

12-0769

IN THE CIRCUIT COURT OF LOGAN COUNTY, WEST VIRGINIA

FREDA BRADLEY,

PLAINTIFF,

V.

CIVIL ACTION NO. 10-C-269  
HONORABLE ROGER L. PERRY

FARMERS & MECHANICS MUTUAL  
INSURANCE COMPANY OF WEST VIRGINIA;  
RALPH ELDRIDGE; MADISON INSURANCE  
AGENCY, INC., and SHAWN WALKER,

DEFENDANTS.

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**ORDER GRANTING DEFENDANT FARMERS AND MECHANICS  
MUTUAL INSURANCE COMPANY OF WEST VIRGINIA'S MOTION  
FOR SUMMARY JUDGMENT**

On August 8, 2011, the Parties appeared, by counsel, for a hearing on Farmers & Mechanics Mutual Insurance Company's ("Farmers & Mechanics") Motion for Summary Judgment. At the hearing, the Court directed the parties to file supplemental briefs by August 29, 2011 on the narrow issue of "Collapse"/"hidden decay." Subsequently, after more discovery/depositions were complete, a hearing was held on February 1, 2012 to hear oral argument on this limited issue. The Court then directed the Parties to propose findings of fact and conclusions of law on all issues focusing on whether Freda Bradley's ("Ms. Bradley") floor "collapsed" within the meaning of the insurance policy.

After mature and deliberate consideration of the record in this case, as well as the argument of counsel, this Court does hereby make the following findings of fact and conclusions of law:

## **FINDINGS OF FACT:**

1. In May of 2002, Plaintiff Bradley purchased a named-peril homeowners insurance policy with FARMERS & MECHANICS.
2. On or about April 25, 2005, Ms. Bradley filed a claim with FARMERS & MECHANICS for damages to her home as a result of alleged blasting activities nearby..
3. On May 16, 2005, a home inspection was completed by Darren Franck of Advanced Engineering Associates, at the request of Mr. Eldridge, an FARMERS & MECHANICS adjuster assigned to the claim.
4. By letter dated May 23, 2005, Mr. Eldridge had denied Ms. Bradley's claim and provided a copy of said inspection to Ms. Bradley.
5. On September 22, 2008, Ms. Bradley filed a second claim with FARMERS & MECHANICS for the settling/dropping of her kitchen and bathroom floors. Ms. Bradley claimed her floor had dropped 2 to 4 inches in the Kitchen and that she feared for her and her daughter's safety.
6. On October 1, 2008, Darren Franck completed a second home inspection. The results of Mr. Franck's inspection assigned the damage to the kitchen from the result of long-term rotting and decay resulting from inadequate perimeter drainage and lack of vapor barrier. The inspection assigned damage to the bathroom floor from the result of water leaking from the toilet drain associated with a faulty wax-seal.
7. By letter dated October 10, 2008, Mr. Eldridge had denied Ms. Bradley's claim, citing Section 1 Exclusions for water damage below the surface of the ground, and fungi, wet or dry rot, or bacteria.
8. Ms. Bradley had a Homeowners 3 Special Form insurance policy, which is a "named-peril" insurance policy. Pursuant to the terms of the policy, Section 1 – Perils Insured Against,

Farmers & Mechanics, relating to Coverage A – Dwelling, insured against risk of direct loss to property described in Coverages A and B only if that loss is a physical loss to the property. The coverage provides, we do not insure, however, for loss:

1. Involving Collapse, other than as provided in additional Coverages 8. *See Homeowners 3 Special Form, p.4 of 9.* Turning to the coverage provided within Additional Coverages 8, the policy provides:

8. Collapse. We insure or direct physical loss to covered property involving collapse of a building or any part of a building caused only by one or more of the following:
- a. Perils Insured Against in Coverage C PERSONAL PROPERTY. These Perils apply to covered buildings and personal property for loss insured by this additional coverage;
  - b. Hidden decay;
  - c. Hidden insect or vermin damage;
  - d. Weight of contents, equipment, animals or people;
  - e. Weight of rain which collects on a roof; or
  - f. Use of defective material or methods in construction, remodeling or renovation if the collapse occurs during the course of the construction, remodeling or renovation.

Loss to an awning, fence, patio, pavement, swimming pool, underground pipe, flue, drain, cesspool, septic tank, foundation, retaining wall, bulkhead, pier, wharf or dock is not included under items b,c,d,e, and f, unless the loss is a direct result of collapse of a building.

Collapse does not include settling, cracking, shrinking, bulging or expansion.

This coverage does not increase the limit of liability applying to the damaged coverage property.

9. As noted within COVERAGE C – PERSONAL PROPERTY, the policy provides as following:

We insure for direct physical loss to the property described in Coverage C caused by a peril listed below unless the loss is excluded in SECTION I – EXCLUSIONS.

