UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

WINDSONG CONDOMINIUM ASSOCIATION, a Washington non-profit corporation, Plaintiff, v. BANKERS STANDARD INSURANCE COMPANY, a foreign corporation; ACE FIRE UNDERWRITERS INSURANCE COMPANY, f/k/a CIGNA FIRE UNDERWRITERS INSURANCE COMPANY, a foreign corporation, Defendant.	CASE NO. C08-0162-JCC ORDER

This matter comes before the Court on Plaintiff's Motion for Partial Summary Judgment Re: Insurance Coverage for "Water Damage" (Dkt. No. 17), Defendant's Response (Dkt. No. 22), and Plaintiff's Reply (Dkt. No. 24). Having considered these papers, their supporting declarations and exhibits, and the balance of the record, the Court has determined that oral argument is not necessary. For the reasons discussed herein, the Court GRANTS the motion and finds and rules as follows.

I. BACKGROUND

This insurance coverage dispute centers on whether a property insurance policy that explicitly

excludes from coverage "deterioration" and "wet or dry rot" but not "resulting loss or damage caused by . . . water damage" should provide coverage for the decay of gypsum sheathing and wood framing in certain areas of an insured building caused by water intrusion.

Plaintiff is the homeowner's association at the Windsong Condominium in Seattle, Washington, a three-story building constructed in 1978. (Pl.'s Mot. 1 (Dkt. No. 17); Bennion Letter Feb. 4, 2008 (Dkt. No. 19-2 at 3).) The building is wood-framed with an exterior of traditional stucco applied over gypsum wallboard sheathing. (Bennion Letter (Dkt. No. 19-2 at 3).) In late 2004, Plaintiff hired Charter Construction to inspect the building for water damage. (*Id*.) Charter discovered that the sheetrock behind the stucco was getting wet because of defects in the roof construction. (*Id*.) In 2005, Plaintiff notified its current and former insurers, State Farm and Defendant[1], respectively, of the damage. (*Id*.) As a result, two different structural engineers hired by each of the insurance companies inspected the building and found extensive water intrusion damage behind the stucco on the south side of the building, especially at the corners of the building. (*Id*. at 3–4.) State Farm's engineer opined that the damage probably began during or before 1989 to 1993. (Perrault Decl. ¶ 7 (Dkt. No. 18 at 3).) By contrast, Defendant's engineer found no evidence that the damage occurred as early as 1993. (Bennion Letter 3 (Dkt. No. 19-2 at 4).)

Defendant insured Plaintiff from May 18, 1989, to May 18, 1993, in a series of four annual policies. (*Id*. at 2; Resp. 2 (Dkt. No. 22).) The policies were "all-risk" property insurance policies, covering "the risk of direct physical loss or damage by any cause of loss except those under Comprehensive Protection–Exclusions." (Pl.'s Mot. 1 (Dkt. No. 17); Comprehensive Protection–Exclusions (Dkt. No. 19-6 at 43).) Under the exclusions section, the policies state:

> your protection does not include coverage for loss or damage caused by or resulting directly or indirectly from the following causes, or occurring in the following situations. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently with or before, during or after a loss. . . . 16. "Wear and tear," deterioration,

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[1]Defendant, collectively referred to in the parties' papers as "ACE," is composed of Bankers Standard Insurance Company and ACE Fire Underwriters Insurance Company, which was formerly CIGNA Fire Underwriters Insurance Company. (Resp. 2 (Dkt. No. 22 at 2).)

> rust, corrosion, marring or scratching, erosion, wet or dry rot, and mold. However, we will cover resulting loss or damage caused by: vehicles or aircraft, "sprinkler leakage," water damage, freezing, collapse of a building or falling objects.

(Policy (Dkt. No. 19-6 at 43–44).) In addition, the policies exclude loss caused by:

> Faulty design, workmanship and material including the cost of correcting any faulty design, workmanship, material, manufacture or installation, alteration, repair or work on covered "real property" or "personal property." But we will cover loss or damage that results from any of these, if the loss or damage occurs in connection with any cause of loss not otherwise excluded in this policy.

(*Id*. at 44.)

