STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND
BUSINESS COURT

RA2 TROY, LLC, a Delaware limited liability company,

Plaintiff, **Case No. 21-189427-CB**

Hon. Michael Warren

v

FI 135 TROY, LLC, a Michigan limited liability company, and ICA ACQUISITION TROY, LLC, a Michigan limited liability company,

Defendants.

OPINION AND ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY DISPOSITION PURSUANT TO MCR 2.116(C)(10)

At a session of said Court, held in the County of Oakland, State of Michigan April 28, 2022

PRESENT: HON. MICHAEL WARREN

OPINION

I
Overview

The instant action is before this Court on Defendants' Motion for Summary Disposition Pursuant to MCR 2.116(C)(10).[1] Having reviewed the Motion, Response, and Reply and otherwise being fully informed in the premises, oral argument is dispensed as it would not assist the Court in its decision-making process.[2]

At stake in this Motion is whether a party may avoid the unambiguous dictates of an insurance contract or an insured covenants agreement? Because this Court does not rewrite contractual arrangements, the answer is "no," and the Defendants are granted summary disposition.

II
Factual Background

In August 1998 the Plaintiff RA2 Troy, LLC (the "Plaintiff") acquired real property located at 2971 W. Maple Road in Troy, Michigan (the "Property"). The purchase was

[1] The Plaintiff seeks judgment in its favor under MCR 2.116(I)(2).

[2] MCR 2.119(E)(3) provides court with discretion to dispense with or limit oral argument and to require briefing. MCR 2.116(G)(1) specifically recognizes application of MCR 2.119(E)(3) to summary disposition motions. Subrule (G)(1) additionally authorizes courts to issue orders establishing times for raising and asserting arguments. This Court's Scheduling Order clearly and unambiguously sets the time for asserting and raising arguments, and legal authorities to be in the briefing – not to be raised and argued for the first time at oral argument. Therefore, both parties have been afforded due process as they each had notice of the arguments and an opportunity to be heard by responding and replying in writing, and this Court has considered the submissions to be fully apprised of the parties' positions before ruling. Because due process simply requires parties to have a meaningful opportunity to know and respond to the arguments and submissions which has occurred here, the parties' have received the process due.

financed through a $4,298,968.26 loan (the "Loan" and/or the "Loan Agreement") from PW Real Estate Investments, Inc. (the "Lender").[3] The Loan was secured by a mortgage on the Property. The Plaintiff leased the Property to Rite Aid of Michigan, Inc., as lessee and Rite Aid Corporation, as guarantor.

An express condition precedent to the Loan was that the "Lender shall have received a residual value insurance policy issued by Financial Services Limited in amount, form and substance and with reinsurance agreements and endorsements reasonably satisfactory to the Lender."[4] In accordance with this condition precedent, the Plaintiff purchased a Residual Value Insurance Policy (the "RVI Policy") from the Financial Services Limited (the "Insurer"). The Plaintiff was the "Named Insured," and the Lender was named as the "Additional Named Insured."[5] The "Insured Value" was $1,785,457, the non-refundable premium paid was $74,418, and the policy period ran from August 28, 1998 to September 1, 2020.[6]

Under the RVI Policy:

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[3] Defs' Motion, Exh A, Loan Agreement Dated August 24, 1998.

[4] *Id.* at § 2.02(r). The parties describe "residual value insurance" as:

> [A] risk management tool that asset-based lenders sometimes use to manage the risk that their collateral will depreciate faster than projected or will unexpectedly decline in value . . . By purchasing RVI, a lender is assured that its collateral or a given collateral pool, as enhanced by any RVI claims that are available, will be sufficient in value to retire the balance of the debt investment at maturity. . . . RVI, as conceived and utilized by lenders in many industries for decades was and is used to assist their borrowers or "insureds" achieve favorable financing terms. [Complaint ¶¶ 24-25; Def's Motion, p 3.]

[5] Defs' Motion, Exh C, RVI Policy Declaration.

