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6 UNITED STATES DISTRICT COURT
7 WESTERN DISTRICT OF WASHINGTON
8 AT TACOMA

9 TODD and KAREN BRANDT,

10 Plaintiffs,

11 v.

12 AMERICAN BANKERS INSURANCE
13 COMPANY OF FLORIDA,

14 Defendant.

CASE NO. C08-5760BHS

ORDER GRANTING IN PART,
DENYING IN PART, AND
RESERVING IN PART
DEFENDANTS' MOTION
FOR SUMMARY JUDGMENT

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17 This matter comes before the Court on Defendant's ("American Bankers") motion
18 for summary judgment on Plaintiffs' (the "Brandts") contractual claims (Dkt. 69). The
19 Court has considered the pleadings filed in support of and in opposition to the motion and
20 the remainder of the file and hereby grants in part, denies in part, and reserves ruling in
21 part on the motion as discussed herein.

22 **I. PROCEDURAL HISTORY**

23 On December 17, 2008, The Brandts filed suit against American Bankers seeking
24 insurance coverage for flood damage to their house. Dkt. 1 ("Complaint"). American
25 Bankers failed to file a notice of appearance or answer the Brandts' Complaint, and on
26 February 20, 2009, the clerk entered a default. Dkt. 7. On April 22, 2009, the Court
27 entered a default judgment in favor of the Brandts in the amount of \$655,489.42. Dkt. 16.

1 On September 16, 2009, the Court conditionally set aside the default judgment on the
2 basis of American Bankers' excusable neglect. Dkt. 42; *see also* Dkt. 41 at 15 (imposing
3 conditions on set-aside of default judgment). On December 30, 2009, the Court granted
4 partial summary judgment in favor of American Bankers, which dispensed with the
5 Brandts' extra contractual claims. Dkt. 58.

6 On May 6, 2010, American Bankers filed the instant motion for summary
7 judgment on the Brandts' remaining contractual claims. Dkt. 69. On May 24, 2010, the
8 Brandts responded in opposition. Dkt. 86. On May 28, 2010, American Bankers replied.
9 Dkt. 99.

10 Additionally, American Bankers did not file an answer in this matter until May 24,
11 2010 (Dkt. 83); this filing occurred after the filing of the instant summary judgment
12 motion.

13 **II. FACTUAL BACKGROUND**

14 A more complete factual account of this matter can be found in the Court's order
15 granting American Bankers' motion to set aside default judgment. Dkt. 41.

16 On December 4, 2007, the Brandts' Centralia, Washington house was damaged by
17 flooding. Complaint ¶ 7. At the time of the flood, the Brandts carried a flood insurance
18 policy through American Bankers that covered building damage caused by flooding in the
19 amount of \$250,000, plus an additional \$20,000 for "increased cost of compliance." Dkt.
20 10, Declaration of Todd Brandt (Brandt Decl.) ¶ 5.

21 The insurance plan held by the Brandts is known as a Write Your Own ("WYO")
22 insurance policy issued as a Standard Flood Insurance Policy ("SFIP") pursuant to the
23 National Flood Insurance Program. *See, e.g.*, Dkt. 58 at 2. Such policies are issued
24 directly by FEMA and indirectly by FEMA through approved WYO insurers, like
25 American Bankers. *See id.* at 3. The Court already observed that "[f]ederal law has long
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1 recognized that an insured must comply strictly with the terms and conditions of a [SFIP].
2 *See id.* (quoting *Flick v. Liberty Mut. Fire Ins. Co.*, 205 F.3d 386, 390 (9th Cir. 2000)).

3 On December 6, 2007, the Brandts provided notice to American Bankers of their
4 flood claim. Dkt. 1 at 2. On January 10, 2008, American Bankers issued payment to the
5 Brandts for flood damage in the amount of \$37,715.92. Dkt. 21, Declaration of Patricia
6 Quint (Quint Decl.) ¶ 7. Following this January 2008 payment, the Brandts presented
7 claims for additional damage to their home. *See id.* ¶ 8. According to estimates provided
8 by the Brandts, the house required repairs that would cost more than the \$232,284.08.
9 Dkt. 41 at 3. The Brandts do not contend that they actually have made any of these repairs
10 or replacements to their home; however, they maintain that these costs remain covered
11 under their SFIP. *E.g.*, Dkt. 86 at 3; *see also* Quint Decl., Ex. H (estimates from Kenneth
12 Kirby, contractor (“Kirby”). However, American Bankers maintains that the Brandts
13 failed to submit proper proof of loss, have not determined an actual cash value of loss, are
14 seeking damages precluded by their SFIP, and have failed to submit credible evidence
15 regarding their alleged damages. *See, e.g.*, Dkt. 69.

