DISTRICT COURT, ARAPAHOE COUNTY, COLORADO 7325 South Potomac Centennial, Colorado 80112	DATE FILED: October 8, 2015 CASE NUMBER: 2014CV33306
Tower Ridge II Townhome Homeowners Association, Inc., Plaintiff **v.** **Holyoke Mutual Insurance Company in Salem, Inc., Defendant**	▲ **COURT USE ONLY** ▲ Case Number: 2014CV33306 Div.: 14

ORDER ON MOTION FOR CERTIFICATION AND MOTION FOR PARTIAL SUMMARY JUDGMENT

This Matter is before the Court on a number of Motions. The Court, having reviewed the pleadings, the file, and applicable authorities, hereby Finds and Orders as follows:

First, the Court apologizes for the delay in issuing this Order. It should have gone out weeks ago, but work and life interfered with completing it. Second, the Court did not realize a second Motion for Partial Summary Judgment was filed until it was brought to the Court's attention by the law clerk. The second Motion for Partial Summary Judgment changed the direction the Court was taking on the other motions.

1. Motion for Certification of Section III.a. of the Court's August 14, 2015 Order for C.A.R. 4.2 Appeal.

The Court did not believe that the statute of limitations issue regarding the first cause of action would be dispositive of the second cause of action; thus, the Court did not believe that certification of the statute of limitations issue regarding the first claim would promote a more orderly disposition of the litigation. However, the fact that the Court is dismissing the second cause of action, as noted in the second part of this Order, changes the Court's conclusion. The Court now concludes that immediate review will promote a more orderly disposition of this case.

As an aside, the Court would add to its Order of August 14, 2015, insofar as noting that one of the reasons the Court concluded that section 10-4-110.8 applies to the situation at bar and not just single-family dwellings, is because the statute includes language which deals with common interest communities, such as Tower Ridge II, although admittedly in a different context. *See* § 10-4-110.8(5), C.R.S. 2015. If the legislature had wanted to exclude unit owners, and by extension, the homeowners association, from the provisions of section 10-4-110.8(12)(a), it could have used the words "owner of a dwelling" instead of the more expansive term, "homeowner."

Because the statute of limitations issue involving the first cause of action is a controlling and unresolved question of law, and for the reasons stated below, the Motion for Certification pursuant to C.A.R. 4.1 and section 13-4-102.1, is granted.

2. Second Motion for Partial Summary Judgment.

Defendant argues that Plaintiff's second claim for relief, unreasonable delay or denial of payment pursuant to sections 10-3-1115 and 10-3-1116, must be dismissed because it was filed after the statute of limitations deadline had passed. Defendant asserts that section 13-80-103(d), applies, which states that a civil action for "any penalty or forfeiture of any penal statutes" must be brought within one year after the cause of action accrues. § 13-80-103(d), C.R.S. 2015.

In response, Plaintiff makes several arguments. First, it states that the Court should not accept the untimely filing of Defendant's Motion because it was filed after August 18, 2015, the deadline for dispositive motions set during the case management conference, and because Defendant failed to assert the statute of limitations as an affirmative defense in its Answer. Next, Plaintiff argues that section 13-80-103(d), does not apply to claims for unreasonable delay or denial of payment and that the applicable statute of limitations is two years. It also asserts that even if the one-year statute of limitations applies to an award of double the covered benefit, it does not apply to an award of attorney fees and court costs. Lastly, Plaintiff contends that even if the statute of limitations required its claim to be filed within one year, it filed its claim within that time because its claim did not accrue until less than a year before it filed.

As an initial matter, the Court will accept Defendant's Motion for Partial Summary Judgment although it was filed after the deadline for dispositive motions, because other motions were pending and not yet ruled upon so that Defendant could file an Amended Answer and include the statute of limitations as an affirmative defense. The Court believes this is an important issue in the case that should be determined on the merits, not on a procedural, although important, rule. Accordingly, the Court will analyze the merits of Defendant's Motion for Partial Summary Judgment.

A statue is "penal" for statute of limitations purposes if "(1) the statute asserted a new and distinct cause of action; (2) the claim would allow recovery without proof of actual damages; and (3) the claim would allow an award in excess of actual damages." *Kruse v. McKenna*, 178 P.3d 1198, 1201 (Colo. 2008). Elements one and three are clearly met as the claim for unreasonable delay or denial of payment is a separate cause of action from the breach-of-contract claim and the bad faith claim provides for an award of attorney fees, court costs, and two times the covered benefit. Thus, the issue is whether a claim under sections 10-3-1115 and 10-3-1116 allows recovery without proof of actual damages.

