallowell*, 443 A.2d at 926).

[11] *Id.* at 1195-96.

[12] *Id.* (citations omitted).

To the extent ambiguity does exist in the insurance contract, the doctrine of *contra proferentum* requires the Court to construe the language of the policy most strongly against the insurance company that drafted it.[13] The doctrine finds no application, however, in the context of unambiguous policy language.[14]

4. The 1997 Policy Applies

Both the 1996 and 1997 Policies contain language which define their respective terms of coverage. The 1996 Policy, with effective dates of January 28, 1996 through January 28, 1997, declares "[l]osses for bodily injury or property damage are covered only if they occur while this policy is in effect." (D.I. 21, Ex. B at 54)(emphasis deleted) As a so-called "occurrence policy," "[t]he insurer's duty to indemnify . . . is triggered by a determination that fortuitous . . . property damage occurred during the policy period."[15] The 1996 Policy does not define "occur" or "occurrence."

The 1997 Policy's Coverage Summary indicates that it is effective between January 28, 1997 and January 28, 1998. (D.I. 21, Ex. C at 2) The "General Provisions" portion of the 1997 Policy declares "[c]laims under this policy must be for: a. [l]oss under the property coverages; or b.

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[13] *Steigler v. Ins. Co. of N. Am.*, Del. Supr., 384 A.2d 398, 400 (1978).

[14] *Id.*

[15] *Playtex, Inc. v. Columbia Cas.*, Del. Super., C.A. No. 88C-MR-233, Del Pesco, J. (Sept. 20, 1993), Letter Op. at 21.

[l]iability arising from an accident or occurrence as defined in the applicable [s]egment; which occurs during the policy period shown on the Coverage Summary." (D.I. 21, Ex. C at 63) The 1997 Policy, also an "occurrence policy," defines "[o]ccurrence," in part, as "[a]n event, or a series of related events resulting from continuous or repeated exposure to the same general conditions, that causes bodily injury or property damage during the policy period

. . . ." (*Id.* at 11)

The Court finds that the policy provisions which govern when a loss has "occurred" for purposes of determining coverage are clear and unambiguous.

Accordingly, the Court will consider the undisputed facts against the backdrop of the relevant policy provisions in order to determine which policy applies.

Plaintiffs first noticed minor damage (a hairline crack in flooring) to their home in 1992. Thereafter, the written "chronology" of events prepared by the Plaintiffs recounts a slow but persistent progression of structural damage to the home. Plaintiffs' first made a claim under their homeowner's policy in May, 1996. This claim was limited to foundation damage. Subsequent to the 1996 claim, Plaintiffs advised Fidelity that the cracking to the interior structure of the house was worsening. The source of the damage (at least from Plaintiffs' perspective), the corroded drainpipe, was not discovered until July, 1997.

The undisputed fact that the structural damage to Plaintiffs' home was progressive in nature and continued from January, 1996 through January, 1997 directs the Court's analysis of the relevant policy language. The 1997 claim was based on water damage to the home's foundation which, according to the Plaintiffs, was progressively worsening day-to-day, year-to-year. It is clear that this progressive damage, at least partially, occurred during the 1997 Policy period. The Court holds, therefore, that Plaintiffs could elect to make a claim for coverage under either the 1996 or 1997 Policy. Both policies, at least temporally, provided coverage for the ongoing structural damage sustained by the Plaintiffs' home. Accordingly, absent an express exclusion of coverage under the 1997 Policy, Fidelity would be obliged to cover the loss under that policy.[16]

[16]Although the Court holds that, as a general matter, the 1997 Policy applies to Plaintiffs' claim of loss, the question of whether the 1997 Policy covers the specific character of damage claimed by Plaintiffs must still be addressed.

Several Courts have examined instances, such as this one, where an insured seeks coverage for progressive damage which continues to worsen over the term of multiple policies. These decisions specifically examine situations where the damage occurred continuously over a period during which several "occurrence" policies were in effect. In *California Union Insurance Co. v. Landmark Insurance Co.*,[17] a case closely analogous to this one, the Court examined property damage caused over an extended period of time by water leaking from a swimming pool. As is the case here, the leaking water slowly caused settling and structural damage to a building adjacent to the swimming pool through saturation of surrounding soil, and the effected parties did not discover the cause of the damage until considerable time had passed. The property owner had switched insurance carriers during the progression of the property damage. The carrier which insured the property later in time sought a declaration from the Court that the previous carrier's policy covered the loss. The Court held that the damage was "occurring" during the periods of coverage of both policies and determined, therefore, that the insured could present a claim under either policy.