[6] *Id.*

> In the event of receipt of Notice of Claim from the Additional Named Insured, and subject to the terms and conditions hereof, the Company shall pay to the Additional Named Insured the amount of the Insured Value, subject to the terms and the conditions, exclusions and limitations of this Policy, determined as of the Termination Date.[7]

Pursuant to Article V(a) of the RVI Policy:

> The Company will pay to the Additional Named Insured an amount equal to the Insured Value, if:
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> (i) a valid Notice of Claim has been given;
> (ii) the Additional Named Insured shall not have received payment in full of all amounts owing under the Loan; and
> (iii) all of the terms and conditions of this Policy have been satisfied.[8]

In lieu of making the payment under Article V(a), the Insurer had, subject to certain notice provisions, "the option in its sole discretion . . . to purchase the Loan from the Additional Named Insured for a purchase price equal to all amounts payable under the Loan, but in no event greater than the Insured Value."[9]

On August 28, 1998, the Plaintiff and the Insurer entered into an "Insured Covenants Agreement." The Recitals section of the Insured Covenants Agreement states, in relevant part:

> FSL has issued a Residual Value Insurance Policy, which Policy includes an Additional Named Insured Endorsement (the "Policy") relating to the Property, pursuant to which FSL has agreed, among other things . . . that it

[7] *Id.,* Exh C, RVI Policy, Article I, "Agreement of Insurance."

[8] *Id.,* Article V(a).

[9] *Id.*, Article V(d).

> will pay to the . . . "Additional Named Insured" . . . an amount equal to the "Insured Value" . . . in the event that the Note is not repaid in full by Owner on or before the Termination Date. . . .
>
> ***
>
> Owner has agreed that if FSL makes payment in full to the Additional Insured pursuant to Articles I and V of the Policy and the Additional Named Insured Endorsement to the Policy, the Property will immediately be transferred to FSL for no additional consideration other than such payment to the Additional Named Insured pursuant to the Policy.[10]

Section 4(a) of the Agreement provides:

> Transfer of Title.
>
> In the event that FSL makes payment for a Claim under Articles I and V of the Policy, the Owner shall cause the deed to the Property to be immediately delivered to FSL, without payment of additional consideration by FSL. Owner hereby acknowledges that payment by FSL under the Policy is the equivalent of a purchase of the Property by FSL for an amount equal to the amount paid under the Policy and used in satisfying all or part of Owner's obligations under the Note, and that such payment constitutes full and fair consideration for the transfer of title of the Property to FSL.[11]

The Insurer subsequently assigned its rights under the Insured Covenants Agreement with the Plaintiff to Defendant ICA Acquisitions Troy, LLC ("ICA Acquisitions").[12]

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[10] Defs' Motion, Exh D, Insured Covenants Agreement, Recitals 4 and 6.

[11] *Id.,* Section 4(a).

[12] *Id.,* Exh H, "Assignment of Insured Covenants Agreement."

That is all a long way of saying, to obtain the Loan from the Lender, the Plaintiff was required to take out insurance (i.e., the RVI Policy) which protected the Lender and gave the Plaintiff no rights to the insurance proceeds.

On September 1, 2020, the Loan matured and a balloon payment of $1,803,640.55 became due.[13] The Plaintiff was unable to secure financing to pay the balloon payment.[14] The successor-in-interest to the Lender sent a "Notice of Claim" under the RVI Policy to the Insurer and the Insurer paid the amount due in September 2020.[15]

The Loan was assigned from the original Lender to the Insurer's designee and then to Defendant FI 135 Troy, LLC ("FI 135 Troy").[16]

On July 28, 2021, counsel for Defendant FI 135 Troy (the assignee to the rights of the Lender under the Loan) sent the Plaintiff a demand letter stating that the Loan was in default for the failure to make the final balloon payment on September 1, 2020.[17] FI 135 Troy demanded payment of "the amount owing on the Loan" stated as $1,637,428.55.[18] On August 6, 2021, Defendant ICA Acquisition Troy (the assignee to the rights of the Insurer under the Insured Covenants Agreement) sent a "Notice of Default and Demand

[13] Complaint, ¶ 78.
[14] *Id.* at ¶ 79.
[15] Defs' Motion, Exh E, Notice of Claim; Exh F, Proof of Payment. Complaint ¶ 80.
[16] *Id.*, Exh G, Loan Assignments. As will be discussed in greater detail, this was apparently done pursuant to Section 8 of the Additional Named Insurance Endorsement to the RVI Policy.
[17] Pl's Response, Exhibit K, Correspondence dated July 28, 2021.
[18] *Id.*

for Deed" to the Plaintiff.[19] ICA Acquisitions Troy claimed that because the Insurer paid the "full Insured Value on September 14, 2020" the Plaintiff was required, under Section 4(a) of the Insured Covenants Agreement, to transfer the Property to ICA Acquisition Troy.[20] In their Motion, the Defendants assert that "[t]o avoid conflict regarding their respective rights to the Property, FI 135 and Acquisition Troy entered into a Subordination Agreement by which FI 135 subordinated its lien rights on the Property to Acquisition Troy's rights under the [Insured Covenants Agreement.]"[21]

Soon after the demands were made by the Defendants, the Plaintiff filed the instant action seeking Declaratory Relief (Count I) and alleging Breach of Contract (Count II). The Defendants bring this Motion for Summary Disposition pursuant to MCR 2.116(C)(10).

