STATE OF CONNECTICUT

DOCKET NO.: CV-15-6009841-S

SUPERIOR COURT

SARAH TOOMEY, ET AL.

JUDICIAL DISTRICT
OF TOLLAND

V.

CENTRAL MUTUAL INSURANCE
COMPANY, ET AL.

AUGUST 3, 2017

MEMORANDUM OF DECISION: DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT (#s 113, 144)

This is one of many cases in Tolland County involving claims of extensive pattern cracking to basement walls caused by a chemical compound in the concrete provided by the J.J. Mottes Concrete Company (JJ Mottes) that was used to construct the basement walls of numerous homes, including the plaintiffs'. In this case, the plaintiffs, Sarah A. Toomey and Richard T. Toomey, claim that the defendants, Central Mutual Insurance Company (Central Mutual) and The Travelers Home and Marine Insurance Company (Travelers), breached their homeowners' policies when they denied coverage for the "collapse" of the basement walls of their home and that the denial of their claim also constituted a violation the Connecticut Unfair Trade Practice Act and the Connecticut Unfair Insurance Practices Act (CUTPA/CUIPA). The defendants, whose homeowners' policies in this case contain the same definition of "collapse," have moved for summary judgment on all counts of the complaint, for essentially the same reasons. The plaintiffs have opposed both motions. The parties have thoroughly briefed the issues in this case and the court has heard arguments. This court has recently had occasion to consider the policy language at issue here in a case involving very similar facts in *Jemiola* v. *Hartford Casualty Ins. Co.*, Superior Court, judicial district of Tolland, Docket No.

CV-15-6008837-S (March 2, 2017, *Cobb, J.*) (*Jemiola)*, in which this court granted summary judgment in favor of the defendant insurance company. Having considered the parties' arguments and submissions in this case, the court sees no reason to depart from its analysis in *Jemiola*, and therefore concludes that the defendants are entitled to judgment on all of the plaintiffs' claims for the same reasons.

UNDISPUTED MATERIAL FACTS

The plaintiffs purchased their home, which was built in 1986 and is located at 511 Old Stafford Road in Tolland, in the summer of 2009. Prior to purchasing the property, the plaintiffs had it inspected. At that time, one half of the basement was finished. The plaintiffs did not notice any cracks in the basement walls, but the inspection report indicated that the walls had "typical cracks" for the age of the house and recommended that the plaintiffs seal the cracks. After purchasing the home, the plaintiffs installed shelving throughout the unfinished portion of the basement for storage purposes, which obscured the concrete walls.

In the fall of 2014, the plaintiffs listed the home for sale in connection with their pending divorce. In November 2014, a prospective buyer had the home inspected. The prospective buyer's home inspector noticed cracks of concern in the basement walls and recommended that they be examined by a structural engineer. The prospective buyer retained William F. Neal, P.E., to examine the cracks, and he informed the plaintiffs that they had "bad concrete." In his report, Mr. Neal stated that he observed that the basement walls had numerous "spider-web cracks," and that the basement walls had begun to "bow inward" in a number of locations. Mr. Neal opined that the likely cause of the "foundation distress is alkali-silica-reaction (ASR)," which he explained is "a chemical reaction between alkali aggregate and silica in the concrete mix. It typically causes this type of distress to be visible 15 to 20

years after the foundation is poured. The ASR will continue to deteriorate the concrete and the basement walls will continue to bulge inward until they structurally fail. There is no way to arrest the process and there is no way to repair the existing damage. The basement walls at this time are structurally unsound and corrective action is necessary." He then stated that "it is not possible to predict how quickly the foundation will deteriorate to the point it is structurally dangerous. I therefore urge you to develop a corrective plan with a licensed contractor as soon as possible."

Upon receipt of this report, the prospective buyer decided not to purchase the home and the plaintiffs have since taken it off the market.

