

IN THE SUPERIOR COURT OF FULTON COUNTY  
 STATE OF GEORGIA

GEORGIA CASUALTY AND SURETY CO.,

Petitioner,

v.

CHAMBERS DRUM COMPANY, INC.,

Respondent.

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Civil Action No. 2005CV104094

ORDER ON MOTIONS

This matter is before the Court for consideration of multiple motions pending before the Court. The Court having considered the record, briefs and oral arguments of counsel presented at the hearing in this matter on September 23, 2009, enters this order.

Respondent is a business which brokers and reconditions industrial 55 gallon drums and other containers. Petitioner issued a policy of insurance insuring Respondent's drum reconditioning facility. The subject policy provided coverage for Property Damage and Business Income and Extra Expense. Plaintiff brought the within action declaratory judgment action asserting that once it paid the limits of the property damage coverage it met its duty for paying for all property in the damaged structure.

In an order dated April 4, 2008 this Court found that "It cannot be said as a matter of law that repair and replacement of property is not covered or restricted to temporary replacement of property" and denied Plaintiff's motion for summary judgment. Plaintiff now seeks summary judgment as to: 1) bad faith; 2) that a period of restoration must be reasonable; 3) extra expenses must be actually incurred; 4) extra expense must reduce business income loss; 4) Plaintiff's entitlement to deduct salvage value; and 6) Defendant's entitlement to rental coverage.

The construction and interpretation of insurance contracts is a matter for the Court applying the ordinary rules of contract construction. *Hartford Casualty Insurance Co. v. Banker's Note, Inc.*, 817 F. Supp. 1567 (USDC, ND Ga.) (1993).

Using the rules of construction codified at O.C.G.A. § 13-2-2 the Court finds that under the plain language of the policy Defendant is not entitled to recover rental value. The Court further finds that Plaintiff is entitled to deduct salvage value from any payment it makes under the Business Income and Extra Expenses ("BI/EE") portion of this policy.

The Court finds, and Defendant concedes that expenses claimed under the BI/EE portion of the policy must be actually incurred. However, having considered the totality of the circumstances in this case, the Court does not find that Defendant's claimed period of restoration is unreasonable as a matter of law or that Defendant's must show an actual loss of business income.

A bad faith claim brought pursuant to O.C.G.A. § 33-4-6 requires a frivolous and unfounded denial of a claim. Where there is any reasonable ground to contest the claim there is no bad faith. *Swyers v. Motorola Employees Credit Union*, 244 G. App. 356, 535 S.E.2d 508 (2000). Having reviewed the evidence in a light most favorable to Defendant, the Court finds that Plaintiff had reasonable grounds to contest the type and amount of Defendant's claimed expenses. Accordingly, Plaintiff is entitled to summary judgment on Defendant's claim for bad faith under O.C.G.A. § 33-4-6. See *Worsham v. Provident Companies, Inc.*, 249 F.Supp.2d 1325 (2002).

Defendant's Motion for Leave to File Second Amended Counterclaim for Share of Subrogation Proceeds is **GRANTED**.

Plaintiff asserts it is entitled to summary judgment on Defendant's claim for a portion of the proceeds Plaintiff received in a subrogation suit involving this matter. Plaintiff argues that Defendant has been made whole, equitable division does not apply to subrogation in a property context and Defendant's recovery is barred by the equitable doctrine of laches.

The uncontroverted evidence before the Court is that Defendant's loss exceeds the limits of their property damage coverage and the amount paid to date under the BI/EE portion of the policy. Nor is the Court persuaded that equitable division is not available in this context. Therefore, the question before the Court is whether this claim is barred by laches.

The equitable doctrine of laches is founded upon the principles that persons have a right to be free of stale claims and that justice requires that an adversary be put on notice of a claim in a timely manner so that it will not suffer a loss of witnesses and evidence. The bar of laches is available whenever it would be inequitable to allow a party to enforce its legal rights. *Boyd v. Robinson*, 2009WL2530096.

Viewing the evidence in a light most favorable to Defendant, the Court finds that Defendant's action is not barred by laches. Plaintiff's motion for summary judgment is **DENIED**. Plaintiff's handling of Defendant's claim, including its subrogation lawsuit, are central to this case. Accordingly, Plaintiff's Motion to Bifurcate and Motion in Limine to Exclude Testimony Regarding Subrogation Efforts are both **DENIED**.

The Court, having reviewed the remaining claims and the burdens of proof associated therewith, in its discretion, hereby **GRANTS** Defendant's Motion to Realign Parties.


Plaintiff's Motion in Limine to prohibit evidence of ISO Form 00 30 0402 or other alternative policy language is **GRANTED**, subject to reconsideration if it becomes relevant during the trial.

O.C.G.A. § 24-9-67.1(b) requires that the expert is "qualified to render an expert opinion, that the opinion is reliable, and that the opinion would assist the trier of fact in resolving a disputed issue of material fact..." *McDowell v. Brown*, 392 F.3d 1283, 1298 (11<sup>th</sup> Cir. 2004). The burden of laying the proper foundation for the admission of the expert testimony is on the party offering the expert, and admissibility must be shown by a preponderance of the evidence." *Cook v. Sheriff of Monroe County, Florida*, 402 F.3d 1092, 1107 (11<sup>th</sup> Cir. 2005) (internal citation and quotation omitted).

Defendant has demonstrated by a preponderance of the evidence that the testimony of Jesse Forkner and Louis Fey should be admitted. Plaintiff's Motions to exclude these individuals from testifying are **DENIED**. Defendant's Motion to Disqualify Howard Zandman is also **DENIED**.

The Court has reviewed the documents submitted by Defendant and agrees they contain opinion, mental conclusions, legal theories or other attorney work product. The Court also accepts Defendant's assertion that any deficiency in its written discovery responses was cured at the deposition. Plaintiff's Motion to Compel is **DENIED**.

SO ORDERED this 28<sup>th</sup> day of September, 2009.

  
TOM CAMPBELL, JUDGE  
Superior Court of Fulton County  
Atlanta Judicial Circuit

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