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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Lexington Insurance Company,
10 Plaintiff,

11 v.

12 Scott Homes Multifamily Incorporated, et
13 al.,
14 Defendants.

No. CV-12-02119-PHX-JAT

ORDER

15 Pending before the Court is Plaintiff Lexington Insurance Company
16 (“Lexington”)’s Renewed Motion for Judgment [sic] as a Matter of Law, Motion for a
17 New Trial, Motion to Alter or Amend the Judgment, and/or Motion for Relief from the
18 Judgment. (Doc. 499). Defendant/Counterclaimant Silverbell 290 Limited Partnership
19 and Defendant Scott Homes Multifamily, Inc. (“Silverbell”) filed a response, (Doc. 512),
20 and Lexington replied, (Doc. 513). The Court held a jury trial in this matter, and the jury
21 returned a verdict in favor of Silverbell. (Doc. 463). The Court entered Judgment in favor
22 of Silverbell in the amount of \$3,410,000.01 in addition to pre- and post-judgment
23 interest. (Doc. 486). The Court now rules on Lexington’s motions.

24 **I. Renewed Motion for Judgment as a Matter of Law**

25 **A. Legal Standard**

26 Federal Rule of Civil Procedure (“Rule”) 50 permits a court to grant judgment as a
27 matter of law (“JMOL”) on an issue if “the court finds that a reasonable jury would not
28 have a legally sufficient evidentiary basis to find for the party on that issue.” Fed. R. Civ.

1 P. 50(a)(1). JMOL is “proper when the evidence permits only one reasonable conclusion
2 and the conclusion is contrary to that reached by the jury.” *Lakeside-Scott v. Multnomah*
3 *Cnty.*, 556 F.3d 797, 802 (9th Cir. 2009) (quoting *Ostad v. Or. Health Sci. Univ.*, 327
4 F.3d 876, 881 (9th Cir. 2003)). The Court must uphold the jury’s verdict “if it is
5 supported by substantial evidence, which is evidence adequate to support the jury’s
6 conclusion, even if it is also possible to draw a contrary conclusion.” *Pavao v. Pagay*,
7 307 F.3d 915, 918 (9th Cir. 2002). “In making this determination, the court must not
8 weigh the evidence, but should simply ask whether the [moving party] has presented
9 sufficient evidence to support the jury’s conclusion.” *Harper v. City of Los Angeles*, 533
10 F.3d 1010, 1021 (9th Cir. 2008). The Court must “view the evidence in the light most
11 favorable to the party in whose favor the jury returned a verdict and draw all reasonable
12 inferences in [its] favor.” *Lakeside-Scott*, 556 F.3d at 802.

13 **B. Analysis**

14 In support of its Renewed Motion for Judgment as a Matter of Law, Lexington
15 contends that Silverbell did not prove (1) more than \$1,000,000 of “property damage” as
16 defined by the underlying Evanston Policy, (2) that any “property damage” actually
17 occurred during the policy period, and (3) that Scott Homes complied with the Evanston
18 Policy’s independent contractors conditional exclusion. (Doc. 499 at 2–8).

19 **1. Amount of “Property Damage”**

20 Lexington first argues that Silverbell did not provide sufficient evidence to show
21 that “property damage” exceeded \$1 million. (*Id.* at 2–3). In this regard, Silverbell’s
22 expert opined that Silverbell suffered over \$7 million in property and resultant damages
23 to tangible property in addition to loss-of-use damages of over \$1 million. *See* (9/2/15 Tr.
24 at 26–44). Silverbell also introduced into evidence volumes of photographs depicting
25 property damage. *See e.g.*, (Tr. Exs. 1029–30). On the other hand, Lexington’s expert
26 testified that Scott Homes suffered less than \$1 million in covered property damages. *See*
27 (9/9/15 Tr. at 1684, 1174–75). While Lexington’s view could be construed as one
28 possible interpretation of the evidence, the Court finds that the jury’s interpretation is a

1 reasonable one. Even assuming the Court considered Lexington’s view of the evidence to
2 be more reasonable, it is not for the Court to “substitute [its] view of the evidence for that
3 of the jury.” *Polar Bear Prods., Inc. v. Timex Corp.*, 384 F.3d 700, 708 (9th Cir. 2004).

4 **2. Time Period of “Property Damage”**

5 Lexington next contends that Silverbell presented no evidence showing that the
6 millions of dollars in “property damages” occurred during the Lexington Policy period.
7 (Doc. 499 at 3–6). “Property damage” was defined by the Evanston Policy as:

8 a. Physical injury to tangible property, including all resulting loss of use of
9 that property. All such loss of use shall be deemed to occur at the time of
10 the physical injury that caused it; or

11 b. Loss of use of tangible property that is not physically injured. All such
12 loss of use shall be deemed to occur at the time of the “occurrence” that
13 caused it.

14 (Doc. 270-2 at 53). The Court previously held that in order to recover, Silverbell needed
15 to show that “Scott Homes suffered damages exceeding \$1 million for property damages
16 caused by construction defects.” (Doc. 323 at 23). The Court finds that the jury’s verdict
17 in this regard was “supported by substantial evidence,” *Pavao*, 307 F.3d at 918, and thus,
18 will not overturn the verdict.