After its investigation, Defendant determined that the damage to Windsong Condominium was "caused by perils not covered by the ACE policies, and there is no evidence that any of the claimed damage took place during the time period covered by those policies." (Bennion Letter (Dkt. No. 19-2 at 2).) Consistent with this finding, Defendant declined to provide coverage. Plaintiff filed the instant suit seeking damages for breach of contract and other state law claims. (Am. Compl. (Dkt. No. 9).) In the instant motion, Plaintiff seeks a partial summary judgment order that (1) rules that the policies at issue cover "water damage" caused by accidental leaks; and (2) rules that if *some* of the "water damage" to Windsong Condominium occurred during the policy period, then Defendant is liable for *all* water damage resulting from the leaks, even if some of the damage actually occurred after the policies expired. (Pl.'s Mot. 2 (Dkt. No. 17).) Defendant opposes the motion on grounds that, notwithstanding Plaintiff's characterization of its damage as "water damage," the policies clearly exclude the damage at issue, which is more accurately described as "wood rot and deterioration of the gypsum sheathing." (Resp. 1, 4 (Dkt. No. 22).) Further, Defendant argues, a ruling on the second issue would be premature because Plaintiff has not established that *any* damage developed during the policy periods. (*Id*. at 2.) Moreover, Defendant argues, the rule that Plaintiff cites to support its assertion that Defendant must pay for all of the water damage if some of the water damage took place during the policy periods is a rule that applies only to third-party policies, not to first-party property policies like the ones at issue. (*Id*.)

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II. APPLICABLE STANDARDS

A. Summary Judgment

Summary judgment "should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). In determining whether an issue of fact exists, the Court must view all evidence in the light most favorable to the nonmoving party and draw all reasonable inferences in that party's favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248–50 (1986); *Bagdadi v. Nazar*, 84 F.3d 1194, 1197 (9th Cir. 1996). The inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson*, 477 U.S. at 251–52. The moving party bears the burden of showing that there is no evidence which supports an element essential to the nonmovant's claim. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Once the movant has met this burden, the nonmoving party then must show that there is in fact a genuine issue for trial in order to survive summary judgment. *Anderson*, 477 U.S. at 250. Where the moving party bears the ultimate burden of proof at trial, he must affirmatively put forth evidence that would satisfy his burden of proof at trial. STEPHEN S. GENSLER, FEDERAL RULES OF CIVIL PROCEDURE: RULES AND COMMENTARY 777 (2008). The nonmoving party can defeat summary judgment with fact assertions that create a genuine dispute as to any essential element of the moving party's claim. *Id.*

B. Interpreting Insurance Contracts

In addition, "[i]nterpretation of the terms of an insurance policy is a matter of law." *Allstate Ins. Co. v. Raynor*, 21 P.3d 707, 711 (Wash. 2001). "When clear and unambiguous, [the court] enforce[s] the policy language as written." *Wheeler v. Rocky Mountain Fire & Cas. Co.*, 103 P.3d 240, 242 (Wash. Ct. App. 2004) (internal citation omitted) (brackets added). "When determining whether an ambiguity exists, [the court] look[s] to the policy language as it would be read by the average insurance purchaser." *Id.* (brackets added); *see also Roller v. Stonewall Ins. Co.*, 801 P.2d 207, 209 (Wash. 1990),

overruled on other grounds by Butzberger v. Foster, 89 P.3d 689, 692 (Wash. 2004) ("In construing the language of an insurance policy, the policy should be given a fair, reasonable, and sensible construction as would be given to the contract by the average person purchasing insurance.") (*citing E-Z Loader Boat Trailers, Inc. v. Travelers Indem. Co.*, 726 P.2d 439 (Wash. 1986)). Washington law is settled that "[l]anguage in an insurance policy that is susceptible of two different but reasonable interpretations is ambiguous and must be liberally construed in favor of the insured." *McAllister v. Agora Syndicate, Inc*., 11 P.3d 859, 860 (Wash. Ct. App. 2000) (*citing Teague Motor Co. v. Federated Serv. Ins. Co.*, 869 P.2d 1130 (Wash. Ct. App. 1994)). "In addition, exclusionary clauses should be construed against the insurer with special strictness." *Id*. (*citing Tewell, Thorpe, & Findlay, Inc. v. Cont'l Cas. Co.*, 825 P.2d 724 (Wash. Ct. App. 1992)). This is because "[c]overage exclusions are contrary to the fundamental protective purpose of insurance and will not be extended beyond their clear and unequivocal meaning." *Bordeaux, Inc. v. Am. Safety Ins. Co.*, 186 P.3d 1188, 1191 (Wash. Ct. App. 2008) (internal quotation and citation omitted).