10. Collapse is not listed as one of the 16 perils under this provision, which are the only covered losses.
11. Darren Franck, the only engineer to inspect the property testified that at the time that he inspected the property in 2008, the floor had not collapsed.
12. Ms. Bradley testified that she noticed the floor sloping back in 2002.
13. The fact that Ms. Bradley had noticed the floor sinking for 6 years before filing a claim goes to prove that the problem or decay was not hidden.

#### **CONCLUSIONS OF LAW**

1. In the interest of efficient and effective resolution of cases, the West Virginia Supreme Court of Appeals has recognized that when there is no real dispute as to the facts or law in a case, summary judgment is a useful mechanism to resolve the controversy. Johnson v. Mays, 191 W.Va. 628, 630, 447 S.E.2d 563, 565 (*per curiam*) (1994).

#### **COUNT IV**

2. Farmers & Mechanics is entitled to summary and declaratory judgment as to Count IV of the Plaintiff's Second Amended Complaint.
3. Count IV of the Plaintiff's Second Amended Complaint seeks declaratory judgment from this Court as to the coverage under Ms. Bradley's insurance policy.
4. There is no coverage for collapse under the terms and conditions of Ms. Bradley's Homeowners 3 Special Form insurance policy.

5. Collapse is not a named peril within Ms. Bradley's insurance policy and there is no coverage for her claim.
6. "Language in an insurance policy should be given its plain, ordinary meaning." Syl. Pt. 1, Murray v. State Farm Fire and Cas. Co., 203 W.Va. 477, 509 S.E.2d 1 (1998) (citing Syl. Pt. 1, Soliva v. Shand, Morahan & Co. Inc., 176 W.Va. 430, 345 S.E.2d 33 (1986)).
7. "Where the provisions in an insurance policy contract are clear and unambiguous they are not subject to judicial construction or interpretation, but full effect will be given to the plain meaning intended." Keffer v. Prudential Ins. Co., 153 W.Va. 813, 172 S.E.2d 714 (1970).
8. The term collapse is not ambiguous.
9. Under the plain and ordinary meaning of "collapse", Ms. Bradley's kitchen floor did not collapse.
10. Even if the term collapse were open to interpretation and it could be found that Ms. Bradley's sinking kitchen floor is a "collapse" (which this Court clearly finds it is not a collapse), it was not caused by "hidden decay."
11. The fact that Ms. Bradley's floor had been sinking over a period of six years before filing a claim goes to prove that Ms. Bradley was aware of the sinking and therefore of the decay. (Ms. Bradley's own testimony also supports the fact that she was aware of the sinking/decay. One example is Ms. Bradley's statement about how items would roll out of the refrigerator when she opened the door.)
12. As the plain and unambiguous provisions of the Farmers & Mechanics policy do not cover collapse, Ms. Bradley's claim for declaratory relief must be DENIED and Farmers & Mechanics motion for summary judgment on Count IV is GRANTED.

## COUNT I

13. Farmers & Mechanics is entitled to summary judgment as to Count I of Ms. Bradley's Second Amended Complaint, as Farmers & Mechanics did not breach its contract of insurance with Ms. Bradley.

14. A material breach of contract occurs when a party fails to do something which he is bound to do according to the contract and when that failure to perform is so important and central to the contract that it defeats the very purpose of the contract. J.W. Ellison, Son & Co. v. Flat Top Grocery Co., 69 W.Va. 380, 71 S.E. 391 (1911); Emerson Shoe Co. v. Neely, 99 W.Va. 657, 129 S.E. 719 (1925); Kesner v. Lancaster, 180 W.Va 607, 378 S.E.2d 649 (1989).

15. Because Ms. Bradley is not entitled to coverage under the insurance policy, Farmers & Mechanics did not fail to do what it was bound to do. Therefore Farmers & Mechanics motion for summary judgment on Count I is GRANTED.

16. Regarding additional policy provisions upon which Ms. Bradley now seeks coverage, the applicable policy provides,

**12. Fungi, Wet or Dry Rot, or Bacteria**

**a.** The most we will pay is up to \$10,000 to cover:

(1) the total of all loss payable under Section 1 Property Coverages cause by fungi, wet or dry rot, or bacteria;

(2) the cost to remove fungi, wet or dry rot, or bacteria from property covered under Section1;

(3) the cost to tear out and replace any part of the building or other covered property as needed to gain access to the fungi, wet or dry rot, or bacteria;

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**b.** The coverage described in 12.a, only applies when such loss or costs are a result of a Peril Insured Against that occurs during the policy period and only if all reasonable means were used to save and preserve the property from further damage at and after the time the Peril Insured Against occurred;

17. The limited coverage under this provision only applies when the loss is a result of a Peril Insured Against.

18. As discussed above, Ms. Bradley's loss is not the result of a Peril Insured Against, therefore Section 12.a is not applicable.

