**STATE OF CONNECTICUT**

DOCKET NO. CV-15-6008837-S 2017 MAR -2 PM 2:32 SUPERIOR COURT

EDITH R. JEMIOLA, TRUSTEE
OF THE EDITH R. JEMIOLA
LIVING TRUST

JUDICIAL DISTRICT
OF TOLLAND

V.

HARTFORD CASUALTY
INSURANCE COMPANY

MARCH 2, 2017

**MEMORANDUM OF DECISION: DEFENDANT'S MOTION FOR SUMMARY JUDGMENT (#141)**

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 plaintiff's. In this case, the plaintiff, Edith R. Jemiola, Trustee of the Edith R. Jemiola Living Trust, claims that the defendant, Hartford Casualty Insurance Company, breached the homeowner's policy when it denied coverage for the "collapse" of the basement walls of her home and that this breach also constituted a violation of the implied covenant of good faith and fair dealing as well as the Connecticut Unfair Trade Practice Act and the Connecticut Unfair Insurance Practices Act (CUTPA/CUIPA). The defendant moves for summary judgment on all counts of the complaint, which the plaintiff has opposed. Both parties have thoroughly briefed the issues in this case and the court has heard lengthy arguments. Having considered the parties' arguments and submissions,[1] the court concludes that the defendant is entitled to judgment on all of the plaintiff's claims.



[1]The defendant filed a motion to strike certain exhibits submitted by the plaintiff in opposition to summary judgment (#156), which the plaintiff opposed (#157). The court granted the motion to strike in part and denied it in part. In particular, the court struck the deposition excerpts of the plaintiff's expert taken in other similar cases,

## UNDISPUTED MATERIAL FACTS

The plaintiff's home is located at 54 Hall Hill Road in Willington. She purchased the home with her former spouse in 1986 shortly after it was constructed. The plaintiff was divorced in 2001 and since then has owned the home individually or as the beneficiary of the trust. The plaintiff placed the home in a living trust in September 2002. The plaintiff's home has been insured by the defendant since 1986.[2] The plaintiff has paid all of the premiums and her policy has been renewed by the defendant, or one of its related subsidiaries, each year since 1986.

At all times from 1986 to March 2014, the plaintiff's homeowner's policy with the defendant provided coverage for "collapse." However, from 1986 to March 2005, the policies did not define the term "collapse." In March 2005, the defendant amended the policy to define "collapse" as "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." This definition of "collapse" has been contained in the plaintiff's policies from March 2005 through 2014, when she made her coverage claim in this case.

The plaintiff was employed by The Harford for forty-one years in the property-casualty insurance department. The plaintiff read her insurance policies, understood her duty as the insured to timely report claims, and the timing limitations for filing a coverage lawsuit.

The plaintiff first observed damage to her home when a crack in the drywall appeared in the southeast side of the master bedroom in the late 1990s, which was repaired and repainted. Around the 2005 to 2006 timeframe, the plaintiff noticed that several nails in her

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as this practice is not permitted under the Practice Book and there was no agreement by the parties as to the use of depositions taken in other cases in the present case.

[2]The plaintiff's house was insured by the defendant after it had been constructed and subsequently purchased.

kitchen had popped out. Several years later, in 2009 and 2010, the plaintiff further noticed that more nails had come out around the windows in the upper portion of her home.

In the fall of 2006, the plaintiff observed cracks in her basement walls that ran in vertical and horizontal directions along the south side of the house and at least one crack split the wall so that the plaintiff could observe light outside through the crack. Consequently, the plaintiff consulted a contractor, Viking Masonry of Manchester, who told the plaintiff that the cracks were normal. The plaintiff then hired Viking Masonry to repair the basement cracks in October 2006. The repairs included excavation around the outside of the house to reinforce the foundation in seven places with 14-inch rebar and expoxy, repairing the outside of the foundation, and waterproofing the plaster. Viking Masonry also filled in the cracks on the inside of the basement walls and installed a support post underneath one of the beams in the plaintiff's home. The post came loose several times and had to be adjusted twice a year.