17 III. DISCUSSION

18 A. Summary Judgment Standard

19 Summary judgment is proper only if the pleadings, the discovery and disclosure
20 materials on file, and any affidavits show that there is no genuine issue as to any material
21 fact and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c).
22 The moving party is entitled to judgment as a matter of law when the nonmoving party
23 fails to make a sufficient showing on an essential element of a claim in the case on which
24 the nonmoving party has the burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323
25 (1985). There is no genuine issue of fact for trial where the record, taken as a whole,
26 could not lead a rational trier of fact to find for the nonmoving party. *Matsushita Elec.*
27 *Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) (nonmoving party must
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1 present specific, significant probative evidence, not simply “some metaphysical doubt”).
2 *See also* Fed. R. Civ. P. 56(e). Conversely, a genuine dispute over a material fact exists if
3 there is sufficient evidence supporting the claimed factual dispute, requiring a judge or
4 jury to resolve the differing versions of the truth. *Anderson v. Liberty Lobby, Inc.*, 477
5 U.S. 242, 253 (1986); *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass’n*, 809 F.2d
6 626, 630 (9th Cir. 1987).

7 The determination of the existence of a material fact is often a close question. The
8 Court must consider the substantive evidentiary burden that the nonmoving party must
9 meet at trial – e.g., a preponderance of the evidence in most civil cases. *Anderson*, 477
10 U.S. at 254; *T.W. Elec. Serv., Inc.*, 809 F.2d at 630. The Court must resolve any factual
11 issues of controversy in favor of the nonmoving party only when the facts specifically
12 attested by that party contradict facts specifically attested by the moving party. The
13 nonmoving party may not merely state that it will discredit the moving party’s evidence at
14 trial, in the hopes that evidence can be developed at trial to support the claim. *T.W. Elec.*
15 *Serv., Inc.*, 809 F.2d at 630 (relying on *Anderson, supra*). Conclusory, nonspecific
16 statements in affidavits are not sufficient, and missing facts will not be presumed. *Lujan*
17 *v. Nat’l Wildlife Fed’n*, 497 U.S. 871, 888-89 (1990).

19 **B. The Brandts’ Motion to Deny**

20 The Brandts move the Court to deny American Bankers’ motion on the basis that it
21 never filed an answer until after the Brandts filed their response to the instant motion.
22 Dkt. 86 at 2. The Brandts argue that this put American Bankers in default and they filed a
23 motion for default on this basis. *Id*; *see also* Dkt. 82 (second motion for default).
24 However, the Brandts have subsequently withdrawn their motion for default. Dkt. 90. In
25 any event, the fact that the answer was untimely filed does not appear to the Court to have
26 caused the Brandts any prejudice. In fact, the Brandts have been litigating this matter all
27 along and have also filed the proposed pretrial order (Dkts. 80, 81).

1 The Brandts also argue that American Bankers raised new defenses for the first
2 time that have not previously been presented to the Brandts. Dkt. 86 at 2. However, again,
3 this argument is based on the fact that the answer was only recently filed. On the record
4 currently before the Court, it is unable to determine at this time what prejudice has
5 resulted in disabling the Brandts' preparation for trial.

6 Furthermore, a party will not be held in default for failure to file an answer when
7 the party has otherwise defended itself in the lawsuit (e.g., filed a motion for summary
8 judgment). *E.g., Rashidi v. Albright*, 818 F. Supp. 1354, 1355 (D. Nev. 1993). American
9 Bankers has otherwise defended itself in this lawsuit, which appears to make the timing
10 of its answer of little import.

11 Therefore, the Court denies the Brandts' motion to deny American Bankers
12 summary judgment. However, the Court is inclined to entertain a motion for continuance
13 of trial on this basis, if the Brandts can establish unfair prejudice.