III. ANALYSIS

A. The Policies Cover "Water Damage"

The policies' wear-and-tear exclusionary provision that precludes coverage for damages from deterioration and wet or dry rot expressly distinguishes those kinds of damages from those caused by "water damage," for which coverage is preserved:

> your protection does not include coverage for loss or damage caused by or resulting directly or indirectly from . . . "[w]ear and tear," deterioration, rust, corrosion, marring or scratching, erosion, wet or dry rot, and mold. However, we will cover resulting loss or damage caused by: vehicles or aircraft, "sprinkler leakage," water damage, freezing, collapse of a building or falling objects.

(Comprehensive Protection–Exclusions (Dkt. No. 19-6 at 43).) The policies do not define the terms "water damage," "deterioration," or "wet or dry rot." Therefore, in determining the fair, reasonable, and sensible meaning of those words as would be given to them by the average purchaser of insurance, the Court looks to the ordinary dictionary definitions of those terms. *See State Farm Fire & Cas. Co. v.*

English Cove Ass'n, Inc., 88 P.3d 986, 990 (Wash. Ct. App. 2004) (looking first to the dictionary definition where a policy term was not defined); *see also Raynor*, 21 P.3d at 711 (explaining that courts "give undefined terms in [insurance] contracts their 'plain, ordinary, and popular' meaning"). *Webster's Third New International Dictionary* contains no definition of "water damage" but defines "water damage insurance" as "insurance against loss that is due to direct damage by rain or leakage of plumbing but not by flood." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2582 (2002). Thus, the Court finds that the average purchaser of insurance could fairly read "water damage" as meaning damage caused by rain or leaky plumbing. The Court notes that it is the intrusion of rain water that Plaintiff alleges caused the gypsum sheathing and wood framing to decay.

The ordinary and plain meaning of "wet rot" is "a soft rot in which the decayed tissues are markedly watery; decay of timber by fungi that attack wood having high moisture content." *Id*. at 2599. "Dry rot" is defined as "a decay of seasoned lumber caused by certain fungi (as the house fungi and some polypores) that consume the cellulose of wood leaving a mere soft skeleton that is readily reduced to powder." *Id*. at 697. Plaintiff does not allege specifically that the damage to the building was caused by fungi. In addition, based on the ordinary definition of wet and dry rot, damage from wet or dry rot may occur without direct damage by rain. Therefore, it is reasonable to read the exclusionary language as plain and unambiguously excluding damage caused by fungus but not by rain.

"Deterioration" means "the action or process of deteriorating or state of having deteriorated: gradual impairment." *Id*. at 616. "Deteriorate" means "to make inferior in quality or value: impair." *Id*. Like fungal growth, deterioration can occur without the presence of water damage. Therefore, it is also reasonable to read this exclusion as excluding coverage for deterioration but not for rain intrusion.

In addition, the terms "deterioration" and "wet or dry rot" appear in the context of the "wear and tear" exclusion. "Wear and tear" is specifically defined in the policies to include "wear, deterioration, rust, corrosion, marring or scratching, erosion, wet or dry rot, and mold." (Dkt. No. 19-7 at 4.) In other words, the policies' express definition of "wear and tear" is identical to the exclusionary provision

language at issue here. As such, it would be a fair reading of the exclusionary provision to understand that it excludes damages from deterioration and rot arising from normal "wear and tear" but not from an unusual occurrence of water damage.

