

HONORABLE RONALD B. LEIGHTON

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

KENNETH W WITT & KIT WITT,

Plaintiffs,

v.

PROPERTY & CASUALTY
INSURANCE COMPANY OF
HARTFORD,

Defendant.

CASE NO. C16-5202-RBL

ORDER GRANTING
DEFENDANT’S MOTION FOR
PARTIAL SUMMARY JUDGMENT

THIS MATTER is before the Court on Defendant Hartford’s Motion for Partial Summary Judgment on Plaintiff Witts’ contract claims. [Dkt. #12]. The Witts purchased a Hartford homeowners policy for their home, which was damaged by fire in February, 2015. Hartford has paid more than \$650,000 for the claim. The case (and this motion) involves three areas of continued dispute over Hartford’s obligations under the policy:

(1) The policy covered the structure for \$251,000 (“Coverage A”), which was extended if the structure was replaced. Hartford argues that the extended replacement limit is capped at 1.5 times the stated coverage, or \$376,500. The Witts claim that the coverage was extended for an *additional* 1.5 times the stated structure coverage, or $[\$251,000 + (1.5 \times 251,000)] = \$627,500$.

1 Hartford argues that this is a plain vanilla contract construction issue and that the Witts' reading
2 is wrong as a matter of law. The Witts argue that the contract is unambiguous and that their
3 reading is correct, and that if it is ambiguous it must be construed in their favor.

4 (2) The policy included an additional living expenses, or ALE, coverage. The Witts claim
5 that Hartford's adjuster agreed to pay them \$1400 per month to live in a cabin on the property, in
6 lieu of paying them significantly more to live in a rental home. In reliance on that promise, they
7 refurbished the cabin to make it livable.

8 The Witts' claim depends on their public adjuster's claim that the promise was made, and
9 their own claim that they reasonably relied on it. Hartford ultimately paid \$5650 for this work,
10 but denies that it ever agreed or promised to pay the Witts any monthly amount to live in their
11 own cabin. Hartford argues that the policy is clear that ALE coverage is triggered only where
12 such expenses are actually incurred, that they consistently told the Witts this, and that there is no
13 evidence in support of the Witt's claim.

14 (3) The policy included an "ordinance and law" coverage, which pays for cost increases
15 due to building code enforcement. The Witts claim they incurred additional costs (a total of
16 \$54,200, of which Hartford has paid \$32,350) due to code compliance. The Witts therefore claim
17 an additional \$21,850 for increased code compliance costs. Hartford claims that it already
18 characterized repair costs that would not have otherwise been payable (due to the cap discussed
19 above) as code costs, and denies that it owes any additional amounts. It claims there is no
20 support for the Witts' additional code claim as a matter of law.

21 **A. Summary Judgment Standard.**

22 Summary judgment is proper "if the pleadings, the discovery and disclosure materials on
23 file, and any affidavits show that there is no genuine issue as to any material fact and that the
24 movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). In determining

1 whether an issue of fact exists, the Court must view all evidence in the light most favorable to
2 the nonmoving party and draw all reasonable inferences in that party's favor. *Anderson Liberty*
3 *Lobby, Inc.*, 477 U.S. 242, 248-50 (1986); *Bagdadi v. Nazar*, 84 F.3d 1194, 1197 (9th Cir. 1996).

4 A genuine issue of material fact exists where there is sufficient evidence for a reasonable
5 factfinder to find for the nonmoving party. *Anderson*, 477 U.S. at 248. The inquiry is "whether
6 the evidence presents a sufficient disagreement to require submission to a jury or whether it is so
7 one-sided that one party must prevail as a matter of law." *Id.* At 251-52. The moving party
8 bears the initial burden of showing that there is no evidence which supports an element essential
9 to the non-movant's claim. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Once the
10 movant has met this burden, the nonmoving party then must show that there is a genuine issue
11 for trial. *Anderson*, 477 U.S. at 250. If the nonmoving party fails to establish the existence of a
12 genuine issue of material fact, "the moving party is entitled to judgment as a matter of law."
13 *Celotex*, 477 U.S. at 323-24.

14 There is no requirement that the moving party negate elements of the non-movant's case.
15 *Lujan v. National Wildlife Federation*, 497 U.S. 871, 110 S. Ct. 3177, 111 L. Ed. 2d 695 (1990).
16 Once the moving party has met its burden, the non-movant must then produce concrete evidence,
17 without merely relying on allegations in the pleadings, that there remain genuine factual issues.
18 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505 (1986).

19 **B. Coverage A included a 150% cap, not an additional 150% coverage, for structure**
20 **replacement.**

21 There can be no dispute about the terms of the policy, despite the fact that it requires the
22 reader to look in multiple places to find those terms. It states:
23
24

1 **B. If there is a loss to the building insured under Coverage A that exceeds the Coverage A limit of**
2 **liability shown in the Declarations:**

- 3 1. We will increase the Coverage A limit of liability to equal the current "replacement cost" of
4 the building. However, in no event will such increased limit exceed * times the
5 Coverage A amount shown in the Declarations.