14 **C. American Bankers' Summary Judgment Motion**

15 American Bankers moves the Court to order summary judgment on the Brandts'
16 remaining contractual claims. Dkt. 69. American Bankers maintains that the following
17 reasons support its motion for summary judgment: the Brandts (1) did not timely file a
18 proof of loss statement for the additional funds sought; (2) may not recover replacement
19 cost damages until their dwelling is actually repaired or replaced but may recover actual
20 cash value of loss, if established; (3) did not put forth admissible or credible evidence to
21 support their claimed repair/replacement costs; and (4) cannot recover for damages
22 excluded from their policy. Dkt. 69 at 9-25.

23 **1. Proof of Loss**

24 American Bankers argues that, because there was no timely submission of a "Proof
25 of Loss for the additional amount of damages requested in this lawsuit as required by
26 SFIP, [the Brandts] are divested of the right to even bring this law suit." Dkt. 69 at 22
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1 (citing *Mancini v. Redland Ins. Co.*, 248 F.3d 729, 735 (8th Cir. 2001); *Rojek v. FEMA*,
2 234 F. Supp. 2d 999 (S.D. Iowa, 2002)). While this rule is generally true, the Court’s
3 order setting aside default judgment was conditioned on American Bankers’ open-court
4 assertion that it would negotiate in good faith with FEMA to waive the proof of loss
5 requirement should the Brants prove they are entitled to funds under the policy. Dkt. 41 at
6 17 (American Bankers’ counsel represented in open court he would seek a proof of loss
7 waiver from FEMA “if [the Brandts’] documentation shows that they are entitled to more
8 funds under their policy”).

9
10 Because of the conditions imposed on and agreed to by American Bankers,
11 whether the Brandts’ failure to file a timely proof of loss statement precludes their
12 recovery in this action is not ripe for consideration by the Court. Dkt. 41 at 17. Therefore,
13 summary judgment on this issue is denied.

14 **2. Actual Cash Value**

15 American Bankers argues that the “terms of the [Brandts’] policy preclude
16 recovery for ‘replacement cost coverage’ until the dwelling is actually repaired or
17 replaced.” Dkt. 69 at 9 (citing SFIP, Article V(2)(c)). Even if the repair or replacement
18 has not occurred, the insured may still be able to recover the actual cash value (“ACV”)
19 of any damages. *Id.*; see also *Hess v. North Pacific, Ins. Co.*, 122 Wn.2d 180, 185
20 (holding that repair/replacement cost may not be sought absent actual repairs or
21 replacement but that ACV may still be recovered).¹

22 The SFIP part II(B)(2) defines ACV as “the cost to replace an insured item of
23 property at the time of loss, less the value of its physical depreciation.” Section J of the
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26 ¹The *Hess* court noted the rationale for this provision is that the insured should not
27 be enabled to profit from the difference between actual cash value of loss and the
28 replacement/repair cost when the insured collects insurance proceeds but does not
actually use them to fix the dwelling. 122 Wn.2d at 185-56.

1 SFIP, entitled Requirements in Case of Loss, provides that “In case of a flood loss to
2 insured property, [the *insured*] *must*, . . . (3) [p]repare an inventory of damaged property
3 showing the quantity, description, *actual cash value*, and amount of loss” (Emphasis
4 added). American Bankers contends that the Brandts are not entitled to such a payment
5 because they “have not determined the actual cash value of any damages for which they
6 seek recovery” Dkt. 69 at 10 (citing to the Brandts’ answer to interrogatory No. 6,
7 which supports American Bankers’ position).

8 In opposition, the Brandts contend that the ACV and the replacement/repair cost
9 are the same. Dkt. 86 at 3 (relying on the Quint Decl. (Dkt. 71), Ex. H). The Brandts also
10 assert that Todd Brandt will testify to this fact. *Id.* The Brandts, however, do not contest
11 the fact that the burden of establishing the ACV rests with them or that a failure to
12 establish the ACV is fatal to an SFIP claim. Put otherwise, if the Brandts are unable to
13 establish the ACV, this matter is concluded as a matter of law. On the record before the
14 Court, it is unclear what evidence the Brandts have, to show that the ACV has been
15 established.
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17 To begin with, Exhibit H is the estimate for repair/replacement costs provided by
18 Kirby, which did not account for depreciation. Kirby testified in his deposition that he did
19 not account for depreciation in arriving at his estimate. Kirby Dep. (Dkt. 87, Ex. A) at 29
20 (stating that “I had no reason for depreciation. I wasn’t depreciating my costs”). It is also
21 unclear on what basis Todd Brandt could testify that the actual cash value of loss, which
22 necessarily includes depreciation, could equate to the estimate Kirby came up with for the
23 repair/replacement cost, which expressly did not include depreciation.