The plaintiff believed that the cracking in her basement walls was normal, and, thus, the repairs constituted routine home maintenance. As a result, she did not notify the defendant of the cracking condition in 2006 and did not make a claim under her policy.

In 2009, the plaintiff hired Hillcrest Builders to repair chimney damage that she now believes was connected to the shifting of her basement walls. Hillcrest told her that the cracks were "very unusual" and "not normal." The plaintiff did not make an insurance claim after this event.

In 2014, the plaintiff noticed that the same area in her basement that had cracking in 2006, had again begun to crack. The plaintiff was referred to Dean Soucy, a contractor who was experienced with the cracking problem the plaintiff faced. Soucy viewed the basement walls and told the plaintiff that the cracks were related to faulty concrete supplied by the JJ

Mottes. The plaintiff believed that Soucy's explanation shed light on the other continuing conditions she had been experiencing in her home.

On June 3, 2014, one day after Soucy informed her of what he believed were significant structural issues with her home, the plaintiff made a claim to the defendant under her policy. The defendant investigated the claim and engaged an engineer to inspect the condition of the plaintiff's home. The defendant then denied the plaintiff's claim and, in its July 22, 2014 denial letter, explained that its engineer determined that "the foundation was cracking due [to] faulty workmanship and the type of materials used in the foundation, however the structural integrity of the foundation walls is not compromised. It was also determined . . . that the cracking and nails popping was due to settling of the Lally columns and not related to the foundation damage."

The defendant's denial letter relied on the policy with effective dates of July 10, 2013, to July 10, 2014, and explained that the policy "provides coverage for direct physical loss to your property on an all risk basis. Unfortunately, faulty workmanship and materials as well as settling of walls and foundations are excluded from coverage under the policy." The letter then cited specific provisions in the policy that excluded coverage, including "bulging or expansion, including resultant cracking, of . . . foundations [or] walls," or "loss . . . caused by . . . [f]aulty, inadequate or defective . . . [m]aterials used in . . . construction."

Soucy's opinion was confirmed by David Grandpré, the plaintiff's expert witness, after he inspected the plaintiff's home on September 4, 2015. Grandpré has opined that the pattern or map cracking condition in the plaintiff's basement is caused by the use of aggregate material, which most likely contains a reactive chemical compound, in the composition of the concrete used to form the basement walls of the plaintiff's home. He believes that the damage

is either caused by a ferrous sulfide reaction or an alkali-silica reaction. In the case of iron sulfide reaction, there is an iron mineral such as pyrrhoitite in the concrete which expands in the presence of water, of such small amount as humidity in the air. This internal expansion of the chemical reaction causes the concrete to fracture internally, which results in the cracking or general deterioration of the concrete. The other possible cause, alkali-silica reaction, has a similar expansive mechanism and resulting damage. Grandpré opines that eventually, this condition will lead to the decomposition of the concrete in the basement walls of the plaintiff's home. Once this happens, the walls of the basement will be unable to support the structure above and the home will fall to the ground. Grandpré has not provided a date or period of time that he believes the home will fall to the ground.

In Grandpré's opinion, the structural integrity of the plaintiff's basement walls is "substantially impaired." He believes that because the aggregate containing the reactive chemical agent was used in the mixing of the concrete, the decomposition and deterioration of the concrete began immediately and was assured the moment it was mixed and poured. Grandpré believes that although the home was "doomed" from the outset, the substantial impairment of the structural integrity of the plaintiff's home occurred after the expansive reaction took place, causing the fracturing and cracking of the concrete to the point that it is no longer a solid mass that it was intended to be. In other words, the substantial impairment occurs when there is some outward manifestation of cracking, which occurs due to the expansive reaction occurring within the walls.

The plaintiff has continuously resided in the home since 1986 and still lives in the home, which remains standing. The plaintiff continues to use her basement for a playroom, storage, and for recreational purposes.

## DISCUSSION

The plaintiff's complaint is in three counts; breach of contract, breach of the covenant of good faith and fair dealing, and violation of CUTPA/CUIPA. In count one, the breach of contract claim, the plaintiff asserts that the defendant violated the homeowner's insurance policies, in place since 1986, when it denied her claim in this case.[3] In count two, the plaintiff asserts that the defendant violated the implied covenant of good faith and fair dealing when it unilaterally, without notice and disclosure, changed the terms of the policy. In count three (incorrectly identified in the complaint as IV), the plaintiff claims that the defendant violated CUTPA/CUIPA by engaging in a general business practice to deny coverage for similar concrete decay claims.