Gruol Construction Co. v. Insurance Co. of North America[18] also addressed analogous facts. In *Gruol*, a contractor had negligently failed to remove "fill" dirt adjacent to a wooden structure. Over a period of years, water was able to seep into the

[17]Cal. Ct. App., 193 Cal. Rptr. 461 (1983).

fill dirt; and the presence of wet dirt near the wooden structure caused progressive dry rot. The Court examined the liability of three separate insurance carriers for the property, all of which had provided coverage to the insured over successive policy periods. *Gruol* framed the question as:

[18]Wash. Ct. App., 524 P.2d 427 (1974).

> which insurer [must] cover[] the damage – the insurer at the time of the defective backfilling, at the time of the discovery of the dry rot, or all insurers providing coverage during the total time period of the undiscovered condition which progressively worsened. The answer is determined by a consideration of whether the term 'accident' or 'occurrence' as used in the policy must of necessity be a single isolated event or whether it can be a continuing condition or process.[19]

The Court then affirmed the lower court's finding that all three carriers' policies provided coverage despite the fact that the original negligent act took place during the first insurer's policy period.

Returning to the 1997 Policy, "[o]ccurrence" is defined as "[a]n event, or a series of related events resulting from continuous or repeated exposure to the same general conditions, that causes bodily injury or property damage during the policy period . . . ." (D.I. 21, Ex. C at 11) Regardless of the cause of the water saturation, it is undisputed in the record that water saturation caused the foundation of the home to settle which resulted in damage to the home over an extended period of time. This extended period of time reached into the 1997 Policy period. Thus, the ongoing water damage was part of "a series of related events . . . [which] . . .cause[d] . . . property

[19] *Id.* at 430.

damage during the policy period . . . ." (*Id.*) In other words, since

progressive damage occurred **during the 1997 Policy period**, the 1997 Policy provides coverage unless the loss is otherwise excluded.

Fidelity argues that this Court's decision in *Playtex,* supra, precludes a finding that the 1997 Policy applies. This argument is based on the "general rule that one cannot obtain insurance for those losses which are not fortuitous, in other words, for those losses of which the insured knows, plans, intends, or is aware."[20] Fidelity points to Plaintiffs' 1996 claim and their "chronology" of events as evidence of their knowledge of the damage to the foundation and argues that this knowledge at the time Plaintiffs procured the 1997 Policy prevents coverage under that policy.

Fidelity's argument misses the mark for three reasons. First, there is no evidence that Plaintiffs first sought insurance after learning of damage to their home. The two policies at issue were maintained by the Plaintiffs in keeping with their design to provide ongoing homeowner's coverage for their home. From January 1996 through January 1998, Plaintiffs simply renewed their coverage with the same company (Fidelity), and advised that company throughout the relationship of the problems they were having with progressive damage to the structure of their home. Second, Fidelity's argument would effectively preclude coverage for any property

[20]*Playtex*, Letter Op. at 21 (citing *Intermetal Mexicana v. Ins. Co. of N. Am.*, 3d Cir., 866 F.2d 71 (1989); *Bartholomew v. Appalachian Ins. Co.,* 1st Cir., 655 F.2d 27, 29 (1981)).

damage of a progressive nature when multiple policies are in play. Under Fidelity's interpretation of "occurrence," insurance carriers could deny coverage based on the fact that some portion of progressive property damage occurred during another policy period. The Court will not endorse such a restrictive interpretation of "occurrence," particularly in the context of policy language which suggests no such temporal restriction of coverage. Third, and finally, while it is true that Plaintiffs were aware of cracking to the bathroom and laundry room floors in 1996, the record clearly demonstrates that the damage intensified during 1997.

D. The 1997 Policy Does Not Provide Coverage for the Loss Sustained by Plaintiffs

The 1997 Policy purports to provide coverage for all losses to Plaintiffs' home not specifically excluded by the Policy. It then excludes certain specified damage from coverage. The preface to the policy exclusions provides:

> "We do not insure for the loss caused directly or indirectly by any of the following. **Such loss is excluded regardless of any other cause or event contributing concurrently or in any sequence to the loss**." (D.I. 21, Ex. C at 20)(emphasis supplied)

This preface enhance the policy exclusions which, when read together, exclude from coverage *inter alia*:

> loss[es] [c]aused by the following: . . . [r]ust or other corrosion . . . [and] [s]ettling, shrinking, bulging, or expansion including resultant cracking of pavements, patios, foundations, walls, floors roofs or ceilings . . . ."