The plaintiffs retained David Grandpré, P.E., who inspected the home and confirmed Mr. Neal's findings. He also indicated that the house exhibits cracking, bulging, bending, leaning, shrinkage, and expansion. Mr. Grandpré believes that the pattern cracking condition is either caused by a ferrous sulfide reaction or an alkali silica reaction which causes the concrete to fracture internally. The internal fracturing exhibits itself as "map cracking" on the concrete walls. This pattern cracking in the plaintiffs' basement has occurred over time and, according to Mr. Grandpré, began the when the concrete was poured. In his opinion, this condition will eventually lead to the basement walls being unable to support the upper structure and the entire home will fall to the ground. In his opinion, the basement walls are structurally impaired, but he cannot say when the condition of the basement walls will worsen such that the walls will fall into the basement.

The plaintiffs' home and basement walls remain standing. The plaintiffs have resided in the home continuously since they purchased it in 2009. The basement foundation walls have not fallen down or caved in. No evidence has been presented that the plaintiffs have been told

that the home is not presently unsuitable for residential purposes or that they should move out of the house due to its dangerous condition. Although Richard Toomey does not live in the home any longer due to the divorce, he testified that they have not been informed that their home is unsafe to live in and that to his knowledge the basement is still used for storage and a play room for the children. Sarah Toomey lives in the home with the children and pets. Richard Toomey testified that he has not insisted that the family move out of the home but that if he was told or thought that the house was about to fall down, he would insist that they leave the premises. Sarah Toomey exercises in the finished portion of the basement five to seven times per week.

At all times since 2009, the plaintiffs have insured their home, first with the defendant Central Mutual from 2009 to 2012 and later with defendant Travelers. The plaintiff Richard Toomey indicated that he did not read any of the policies before he purchased them. Both of the defendants' policies provided "additional coverage" for "collapse" and define collapse as follows:

> With respect to this Additional Coverage:
>
> (1) Collapse means an abrupt falling down or caving in of a building or any part of a building with the result that the building or part of the building cannot be occupied for its current intended purpose.
>
> (2) A building or any part of a building that is in danger of falling down or caving in is not considered to be in a state of collapse.
>
> (3) A part of a building that is standing is not considered to be in a state of collapse even if it has separated from another part of the building.
>
> (4) A building or any part of a building that is standing is not considered to be in a state of collapse even if it shows evidence of cracking, bulging, sagging bending leaning, settling, shrinkage or expansion.

In 2014, the plaintiffs submitted a coverage claim to Travelers and, in 2015, submitted a coverage claim to Central Mutual under the collapse provisions of their policies. Both defendants reviewed and investigated the claims and denied them finding that the plaintiffs' home has not suffered a collapse under the policies.

DISCUSSION

The plaintiffs' complaint is in four counts, the first two are against Central Mutual for breach of contract (count one) and violation of CUTPA/CUIPA (count two) and the third and fourth counts are asserted against Travelers on the same grounds. In the breach of contract claims, the plaintiffs assert that the defendants violated the terms of the homeowner's insurance policies that provided coverage for "collapse of a building or a part of a building caused by . . . decay that is hidden from view . . . use of defective materials or methods in construction, remodeling, or renovation." In counts two and four, the plaintiffs assert that the defendants violated CUTPA/CUIPA by engaging in a general business practice to deny coverage for similar concrete decay claims.

The defendant Travelers has denied the essential allegations of the plaintiffs' complaint and asserted seventeen special defenses. The defendant Central Mutual has also denied the essential allegations of the plaintiffs' complaint and has asserted twenty-two special defenses. The defendants have both moved for summary judgment on the plaintiffs' complaint, not on their special defenses, and argue that the undisputed material facts establish that the plaintiffs' losses are not covered under the policy provisions and that if the court grants summary judgment on the breach of contract counts and finds that they correctly denied coverage, then the plaintiffs' remaining CUTPA/CUIPA counts cannot survive. The defendants also claim that their coverage positions were fairly debatable and liability not

reasonably clear, and therefore even if there was a breach of the policies, they did not violate CUTPA/CUIPA.

The plaintiffs oppose the defendants' motions for summary judgment and assert, as to each, that the record suggests that the basement walls of their home have suffered a "collapse," and to the extent the record does not clearly demonstrate a covered collapse, the lack of clarity arises from factual issues that preclude summary judgment. They also assert that the defendants wrongfully denied their claim for coverage as a part of a general business practice to wrongfully deny their claim or, in the alternative, that there are issues of fact as to this claim.