The defendant has denied the essential allegations of the plaintiff's complaint and asserted eighteen special defenses. The defendant moves for summary judgment on all three counts of the complaint. As to count one, the defendant argues that the plaintiff's losses are not covered under any of the policies and that the action is barred due to the plaintiff's failure to bring it in a timely manner under the limitation of suit provision, after she first noticed the cracks in the basement in 2006. The defendant asserts that if the court grants summary judgment on the breach of contract count and finds that it correctly denied coverage, then the plaintiff's remaining counts, which depend on a finding of breach, cannot survive.

The plaintiff opposes the defendant's motion for summary judgment and asserts that as to the breach of contract claim, there is a genuine issue of material fact as to when the

[3]In her breach of contract count, the plaintiff asserts that the defendant made a unilateral change in her policy in 2005 when it included a definition of collapse without notice or adequate disclosure to the plaintiff. As a result, the plaintiff alleges that the original provisions of the policy, prior to the institution of the new definition of "collapse," remained in place and apply to this claim. The plaintiff's brief does not address this claim. When asked at argument if the plaintiff was pursuing it in relation to her breach of contract claim, plaintiff's counsel said, "not really." Thus, this court does not address this issue.

plaintiff's loss occurred – prior to, or after, the defendant amended the policy to include the definition of "collapse." The plaintiff contends that the pre-2005 policies are applicable and under those policies, the court must apply the common law definition of "collapse" that requires a finding of any substantial impairment to structural integrity of the plaintiff's home, and that as to this issue, there is a genuine issue of material fact. If the post-2005 policies are applied, which include a definition of collapse, the plaintiff argues that the definition is ambiguous, thereby triggering the common law definition of collapse applicable to the pre-2005 policies, which would similarly create a genuine issue of material fact.

*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. Count One - 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 – from 1986 to 2014, and that the plaintiff paid all of her annual premiums over that period of time. The plaintiff's claim in this case is that the defendant breached these policies by denying her claim for the damage to her basement walls, which she claims constitutes a "collapse." Because the definition of collapse changed substantially in March 2005, from an undefined term to a defined term, the first question the court must determine is whether there is a genuine issue of material fact as to when the plaintiff's loss occurred. If so, then the parties agree that the issue of when the loss occurred must be decided by the jury.

1. When the Loss Occurred

This case involves two sets of policies, which require application of two very different definitions of "collapse:" (1) the pre-March 2005 policies provide coverage for "collapse," but do not define the term, leaving the court to apply the more liberal common law definition of "collapse" to determine if the defendant breached the contract; and (2) the post-March 2005 policies which contain a more narrow and limited definition of the term "collapse." If there is a genuine issue of material fact as to whether the loss occurred prior to March 2005, then the issue of whether there had been a "collapse" would be guided by the 1986 decision of our

Supreme Court that held that the undefined word "collapse" in a similar homeowner's insurance policy was ambiguous and then defined it to mean "any substantial impairment of the structural integrity of a building." *Beach* v. *Middlesex Mutual Assurance Co.*, 205 Conn. 246, 532 A.2d 1297 (1987). If the *Beach* definition applies in this case, then the issue of whether there was any substantial impairment of the structural integrity of the plaintiff's home would be a question of fact for the jury to decide based on the competing opinions of the parties' experts. See *Roy* v. *Liberty Mutual Fire Ins. Co.*, Superior Court, judicial district of Tolland, Docket No. CV-15-6009410-S (February 22, 2017, *Cobb, J.*) (applying the definition of "collapse" as outlined by *Beach* to deny summary judgment because there was a genuine issue of material fact as to whether the plaintiff's house had suffered any substantial impairment of its structural integrity).