(*Id.* at 21-22)

At first glance, this exclusion would appear to embrace Plaintiffs' property damage claim: Plaintiffs contend that rust or corrosion damage to a bathroom drainpipe caused water to leak from the pipe which, in turn, caused the foundation to settle which, in turn, caused the cracks and other damages for which Plaintiffs claim coverage. The essence of the claim, then, is coverage for damages caused by corrosion and/or settlement. Such claims are clearly excluded under the Policy "**regardless of any other cause or event contributing concurrently or in any sequence to the loss**." (*Id.* at 20)(emphasis supplied)

The 1997 Policy, however, contains an additional clause which follows the listed exclusions and upon which Plaintiffs rely as a basis for coverage: "[i]f any of these [listed exclusions] cause water **not otherwise excluded** to escape from a plumbing . . . system, we cover loss caused by the water." (*Id.* at 22)(emphasis supplied) To follow Plaintiffs' reasoning, since the corroded drainpipe leaked water which, in turn, caused the foundation of the home to settle which, in turn, caused the damage to the interior of the home, all of the damage sequentially resulted from leaking water from a faulty plumbing system (i.e. a corroded drain pipe).

While the interpretation offered by Plaintiffs has intuitive appeal, it does not comport with the clear language of the Policy. According to the preface to the 1997

Policy's exclusions, all "loss caused directly or indirectly" by either settlement of the foundation or rust and corrosion is excluded. (*Id.* at 20) Even according to Plaintiffs' characterization of the damage to their home, all damage was, at least, "indirectly" caused by a corroded drain in the bathroom. The water which escaped from the corroded drain pipe was, therefore, "otherwise excluded" under the clear language of the 1997 Policy. Consequently, the predicate to application of the language relied upon by Plaintiffs - - "not otherwise excluded" - - is missing.

Moreover, the Policy anticipates Plaintiffs' circuitous route around the exclusions and cuts them off at the pass. Returning to Plaintiffs' version of the facts, they contend water escaped from the drainpipe which, over a number of years, caused the foundation of their home to settle. This settlement caused all of the damage to their home for which they now seek coverage - - mainly to repair the foundation as well as cracks and related damage to the structure which rests upon that foundation. This damage was not "caused" by the water that escaped from the corroded drainpipe. Rather, it was "caused" by the settlement. Even though Plaintiffs claim the settlement was caused by water escaping from the drainpipe, the Policy clearly and specifically excludes from coverage damage caused by settlement "**regardless of any other cause or event contributing concurrently or in any sequence to the loss**." (*Id.* at 20)(emphasis supplied) The exception upon which Plaintiffs' rely does not alter this

result; the Policy is clear, and the Court will not twist or alter the specific language of the Policy under the guise of construing it.[21] The Court is required to give every portion of the Policy consideration; reading it as an entire document.[22] Where the provisions of an insurance contract are clear and unambiguous, they will be applied in accordance with their express terms.[23]

III. CONCLUSION

Based on the foregoing, Fidelity's Cross-Motion for Summary Judgment on coverage is GRANTED. This holding renders moot Fidelity's Motion for Summary Judgment on the contractual limitation provision and Plaintiffs' Motion for Partial Summary Judgment on coverage.

IT IS SO ORDERED.

Judge Joseph R. Slights, III

[21] *See Rhone-Poulenc*, 616 A.2d at 1195.

[22] *Cheseroni v. Nationwide Mut. Ins. Co.*, Del. Super., 402 A.2d 1215, 1217 (1979)(citing *Hudson v. D & V Mason Contractors, Inc.*, Del. Super., 252 A.2d 166 (1969); *Wooleyhan v. Green*, Del. Super., 155 A. 602 (1931)).

[23] *See, e.g., Eagle Indus.,* 702 A.2d at 1232 ("Contract terms themselves will be controlling when they establish the parties' common meaning so that a reasonable person in the position of either party would have no expectations inconsistent with the contract language.")(citing *Rhone-Poulenc*, 616 A.2d at 1196).