III
Standard of Review

A motion for summary disposition pursuant to MCR 2.116(C)(10) tests the factual support for a claim or defense. See, e.g., MCR 2.116(G)(3)(b); *Quinto v Cross & Peters Co*, 451 Mich 358, 362 (1996). Accordingly, "[i]n evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion." *Maiden v Rozwood,* 461 Mich 109, 119-

[19] *Id.,* Exh L, Correspondence dated August 6, 2021.
[20] *Id.*
[21] Defs' Motion, p 2 n 1.

120 (1999); MCR 2.116(C)(10); MCR 2.116(G)(4); *Quinto,* 451 Mich at 358. The moving party "must specifically identify the issues" as to which it "believes there is no genuine issue" of material fact and support its position as provided in MCR 2.116. MCR 2.116(G)(4).

Under Michigan law, the moving party may satisfy its burden of production under MCR 2.116(C)(10) by demonstrating to the court that the non-moving party's evidence is insufficient to establish an essential element of the nonmoving party's claim. *Quinto,* 451 Mich at 361. If the moving party properly supports its motion, the burden "then shifts to the opposing party to establish that a genuine issue of disputed fact exists." *Id*. at 362. If the moving party fails to properly support its motion for summary disposition, the nonmoving party has no duty to respond and the trial court should deny the motion. MCR 2.116(G)(4); see also *Meyer v City of Center Line*, 242 Mich App 560, 575 (2000) (concluding that the trial court erred when it granted an improperly supported motion for summary disposition under MCR 2.116(C)(10)).

Granting a motion for summary disposition under MCR 2.116(C)(10) is warranted if the substantively admissible evidence shows that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law. *Quinto*, 451 Mich at 362-363.

IV

A
Count I Declaratory Relief

As noted above, Defendant FI 135 Troy, as the assignee to the rights of the Lender under the Loan, seeks payment of $1,637,428.55 for "the amount owing on the Loan." Defendant ICA Acquisition, the assignee to the rights of the Insurer under the Insured Covenants Agreement, claims that the Plaintiff is required, under Section 4(a) of the Insured Covenants Agreement, to transfer the Property to ICA Acquisition.

In Count I of the Complaint, the Plaintiff seeks a declaration that it is not responsible for payment of the amount owing on the Loan. The crux of the Plaintiff's argument is that the "the Mortgage Instruments were retired in full by the payment by [the Insurer] of the applicable claim amount under the Policy" and that [FI 135 Troy] "acquired no valid indebtedness or lien or other rights against Plaintiff or the Property by reason of [its] acquisition of the Mortgage Instruments."[22]

The Plaintiff also seeks a declaration that it is not required to transfer the Property to ICA Acquisition because the Insured Covenants Agreement "clogs" the Plaintiff's right of redemption and is therefore void.[23]

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[22] Complaint, ¶ 99(a)-(b).

[23] *Id.*, ¶ 99(g). The Plaintiff sought a declaration in Count I that the RVI Policy and the Insured Covenants Agreement permit subrogation against the Plaintiff and are void as against public policy. It further alleged and sought a declaration that the assignments were invalid and that the provisions of the RVI Policy violate the illusory coverage doctrine and the doctrine of reasonable expectations. See e.g., Complaint at ¶¶ (c), (e)

1
Validity of the Defendants' claim as assignees to the Mortgage Instruments

a
The Arguments

The Defendants reject the Plaintiff's allegation that the Mortgage Instruments were retired by the Insurer's payment of the claim under the RVI Policy. Instead, they argue that "Section 8 of the Additional Named Insured Endorsement expressly contemplates that [the Plaintiff's] lender will assign the Loan documents to FSL [the Insurer] upon payment of the Insured Value" and there is no provision in the RVI Policy or the Insured Covenants Agreement that states that the Insurer's payment of the Lender's claim serves to retire the Loan Documents.[24] The Defendants argue that under Section 4(a) of the Insured Covenants Agreement, "to the extent that [the Plaintiff] transfers the Property to Acquisition Troy as required by the ICA, this transfer would satisfy [the Plaintiff's] obligations under the Insured Covenants Agreement ***and the Loan Documents***" and "[i]t is only in consideration for [the Plaintiff's] transfer of title to the Property that the 'Mortgage Instrument' could be deemed to be 'retired' by [the Insurer's] payment of the