Defendant argues that the second sentence, "[h]owever, we will cover resulting loss or damage caused by: vehicles or aircraft, 'sprinkler leakage,' water damage, freezing, collapse of a building or falling objects," preserves coverage for certain perils only if they result or ensue from the peril excluded in the exclusion. (Def.'s Resp. 7 (Dkt. No. 22).) As such, Defendant argues, since water damage cannot be said to have resulted from deterioration, wood decay, or mold, the preservation of coverage clearly does not apply to Plaintiff's loss. However, the Court is not persuaded that an average purchaser of insurance would read the second sentence in this way. Applying Defendant's reading leads to absurd results. For instance, it is hard to imagine how damages caused by "vehicles or aircraft" could ever result from the building's wear and tear, deterioration, rust, corrosion, marring or scratching, erosion, wet or dry rot, or mold. A more logical reading would be that damages caused by vehicles or aircraft would be covered, despite the fact that, say, marring or scratching of the building is normally excluded. Further, the sentence does not unequivocally say "we will cover loss *resulting from the previously listed excluded perils* if they are caused by vehicles, water damage, etc." Rather, the plain language of the sentence could reasonably be read as informing the insured that notwithstanding the exclusions for wear-and-tear type deterioration and rot, he will still be covered for "resulting loss or damage caused by . . . water damage[.]"

Defendant also argues that for coverage to be preserved for water damage, that peril must be "separate and distinct from the perils excluded by the exclusion." (Resp. 7 (Dkt. No. 22).) Defendant alludes to Washington's efficient proximate cause doctrine, which:

> operates to permit coverage when an insured peril sets other excluded perils into motion[,] which in an unbroken sequence and connection between the act and final loss, produce the result for which recovery is sought. In such a situation, the insured peril is considered the "proximate cause" of the entire loss and the loss is covered despite the fact that the other perils contributing to the loss were excluded. The efficient proximate

> cause rule applies *only where two or more independent forces operate to cause the loss*. When, however, the evidence shows the loss was in fact occasioned by only a single cause, albeit one susceptible to various characterizations, the efficient proximate cause analysis has no application. . . . If the rule applies, the question of which peril constitutes the proximate cause is best left to the factfinder[.]

Kish v. Ins. Co. of N. Am., 883 P.2d 308, 311 (Wash. 1994) (internal citations, quotations, and footnote omitted) (emphasis added). Defendant argues that "water damage" is really just Plaintiff's alternate characterization of the "deterioration" and "rot" damages it suffered. However, it is not merely Plaintiff who attempts to distinguish between "water damage" and "deterioration" and "rot"—rather, the express language of the policies distinguishes between those terms and requires the insured to characterize its damages as either from deterioration/rot or water damage in order to determine whether coverage is available. Further, as described above, the plain language definitions of those terms indicate that they are two independent perils: rot is caused by fungus, whereas water damage is caused by rain or plumbing leaks. As such, the Court finds that under the policies, "water damage" is a covered peril, distinct from wear-and-tear type "deterioration" and "rot." The question of whether "water damage" proximately caused Plaintiff's loss, however, is a question best left for the jury to determine.

B. Whether the Policies Cover All Damage If Some of the Damage Occurred During the Policy Period

There is a material fact issue as to whether any of Plaintiff's damage occurred during the policy periods, as opposed to some time after 1993. (*See* Perrault Decl. ¶ 7 (Dkt. No. 18 at 3) (opining that the damage probably began during or before 1989 to 1993); Bennion Letter 3 (Dkt. No. 19-2 at 4) (reporting that Defendant's structural engineer found no evidence that the damage occurred as early as 1993).) However, Plaintiff asks the Court to rule that as a matter of law, if indeed *some* of the water damage occurred during the policy period, then under the policies, Defendant is liable for *all* of the water damage, even damage that took place after 1993. Plaintiff's analysis is as follows: The policies state that "[e]ach coverage limit in the Declarations shows the most we will pay, under each coverage, for

