

STATE OF MICHIGAN
SIXTEENTH JUDICIAL CIRCUIT COURT

MAIN STREET REAL ESTATE, LLC,
a Michigan limited liability company,

Plaintiff,

vs.

Case No. 2021-002117-CB

CONIFER HOLDINGS, INC, d/b/a
CONIFER INSURANCE COMPANY,
a domestic profit corporation,

Defendant,

_____ /

OPINION AND ORDER

This matter is before the Court on Plaintiff Main Street Real Estate, LLC's ("Main Street"), motion for summary disposition under MCR 2.116(C)(10).

I. Background

This case is an insurance coverage dispute between Main Street and its insurer, Defendant Conifer Holdings, Inc. ("Conifer") over Conifer's denial of coverage for claims against Main Street in a separate pending lawsuit (the "Kyoto Case.")

A. The Kyoto Case

The Kyoto Case is a complex, multiparty lawsuit involving the purchase of property in Shelby Township. The Plaintiffs in that case, collectively referred to as "Kyoto," allegedly hired Main Street as the purchasing broker to represent them and negotiate the purchase of the property. Michael Kemsley, a licensed real estate salesperson and independent contractor of Main Street, allegedly participated in Main Street's representation of Kyoto. According to Kyoto, at Main Street's direction, it paid \$250,000 to Main Street to be held in escrow as a deposit for the purchase of the property on July

30, 2018. On November 1, 2018, Kyoto and the seller executed a purchase agreement for the property. Over the subsequent months, a number of addenda to the purchase agreement were executed, allegedly at Main Street's direction, and Kyoto ultimately closed on the purchase of the property on May 8, 2019.

On July 31, 2019, Kyoto filed suit against Main Street, Kemsley, Main Street's owner, Janis DeGregory, and other entities involved in the purchase of the property. The amended complaint alleged 27 claims against the various defendants, including Main Street.¹ Relevant to this case, Kyoto's claims against Main Street included breach of contract (Count I), breach of implied contract (Count II), unjust enrichment (Count III), accounting (Count VII), breach of fiduciary duty (Count IX), breach of statutory fiduciary duties under MCL 339.2512d (Count XIII), vicarious liability for Kemsley's misconduct (Count XIV), and negligence (Counts XV and XXV). The Kyoto case is currently stayed pending the completion of criminal proceedings against Kemsley.

B. This Case

Main Street has a real estate professional's errors and omissions insurance policy with Conifer. After Main Street sent notice of the Kyoto Case to Conifer, on January 12, 2021, Conifer notified Main Street it was denying coverage for all the claims against it in the Kyoto Case. The basis for Conifer's denial of coverage was that the allegations against Main Street were not within the definition of "real estate services" covered under the policy and that Kyoto's damages did not result from the "actions or failure to provide real estate services." (Mot., Ex. F, p 5.) Conifer further based its denial on exclusions in the policy for criminal actions and penalties, equitable relief, punitive and exemplary

¹ Kyoto filed its first amended complaint on December 4, 2019.

damages, dishonest, fraudulent, and malicious conduct, conversion, theft, misappropriation, and failure to pay money held for others, and employment practices. (Id., pp 5-7.)

On June 15, 2021, Main Street filed suit in this case against Conifer for breach of contract (Count I) and for a declaratory judgment (Count II). Main Street alleges Conifer breached the policy by denying coverage and refusing to defend and indemnify Main Street against the claims in the Kyoto Case. Main Street seeks a declaratory judgment that Conifer breached the policy by denying coverage and that under the terms of the policy, Conifer must defend and indemnify Main Street.

On January 3, 2022, Main Street filed a motion for summary disposition under MCR 2.116(C)(10) seeking a declaratory ruling from the Court that Conifer must defend Main Street against Counts I, II, III, VII, IX, XIII, XIV, XV, and XXV in the Kyoto Case. Conifer filed its response on January 24, 2022, and Main Street subsequently replied on January 27, 2022. The Court held oral arguments on the motion on March 21, 2022, where it took the matter under advisement and allowed the parties to file supplemental briefs. The Court has received and read the supplemental briefs.