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and (g). Although the Defendants addressed these additional allegations in their Motion, the Plaintiff did not address these issues in its Response. Accordingly, those allegations are deemed abandoned. *Walters v Nadell*, 481 Mich 377, 388 (2008) ("[t]rial Courts are not the research assistants of the litigants; the parties have a duty to fully present legal arguments for its resolution of their dispute"*); Houghton v Keller*, 256 Mich App 336, 339-340 (2003) ("failure to properly address the merits of [one's] assertion of error constitutes abandonment of the issue"; a party "may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims . . . nor may he give issues cursory treatment with little or no citation of supporting authority" ([citations omitted]). See also MCR 2.119(A)(2).

[24] Defs' Motion, p 14. The Defendants also argue that interpreting either the RVI Policy or the Insured Covenants Agreement to allow the Plaintiff to escape liability for a $1.8 million debt based upon a premium payment of $74,418 under the RVI Policy would be a completely absurd result . . . ." *Id.,* p 15.

Insured Value."[25] The Defendants argue that the Plaintiff's refusal to comply with its obligation under the Insured Covenants Agreement to transfer the Property leave both the Loan Documents and the provisions of the Insured Covenants Agreement "fully actionable."[26]

The Plaintiff argues that the Insurer's payment of the Lender's claim under the RVI Policy discharged the Loan. According to the Plaintiff, Article V of the RVI Policy "establishes a construct in which a sum certain must be paid by [the Insurer] to the Lender upon submission of a claim. Within this construct, the money paid can only be one of two things . . . (i) 'proceeds' of the policy which must be applied to and satisfy the loan balance under Article V(a) , or (ii) if, and only if, the option in Article V(d) of the RVI Policy is properly exercised it is 'purchase price' for acquisition of the loan."[27] The Plaintiff argues that the only time the "assigned loan documents can evidence an unsatisfied loan is when the loan purchase option under Article V(d) of the RVI Policy is exercised."[28] The Plaintiff also argues that it is not bound by the Additional Named Insured Endorsement which was only intended to be binding between the Lender and the Insurer. Further, the Plaintiff argues that even if the Additional Named Insured Endorsement is applicable, Section 8 of the Endorsement is only additive to Article V of the Policy.

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[25] *Id.*, p 15 (emphasis in original).
[26] *Id.*, p 15.
[27] Pl's Response, p 8.
[28] *Id.*, p 15.

b

The Plaintiff's argument that the Insurer's payment of the claim to the Lender served to pay off the Loan balance is not supported by the unambiguous provisions of the RVI Policy and the Additional Named Insured Endorsement

As noted by the parties, "[i]nsurance policies are contracts and, absent an applicable statute, are subject to the same construction principles applicable to other contracts." *Skanska USA Building, Inc v M.A.P. Mech Contractors, Inc*, 505 Mich 368, 377 (2020). "[U]nless a contract provision violates law or one of the traditional defenses to the enforceability of a contract applies, a court must construe and apply unambiguous contract provisions as written." *Rory v Continental Ins Co*, 473 Mich 457, 461 (2005).

The relevant provisions of the RVI Policy are Articles V(a) and (d) and Section 8 of the Additional Named Insured Endorsement. Pursuant to Article V(a) of the RVI Policy:

> The Company will pay to the Additional Named Insured an amount equal to the Insured Value, if:
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> (i) a valid Notice of Claim has been given;
> (ii) the Additional Named Insured shall not have received payment in full of all amounts owing under the Loan; and
> (iii) all of the terms and conditions of this Policy have been satisfied.
>
> The Company's obligations hereunder are limited to making payment to the Additional Named Insured in accordance with the terms hereof and the Additional Named Insured Endorsement, or at the Company's option, in accordance with paragraph (V)(d) below, and the Company shall have no liability to the Insured except to make payment to the Additional Named Insured in accordance with this Policy. In no event will the Insured have any ownership interest or other rights with respect to the proceeds of this Policy.[29]

[29] Defs' Motion, Exh C, RVI Policy, Article V(a).