If, however, the undisputed material facts establish that the loss occurred after March 2005, then the court must undertake a two part analysis to determine whether there has been a "collapse," as defined by all of the post March 2005 polices as "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 court must first determine whether this definition of "collapse" is ambiguous, and, second, whether there is a genuine issue of material fact that the policy provides coverage for the plaintiff's loss.

At a minimum to prevail under any policy, and in particular the pre-2005 policies where there is no policy definition, to establish that her house has suffered a "collapse" the plaintiff agrees that she must establish that her home suffered a substantial impairment to the structural its integrity, pursuant to the common law definition of "collapse."

The plaintiff claims that she has presented sufficient evidence to establish a genuine issue of material fact that the loss occurred prior to March 2005, and in particular, that it can reasonably be inferred from the evidence presented that the substantial impairment existed prior to March 2005 in the early 2000s. The defendant disagrees and argues that such an inference cannot be drawn from the facts presented, but rather, would require a jury to resort to speculation and surmise. The court agrees with the defendant and finds that the plaintiff has not produced sufficient evidence to establish a genuine issue of material fact from which the court, or a jury, could find or infer that the loss occurred prior to March 2005.

The plaintiff testified at her deposition that the first time she observed horizontal and vertical cracks on the walls on the south side of her basement was in the fall of 2006. In October 2006, the plaintiff hired a contractor to repair the cracks. The plaintiff presented no evidence that anyone observed any cracks to the plaintiff's basement walls prior to October 2006. The plaintiff further testified that she had issues with her furnace, and, therefore, she was very diligent about checking her basement. Therefore, there is no eyewitness evidence of cracking to the plaintiff's basement walls prior to October 2006.

The plaintiff conceded at argument that the determination of whether there was a substantial impairment of the structural integrity of her home requires expert testimony.[4] The plaintiff's expert witness stated in his deposition, that the plaintiff's basement walls have been impaired since 1986 when the concrete was poured because the chemical reaction in the concrete was inevitable. However, he did not provide an opinion, and it is not the plaintiff's position, that the substantial impairment of the structural integrity of the plaintiff's home

[4] Expert testimony is generally required where the question involved goes beyond the field of ordinary knowledge and expertise of judges or jurors. *Franchey* v. *Hannes*, 155 Conn. 663, 666, 237 A.2d 364 (1967); *State* v. *Padua*, 273 Conn. 138, 149, 869 A.2d 192 (2005).

occurred in 1986, when the concrete was first poured.[5] Instead, it is the plaintiff's position in this case, supported by her expert witness, that the substantial impairment of the structural integrity of the plaintiff's home, that is, the loss, occurred when outward manifestations of horizontal and vertical cracking appeared and were visible in the basement walls.[6] The plaintiff's expert opines that October 2006 was "latest point in time" that a substantial impairment occurred, that is, when the plaintiff observed the cracks. The plaintiff's expert did not offer an opinion that it could be reasonably inferred that the substantial impairment existed nineteen months earlier, prior to March 2005, based on the fact that the cracks were visible in October 2006.

Despite the lack of direct eyewitness or expert evidence, the plaintiff claims that the jury could make a reasonable inference that there was a substantial impairment to her home prior to March 2005 because (1) there was visible cracking in the basement in October 2006 and her expert opined that the deterioration began immediately in 1986, and (2) she observed cracking in the drywall and the popping of nails in the upstairs living portion of her home as early as the late 1990s and "around the 2005-2006 time frame."[7] The court disagrees that such an inference could be made based upon this evidence because no one observed any visible signs of cracking prior to October 2006, despite the plaintiff's diligence in checking her basement, and her expert offered no opinion in this case that based on the existence of

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[5]Even if this argument was made, it fails because the defendant did not insure the home when it was first poured; rather, the home at issue was constructed and purchased before it was subject to any homeowner's policy.

[6]At oral argument, plaintiff's counsel clarified this point, stating that "substantial impairment" requires some evidence of cracking, "when the concrete itself is broken apart and fractured."