There are two ways to look at this issue. First, does Plaintiff need to prove that it was damaged by the unreasonable delay or denial of benefits? Second, even if Plaintiff need not prove that it was damaged by the unreasonable delay or denial of benefits, is the second *Kruse* factor met because it would need to prove the amount of the covered benefit that was delayed or denied? As to the first question, Plaintiff need not prove that it was damaged by the unreasonable delay or denial of benefits, *Hansen v. Am. Family Mut. Ins. Co.*, No. 11CA1430, 2013 WL 6673066, at *9 (Colo. App. Dec. 19, 2013), *cert. granted*, No. 14SC99, 2014 WL 5510047 (Colo. Nov. 3, 2014). As to the second question, neither the Colorado Supreme Court nor the Colorado Court of Appeals has addressed that argument. However, the United States District Court, District of Colorado, has addressed the issue. That court reasoned: "The fact that Section

10-3-1116 does not depend upon a finding of 'actual damages' is illustrated by a plaintiff's ability to recover twice the covered benefit even if the insurer pays the benefit in full." *Gerald H. Phipps, Inc. v. Travelers Prop. Cas. Co. of Am.*, 2015 WL 5047640, at *2 (D. Colo. Aug. 27, 2015). That court held that a Plaintiff can be awarded twice the covered amount even if payment was delayed, but eventually paid. This Court agrees with that analysis and concludes that the second *Kruse* element is met. Accordingly, section 13-80-103(d) applies to a claim for unreasonable delay or denial of payment pursuant to sections 10-3-1115 and 10-3-1116, and such claims must be filed within one year of accrual. The Court further concludes that section 13-80-103(d) applies equally to awards of attorney fees, court costs, and two times the covered benefit.

The Court also concludes that Plaintiff did not file its claim for unreasonable delay or denial of payment pursuant to sections 10-3-1115 and 10-3-1116 within one year of accrual.

"[A] cause of action for injury to person, property, reputation, possession, relationship, or status shall be considered to accrue on the date both the injury and its cause are known or should have been known by the exercise of reasonable diligence." § 13-80-108(1), C.R.S. 2015. "The point of accrual is usually a question of fact, but if the undisputed facts clearly show when a plaintiff discovered or should have discovered the damage or conduct, the issue may be decided as a matter of law." *Murry v. GuideOne Specialty Mut. Ins. Co.,* 194 P.3d 489, 491 (Colo. App. 2008).

On August 22, 2013, Plaintiff first presented a Property Loss Notice to Defendant, which stated it had hail damage and wind damage to its roofs. On November 12, 2013, Plaintiff submitted a Sworn Statement in Proof of Loss to Defendant, indicating that the cause of its loss was a June 6, 2012, hail and wind storm. Plaintiff received Defendant's denial of its claim on December 9, 2013. This case was filed December 23, 2014. Plaintiff asserts that it first knew or should have known that Defendant lacked any reasonable basis for denying its insurance claim on June 3, 2014—less than a year before it filed this case—when it received the report of a second expert, Jim Ragsdale, hired to inspect the roofs and evaluate Defendant's bases for denying its claim. Here, Plaintiff claims that Defendant "simply used [a previous] construction defect suit as a ruse to deny millions of dollars in coverage." Pl.'s Resp. [First] Mot. Summ. J. 2. Thus, if Plaintiff was aware, as asserted in the Proof of Claim, that the damage was caused by wind and hail, Plaintiff, from its standpoint, should have believed and known immediately upon denial of its claim on December 9, 2013, that Defendant lacked any reasonable basis for its denial. Further, even if Plaintiff waited until June to have the roof inspected, nothing prevented it from filing the lawsuit before December 9, 2013. Accordingly, Plaintiffs claim accrued on December 9, 2013, more than a year before it filed its claim for unreasonable delay or denial of payment.

For the reasons stated above, the Court dismisses Plaintiff's second cause of action. Because the Court is dismissing the second cause of action based on a controlling and unresolved question of law, the Court will certify that dismissal. Further, resolving both statute of limitations issues in one appeal will promote a more orderly disposition of the litigation, pursuant to C.A.R. 4.2 and section 13-4-102.1.

The Court holds in abeyance all other motions pending a decision from the Court of Appeals.

So ORDERED, October 8, 2015.

BY THE COURT:

Christopher C. Cross

Certificate: Copies of the above order were mailed/ faxed to counsel of record this _________ day of ___________, 2015, by ______________________________.