6 [Dkt. #113-15 at 31] The asterisk refers the reader to an endorsement, which provides that the
7 entry "may be left blank if shown elsewhere in the coverage." Hartford claims that the
8 applicable "elsewhere" is the Policy Declarations, which provide that the "additional limits
9 coverage" is "CAP 1.5." See Dkt. #13-15 at 4.

10 The Witts claim that this coverage provides an *additional* 1.5 times the base structure
11 coverage of \$251,000—or a total of **2.5 times** the stated coverage. But there is no legal or logical
12 support for this argument.

13 The word "additional" does not appear in the coverage; instead, in the event of
14 replacement (rebuilding), the limit is increased, but shall not exceed "[1.5] **times** the amount
15 [\$251,000] shown" in the Declarations. There is no other way to reasonably read this
16 unambiguous provision: the increased replacement coverage is capped at 1.5 times the base
17 coverage. \$251,000 times 1.5 is \$376,500. There is no support for the claim that the limit is
18 *increased by an additional* 1.5 times the base amount. Hartford's reading is correct, as a matter
19 of law, and the Witts' is not. Hartford's motion for partial summary judgment on the applicable
20 replacement coverage is **GRANTED**.

21 **C. The Witt's ALE claim fails as a matter of law.**

22 The Witts' claim \$1400 per month in "loss of use," or Alternate Living Expenses, for
23 living in the cabin on their property. They do not dispute that the policy's ALE coverage applies
24 only where the additional living expense is actually incurred. They claim instead that, at an
unspecified time, an unidentified Hartford adjuster promised their public adjuster that the insurer
would pay them to stay in their cabin. There is no claim or evidence that the promise was

1 written. Specifically, their public adjuster, Jack Thomas, claims the “Hartford adjuster” promised
2 that Hartford would pay the Witts \$1400 per month to live in the cabin, and that in reliance on
3 that promise the Witts spent almost \$6000 making it livable. Then, Thomas claims, Hartford
4 reneged on that promise:

5 14. However, months later, The Hartford went back on their promise, citing the
6 Policy language that Additional Living Expenses were only those that are actually incurred, and
7 refused to pay the \$1,400 per month. Attached hereto as Exhibit D is a true and correct copy of a
8 letter from the Hartford adjuster dated July 27, 2015.

9 [Dkt. #16 at 3]

10 Kit Witt’s declaration confirms that any promise was made to Thomas, and not to her:

11 9. We were informed by our public adjuster that The Hartford would compensate us
12 \$1,400 per month if we decided to live on a small cabin located on our property. As it was our
13 preference to remain on the property, we obtained help from our friends to make the cabin
14 liveable.

15 [Dkt. #17 at 2]

16 Hartford denies that it or its adjuster did or would make such a promise, given the
17 policy’s clear language. Thomas’s own documents undermine his vague claim that there was
18 such an agreement. Some five months after the fire, after the cabin renovations had been
19 completed, and after the Witts moved in, (and after Thomas had corresponded with Hartford on
20 various other matters, without mentioning any promise) Thomas contacted Hartford’s adjuster
21 about the loss. He wrote:

22 The loss of use matter **remains unresolved**. Again, the insured **will agree** to a
23 rental allowance of \$1500 per month. . . . They **will** stay in the cabin on the
24 property, but **only if you agree** to the \$1500 rental allowance.

[Dkt. # 13-5 at 2 (emphasis added)].

1 This is not evidence of Hartford's past promise to pay \$1400 per month; it is evidence
2 that, through their public adjuster, the Witts offered to stay in the cabin *if* Hartford agreed to
3 pay \$1500 them per month. Hartford's adjuster, Baldwin, promptly rejected that offer, because
4 the policy did not cover alternate living expenses that were not actually incurred:

5 With regards to the Additional Living Expense coverage, we owe for incurred and documented expenses. we
6 cannot pay the insured to live on their own property. If they move to the neighbor's house and pay a rental fee;
please submit the rental contract for consideration.

7 [Dkt. #13-6]. There is no evidence or claim that Hartford ever agreed to pay such an amount at a
8 later date, though it is apparent that the Witts continued to live in the cabin. On October 19,
9 Thomas again raised the issue of the ALE, both with respect to the \$1400 and to the cabin
10 refurbishment costs:

11 We have discussed the Loss of Use Claim at the onset of this matter. You indicated your
12 company would be receptive to compensating the insureds the amount of \$1,400.00 per month to
live in the cabin on their property. Under the pretense of possible ocmpenstation, the insureds
13 remolded the cabin to make it habitable. They did so at out-of-pocket expenses of \$5,650.08 for
materials. Friends and family members volunteered their time for labor to remodel the cabin.
14 Shortly after the insured's moved into the cabin, your company refused to compensate the
insured's. However, you have requested the receipts for the remodel of the cabin, which are
enclosed with this correspondence.