## COUNT II

19. Farmers & Mechanics is entitled to summary judgment as to Count II of the Plaintiff's Second Amended Complaint, as Count II does not contain a cause of action.

20. Under West Virginia law, the *doctrine* of reasonable expectations provides that,

[w]ith respect to insurance contracts, the doctrine of reasonable expectations is that the objectively reasonable expectations of applicants and intended beneficiaries regarding the terms of insurance contracts will be honored even though painstaking study of the policy provisions would have negated those expectations.

Boggs v. Camden-Clark Mem. Hosp. Corp., 225 W.Va. 300, 310, 693 S.E.2d 53, 63 (2010)

(quoting National Mut. Ins. Co. v. McMahan & Sons, Inc., Syl. Pt. 8, 177 W.Va. 734, 356 S.E.2d 488 (1987), *abrogated on other grounds by*, Potesta v. United States Fid. & Guar. Co., 202 W.Va. 308, 504 S.E.2d 135 (1998)).

21. "In West Virginia, the doctrine of reasonable expectations is limited to those instances...in which the policy language is ambiguous." Boggs v. Camden-Clark Mem. Hosp. Corp., 225 W.Va. 300, 310, 693 S.E.2d 53, 63 (2010) (quoting National Mut. Ins. Co. v. McMahan & Sons, Inc., Syl. Pt. 8, 177 W.Va. 734, 356 S.E.2d at 496). *See also* Jenkins v. State Farm Mut. Auto. Ins. Co., 219 W.Va. 190, 196, 632 S.E.2d 346, 352 (2006) ("[t]he doctrine of reasonable expectations is essentially a rule of construction"); Luikari v. Valley Brooke Concrete & Supply, Inc., 216 W.Va. 748, 755, 613 S.E.2d 896, 903 (2005) ("The doctrine of reasonable expectations is essentially a rule of construction").

22. "Reasonable Expectations" is not an independent cause of action under West Virginia law. Therefore, Farmers & Mechanics motion for summary judgment as to Count II is GRANTED.

### COUNT III

23. Farmers & Mechanics is entitled to summary judgment as to Count III of the Plaintiff's Second Amended Complaint regarding the sale of the insurance policy.

24. Given Ms. Bradley's admissions, including that she did not talk to anyone at Farmers & Mechanics until 2005, Farmers & Mechanics cannot be held liable for a claim regarding the sale of the insurance policy. Therefore, Farmers & Mechanics's motion for summary judgment as to Count III is GRANTED.

### COUNT V AND VI

25. Farmers & Mechanics is entitled to summary judgment as to Counts V and Counts VI of the Plaintiff's Second Amended Complaint alleging Fraud and Negligent Misrepresentation as there are no issues of material fact.

26. Count V asserts a cause of action against the defendants, including Farmers & Mechanics for fraud. Count VI asserts a cause of action against defendants, including Farmers & Mechanics for negligent misrepresentation.

27. The allegations within the Second Amended Complaint state that the defendants committed fraud and/or negligent misrepresentation by selling and continuing to bill and collect payments on a contract that they knew was worthless due to the condition of Ms. Bradley's home at the time it was sold or payments were accepted.

28. Pursuant to controlling West Virginia law, the essential elements of negligent representation and fraud are as follows:

“...(1)that the act claimed to be fraudulent was the act of the defendant or induced by him; (2) that it was material and false; that plaintiff relied on it and was justified under the circumstances in relying upon it; and (3) that he was damaged because he relied on it.”

Folio v. City of Clarksburg, 221 W.Va. 397, 404, 655 S.E.2d 143, 150 (2007) (*quoting Horton v. Tyree*, 104 W.Va. 238, 242, 139 S.E. 737 (1927) (*quoting* syl. Pt. 1, Lengyel v. Lint, 167 W.Va. 272, 280 S.E.2d 66 (1981))).

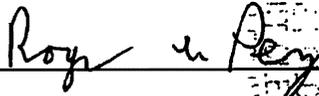
29. Based on her own testimony, Ms. Bradley cannot point to any act of Farmers & Mechanics that was fraudulent and that she relied upon to her detriment. Therefore, Farmers & Mechanics’s motion for summary judgment as to Counts V and VI is GRANTED.

It seems appropriate in this case to use the old adage “you get what you pay for.” Ms. Bradley purchased a named peril policy and is only entitled to coverage that falls under one of those named perils.

Based on the foregoing Findings of Facts and Conclusions of Law, it is accordingly **ORDERED, ADJUDGED** and **DECREED** that defendant Farmers & Mechanics Mutual Insurance Company’s Motion for Summary Judgment is **GRANTED**.

It is further Ordered that the Clerk of this Court send a copy of this Order to all counsel of record.

Entered this 11th of May 2012.

  
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JUDGE ROGER L. PERRY

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CLERK OF COURT

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