Section V(d) of the Policy provides:

> In the event that the Company is obligated in accordance with the terms and conditions of this Policy to make payment to the Additional Named Insured, on the Termination Date (and any time thereafter) the Company shall have the option in its sole discretion, in lieu of complying with Article I and Article V of the Policy, to purchase the Loan from the Additional Named Insured for a purchase price equal to all amounts payable under the Loan, but in no event greater than the Insured Value. The Company may exercise such option by giving written notice to the Insured and Additional Named Insured and making payment of the purchase price to the Additional Named Insured within the time period provided in Article V(c) hereof. *If the Company exercises such option, the Additional Named Insured will assign the Loan and all documents evidencing or securing the Loan to the Company, without recourse, in accordance with the provisions of Section 8 of the Additional Named Insured Endorsement*. . . .[30]

Section 8 of the Additional Named Insured Endorsement provides, in pertinent part:

> *Upon payment by the Company of the Insured Value pursuant hereto, the Additional Named Insured agrees to promptly assign to the Company (or its designee), without recourse, the Note, the Mortgage and all other documents relating to the Loan ("Loan Documents")* . . . or, in the event the Additional Named Insured (or its Affiliate) has acquired title to the Property prior to the Termination Date, the Additional Named Insured, at the option of the Company, shall also transfer good and marketable title to the Property to the Company . . . .[31]

The Plaintiff argues that because the Insurer paid the claim under Section V(a) and did not exercise its option under Section V(d) of the RVI Policy to purchase the loan, there

[30] *Id.* Article V (d).

[31] *Id.*, Exh C, Additional Named Insured Endorsement, p 6, Section 8.

could be no assignment of the Loan to the Insurer and therefore, the payment of the claim must have been used to satisfy the mortgage debt. This argument is unavailing.

First, contrary to the Plaintiff's argument, Article V(a) does not state that if a claim is made, the Insurer's payment to the Lender will be used to pay off the loan. Article V(a) merely states that upon valid notice of a claim, the Insurer will pay the Insured Value to the Additional Named Insured (the Lender). Further, Section 8 of the Additional Named Insured Endorsement unambiguously provides for assignment of the Mortgage Instruments upon payment of a claim by the Insurer. Thus, the consideration for the payment by the Insured of a claim made by the Additional Named Insured is not, as the Plaintiff argues, the payoff of the Loan but rather it is the assignment of the loan documents to the Insurer.[32]

The Plaintiff argues that there could be no assignment under the Policy because under Article V(d) assignment only occurs where the Insurer exercises the option to purchase the Loan from the Additional Named Insured and the option was not exercised in this case. However, Section 8 of the Additional Named Insured Endorsement provides for assignment upon payment of the Insured Value. To the extent that Article V(d) of the Policy and Section 8 of the Additional Named Insured Endorsement conflict, the Endorsement controls. After all, the Additional Named Insured Endorsement itself states

[32] The Plaintiff poses the question "[i]f the insurance proceeds were not applied to the loan balance, then what happened to them?" The answer is provided by Section 8 of the Additional Named Insured Endorsement.

that in the event of any conflict between the Policy and the Endorsement, the Endorsement governs. [33] This contractual term dovetails exactly with binding precedent. *Besic v Citizens Ins Co of the Midwest*, 290 Mich App 19, 26 (2010) (quotations marks and citation omitted) ("When a conflict arises between the terms of an endorsement and the form provisions of an insurance contract, the terms of the endorsement prevail").

The Plaintiff's argue that Section 8 of the Additional Named Insured Endorsement does not bind it because it is not a party to the Endorsement. However, the Endorsement is considered part of the Policy under which the Plaintiff is the named insured. The Policy specifically defines the "Policy" as "this Residual Value Insurance Policy, the Application and the Declarations, *the Additional Named Insured Endorsement* and any and all other endorsements hereto or thereto."[34] Moreover, the fact that the Plaintiff is not named in the Additional Named Insured Endorsement has no effect on its application. The RVI Policy (including the Additional Named Endorsement) is for the benefit of the Lender (the Additional Named Insured) which is the only party that can make a claim under the Policy. The Plaintiff has no "ownership interests or rights with respect to the proceeds of the Policy."[35]

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[33] Defs' Motion, Exh c, Additional Named Insured Endorsement, Section 4.

[34] Defs' Exh C, RVI Policy, Article 2 ¶ 27 (emphasis added).

[35] Section V(a) of the RVI Policy states that "[the Insurer] shall have no liability to the Insured except to make payment to the Additional Named Insured in accordance with the Policy. In no event will the Insured have any ownership interest or other rights with respect to the proceeds of this Policy." Defs' Exh C, RVI Policy, Article V(a).