[7]The plaintiff urges the court to follow another nonbinding Superior Court's decision in this district denying summary judgment in a similar case finding that when the loss occurred was a genuine issue of material of fact. See *Boucher* v. *Amica Mutual Ins. Co.*, Superior Court, judicial district of Tolland, Docket No. CV-12-6004826-S (February 1, 2013, *Sferrazza, J.*). The court declines to apply this decision because the facts are distinguishable and the decision is a single sentence containing no analysis.

extensive cracking in plaintiff's basement walls in October 2006, it could be reasonably inferred that visible cracking was present prior to March 2005. Similarly, the plaintiff's expert did not opine that the substantial impairment to her basement walls occurred, or was at all related to, the outward manifestations occurring in the upper portion of the home. There was nothing in the plaintiff's expert's deposition that could permit either inference, and no affidavit of the plaintiff's expert was submitted in this case.[8] "Although the court must view the inferences to be drawn from the facts in the light most favorable to the party opposing the motion . . . a party may not rely on mere speculation or conjecture as to the true nature of the facts to overcome a motion for summary judgment. . . . A party opposing a motion for summary judgment must substantiate its adverse claim by showing that there is a genuine issue of material fact together with the evidence disclosing the existence of such an issue." (Internal quotation marks omitted.) *Ecourse* v. *100 Taylor Avenue, LLC*, 150 Conn. App. 819, 829-30, 92 A.3d 1025 (2014); see *Buell Industries* v. *Greater N.Y. Mutual Ins. Co.*, 259 Conn. 527, 558, 791 A.2d 489 (2002); see also *Paige* v. *St. Andrew's Roman Catholic Church Corp.*, 250 Conn. 14, 33-34, 734 A.2d 85 (1999) ("[d]rawing logical deductions and making reasonable inferences from facts in evidence, whether that evidence be oral or circumstantial, is a recognized and proper procedure in determining the rights and obligations of litigants, but to be logical and reasonable they must rest upon some basis of definite facts, and any conclusion reached without such evidential basis is a mere surmise or guess" [Internal quotation marks omitted]).

[8]At oral argument, the court pressed plaintiff's counsel on this important point – that is, whether the plaintiff's expert had offered or could offer an opinion that based on the visible cracking in the plaintiff's basement walls in October 2006, it could be reasonably inferred that such visible cracking, and thus, a substantial impairment of the structural integrity of the plaintiff's home, existed in March 2005 or earlier. The plaintiff conceded that the expert has not rendered such an opinion. The court invited the plaintiff to provide the court with a supplemental affidavit from the expert on this crucial issue, but such an affidavit was not submitted in this case.

Thus, the court concludes that the undisputed material facts establish that the loss in this case can be traced to October 2006, when the plaintiff observed the cracking of her basement walls. The plaintiff has failed to produce admissible counter-evidence to establish a genuine issue of material fact that the loss occurred prior to March 2005.

2. Coverage Under Post-2005 Policies

Having determined that the undisputed evidence establishes that the loss occurred after the defendant changed the policies to include an amendment for the term "collapse," in March 2005, the court turns to the issue of whether the defendant breached the post-March 2005 policies by finding that the loss did not constitute a "collapse," and denying the plaintiff's claim. Because all of the relevant provisions contained within the post-March 2005 policies are the same, the court does not have to decide the exact date of the loss or which specific annual policy applies here.

The defendant asserts that it is entitled to summary judgment on the plaintiff's breach of contract claim because the undisputed material facts establish that it did not breach the policy in denying coverage for this claim. In particular, the defendant claims that the definition of "collapse" in the post March 2005 policies 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 argues that the claim is not covered under the policy and it is 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 the plaintiff remains living in the home. The plaintiff disputes the defendant's claims and argues that the policy definition of collapse is internally inconsistent and ambiguous. In particular, the plaintiff argues that the

word "abrupt" is ambiguous and it should be construed to mean "unexpected." The plaintiff also argues that the terms "falling down," "caving in," and "occupied for its current intended purpose," are ambiguous. If the policy definition is ambiguous, then the more liberal common law definition of collapse annunciated in *Beach* would apply, rendering the issue one for the jury to decide. Having reviewed the policy, the relevant cases and the parties' arguments, the court concludes that as applied to this case, the policy definition of collapse is unambiguous and does not provide coverage for the plaintiff's loss.

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.*, supra, 205 Conn. 246. 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.