II. Standard of Review

A motion filed under MCR 2.116(C)(10) “tests the factual sufficiency of a claim.” *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). “Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law.” *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). In reviewing such a motion, a court considers the documentary evidence submitted by the parties in the light most favorable

to the non-moving party. *Maiden*, 461 Mich at 120. “A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ.” *West*, 469 Mich at 183. The initial burden is on the moving party to support its position “by affidavits, depositions, admissions, or other documentary evidence.” *Smith v Globe Life Ins Co*, 460 Mich 446, 455; 597 NW2d 28 (1999). The burden then shifts to the opposing party to set forth specific facts via admissible evidence that establish a genuine issue of disputed fact exists. *Maiden*, 461 Mich at 121.

III. Parties’ Arguments

In its motion, Main Street seeks a declaratory ruling from the Court that Conifer must defend and indemnify it against Counts I, II, III, VII, IX, XIII, XIV, XV, and XXV in the Kyoto Case. It argues those claims involve “real estate services” provided by Main Street as contemplated by the insurance policy and further that none of those claims are subject to any exclusion in the policy as asserted by Conifer in its denial letter.

In response, Conifer argues that none of the conduct alleged in the Kyoto Case qualifies as “real estate services” under the policy. It further argues that even if the Main Street provided real estate services, the allegations against Main Street are subject to the policy’s exclusions for misappropriation, criminal conduct, and punitive and penalty damages. Finally, Conifer contends that all of the claims against Main Street are derivative of Kemsley’s alleged criminal conduct so they are all subject to the criminal conduct exclusion under the policy.

IV. Law & Analysis

The Michigan Supreme has explained an insurer’s duty to defend as follows:

The duty of the insurer to defend the insured depends upon the allegations in the complaint of the third party in his or her action against the insured. This duty is not limited to meritorious suits and may even extend to actions which are groundless, false, or fraudulent, so long as the allegations against the insured even arguably come within the policy coverage.

Protective Nat Ins Co of Omaha v City of Woodhaven, 438 Mich 154, 159; 476 NW2d 374 (1991). The duty to defend is broad and arises when coverage is even arguable. *Auto-Owners Ins Co v City of Clare*, 446 Mich 1, 15; 521 NW2d 480 (1994). When theories of liability, which are not covered, are raised with theories of liability that are included in the policy, the insurer has a duty to defend. *Protective Nat'l*, 438 Mich at 159. Consequently, an insured has a duty to defend until there is sufficient factual development that all the claims are outside the scope of the policy. *Id.*; *Am Bumper & Mfg Co v Hartford Fire Ins Co*, 452 Mich 440, 455; 550 NW2d 475 (1996). "Uncertainty regarding whether an allegation comes within the scope of the policy must be resolved in the policyholder's favor." *Am Bumper*, 452 Mich at 455.

However, an insurer is not required to defend claims that are expressly excluded from coverage under the policy. *Meridian Mut Ins Co v Hunt*, 168 Mich App 672, 677; 425 NW2d 111 (1988). Policy exclusions are strictly construed against the insurer and must be clear and exact to be given effect. *Hunt v Drielick*, 496 Mich 366, 373; 852 NW2d 562 (2014). If the policy is ambiguous, it will be construed in favor of the insured to require coverage. *Allstate Ins Co v Fick*, 226 Mich App 197, 202; 572 NW2d 265 (1997). The insurer has the burden of proving that an exclusion applies. *Hunt*, 496 Mich at 373.