24 Further, the Brandts have not sufficiently established how Todd Brandt could be
25 qualified to testify to the claim that the repair/replacement cost is equal to the actual cash
26 value. In fact, the Court cannot find, and it does not appear, that the Brandts have
27 supplied any evidence that would be sufficient to overcome American Bankers’ position
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1 on this issue. In deciding a summary judgment motion, conclusory, nonspecific
2 statements in affidavits are not sufficient, and missing facts will not be presumed. *Lujan*
3 *v. Nat'l Wildlife Fed'n*, 497 U.S. at 888-89.

4 In short, the Brandts' failure to adequately demonstrate the actual cash value of
5 loss appears to be fatal to their claim for recovery under their SFIP. However, the Court
6 reserves its ruling on this issue and will hear oral argument regarding the matter at the
7 pretrial conference.

8 **3. Admissibility of Evidence of Repair/Replacement Costs**

9 American Bankers argues that the Brandts have supplied no "competent or
10 admissible evidence to support [their] replacement cost figure." Dkt. 69 at 10. American
11 Bankers further argues that the Brandts' damage calculation is based on an estimate
12 developed by Kirby, which it asserts is based on his reliance on the opinions of Ryan
13 Moore ("Moore"), an engineer hired by the Brandts, and that Moore's opinion has
14 dramatically changed since Kirby's reliance. *Id.* at 10-11. Finally, American Bankers
15 asserts that Kirby, a California contractor, is not qualified to provide an estimate for a
16 structure in Washington. *Id.* at 11.

17 As an initial matter, the Court finds that Brandt will likely be able to qualify Kirby
18 as competent to testify in this matter as an expert. This is not to say that American
19 Bankers cannot attempt to discredit his opinions or to offer their own expert opinions to
20 contradict the position of Kirby. As such, Kirby's competency is not a basis for summary
21 judgment.
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23 Further, in opposition, the Brandts argue that Kirby has his own opinions on the
24 matter and that they are not simply limited to Moore's former position. *See* Dkt. 86 at 6-8;
25 *see also* Kirby Dep. at 20 (noting that Kirby's estimate was based on documents from MC
26 Squared Engineering, All-American Home inspection proposal, 3R Construction, and his
27 own visual inspection). This deposition testimony is sufficient to overcome the claims
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1 made by American Bankers on this issue. Indeed, when the parties present different
2 versions of the truth, the Court cannot resolve such an issue in favor of the moving party
3 on summary judgment. *T.W. Elec. Serv., Inc.*, 809 F.2d at 630-31.

4 Therefore, viewed in the light most favorable to the Brandts, the Court denies
5 summary judgment on this issue. However, to the extent Kirby would testify to the costs
6 of lifting the house, such testimony would not be permitted because the Brandts are not
7 entitled to recover any costs associated with lifting the house; *see* the following section.

8 **4. Recovering Damages Excluded by Policy**

9 **a. Pre-Flood Conditions and Other Recovery Precluded**

10 American Bankers argues that the Brandts may not recover damages excluded by
11 the SFIP. Dkt. 69 at 13. Specifically, American Bankers contends that the Brandts cannot
12 recover costs unrelated to the 2007 flood (e.g., pre-flood condition, settlement of the
13 foundation, and repairs not directly related to flood damage, or those incurred for code
14 compliance). In opposition, the Brandts concede they cannot recover for matters excluded
15 by the policy but that they are requesting payment for losses sustained directly from the
16 flood. Dkt. 86 at 10.

17 Therefore, the Court grants summary judgment in favor of American Bankers to
18 the extent the Brandts seek recovery for damages excluded by their SFIP.