The court considers both of the defendants' motions for summary judgment and the plaintiffs' oppositions together because the undisputed facts, arguments, and policy provisions are essentially the same.

A. Summary Judgment Standards

The standards for considering motions for summary judgment are well established. Practice Book § 17-49 provides that summary judgment "shall be rendered forthwith if the pleadings, affidavits and other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Our Supreme Court has recently set forth the burden on each party: "In seeking summary judgment, it is the movant that has the burden of showing the nonexistence of any issue of fact. The courts are in entire agreement that the moving party for summary judgment has the burden of showing the absence of any genuine issue as to all the material facts, which, under applicable principles of substantive law, entitle him to a judgment as a matter of law. The courts hold the movant to a strict standard. To satisfy his burden the movant must make a

showing that it is quite clear what the truth is, and that excludes any real doubt as to the existence of any genuine issue of material fact. . . . As the burden of proof is on the movant, the evidence must be viewed in the light most favorable to the opponent. . . . When documents submitted in support of a motion for summary judgment fail to establish that there is no genuine issue of material fact, the nonmoving party has no obligation to submit documents establishing the existence of such an issue. . . . Once the moving party has met its burden, however, the opposing party must present evidence that demonstrates the existence of some disputed factual issue. . . . It is not enough, however, for the opposing party merely to assert the existence of such a disputed issue. Mere assertions of fact . . . are insufficient to establish the existence of a material fact and, therefore, cannot refute evidence properly presented to the court under Practice Book [§ 17-45]." (Internal quotation marks omitted.) *State Farm Fire & Casualty Co.* v. *Tully*, 322 Conn. 566, 573, 142 A.3d 1079 (2016); see *Stuart* v. *Freiberg*, 316 Conn. 809, 820-21, 116 A.3d 1195 (2015).

"[S]ummary judgment is appropriate only if a fair and reasonable person could conclude only one way. . . . [A] summary disposition . . . should be on evidence which a jury would not be at liberty to disbelieve and which would require a directed verdict for the moving party. . . . [A] directed verdict may be rendered only where, on the evidence viewed in the light most favorable to the nonmovant, the trier of fact could not reasonably reach any other conclusion than that embodied in the verdict as directed." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *Dugan* v. *Mobile Medical Testing Services, Inc.*, 265 Conn. 791, 815, 830 A.2d 752 (2003); see *Farrell* v. *Twenty-First Century Ins. Co.*, 301 Conn. 657, 662, 21 A.3d 816 (2011).

"In ruling on a motion for summary judgment, the court's function is not to decide issues of material fact, but rather to determine whether any such issues exist. . . . Because [l]itigants have a constitutional right to have factual issues resolved by the jury . . . motion[s] for summary judgment [are] designed to eliminate the delay and expense of litigating an issue when there is no real issue to be tried." (Citations omitted; internal quotation marks omitted.) *Maltas* v. *Maltas*, 298 Conn. 354, 365-66, 2 A.3d 902 (2010); see *Grenier* v. *Commissioner of Transportation*, 306 Conn. 523, 534-35, 51 A.3d 367 (2012).

B. Counts One and Three - Breach of Contract

"The elements of a breach of contract action are the formation of an agreement, performance by one party, breach of the agreement by the other party and damages." (Internal quotation marks omitted.) *Keller* v. *Beckenstein*, 117 Conn. App. 550, 558, 979 A.2d 1055, cert. denied, 294 Conn. 913, 983 A.2d 274 (2009). There is no dispute that the parties entered into contracts – homeowner's insurance policies – during relevant times, and that the plaintiffs paid all of their annual premiums over that period of time.

The defendants assert that they are entitled to summary judgment on the plaintiffs' breach of contract claims because the undisputed material facts establish that they did not breach the policies in denying coverage for this claim. In particular, the defendants claim that the definition of "collapse" is unambiguous, requiring "an abrupt falling down or caving in of a building or any part of a building with the result that the building or part of the building cannot be occupied for its current intended purpose." The defendants argue that the plaintiffs' claim is not covered under the policies and they are therefore entitled to summary judgment because the undisputed facts establish that the house has not "abruptly" "fallen down" or "caved in," rather, it is still standing and Sarah Toomey remains living in the home. The

plaintiffs dispute the defendants' claims and argue that the policies' definition of collapse is internally inconsistent and ambiguous.