A. Definition of "Real Estate Services"

The parties dispute whether any of the claims against Main Street in the Kyoto Case relate to "real estate services" covered under the policy. "The rules of contract

interpretation apply to the interpretation of insurance contracts.” *McGrath v Allstate Ins Co*, 290 Mich App 434, 439; 802 NW2d 619 (2010). “The language of insurance contracts should be read as a whole and must be construed to give effect to every word, clause, and phrase.” *Id.* “When the policy language is clear, a court must enforce the specific language of the contract.” *Id.* When interpreting a contract, the Court’s “primary obligation is to give effect to the parties’ intention at the time they entered into the contract.” *Innovation Ventures v Liquid Mfg*, 499 Mich 491, 507; 885 NW2d 861 (2016). To do so, the Court must “examine the language of the contract according to its plain and ordinary meaning,” *id.*, and technical, constrained constructions should be avoided. *Bianchi v Automobile Club of Michigan*, 437 Mich 65, 71, n 1; 467 NW2d 17 (1991). If the contract is ambiguous “and one of these interpretations is in accord with the reasonable expectations of the insured, this interpretation should prevail.” *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 60; 664 NW2d 776 (2003). However, “if a contract is ambiguous and the parties’ intent cannot be discerned from extrinsic evidence, the contract should be interpreted against the insurer.” *Id.*

The “Coverages” provision in the policy provides

1. Subject to all of the terms, limitations, conditions, definitions, exclusions and other provisions of this policy:

a. We will pay all sums that the Insured becomes legally obligated to pay as damages because of a claim that relates to the act or omission of an Insured in providing or failing to provide **real estate services**, provided that . . . this insurance applies to such claim.

(Mot., Ex. E., p 1.) (emphasis added). The policy defines “real estate services” to mean

those services rendered by an Insured for others as a real estate agent, real estate broker, real estate personal assistant, notary public, real estate consultant or counselor, real estate appraiser, real estate leasing agent, short term escrow agent, or auctioneer of real property, provided that

all necessary licenses or certifications are held by the Insured at the time of obtaining this policy and at the time of the act or omission giving rise to a claim. Construction management and property management are not real estate services.

(*Id.*, p 14.) (emphasis added).

If a policy defines contract terms, the policy is to be interpreted consistent with the definition of those terms. *Century Surety Co v Charron*, 230 Mich App 79, 82; 583 NW2d 486 (1998). While “real estate agent” and “real estate broker” are not defined, “[t]he mere fact that a term is not defined in a policy does not render that term ambiguous.” *Vushaj v Farm Bureau Gen Ins Co of Mich*, 284 Mich App 513, 515-516; 773 NW2d 758 (2009). If a term isn’t defined in the policy, it must be defined according to its commonly understood meaning, including by reference to a dictionary. *Id.*

Main Street argues the policy’s definition of “real estate services” must be interpreted consistent with the statutory definition of that term in the Occupational Code, MCL 339.2501(u). However, nothing in the plain language of the policy indicates the parties intended to apply the statutory definition of “real estate services” to the policy. See *Twichel v MIC Gen Ins Corp*, 469 Mich 524, 534; 676 NW2d (2004) (rejecting use of statutory definition of “owner” when “nothing in the plain language of the policy support[s] the application of the definition of “owner” . . . to this independent, nonstatutory coverage.”)

Conifer, in response, appropriately cites Black’s Law Dictionary to support its argument that “a real estate agent or broker would be somebody who assists others in the purchase or sale of real property.” (Resp., p 15.) See *id.* However, it relies on an outdated edition of Black’s and cites only the definition of “real estate agent” even though the policy’s definition of “real estate services” includes services provided by both “real

estate brokers” and “real estate agents.” The most recent edition of Black’s defines “real estate broker” as “[a] broker who negotiates contracts of sale and other agreements (such as mortgages or leases) between buyers and sellers of real property.” *Black’s Law Dictionary* (11th ed. 2019). A “broker” is “1. One who is engaged for another . . . , to negotiate contracts relating to property in which he or she has no custodial or proprietary interest. 2. An agent who acts as an intermediary or negotiator, esp. between prospective buyers and sellers; a person employed to make bargains and contracts between other persons in matters of trade, commerce, or navigation.” *Id.* Black’s similarly defines “real estate agent” as “[a]n agent who represents a buyer or seller . . . in the sale or lease of real property.” *Id.*