19 **b. Recovery for Code Compliance**

20 Part of the costs sought to be recovered by the Brandts is the cost of raising the
21 house in order to repair the alleged flood-related damage. American Bankers asserts that
22 the Brandts are precluded from recovering such costs. They assert these costs are related
23 to code compliance. Relevant here is article V of the SFIP, entitled Exclusions, which
24 provides in pertinent part as follows:
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26 A. We only pay for direct physical loss by or from flood, which
27 means that we do not pay you for:
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1 6. The cost of complying with any ordinance or law requiring
2 or regulating the construction, demolition, remodeling, renovation,
3 or repair of property, including removal of any resulting debris. This
4 exclusion does not apply to any eligible activities we describe in
5 Coverage D--Increased Cost of Compliance

6 Thus, unless otherwise excepted in the SFIP, the Brandts may not recover damages
7 incurred in bringing their structure up to code.

8 American Bankers further asserts that, even if the Brandts could establish that one
9 of the exceptions in the SFIP, part D, applied in their case, they would not be able to
10 survive the exclusions to the exceptions. See SFIP part D(5). Section 5(e) to part D
11 provides in pertinent part as follows:

12 Under this Coverage D (Increased Cost of Compliance) we will not pay for:

13 e. Any Increased Cost of Compliance under this Coverage D:

14 (1) Until the building is elevated, floodproofed, demolished,
15 or relocated on the same or to another premises; and

16 (2) Unless the building is elevated, floodproofed, demolished,
17 or relocated as soon as reasonably possible after the loss, not to
18 exceed two years.

19 The parties do not dispute that the Brandts have never repaired their structure, much less
20 elevated the building within two years after the loss was sustained as a result of the flood.
21 Because the Brandts provide no authority for circumventing these exclusions, the Court
22 finds that no material factual dispute remains regarding recovery for damages related to
23 code compliance.

24 In opposition, the Brandts argue that they are not attempting to recover the costs
25 for raising the structure to comply with the City of Centrailia's codes; rather, they are
26 attempting to recover these costs because it is necessary to fix the flood damage. Dkt. 86
27 at 10 (relying on Kirby Dep. At 22:6-9).

28 In fact, Kirby testified as follows regarding the need to elevate the Brandts' house:

[T]he City of Centrailia said there had to be a new foundation put under
there. There's no other way to put a new foundation in there without raising
the home, *and* there's no way to fix the home the way it was without raising

1 a goodly portion of it and straightening it out and pulling it back over on to
2 the foundation.

3 Kirby Dep. at 21-22 (emphasis added). The disjunctive nature of Kirby's answer suggests
4 that, when viewed in the light most favorable to the Brandts, while compliance with the
5 City of Centrailia's codes appears to be a basis on which Kirby determined raising the
6 house was necessary, it also suggests that repairing the flood damage underneath the
7 house would require elevating the house apart from code compliance. The Court is
8 somewhat persuaded that the Brandts' position presents a material question of fact.

9 Therefore, to the extent the Brandts seek recovery for increased code compliance,
10 summary judgment is granted. To the extent the Brandts seek recovery of the cost of
11 elevating the house apart from code compliance, summary judgment is denied.

12 **c. Recovery for Damages from Earth Movement**

13 American Bankers contends that the Brandts are seeking damages for loss
14 sustained as a result of earth movement. Dkt. 69 at 16 (citing section V of the SFIP,
15 which excludes such recovery). However, the Brandts do not claim such losses. Dkt. 86 at
16 12.

17 Therefore, the Court grants summary judgment in favor of American Bankers on
18 this issue.

19 **IV. ORDER**

20 Therefore, it is hereby **ORDERED** that, as discussed herein:

21 1. The Brandts' motion to deny American Bankers' summary judgment
22 motion is **DENIED**;

23 2. Summary judgment is **DENIED** on American Bankers' proof of loss
24 theory;

25 3. Summary judgment is **DENIED** on American Bankers' theory that the
26 Brandts did not supply credible evidence of their loss;
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1 4. Summary judgment is **RESERVED** on American Bankers' theory that the
2 Brandts' claims fail because they did not determine the actual cash value of loss;

3 5. Summary judgment is **GRANTED** on American Bankers' theory that the
4 Brandts cannot recovery for damages caused by earth movement; and

5 6. Summary judgment is **GRANTED** on American Bankers' theory that the
6 Brandts cannot recover for costs associated with code compliance, but summary judgment
7 is **DENIED** to the extent the Brandts are able to establish damages apart from code
8 compliance, as discussed above.

9 DATED this 1st day of June, 2010.

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13 BENJAMIN H. SETTLE
14 United States District Judge
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