Likewise, the Plaintiff's proffered reading of the RVI Policy based upon its argument that Section 8 of the Endorsement is "additive" to the provisions of Article V of the Policy is unconvincing The Plaintiff argues that the Additional Named Insured Endorsement and the RVI Policy provisions do not conflict because the heading of Section 8 of the Additional Named Insured Endorsement is titled "Assignment of Loan Documents in Accordance With Requirements of Policy." The Plaintiff further argues that the RVI Policy and Section 8 of the Endorsement should be read to mean "the lender must deliver an assignment of the loan documents in every case where a claim is paid. However, the only time the assigned loan documents can evidence an unsatisfied loan is when the loan purchase opinion under Article V(d) of the RVI Policy is exercised." The Plaintiff concludes "[i]n all other cases, as occurred here, the assignment can only be one that assigns documents evidencing a loan has already been paid in full pursuant to the language of Article V(a) of the RVI Policy."[36]

The Plaintiff's construction is unsupported. First, the Plaintiff's construction is not supported by the language of the Policy and Endorsement. Again, Article V(a) merely states that the Insurer will pay a claim of the Additional Named Insured. Further, there is no language in either Article V of the Policy or in Section 8 of the Endorsement which states that an assignment does or does not evidence that the Loan has been paid in full. Stated another way, there is nothing stating the payment of a claim by the Insurer to the Lender discharges the Loan. Moreover, such a reading would render the assignment

[36] Pl's Response, p 15.

provisions meaningless, and it is well-settled that Courts must "give effect to every word, phrase, and clause in a contract and *avoid* an interpretation that would render any part of the contract surplusage or nugatory." *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 468 (2003) (emphasis added). If the loan obligation was deemed to have been discharged upon payment of a claim under the Policy, there would no need for an assignment. Indeed, the assignment would be worthless. Moreover, the Plaintiff's construction could easily have been drafted by the parties to the Policy - and it was not. The role of this Court is unequivocally not to rewrite contracts. To do so would give the Plaintiff a windfall of the highest order.

Based upon the foregoing, the Court cannot declare that the Mortgage Instruments were retired by the payment of the claim by the Insurer or that the Defendants acquired no rights under the assignment of the Mortgage Instruments.

2
Enforceability of the Insured Covenants Agreement

a
The Arguments

The Plaintiff argues that the Insured Covenants Agreement is not enforceable because it impermissibly "clogs" the Plaintiff's equity of redemption.

The Defendants argue that there was no forfeiture and therefore, no right of redemption. Additionally, the Defendants asserts that any right to redemption was not "clogged" by the Insured Covenants Agreement.

b
The Plaintiff has not demonstrated that the Insured Covenants Agreement impermissibly clogs the Plaintiff's equity of redemption

In making its demand to the Plaintiff to transfer the Property, ICA Acquisition relies on Section 4(a) of the Insured Covenants Agreement which provides:

> Transfer of Title.
>
> *In the event that [the Insurer] makes payment for a Claim under Articles I and V of the Policy, the Owner shall cause the deed to the Property to be immediately delivered to [the Insurer], without payment of additional consideration by [the Insurer].* Owner hereby acknowledges that *payment by [Insurer] under the Policy is the equivalent of a purchase of the Property by [the Insurer] for an amount equal to the amount paid under the Policy and used in satisfying all or part of Owner's obligations under the Note*, and that such payment constitutes full and fair consideration for the transfer of title of the Property to [the Insurer.][37]

There is no dispute that the Insurer made a "payment for a Claim under Articles I and V of the Policy" thus triggering the Plaintiff's obligation to deliver the deed to the Property under Section 4(a) of the Insured Covenants Agreement.[38] However, the

[37] Defs' Motion, Exh D, Insured Covenants Agreement, § 4(a).

[38] The Defendants acknowledge that under Section 4(a) of the Insured Covenants Agreement transfer of the Property by the Plaintiff to ICA Acquisition "would satisfy [the Plaintiff's] obligations under the [Insured Covenants Agreement] **and the Loan Documents**." Defs' Motion, p 15 (emphasis in original). Thus, any assertion by the Plaintiff that it would be required, under the Defendants' construction of the RVI Policy and the Insured Covenants Agreement, to both lose its equity in the Property and pay the outstanding balance on the Loan appears to be unfounded.

Plaintiff argues that ICA Acquisition cannot enforce the Insured Covenants Agreement because to do so would impermissibly clog the Plaintiff's right of redemption.