Applying these definitions to the policy provides an unambiguous construction of what “services” rendered by a “real estate broker” and “real estate agent” constitute covered “real estate services.” A real estate broker engages in covered real estate services when he or she provides services for another related to the negotiation of contracts for the sale or real property. Likewise, a real estate agent engages in covered real estate services when he or she provides services as an agent representing a buyer or seller in the sale or lease of real property.

Having determined what constitutes covered “real estate services” under the policy, the next issue is whether any of the theories of liability alleged in Counts I, II, III, VII, IX, XIII, XIV, XV, and XXV of the Kyoto Case against Main Street are arguably within that definition for purposes of coverage. See *Auto-Owners*, 446 Mich at 15. To determine whether the third parties’ allegations against the insured in the complaint arguably come within the policy, courts must “look behind” the allegations and analyze whether coverage

is possible. *Protective Nat'l*, 438 Mich at 159; see *Radenbaugh v Farm Bureau Gen Ins Co of Michigan*, 240 Mich App 134, 139; 610 NW2d 272 (2000) (it's "the obligation of the circuit court to determine if the allegations of the underlying suit arguably fall within the coverage of the policy.") The wording of the complaint will not ultimately determine whether there is a duty to defend under the terms of a policy. The court will look at the "basis for the injury" rather than the "nomenclature" of the claim. *Illinois Emp'rs Ins v Dragovich*, 139 Mich App 502, 507; 362 NW2d 767 (1984). If the allegations in the complaint can reasonably be inferred to allege conduct within the policy, the insurer has a duty to defend. *Detroit Edison Co v Michigan Mut Ins Co*, 102 Mich App 136, 142; 301 NW2d 832 (1980).

B. Count I (Breach of Contract), Count II (Implied Contract), Count III (Unjust Enrichment), Count VII (Accounting), Count IX (Breach of Fiduciary Duty), And Count XIII (Violation of MCL 339.2512d)

The allegations in Count I consists of 34 paragraphs (¶¶ 22-56). It contains the bulk of the general allegations that all the other counts appear to rely on. Looking at the substance of the allegations in Count I, the Court is satisfied that while Kyoto seeks several alternative theories of liability for its injuries against Main Street, it primarily seeks damages from Main Street for injuries caused by Main Street for breach of the parties' agreements: namely, its agreement that it would assist Kyoto in purchasing the property, that it would act in Kyoto's best interests in doing so, and that it would make sure the transfer of the liquor license would be part of the purchase of the property. The substance of the breach of contract allegations is that when Main Street breached the agreements by failing to draft accurate purchase agreements and addenda, failing to properly advise concerning escrow funds, and failing to secure transfer of the liquor license, it was

providing real estate services to Kyoto for the negotiation of contracts for the sale of real property and was thus acting as an agent representing Kyoto in the purchase of real property.

In Count II, Kyoto seeks imposition of a quasi-contract, or contract implied in law, “under the same terms as those stated in the agreements with [Main Street].” (Kyoto First Am. Compl., ¶¶58-59.) This claim is sought in the alternative to Count I. The theory of liability in this count is based on the same agreements that make up the breach of contract claims in Count I.

In Count III, Kyoto alleges Main Street was unjustly enriched as a result of Kyoto’s time, effort, and resources, so Kyoto is entitled to recover that unjust enrichment. It is unclear from review of the allegations the specific conduct Kyoto relies on as the basis for its injury. To the extent it involves the provision of real estate services, it would be covered. Further, to the extent it is unclear whether the conduct alleged comes within the scope of the policy, the Court must resolve this uncertainty in the policyholder’s favor. *Am Bumper*, 452 Mich at 455.

