

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Christine M. Arguello**

Civil Action No. 17-cv-01456-CMA-KLM

MICHAEL BETHEL,

Plaintiff,

v.

BERKSHIRE HATHAWAY HOMESTATE INSURANCE COMPANY,

Defendant.

**ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND
DENYING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT**

This matter is before the Court on remand from the Tenth Circuit Court of Appeals. The Court of Appeals affirmed in part and reversed in part this Court's order granting summary judgment in favor of Defendants. (Doc. # 121). This Court then directed the parties to file renewed summary judgment motions addressing the issues identified by the Court of Appeals, and those motions are now fully briefed. (Docs. ## 128, 129). For the following reasons, the Court denies the parties' renewed motions for summary judgment.

I. BACKGROUND

This is an insurance dispute. Plaintiff, Michael Bethel, owned an apartment in Rocky Ford, Colorado ("the Property"). The Property was insured by Defendant,

Berkshire Hathaway Homestate Insurance Company (“Berkshire”). In 2016, the Property was destroyed in a fire, and Bethel filed an insurance claim. Berkshire paid Bethel the full market value of the Property at the time of the fire: \$109,000.

Bethel then sued, claiming that he had been underpaid. According to Bethel, the proper measure of the amount due under the policy was not the market value of the property, but the “replacement cost minus depreciation.” By that measure, Bethel argued, he was entitled to receive \$407,000 in insurance benefits under his Berkshire policy (“the Policy”).

Both parties moved for summary judgment. The parties agreed that, under the Policy, Berkshire was obliged to pay Bethel the “actual cash value” (“ACV”) of the Property. They disagreed, however, as to the meaning of “actual cash value.” Berkshire argued that “the actual cash value of the building should be calculated based on its market value as determined by a real estate appraisal.” (Doc. # 63, p. 5). Bethel argued that “the industry standard definition of ACV in Colorado [is] ‘replacement cost minus depreciation.’” (Doc. # 55, pp. 1-2). The Court agreed with Berkshire.

The Court reasoned that “‘actual cash value’ stands for a specific concept in insurance law where the insured is paid only what the asset is worth at the time of loss, a theory of coverage distinct from ‘replacement cost,’ where the insured receives the amount to replace the asset.” (Doc. # 101, p. 11 (quoting *McFarland v. State Farm Fire and Casualty Company*, No. 17-cv-00291-MSK-STV, 2017 WL 3034623 (D. Colo. July 18, 2017))). Thus, the Court explained, “when an insurance policy does not have a specific formula on which to base a determination of the value of property according to

an ACV provision,” courts apply the following principles to determine the meaning of “actual cash value” in a particular insurance policy: “(1) where market value is easily determined, actual cash value is market value, (2) if there is no market value, replacement or reproduction cost may be used, (3) failing the other two tests, any evidence tending to formulate a correct estimate of value may be used.” (Doc. # 101, p. 12 (quoting 12 COUCH ON INS. 3d § 175:24 (2018) (internal citations omitted))). Because market value was easily determined in this case, the Court concluded, “Defendant’s evaluation of Plaintiff’s Covered Property according to its market value did not constitute a breach of Defendant’s contractual obligations.” (Doc. # 101, p. 12). Accordingly, the Court granted summary judgment in Berkshire’s favor.

The Court of Appeals reversed.¹ Though the Court of Appeals agreed that “actual cash value” is distinct from “replacement cost,” it found that, under this particular Policy, the term “actual cash value” *might* mean “replacement cost without depreciation.” (Doc. # 121, p. 9). Therefore, it concluded, “the meaning of ‘actual cash value’ is ambiguous,” as it is used in this particular Policy. (Doc. # 121, p. 6). The Court of Appeals remanded the case to this Court “for full consideration of extrinsic evidence bearing on the parties’ intended meaning of ‘actual cash value.’” (Doc. # 121, p. 11).

This Court ordered additional briefing (Doc. # 123), and both parties filed a renewed motion for summary judgment (Docs. ## 128, 129). The motions are now fully briefed.

¹ The Court of Appeals affirmed this Court’s decision to grant summary judgment in Berkshire’s favor on Bethel’s claim regarding his debris-removal benefit.

II. LEGAL STANDARD

Summary judgment is warranted when “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.” Fed. R. Civ. P. 56(a). A fact is “material” if it is essential to the proper disposition of the claim under the relevant substantive law. *Wright v. Abbot Labs., Inc.*, 259 F.3d 1226, 1231-32 (10th Cir. 2001). A dispute is “genuine” if the evidence is such that it might lead a reasonable jury to return a verdict for the nonmoving party. *Allen v. Muskogee, Okl.*, 118 F.3d 837, 839 (10th Cir. 1997). When reviewing motions for summary judgment, a court may not resolve issues of credibility, and must view the evidence in the light most favorable to the nonmoving party—including all reasonable inferences from that evidence. *Id.* However, conclusory statements based merely on conjecture, speculation, or subjective belief do not constitute competent summary judgment evidence. *Bones v. Honeywell Int’l, Inc.*, 366 F.3d 869, 875 (10th Cir. 2004).

III. ANALYSIS

Upon consideration of the parties’ summary judgment briefing, the exhibits attached thereto, and the applicable law, the Court finds that there are genuine disputes of material fact that preclude summary judgment. “Once an ambiguity [in a contract] is found, it should be resolved by giving effect to the intent of the parties.” *Ad Two, Inc. v. City & Cty. of Denver*, 9 P.3d 373, 381 (Colo. 2000). “[T]he determination of the parties’ intent is a question of fact.” *Moland v. Indus. Claim Appeals Off. of State*, 111 P.3d 507, 510 (Colo. App. 2004). The parties to this case have offered conflicting evidence of intent, and the Court cannot resolve the conflict without weighing that evidence and

making credibility determinations, neither of which are appropriate at this stage of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) (“Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict.”). Further, the Court cannot make a determination as to the reasonableness of Defendant’s conduct without weighing evidence and evaluating the credibility of witnesses. Therefore, summary judgment is not appropriate.

IV. CONCLUSION

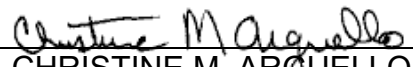
For the foregoing reasons, the parties’ renewed Motions for Summary Judgment (Docs. ## 128, 129) are DENIED. It is

FURTHER ORDERED that Plaintiff’s Motion to Strike Defendant’s Motion for Summary Judgment (Doc. # 130) is DENIED AS MOOT.

The parties are directed to contact chambers by email, Arguello_Chambers@cod.uscourts.gov, to schedule this matter for trial.

DATED: September 21, 2021

BY THE COURT:


CHRISTINE M. ARGUELLO
United States District Judge