"[F]or centuries it has been the rule that a mortgagor's equity of redemption cannot be clogged and that [it] cannot, as part of the original mortgage transaction, cut off or surrender [its] right to redeem. Any agreement which does so is void and unenforcible [sic] as against public policy." *Blackwell Ford, Inc v Calhoun*, 219 Mich App 203, 208 (1996) (quotation marks and citation omitted). "A clog or restraint on the equity of redemption denotes any provision inserted to prevent a redemption on payment or performance of the debt or obligation for which the security was given." *Id.* (quotation marks and citations omitted).

"Courts must carefully scrutinize any transaction in which a mortgagor waives the equitable or statutory right of redemption." *Oakland Hills Dev Corp v Lueders Drainage Dist*, 212 Mich App 284, 295 (1995). The Court of Appeals has elaborated:

> The mortgagor may release the equity of redemption to the mortgagee for a good and valuable consideration, when done voluntarily, and there is no fraud, and no undue influence brought to bear upon him for that purpose by the creditor. But it can not be done by a contemporaneous or subsequent executory contract, by which the equity of redemption is to be forfeited if the mortgage debt is not paid on the day stated in such contract . . . . [*Id.* (citations omitted).]

"A mortgagor may, however, sell and convey its equity right of redemption to the mortgagee in a contract that is separate and distinct from the mortgage agreement and entered into in good faith for good consideration." *Id.*

The Defendants argue that the Insured Covenants Agreement does not implicate any right of redemption because redemption rights arise only by statute following foreclosure and there was no foreclosure in this case. However, Michigan law recognizes both the statutory right to redemption, see MCL 600.3240, and the "pre-judicial sale" equity of redemption. *Russo v Wolbers*, 116 Mich App 327, 336 (1982); *Oakland Hills*, 212 Mich App at 295. "The equity of redemption is that interest in the land which is held by the mortgagor before foreclosure; while the right of redemption is not an interest in the land at all, but a mere personal privilege given by statute to the mortgagor after the land has been sold under the mortgage." *Gerasimos v Continental Bank*, 237 Mich 513, 518-519 (1927) (quotation marks and citation omitted). The doctrine against clogging applies to the equity of redemption, which is "an inherent and essential characteristic of every mortgage . . . ." *Russo*, 116 Mich App at 338.

The Defendants also argue that the enforcement of the Insured Covenants Agreement does not violate the rule against clogging the equitable right to redemption because the Agreement was separate from the Mortgage and is between two parties, the Insurer and the Plaintiff "that did not have a mortgagor-mortgagee (or even creditor-debtor) relationship." Additionally, the Defendants argue that the Insured Covenants Agreement was supported by separate consideration, the payment of the claim by the Insurer to the Lender, and that there is no evidence of fraud or undue influence.

Indeed, the prohibition against clogging the equitable right to redemption is not implicated in this case. The Insured Covenants Agreement, although entered into shortly after the mortgage, is an agreement between the Insurer and the Plaintiff, and it not an agreement between the Lender (mortgagee) and the Plaintiff (mortgagor). Michigan jurisprudence has only applied the clogging doctrine when an equitable redemption was surrendered in contracts between the mortgagor and mortgagee.[39] See, e.g., *Batty v Snook*, 5 Mich 231, 239-240 (1858) (explaining the prohibition against clogging because "[e]quity is jealous of all contracts between mortgagor and mortgagee, by which the equity of redemption is to be shortened or cut off"). The Plaintiff has cited no authority to support a finding of clogging in an agreement between parties who are not in a mortgagor/mortgagee relationship.

Moreover, even assuming that the prohibition against clogging applies in this case, the circumstances surrounding the Insured Covenants Agreement demonstrate that there is no violation. A party may sell its equity right of redemption in a contract that is separate and distinct from the mortgage agreement and entered into in good faith for good consideration. *Oakland Hills*, 212 Mich App at 295. In this case, the Insured Covenants Agreement was a "separate and distinct" agreement from the mortgage agreement. It was supported by consideration, the Insurer's agreement to pay the claim to the Lender,

[39] *See e.g., Oakland Hills,* 212 Mich App at 295-296 (waiver of right to redemption in mortgage was invalid); *Russo*, 116 Mich App at 338 ("a mortgagee may not contract with the mortgagor at the time of the loan for waiver of redemption rights.")

separate from the consideration that supports the mortgage agreement,.[40] Lastly, there is no indication of bad faith or unfair advantage.[41]

Based upon the foregoing, the Plaintiff's argument that the Insured Covenants Agreement is unenforceable as a matter of law fails.