As discussed, from 1986 to March 2005, the plaintiff's policies provided coverage for collapse, but they did not define the term, thereby rendering the common law provision applicable. See *Roy* v. *Liberty Mutual Fire Ins. Co.*, supra, Superior Court, Docket No. CV-15-6009410-S. However in March 2005, the defendant amended the policy to include a more narrow and limited definition of "collapse." Since March 2005, all of the plaintiff's policies have included this definition.[9]

In particular, the policies from March 2005 forward provide "Additional Coverage" for "collapse," and provide in relevant part:

> b. 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.
>
> c. 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:
>
> (1) The Perils Insured Against named under Coverage C;

[9]It is the court understanding that all or most of the defendant's homeowners' policies now include the definition of "collapse" at issue here.

(2) Decay that is hidden from view, unless the presence of such decay is known to an "insured" prior to collapse;

(3) Insect or vermin damage that is hidden from view, unless the presence of such damage is known to the "insured" prior to collapse;

(4) Weight of contents, equipment, animals or people.

(5) Weight of rain which collects on a roof; or

(6) Use of defective material or methods in construction, remodeling or renovation . . . .

By using the phrase "abrupt falling down or caving in of a building or part of a building" this language 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.

No other Connecticut state court has had occasion to interpret this "collapse" definition in a case JJ Mottes concrete case.[10] However, a Connecticut Federal District Court has recently reviewed the same collapse definition in a similar case, involving defective concrete from JJ Mottes, and granted the defendant's motion to dismiss finding that coverage was barred based on this definition which it found to be unambiguous. *Alexander* v. *General Ins. Co. of America*, United States District Court, Docket No. 3:16-CV-59 (SRU) (D. Conn. July 7, 2016). In the court's oral decision, it stated:

> So there are several problems for the plaintiff given the allegations of the complaint here. The first is that there has been no abrupt falling down or caving in of a building or any part of a building for which coverage applies, and there has not been a clear allegation that any building or part of a building cannot be occupied for its intended purpose.

[10]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.*).

> Even if that had been met, what we have here is a building that is in danger of falling down, and that is expressly excluded from collapse coverage; and, similarly, there has been cracking, building, etc. Those situations are also excluded . . . .

On reconsideration, the District Court reaffirmed its decision, stating: "Plaintiffs cannot avoid the fact that their basement walls are still 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." *Alexander* v. *General Ins. Co. of America*, United States District Court, Docket No. 3:16-CV-59 (SRU) (D. Conn. January 17, 2017).

Courts around the country have examined this same policy definition of the word "collapse," and also determined that the definition is unambiguous, and applied it to sustain the denial of coverage claims. See *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).

The court agrees with the Connecticut Federal District Court in *Alexander* and the other courts around the country that have held that the definition of collapse in the policy is unambiguous as applied to circumstances similar to this case.

The plaintiff relies on a number of out-of-state decisions that have interpreted the definition of "collapse," under the circumstances presented in those cases, and found the definition to be ambiguous.[11] See *Landmark Realty, Inc.* v. *Great American Ins. Co.*, United States District Court, Docket No. 10-278 (JKS) (D. Md. December 3, 2010) (determining that the application of the collapse provision to the building at issue yields conflicting results and, thus, creates an ambiguity); *Ken Johnson Properties, LLC* v. *Harleysville Worcester Ins. Co.*, United States District Court, Docket No. 12-1582 (JRT/FLN) (D. Minn. September 30, 2013) (determining that the collapse provision is ambiguous because "of the conflicting nature of the four subsections defining collapse"); *Malbco Holdings, LLC,* v. *Amco Insurance Company*, 629 F. Supp. 2d 1185 (D. Or. 2009) (finding that the collapse provision is ambiguous because the entire definition, with the exception of "abrupt," is subject to more than one plausible interpretation); *Scorpio* v. *Underwriters at Llyod's London*, United States District Court, Docket No. 10-325 (ML) (D. R.I. June 5, 2012) (finding that the collapse provision at issue would provide coverage under one section, but preclude coverage under other sections, resulting in an ambiguity); *Kings Ridge Community Assn., Inc.* v. *Sagamore Ins. Co.*, 98 So.