The standards governing interpretation of insurance policies are well established. "[A]n insurance policy is to be interpreted by the same general rules that govern the construction of any written contract." (Internal quotation marks omitted.) *Shenkman-Tyler* v. *Central Mutual Ins. Co.*, 126 Conn. App 733, 742, 12 A.3d 613 (2011); see *Connecticut Ins. Guaranty Assn.* v. *Fontaine,* 278 Conn. 779, 784-85, 902 A.2d 18 (2006). "[P]rovisions in insurance contracts must be construed as laymen would understand [them] and not according to the interpretation of sophisticated underwriters and that the policyholder's expectations should be protected as long as they are objectively reasonable from the layman's point of view." (Internal quotation marks omitted.) *Vermont Mutual Ins. Co.* v. *Walukiewicz*, 290 Conn. 582, 592, 966 A.2d 672 (2009). Where policy terms are unambiguous, they should be accorded their natural and ordinary meaning and "the courts cannot indulge in a forced construction ignoring provisions or so distorting them as to accord a meaning other than that evidently intended by the parties." (Internal quotation marks omitted.) *Jacaruso* v. *Lebski*, 118 Conn. App. 216, 233, 983 A.2d 45 (2009). "Contract language is unambiguous when it has a definite and precise meaning . . . concerning which there is no reasonable basis for a difference of opinion." (Internal quotation marks omitted.) *Isham* v. *Isham*, 292 Conn. 170, 181, 972 A.2d 228 (2009).

Where a policy term is susceptible to more than one meaning, the term should be construed against the insurance company. See *New London County Mutual Ins. Co.* v. *Zachem*, 145 Conn. App. 160, 165, 74 A.3d 525 (2013). Ambiguous policy terms are construed in favor of coverage. See *Lexington Ins. Co.* v. *Lexington Healthcare Group, Inc.*

311 Conn. 29, 66, 84 A.3d 1167 (2014); *Johnson* v. *Connecticut Ins. Guaranty Assn.*, 302 Conn. 639, 642, 31 A.3d 1004 (2011). Where an insurance policy is ambiguous, extrinsic evidence as to the parties' intent may properly be considered, and the determination of the parties' intent is a question of fact. *Hartford Accident & Indemnity Co.* v. *Ace American Reinsurance Co.*, 284 Conn. 744, 762-63, 936 A.2d 224 (2007).

Before examining the specific policy language at issue, the court sets forth some relevant legal history. In 1986, the Connecticut Supreme Court considered an insurance coverage dispute in which the issue was whether the undefined word "collapse" in the homeowners' policy was ambiguous. *Beach* v. *Middlesex Mutual Assurance Co.*, 205 Conn. 246, 532 A.2d 1297 (1987). In *Beach*, the defendant insurance company denied the homeowners' claim and argued that the word "collapse" in the policy unambiguously connoted a sudden and complete catastrophe of a cataclysmic nature. The court disagreed and found that the word "collapse" in the policy was ambiguous. It then adopted the majority view of courts that had similarly considered policies that did not define the term, and determined that collapse meant "any substantial impairment of the structural integrity of a building." Id., 252. In its decision, the Court invited the defendant insurance company to define the term "collapse" stating: "If the defendant wished to rely on a single facial meaning of the term 'collapse' as used in its policy, it has the opportunity expressly to define the term to provide for the limited usage it now claims to have intended." Id., 251.

The defendants in this case have included a definition of "collapse" in their policies which has been set forth above but the court repeats here:

With respect to this Additional Coverage:

> (1) Collapse means an abrupt falling down or caving in of a building or any part of a building with the result that the

building or part of the building cannot be occupied for its current intended purpose.

(2) A building or any part of a building that is in danger of falling down or caving in is not considered to be in a state of collapse.

(3) A part of a building that is standing is not considered to be in a state of collapse even if it has separated from another part of the building.