B
Count II-Breach of Contract

1
The Arguments

In Count II, the Plaintiff alleges that the Insurer breached the RVI Policy by failing to obtain an appraisal under Article IV of the Policy.[42]

The Defendants do not dispute that no appraisal was made by the Insurer as required by Article IV but argue that the performance of an appraisal was not a condition precedent to the Insurer's right to an assignment of the Loan upon payment of a claim under the RVI Policy or the Plaintiff's obligation to transfer the Property under the

[40] Defs' Motion, Exh D, Insured Covenants Agreement, Recitals 4.

[41] Paragraph 5(i) of the Insured Covenants Agreement states that "Owner has received the advice of counsel concerning each and all of the terms, conditions, limitations and exclusions of the Policy."

[42] Article IV states:

> During the period beginning twelve months and ending five months prior to the Termination Date, the Company will perform an Inspection and an Appraisal of the Property and will promptly notify the Insured and the Additional Named Insured of the results thereof, including without limitation any determination by the Inspector and the Appraiser that the Property is not in compliance with the Property Return Conditions. [Defs' Motion, Exh C, RVI Policy, Article IV.]

Insured Covenants Agreement. The Defendants also argue that the Plaintiff was the first party to beach the RVI Policy by assigning its membership interests.

The Plaintiff does not address the "condition precedent" argument. Rather, it argues that any alleged breach on its part was not material and was waived by the Insurer.

2
The failure to obtain an appraisal does not affect the Insurer's rights to assignment under the RVI Policy or the Defendants' ability to enforce the Insured Covenants Agreement and the Plaintiff has not supported any claim for breach of contract

"A condition precedent is a fact or event that the parties intend must take place before there is a right to performance" under a contract. *Able Demolition, Inc v Pontiac*, 275 Mich App 577, 583 (2007) (quotation marks and citation omitted). "A condition is distinguished from a promise in that it creates no right or duty in and of itself but is merely a limiting or modifying factor." *Knox v Knox*, 337 Mich 109, 118 (1953); *Real Estate One v Heller*, 272 Mich App 174, 179 (2006). "If the condition is not fulfilled, the right to enforce the contract does not come into existence." *Knox,* 337 Mich at 118. Courts are "disinclined" to construe contract language as imposing a condition precedent in the absence of express language imposing such condition. *MacDonald v Perry*, 342 Mich 578, 586 (1955); *Mikonczyk v Detroit Newspapers, Inc*, 238 Mich App 347, 350 (1999) (quotation marks and citation omitted) ("Courts are not inclined to construe stipulations of a contract as conditions precedent unless compelled by the language in the contract").

In the instant case, there is no language in the RVI Policy which makes the Insurer's right to an assignment upon payment of a claim conditioned on the performance of an appraisal. And the appraisal provision relied on by the Plaintiff does not appear in the Insured Covenants Agreement. Accordingly, the failure to obtain an appraisal does not affect the Defendants' rights under the RVI Policy or the Insured Covenants Agreement.

Additionally, to the extent that the Plaintiff is seeking to recover damages for the failure to conduct the Appraisal, it has not supported such a claim. A party asserting a breach of contract claim must establish that (1) there was a contract, (2) which the other party breached, (3) thereby resulting in damages to the party claiming breach. *Miller-Davis Co v Ahrens Const, Inc,* 495 Mich 161, 178 (2014). "[C]ausation of damages is an essential element of any breach of contract action." *Id.*

The Plaintiff has made no argument in its Response that it has suffered damages caused by the failure of the Insurer to perform an appraisal and has therefore, abandoned any such claim. See, e.g., *Mitcham v City of Detroit*, 355 Mich 182, 203 (1959); *Houghton v Keller*, 256 Mich App 336, 339-340 (2003); *People v Odom*, 327 Mich App 297, 311 (2019); MCR 2.119(A)(2). Moreover, the Plaintiff has acknowledged that under the RVI Policy "[the Insured] shall have no liability to the [the Plaintiff] except to make payment to the

Additional Insured in accordance with this Policy."[43] Further, the Plaintiff acknowledges that the Insured "did fully perform all its obligations under the RVI Policy owing to [the Plaintiff]." Therefore, the Plaintiff cannot support any claim for breach of contract from the lack of compliance with the appraisal provision.

For the foregoing reasons, the Plaintiff's breach of contract claim fails, and summary disposition should be granted as to Count II of the Complaint.

ORDER

Based upon the foregoing Opinion, the Defendants' Motion for Summary Disposition pursuant to MCR 2.116(C)(10) is GRANTED. The Plaintiff's request for judgment in its favor under MCR 2.116(I)(2) is DENIED.

This Order resolves the last pending claim and closes the case.

[43] Defs' Exh C, RVI Policy, Art V(a).