15 [Dkt. #13-9] Hartford claims they did not get the letter for about a month. In any event, on
16 October 21, Baldwin similarly asked Thomas to document the cabin refurbishment costs:

17 With regards to the Additional Living Expense coverage, the coverage is for the increased cost
18 of living expenses for incurred expenses. You have not yet provided any receipts or documents
to support any additional living expense claim per the policy language. I indicated we would pay
19 any rental fees incurred by the insured if they moved to a rental home. As no information has
been provided for a rental, it appears the Witt's have remained in the cabin they own on the
residence premises.

20 I asked you to document the repair costs to the cabin located on the insured property in order
for consideration to be given for any covered claim. To date, I have not received any
21 information with regard to actual incurred costs for repairs to the cabin. If you have receipts for
restoration of the cabin, please send them in.

22 [Dkt. #13-8] It is undisputed that these costs (after some adjustment) were paid in December,
23 2015. Shortly before she retired, Baldwin informed Thomas of the payment:
24

1 With regards to repairs to the cabin for the insured's living space for
2 duration of the repairs, payment was issued yesterday in the amount of
3 \$5,479.75. This check is also directed to your office and is based on
4 the attached review/spreadsheet of the submitted invoices. As a
5 reminder, these receipts were sent in Mid- November by you and I had to
6 sort out the receipts as they were mixed with contents receipts.

7 [Dkt. # 13-10]

8 The Witts argue that Hartford is estopped from denying its promise to pay \$1400 per
9 month because they relied on that promise to refurbish the cabin. Hartford argues that equitable
10 estoppel cannot create coverage where none existed. *See Baker v. The Pheonix Ins. Co.*, 2013
11 WL 3208564 (W.D. Wa. 2013) and the cases cited therein. [*Cited* by Hartford in its Reply; Dkt.
12 # 19 at 5]. It also argues that the Witts cannot establish the requirements for estoppel, in any
13 event: they cannot show reasonable reliance on the vague promise to a third party that they
14 allege, and they certainly cannot claim they relied on any such promise after their offer to accept
15 \$1500 per month was rejected on July 27, 2015. [*See also* Dkt. #13 at Exhibits 7 and 8]. Their
16 investment in the cabin is not reliance because Harford promptly reimbursed them for those costs
17 when they were presented, presumably under the ALE coverage.

18 The Witts' claim for ALE coverage in the form of \$1400 per month for living in the
19 cabin on their property is unsupportable as a matter of law. Hartford's Motion for summary
20 judgment on this claim is GRANTED, and that claim is dismissed with prejudice.

21 **D. Code compliance.**

22 Hartford's policy provided an additional coverage for code compliance and related costs,
23 which was limited to an additional 10% of "Coverage A." The basis of the Witts' code cost claim
24 is not clear¹. Their Response asserts only that the number sought and the number paid are not the
same. It does not articulate, or demonstrate, any discrepancy, and it does not address the fact that

¹ Indeed, it is not entirely clear that they continue to assert this claim at all. Footnote 2 in
their Response concedes that the code claim has been "paid in full." [Dkt. # 15 at 5, note 2].

1 | the code compliance limit is \$37,650 (10% of the increased Coverage A), which more than
2 | Hartford paid but far less than they seek. Instead, they argue only:

3 | Regarding the code claim, the Witts submitted a total code claim of \$54,200.18, of which
4 | The Hartford has only paid \$32,350.54. A balance of \$21,849.64 remains to be paid.

5 | [Dkt. #15 at 9] Adjuster Thomas's testimony in support of this claim is similarly conclusory:

6 | 21. Regarding the Witts' code claim, the total value of the code claim submitted was
7 | \$54,200.18. Of that, The Hartford has paid \$32,350.54. The Hartford, in its motion for partial
8 | summary judgment references the Witts' code claim to be \$26,597.87, specifically referencing
9 | my letter and submission of March 10, 2016. However, this submission was not the entirety of
10 | the code claim – as was specifically referenced in that letter. Thus, The Hartford has NOT, in
11 | fact, paid the full value of the code claim, but has underpaid by \$21,849.64.

11 | [Dkt. # 16 at 4].

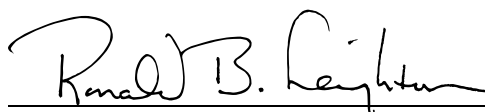
12 | This is an argument, or a conclusion; it is not evidence. The Witts have not established
13 | that Hartford breached its contract to cover increased code compliance costs. Hartford's Motion
14 | for Summary Judgment on this claim is GRANTED.

15 | ***

16 | Hartford's Motion for Partial Summary Judgment on all three issues is GRANTED.

17 | IT IS SO ORDERED.

18 | Dated this 19th day of January, 2017.

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20 | 

21 | Ronald B. Leighton
22 | United States District Judge
23 |
24 |