Count VII seeks an accounting “of all amounts paid and which were supposed to be paid to Kyoto pursuant to the agreements.” (First Am. Compl., ¶85.) To the extent Kyoto seeks an accounting pursuant to the parties’ agreements which involve Main Street’s provision of real estate services, it would be covered by the policy.

Count IX alleges Main Street owed a fiduciary duty to Kyoto. Kyoto specifically identifies the basis for this duty as arising out of express agency contract in the listing agreement and the fact that Main Street is a licensed real estate broker. It also identifies Main Street as its broker and alleges Main Street, as Kyoto’s real estate broker, breached

its fiduciary duty and Kyoto suffered damages as a result of that breach. Main Street's conduct as Kyoto's real estate broker qualifies as providing real estate services under the policy.

Count XIII alleges Main Street breached the duties it owed to Kyoto under MCL 339.2512d. That statute is the Occupational Code for real estate brokers. It provides, in relevant part, that a real estate broker acting under an agency agreement owes the following duties to its client:

- (a) The exercise of reasonable care and skill in representing the client and carrying out the responsibilities of the agency relationship.
- (b) The performance of the terms of the service provision agreement.
- (c) Loyalty to the interest of the client.
- (d) Compliance with the laws, rules, and regulations of this state and any applicable federal statutes or regulations.
- (e) Referral of the client to other licensed professionals for expert advice related to material matters that are not within the expertise of the broker.
- (f) An accounting in a timely manner of all money and property received by the broker in which the client has or may have an interest.
- (g) Confidentiality of all information obtained in the course of the agency relationship, unless disclosed with the client's permission or as provided by law, including the duty not to disclose confidential information to any licensee who is not an agent of the client.

Id. at (2). Given the language in the statute, it's clear the substance of Kyoto's claim in this count is that it was injured by Main Street while it was acting as Kyoto's real estate broker. Those actions by Main Street constitute real estate services under plain language of the policy.

C. Count XIV (Vicarious Liability), Count XV (Negligent Hiring),
And Count XXV (Negligence)

In Count XIV, seeks to hold Main Street vicariously liable for the wrongful acts of Kemsely. Generally, an employer is vicariously liable for the tortious conduct of an employee when the employee is acting within the scope of employment at the time of the negligence. Count XV is set forth in two paragraphs and alleges Main Street was negligent in “hiring, training, and/or supervising Kemsley, and Plaintiffs suffered harm as a result.” (First Am. Compl., ¶121.) Count XXV asserts a claim of negligence against Main Street. Kyoto doesn’t specify what duty Main Street owed to Kyoto or how it breached it, and how such alleged duty is different and distinct from the contractual duties owed under the parties’ real estate agreement.

For the reasons stated above, many of the allegations forming the basis for these claims involve alleged breaches by Main Street arising from the parties’ agreements for the provision of real estate services. Thus, these claims must be covered under the policy until factual development clearly shows none of the claims are covered under the policy. See *Protective Nat’l*, 438 Mich at 159; *Ibrahimovic v Medmarc Cas Ins Co*, unpublished opinion of the Court of Appeals, issued January 19, 2012 (Docket No. 298469), 2012 WL 164096, p *3 (affirming trial courts grant of summary disposition for insured and finding insurer had duty to defend though future factual development may show that exclusions may apply.) Further, any “[u]ncertainty regarding whether an allegation comes within the scope of the policy must be resolved in the policyholder’s favor.” *Am Bumper*, 452 Mich at 455.

While it appears Kyoto includes several alternative theories of liability against Main Street including fraud, misappropriation, and conversion, as explained above, Michigan

case law is clear that when theories of liability which are not covered are raised with theories of liability that are covered under the policy, the insurer has a duty to defend.² *Protective Nat'l*, 438 Mich at 159. Thus the inclusion of these excluded claims alongside the covered claims primarily arising from the alleged breach of contract claims does not extinguish Conifer's duty to defend.