'covered losses'[2] that arise from any one 'occurrence.'" (Commercial Property Conditions (Dkt. No. 19-3 at 8).) An "occurrence" is defined in relevant part as "an accident, including continuous or repeated exposure to the same event, that results, during the policy period, in loss or damage to your property[.]" (Commercial Property Coverage Definitions (Dkt. No. 19-4 at 2).) Plaintiff argues that the jury could determine that the repeated rain intrusion constitutes an "occurrence." (Mot. 12 (Dkt. No. 17).) Plaintiff points out that the property insurance policies do not state that the damage must occur during the policy period, only that the damage must arise from an "occurrence." (*Id*.) Plaintiff contrasts this with Defendant's choice to include a temporal limitation in its *liability* coverage, which states that "[t]his insurance applies to . . . 'property damage' only if . . . [the] 'property damage' occurs during the policy period." (*Id*. at 13; Commercial General Liability Coverage Form (Dkt. No. 19-7 at 8).) Further, Plaintiff argues, Washington law holds that unless a policy expressly states otherwise, any insurer "on the risk" during part of an ongoing loss is jointly and severally liable for all of that loss. (Mot. 13–14 (Dkt. No. 17) (*citing Am. Nat'l Fire Ins. Co. v. B&L Trucking & Constr. Co., Inc*., 951 P.2d 250 (Wash. 1998).)

Defendant argues[3] that even assuming some damage took place during the coverage period, Washington case law does not stand for the proposition proposed by Plaintiff. Specifically, Defendant argues that no Washington court has applied the rule of joint and several liability for continuous property damage in the first-party property insurance context.[4] (Resp. 18 (Dkt. No. 22).)

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[2]"Covered loss" is defined in the policies to include "loss, or damage for which we provide insurance under the terms of this policy." (Commercial Property Coverage Definitions (Dkt. No. 19-7 at 2).)

[3]Defendant first argues that Plaintiff has not yet proven that it suffered damages during the policy period and that therefore, the Court should not rule on the question of coverage limits now. (Resp. 16 (Dkt. No. 22).) However, Plaintiff essentially asks the Court to interpret the insurance contract, which is a matter of law proper for resolution at summary judgment. *See, e.g., Fuller v. The Travelers*, 946 P.2d 1198, 1199 (Wash. Ct. App. 1997).

[4]Defendant explains that "[t]hird-party liability insurance provides protection for the policyholder for its liability to someone else. In contrast, first-party property insurance provides protection for losses to the policyholder's own property." (Resp. 17 (Dkt. No. 22).)

B&L Trucking recognized that "all insurers on the risk during the time of ongoing damage have a joint and several obligation to provide full coverage for all damages." 951 P.2d at 254. Under Washington law:

> once a policy is triggered by an ongoing type of damage, all incremental damage which occurs subsequent to the expiration of the policy period is covered under the policy. The insured is entitled to recover the full amount of the covered damage, even if it did not purchase insurance policies during the years subsequent to the year in which damage first occurred. . . . For purposes of determining the scope of an insured's coverage, all continuous damage occurs within the policy period as long as the process was triggered during that period.

THOMAS V. HARRIS, WASHINGTON INSURANCE LAW § 23.4 (2d ed. 2006) (*citing B&L Trucking*, 951 P.2d at 426–27). If the insurer intends to be liable solely on a *pro rata* basis, such that it is only liable for the amount of damages commensurate with the damage that occurred during the insured years, the insurer must include that language in its policy. *Id*. The Court finds no authority distinguishing between first-party property insurance and third-party liability insurance coverage with respect to this principle.

In this case, Defendant did not include such limiting language. Coverage is triggered by the happening of an "occurrence," which by the policy's express definition, includes a "repeated exposure to the same event, that results, during the policy period, in loss or damage to [the insured's] property[.]" (Dkt. No. 19-4 at 2).) If the jury determines that the building's repeated exposure to water intrusion resulted in water damage to the property between May 18, 1989, and May 18, 1993, then Defendant's liability would be triggered under the policies. If the damage was ongoing after the expiration of the policies, Plaintiff would still be covered by Defendant's policies. It remains for the jury to determine whether, in fact, the policy was triggered during the policy period.

IV. CONCLUSION

For the foregoing reasons, the Court hereby GRANTS Plaintiff's Motion for Partial Summary Judgment (Dkt. No. 17). The Court rules as a matter of law that:

(1) Defendant's policies cover "water damage" resulting from accidental water intrusion, and

(2) Defendant's policies place no temporal limitation on the promise to pay for property

damage arising from "an occurrence," and therefore, to the extent that the policies were triggered during the policy period, the policies also cover all incremental damage which occurred subsequent to the expiration of the policy periods.

SO ORDERED this 12th day of December, 2008.

John C. Coughenour
UNITED STATES DISTRICT JUDGE