19 **3. Compliance with the Evanston Policy**

20 Lexington finally argues that the evidence presented by Silverbell did not show
21 that Scott Homes adequately complied with the Evanston Policy’s independent
22 contractors conditional exclusion. (Doc. 499 at 6–8). The Court finds that Silverbell
23 presented substantial evidence at trial for the jury to determine whether Silverbell proved
24 Scott Homes’ compliance with the conditional exclusion. *See* (Tr. Exs. 1002, 1004–11;
25 8/31/15 Tr. at 928–30, 933–35). Consequently, the Court will not upset the jury’s verdict.

26 **4. Conclusion**

27 In sum, the Court finds that substantial evidence supported the jury’s verdict and
28 thus, Lexington’s Renewed Motion for Judgment as a Matter of Law will be denied.

1 **II. Motion for New Trial**

2 **A. Legal Standard**

3 Rule 59(a) states that “after a jury trial,” a new trial may be granted “for any
4 reason for which a new trial has heretofore been granted in an action at law in federal
5 court.” Fed. R. Civ. P. 59(a). Reasons for granting a new trial historically include a
6 verdict that, in the judge’s view, is against the clear weight of the evidence (or constitutes
7 a miscarriage of justice), *Molski v. M.J. Cable, Inc.*, 481 F.3d 724, 729 (9th Cir. 2007),
8 prejudicial evidentiary rulings, *Dorn v. Burlington N. Santa Fe R.R.*, 397 F.3d 1183, 1189
9 (9th Cir. 2005), and erroneous or inadequate jury instructions, *Murphy v. City of Long*
10 *Beach*, 914 F.2d 183, 187 (9th Cir. 1990). Lexington maintains that all three of these
11 reasons warrant a new trial in this case. (Doc. 499 at 8–15).

12 **B. Analysis**

13 The Court will review each of Lexington’s contentions in turn.

14 **1. Contrary to Clear Weight of Evidence**

15 Lexington first contends that the jury’s verdict is contrary to the clear weight of
16 the evidence and recycles the arguments presented with its renewed JMOL. (Doc. 499 at
17 8). As explained above, the Court finds that the jury’s verdict was based on substantial
18 evidence introduced during the multi-week trial and thus will not disturb the verdict.

19 **2. Evidentiary Errors**

20 Lexington also asserts that the jury’s verdict was the product of two evidentiary
21 errors, namely, that the Court should have excluded the testimony of Dr. Albert DeBonis
22 and Thomas Cologna. (Doc. 499 at 7–9). As to Dr. Debonis, Lexington argues that the
23 jury was not entitled to rely on his testimony because he made opinions as to “when” the
24 wood decay began at the property but did not set forth sufficient methodologies
25 explaining how he arrived at his conclusions. (Doc. 499 at 5). There is no dispute that Dr.
26 Debonis is a qualified wood scientist, and the Court finds that his opinions were the result
27 of appropriate methodologies and principles. Thus, the Court did not err by permitting
28 Dr. Debonis to offer opinions as to the timing of the wood decay.

1 Regarding Mr. Cologna, Lexington insists that his testimony about loss-of-use
2 damages should have been excluded because the parties purportedly entered into a mutual
3 waiver of consequential damages. (Doc. 499 at 9). It is undisputed, however, that the
4 Superior Court of Arizona resolved the applicability of the consequential damages waiver
5 before approving the *Damron* agreement. Thus, yet again, Lexington misinterprets
6 Arizona law which holds that an insurer who does not defend an insured may not
7 challenge the reasonableness of a stipulated judgment entered into by its insured. *See*
8 *Damron v. Sledge*, 460 P.2d 997, 1001 (Ariz. 1969). Although Lexington could litigate
9 whether the insured was in fact covered under its policy and whether the policy carved
10 out coverage for loss-of-use damages, Lexington was not permitted to re-litigate the
11 viability of Silverbell’s loss-of-use claim against its insured, Scott Homes. *See Quihuis v.*
12 *State Farm Mut. Auto. Ins.*, 334 P.2d 719, 729–30 (Ariz. 2014); *Parking Concepts, Inc. v.*
13 *Tenney*, 83 P.3d 19, 22 n.3 (Ariz. 2004). This is an issue Lexington “should have
14 considered before refusing to defend.” *Damron*, 460 P.2d at 1001.