[11]In addition to the preceding cases, the plaintiff also contends that the court in *130 Slade Condominium Assn., Inc.*, v. *Millers Capital Ins. Co.*, United States District Court, Docket No. 07-1779 (CCB) (D. Md. June 2, 2008), found the collapse provision ambiguous; however, the court disagrees. The *130 Slade* decision cannot be read to decide whether the collapse provision is ambiguous or unambiguous because the court did not resolve that issue. Instead, the court found that the policy affords coverage whether it found that the collapse provision was ambiguous or unambiguous.

3d 74 (Fla. Dist. Ct. App. 2012) (recognizing the factual similarities of *Malbco*, *130 Slade*, and *Landmark*, and holding that the collapse provision "is susceptible to more than one reasonable interpretation, one providing coverage, and the other limiting coverage").

The court does not find these cases cited by the plaintiff to be persuasive because they found the definition of collapse to be ambiguous based upon its application to the particular building and facts at issue in those cases, which are distinguishable from this case. For example, in certain cases, the buildings were uninhabitable; see e.g., *Ken Johnson Properties, LLC* v. *Harleysville Worcester Ins. Co.*, supra, United States District Court, Docket No. 12-1582 (JRT/FLN) (the building was suffering from a sagging roof, broken joists, a hole in the roof, and at least one apartment in the building was condemned); *Landmark Realty, Inc.* v. *Great American Ins. Co.*, supra, United States District Court, Docket No. 10-278 (JKS) (the building was evacuated and the property was condemned as "unfit for human habitation" due to the sagging of the floor); *Malbco Holdings, LLC,* v. *Amco Insurance Company*, supra, 629 F. Supp. 2d 1185 (the building was in a dangerous physical condition due to a sagging floor and the city was prepared to shut down the entire building, but for an emergency shoring). Also, in other cases, the building experienced a sudden occurrence in which the building, or a part of it, fell down or caved in; see e.g., *Scorpio* v. *Underwriters at Llyod's London*, supra, United States District Court, Docket No. 10-325 (ML) (after a rain storm, the roof fractured and "permanently deflected"); *Kings Ridge Community Assn., Inc.* v. *Sagamore Ins. Co.*, supra, 98 So. 3d 74 (one morning, the building began to shake resulting in the significant deflection of the flat roof and ceiling).

In interpreting contracts, "[t]he ambiguous language must render the policy ambiguous as to the relevant issue." *Connecticut Medical Ins. Co.,* v. *Kulikowski*, 286 Conn. 1, 15, 942

A.2d 334 (2008). In addition to the plaintiff's cited cases being distinguishable, the ambiguities found by the courts in those cases were premised on the certain facts when applied to the definition that made the definition ambiguous.

Applying the unambiguous "collapse" provision to the plaintiff's home, there 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.*, supra, 259 Conn. 527 (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."[12] The word "abrupt" is unambiguous and the damage to the plaintiff's basement walls was not "abrupt," but rather is happening over time.

[12]The plaintiff urges the court to find the word "abrupt" ambiguous, because the falling down or caving in in this case is not unexpected as it is taking place over time. Even if the court were to adopt this argument, the plaintiff could not prevail under the other unambiguous requirements of the definition as discussed.

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.[13]

*C. Other Claims*

Because the court has found no improper denial of coverage under the policy, the plaintiff cannot prevail on count two, her claim of breach of the covenant of good faith and fair dealing. See *Capstone Building Corp.* v. *American Motorists Ins. Co.*, 308 Conn. 760, 796, 67 A.3d 961 (2013) (concluding that "bad faith is not actionable apart from a wrongful denial of a benefit under the policy"). Thus the defendant is entitled to judgment as to count two.

As to her CUTPA/CUIPA claim, that too must fail in view of the court's finding that there was not coverage under the policy, and, consequently, the plaintiff has 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])

CONCLUSION

For all of the foregoing reasons, the defendant's motion for summary judgment is granted as to all counts of the complaint.

So ordered.

Cobb, J.

[13]Because the court has found that the policy did not cover the plaintiff's loss, it is unnecessary for the court to decide the defendant's suit limitation claim.