(4) A building or any part of a building that is standing is not considered to be in a state of collapse even if it shows evidence of cracking, bulging, sagging bending leaning, settling, shrinkage or expansion.

b. We insure for direct physical loss to covered property involving collapse of a building or any part of a building if the collapse was caused by one or more of the following: . . . Use of defective material or methods in construction, remodeling or renovation.

The use of the phrase "abrupt falling down or caving in of a building or part of a building" appears to be a response to the *Beach* court's suggestion that the defendant insurance company define the term "collapse," in that it clarifies that a "collapse" requires a sudden and catastrophic type event.

As indicated, this court has had occasion to interpret this "collapse" definition in a JJ Mottes concrete case.[1] See *Jemiola*, supra, Superior Court, Docket No. CV-15-6008837-S. In *Jemiola*, this court followed a Connecticut Federal District Court, which is a similar JJ Mottes case, and other courts across the country in finding that this definition of collapse is unambiguous. See *Alexander* v. *General Ins. Co. of America*, United States District Court, Docket No. 3:16-CV-59 (SRU) (D. Conn. July 7, 2016), on reconsideration, *Alexander* v. *General Ins. Co. of America*, United States District Court, Docket No. 3:16-CV-59 (SRU) (D. Conn. January 17, 2017) ("[p]laintiffs cannot avoid the fact that their basement walls are still

[1]There is a Connecticut Superior Court case that found in a different context this policy definition of collapse not to be ambiguous. *The Sports Domain, LLC* v. *Max Specialty Ins. Co.*, Superior Court, judicial district of New Haven, Docket No. CV-09-5025291-S (December 19, 2011, *Hadden J.T.R.*).

standing. The only allegations of impairment to the structural integrity of the walls are allegations that the walls are cracking or . . . they are bulging. Both conditions are expressly excluded under the definition of the policy and it is clear that no collapse has occurred"); see also *Squairs* v. *Safeco National Ins. Co.*, 25 N.Y.S.3d 502, 136 A.D.3d 1393, appeal denied, 27 N.Y.3d 907, 56 N.E.3d 900, 36 N.Y.S.3d 620 (2016) (determining that the collapse provision is unambiguous and finding there had not been a collapse because the building was still standing); *Rector St. Food Enterprises, Ltd.* v. *Fire & Casualty Ins. Co. of Connecticut*, 827 N.Y.S.2d 18, 35 A.D.3d 177 (2006) (rejecting the plaintiff's public policy arguments and determining the collapse provision is unambiguous); *Residential Management, Inc.* v. *Federal Ins. Co.*, 884 F. Supp. 2d 3 (E.D.N.Y. 2012) (following New York precedent and determining that the four section definition of collapse in the policy is clear enough to clarify any potential ambiguity); *Mount Zion Baptist Church* v. *Guideone Elite Ins. Co.*, 808 F. Supp. 2d 1322 (N.D.G.A. 2011) (determining that the collapse provision was unambiguous because of the specific definition included within the policy); *Miller* v. *First Liberty Ins. Co.*, United States District Court, Docket No. 07-1338 (TNO) (E.D.P.A. June 17, 2008) (concluding that the collapse provision, including the four part definition of collapse, is unambiguous).

Applying the unambiguous definition of "collapse" in the *Jemiola* case, the court found that:

> [T]here is no genuine issue of material fact that the plaintiff's loss is not covered because there has been no sudden or abrupt falling down or caving in, pursuant to subsection b (1). Subsection b (1), of the Additional Coverage section, provides the primary definition of "collapse" and the following subparts, (2), (3), and (4), provide additional clarification of that definition. The definition utilizes plain and ordinary language understandable to a layman. "Abrupt" is generally understood to mean "characterized by or involving action or change without preparation or warning." Miriam-Webster's Collegiate Dictionary (11th Ed. 2003). Abrupt is also defined as "unexpectedly sudden." American Heritage College Dictionary (5th Ed. 2011). "Sudden" has recently

been found to mean "a rapid or otherwise abrupt manner." See *Buell* v. *Greater New York Mutual Ins. Co.*, [259 Conn. 527, 791 A.2d 489 (2002)] (concluding that the term "sudden," as used in an insurance policy's "pollution exclusion," to be clear and unambiguous, and expressly rejecting the plaintiff's argument that the "sudden" should be construed to mean "unexpected"). "Unexpected" is generally defined to mean "occurring without warning; unforeseen"; American Heritage College Dictionary (5th Ed. 2011); and is generally considered a synonym for "abrupt" or "sudden." The word "abrupt" is unambiguous and the damage to the plaintiff's basement walls was not "abrupt," but rather is happening over time.