15 **3. Jury Instructions and Verdict Form**

16 As its third and final argument for a new trial, Lexington maintains that the jury
17 instructions and verdict form were inadequate. (Doc. 499 at 10–15). After reviewing
18 Lexington’s arguments and the jury instructions as a whole, the Court is convinced that
19 the instructions “fairly and adequately cover[ed] the issues presented, correctly state[d]
20 the law, and [were] not misleading.” *Chuman v. Wright*, 76 F.3d 292, 294 (9th Cir. 1996).
21 The specific instruction to which Lexington objects is a correct recitation of Arizona law,
22 *see Lennar Corp. v. Auto-Owners Ins. Co.*, 151 P.3d 538, 546 (Ariz. Ct. App. 2007)
23 (“Faulty construction may constitute a ‘general harmful condition.’”), and the Court
24 “must assume that the jury followed the court’s instructions.” *Aspen Skiing Co. v. Aspen*
25 *Highlands Skiing Corp.*, 472 U.S. 585, 604 (1985). Indeed, the Court cannot speculate as
26 to how the jury reached its verdict so long as the verdict is supported by the evidence. *See*
27 *Dunn v. United States*, 284 U.S. 390, 394 (1932) (“That the verdict may have been the
28 result of compromise, or of a mistake on the part of the jury, is possible. But verdicts

1 cannot be upset by speculation or inquiry into such matters.”). Here, the Court finds that
2 the verdict is supported by the evidence and will not speculate as to how the jury reached
3 its verdict.

4 Furthermore, Lexington’s argument that a new trial is warranted because the jury
5 was not instructed that it had to differentiate between “property damage” and “uncovered
6 damages,” *see* (Doc. 499 at 12), is shamelessly false. The Court unambiguously
7 instructed the jury that:

8 To prove coverage under the Lexington Policy for the claims against
9 Scott Homes, consistent with the applicable terms of the policy, Silverbell
10 must prove by a preponderance of the evidence *both* of the following
elements:

- 11 1. There was *property damage* at the Springs at Silverbell
12 Apartments *that is covered under the Lexington Policy*; and
- 13 2. The amount of *covered property damage* exceeded one
million dollars.

14 (Doc. 462 at 18) (emphasis added). Similarly, the jury verdict form read:

15 We the jury find, upon our oaths, as follows:

16 Has Silverbell 290 Limited Partnership proved by a preponderance of the
17 evidence that Scott Homes Multifamily Inc. was liable for *covered property*
damage exceeding \$1 million as defined in the jury instructions?

18 (Doc. 463 at 2) (emphasis added). Whether intentional or not, how Lexington misreads
19 the jury instructions and verdict form in a manner that does not require Silverbell to
20 prove that covered property damages exceeded \$1 million is beyond the Court’s
21 imagination.

22 **III. Motion to Alter or Amend the Judgment**

23 **A. Legal Standard**

24 “Rule 59(e) amendments are appropriate if the district court (1) is presented with
25 newly discovered evidence, (2) committed clear error or the initial decision was
26 manifestly unjust, or (3) if there is an intervening change in controlling law.” *Dixon v.*
27 *Wallowa Cnty.*, 336 F.3d 1013, 1022 (9th Cir. 2003) (internal quotation marks omitted).
28 A court may also grant relief from the judgment based on a mistake or any other reasons

1 that justifies relief. Fed. R. Civ. P. 60(b)(1).

2 **B. Analysis**

3 Lexington argues that the Court should alter or amend the Judgment by
4 (1) offsetting sub-contractor Structural I's \$325,000 fault share and (2) amending or
5 vacating the pre-judgment interest award. (Doc. 499 at 15–18).

6 As to the requested offset of Structural I's fault share, the Court already held that it
7 "is bound by the plain language of the Scott Homes judgment," (Doc. 485 at 5), which
8 stated "[t]he Judgment amount does not include an is not to be offset by payments
9 received by Plaintiff from Third-Party Defendant subcontractors in settlement of issues
10 released via issue release," (Ex. 161). Lexington has not presented "newly discovered
11 evidence," shown that the Court committed "clear error," or explained an "intervening
12 change in controlling law." *Dixon*, 336 F.3d at 1022. Thus, the Court will not modify its
13 ruling in this regard.

14 In respect to pre-judgment interest, the Court is convinced that Arizona Revised
15 Statute § 44-1201(A) applies to the pre-judgment interest award in this case. Lexington
16 had a contractual "obligation" to defend its insured, and the damages amount became
17 liquidated when the Superior Court of Arizona approved the *Damron* agreement. *See*
18 *Pueblo Sante Fe Townhomes Owners' Ass'n v. Transcon. Ins. Co.*, 178 P.3d 485, 497
19 (Ariz. Ct. App. 2008) (holding that interest accrues from the date the court approves a
20 *Damron/Morris* agreement). Furthermore, the "offsets" to which Lexington refers did not
21 manifest through the Court's "opinion or discretion," but were subcontractor payments
22 that reduced the full liquidated damages amount. Accordingly, the Judgment was "based
23 on a written agreement evidencing a loan, indebtedness or obligation," Ariz. Rev. Stat.
24 § 44-1201(A), and was for a liquidated amount, *see Precision Heavy Haul, Inc. v. Trail*
25 *King Indus., Inc.*, 228 P.3d 895, 899 (Ariz. Ct. App. 2010) ("[T]he fact that the insurer
26 dispute[s] the issue of *coverage* does not affect the certainty of [an insured's] *damages*."
27 (quotation omitted)).

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IV. Conclusion

For the reasons set forth above,

IT IS ORDERED that Lexington’s Renewed Motion for Judgment [sic] as a Matter of Law, Motion for a New Trial, Motion to Alter or Amend the Judgment, and/or Motion for Relief from the Judgment (Doc. 499) is **DENIED**.

Dated this 31st day of March, 2016.