D. Exclusions

Conifer also argues that the focus of Kyoto's complaint is to recover the \$150,000 in escrow funds that were allegedly stolen, converted, embezzled, or misappropriated, all of which are subject to exclusions in the policy. Thus, Conifer argues all coverage should be denied. However, as Main Street correctly contends, Conifer's argument ignores the other theories of liability raised by Kyoto in the nine counts addressed above that are not based on allegations of stealing, conversion, embezzlement, or misappropriation but also include conduct related to the provision of real estate services. Conifer has not identified any policy exclusions that expressly apply to any of the theories of liability asserted in the nine counts at issue here. See *Hunt*, 496 Mich at 373 (holding the insurer has the burden of proving an exclusion applies.) Again, Michigan case law is clear that when theories of liability, which are not covered, are raised with theories of liability that are covered under the policy, the insurer has a duty to defend. *Protective Nat'l*, 438 Mich at 159. Thus the inclusion of the excluded claims alongside the covered ones does not extinguish Conifer's duty to defend.

² Main Street does not seek in its motion for summary disposition for declaratory relief as to coverage for the multiple fraud-, misappropriation-, and conversion-specific claims (i.e., Counts XVI, XVII, XVIII, XX, XXI, XXIII, and XXIV).

Conifer also asserts the criminal acts exclusion in the policy applies to exclude all claims against an employer (Main Street) for the criminal acts of an employee (Kemsley). In support of this assertion, Conifer cites to *Allstate Ins Co v Fick*, 226 Mich App at 203. However, *Fick* is readily distinguishable. The insurer in *Fick* was a homeowner's insurance carrier for an insured who had pled guilty to obtaining a prescription drug by falsely representing she was authorized by her employer to do so. *Id.* at 198-199. Here, Conifer's motion is premature. There has been no determination of criminal liability and as a result, this issue remains a question of fact. Additionally, by the nature of the allegations in its Complaint, Kyoto appears to seek relief not only for injury allegedly resulting from Kemsley's alleged actions, but for Main Street's alleged breach of the parties' agreements for the provision of real estate services.

In summary, the allegations in Counts I, II, III, VII, IX, XIII, XIV, XV, and XXV as to Main Street in the Kyoto Case primarily involve Main Street's alleged breach of contract for the provision of real estate services. The fact that Kyoto also seeks relief against Main Street for Kemsley's alleged tortious conduct does not relieve Conifer of its duty to defend Main Street. See *Id.*; *Am Bumper & Mfg Co v Hartford Fire Ins Co*, 452 Mich 440, 455; 550 NW2d 475 (1996).

E. Costs and Attorneys' Fees

Finally, Main Street requests "costs and actual attorney fees incurred to date on the Kyoto Matter, plus penalty interest under MCL 500.2006(4)." (Mot., p 2.) However, it has not elaborated any argument or provided any authority or evidence to support its request for attorney fees, costs, and penalty interest. See *Houghton v Keller*, 256 Mich App 336, 339-340 (2003) ("[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.”) Accordingly, this request is denied.

V. Conclusion

For the reasons set forth above, Main Street’s motion for summary disposition is GRANTED IN PART as to Conifer’s duty to defend Counts I, II, III, VII, IX, XIII, XIV, XV, and XXV against Main Street in the Kyoto Case. The motion is DENIED IN PART as to Main Street’s request for costs, attorney fees, and penalty interest. This Opinion and Order neither resolves the last pending claim nor closes this case. MCR 2.602(A)(3).

IT IS SO ORDERED.

Date: 05/02/2022



Kathryn A. Viviano

Signed by KATHRYN VIVIANO 05/02/2022 08:56:58 5bIOW0Gw

Hon. Kathryn A. Viviano, Circuit Court Judge