The damage to the plaintiff's basement walls is due to defective material in the concrete that is causing it to deteriorate over time. The basement walls will, according to the plaintiff's expert, eventually give way, causing the house to fall into the basement. However, this has not happened yet. The plaintiff's expert offers no opinion as to when this event will occur. Thus, at this point in time, the plaintiff's home and or basement walls are only in danger of falling down or caving in and her home remains standing. Under these circumstances, the plaintiff cannot meet the "abrupt falling down and caving in" portion of the definition. Additionally, under these circumstances, the plaintiff's loss is excluded under subpart b(2) of the definition, which clarifies that a "collapse" does not include a building that "is in danger" of falling down or caving in.

Furthermore, the plaintiff's home can still be occupied "for its intended current purposes," pursuant to the definition. It is undisputed that the plaintiff has lived in the home continuously since 1986 and still lives there today. In addition to living in her home, the plaintiff continues to use her basement. The home is still standing and has not been condemned and she has not been forced to move out of it due to any imminent risk that the basement walls will give way. Also, under these circumstances, the plaintiff's loss is also excluded under subpart b(4) of the definition which clarifies that a building is not in a state of "collapse" if "it is standing . . . even if it shows evidence of cracking, bulging, sagging bending leaning, settling, shrinkage or expansion."

Thus, the court concludes that the policy definition of "collapse," when applied to the circumstances of this case, is unambiguous. Applying that unambiguous definition here, the court finds that the defendant did not breach the policies in place from 2005 forward, when it denied the plaintiff's insurance claim. Accordingly, the defendant is entitled to summary judgment on count one, the plaintiff's breach of contract count.

(footnote omitted). *Jemiola*, supra, Superior Court, Docket No. CV-15-6008837-S.

This case is indistinguishable from *Jemiola*, both factually and based on the arguments raised by the parties. The plaintiffs' home is still standing and habitable. The walls of the home have not fallen or caved in, and the deterioration of the walls is

occurring over time not abruptly. Sarah Toomey continues to occupy the home and basement in the same way as when she moved into the house in 2009. The family continues to use the basement for all of the same purposes, including; storage, as a recreation room, and a space to use exercise equipment. They have not been advised or ordered to leave the home due to a dangerous condition. Although the plaintiffs' expert opines that the condition of the basement walls will continue to worsen and eventually fall or cave in, they have not yet done so and he could not say with any specificity as to when that could occur.

The court concludes that the policies' definition of "collapse," when applied to the circumstances of this case, is unambiguous, thus, the court finds that the defendants did not breach the policies when it denied the plaintiffs' insurance claim. Accordingly, the defendants are entitled to summary judgment on counts one and three, the plaintiffs' breach of contract counts.

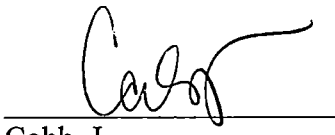
C. Counts Two and Four – CUTPA/CUIPA

The plaintiffs' CUTPA/CUIPA claims fail in view of the court's finding that there was not coverage under the policies, and, consequently, the plaintiffs have not sustained an injury. See *Abrahams* v. *Young & Rubicam, Inc.*, 240 Conn. 300, 306, 692 A.2d 709 (1997) ("in order to prevail in a CUTPA action, a plaintiff must establish both that the defendant has engaged in a prohibited act *and* that, 'as a result of' this act, the plaintiff suffered an injury" [emphasis original]). Thus, the defendants are entitled to summary judgment on counts two and four.

CONCLUSION

For all of the foregoing reasons, the defendants' motions for summary judgment (#s 113 and 144) are granted as to all counts of the complaint.

So ordered.



Cobb, J.