NO. HHD-CV-12-6036618-S	;	SUPERIOR COURT
EDWARD JAZLOWIECKI	;	J.D. OF HARTFORD
V.	;	AT HARTFORD
NATIONWIDE INSURANCE COMPANY OF AMERICA and KOZIURA INSURANCE AGENCY	;	AUGUST 7, 2014

8/7/14 - cc: Rpts Jud Dec, E. Jazlowiecki, Seiger, Feller, Sullivans

RULING RE: DEFENDANTS' MOTION FOR SUMMARY JUDGMENT #131

ISSUE

At issue is whether the court should grant the defendants' motion for summary judgment and dismiss the plaintiff's substituted fourth amended complaint on the basis of, inter alia, that the policy provides coverage for damages due to "bodily injury" or "property damage" arising from an incident; intentional acts prevent coverage under the policy's exclusions provision; and failure to furnish a timely notice under the policy's express conditions.

FACTS AND PROCEDURAL CONTEXT

The tortuous history between the parties goes back 2004. To put this case in a proper context it is crucial to recount the relevant history. This action for breach of contract arises from a dispute between two neighbors in Simsbury. The plaintiff, Edward Jazlowiecki and his wife Linda Jazlowiecki (Jazlowieckis) allegedly erected a "spite fence" and engaged in other harassing conduct, including commencing a lawsuit against their elderly neighbors Carl and Catherine Coppersmith (Coppersmiths). The Coppersmiths filed a counterclaim sounding in intentional torts. The Jazlowieckis notified the Nationwide Insurance Company (Nationwide) about the Coppersmiths' counterclaims and tendered the defense of indemnification under their homeowner's policy. Nationwide denied the coverage.

A. Docket No. HHD CV08-4038491[1] (The Underlying Litigation)

In 2004, Carl Coppersmith reported Edward Jazlowiecki to the Department of Environmental Protection (DEP) for cutting down trees on state forest land located behind both of their properties. The DEP commenced an investigation, and concluded that the Jazlowieckis two-story shed/cottage was encroaching on the state forest land. Not that the DEP instituted an action against the Jazlowiecki with respect to the trees, they were forced to relocate their shed.

It is alleged that in the aftermath of these events, the Jazlowieckis engaged in retaliatory conduct. The alleged conduct included: harassment; making obscene hand gestures (giving the Coppersmiths' middle finger); throwing nails and other sharp objects on the Coppersmiths' driveway; broadcasting loud music for hours a day towards the Coppersmiths' property; and erecting an eight by thirteen foot stockade fence along the border of the properties and plastering it with "no trespassing, neighborhood watch" and similar signs; as well as putting up two video cameras directed at the Coppersmiths' property, specifically at the Coppersmiths' bedroom windows. See Exhibit BB.

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[1]The court has taken judicial notice of this file. Section 2.1 of the Connecticut Code of Evidence, captioned. "Judicial Notice of Adjudicative Facts," provides as follows:

"(a) Scope of section. This section governs only judicial notice of adjudicative facts.

"(b) Taking of judicial notice. A court may, but is not required to take a judicial notice of matters of fact, in accordance with subsection (c).

"(c) Kinds of facts. A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) within the knowledge of people generally in the ordinary course of human experience, or (2) generally accepted as true and capable of ready and unquestionable demonstration.

"(d) Time of taking judicial notice. Judicial notice may be taken at any stage of the proceedings."

Section 2.2 of the Connecticut Code of Evidence, captioned "Notice and Opportunity To Be Heard," provides as follows:

"(a) Request of party. A party requesting the court to take a judicial notice of fact shall give a timely notice of the request to all other parties. Before the court determines whether to take the requested judicial notice, any party shall have an opportunity to be heard.

"(b) Court's initiative. The court may take a judicial notice without request of a party to do so. Parties are entitled to receive notice and have an opportunity to be heard for matters susceptible of explanation or contradiction, but not for matters of established fact, the accuracy of which cannot be questioned."

The Coppersmiths (an elderly couple in their eighties) sought assistance from the police department and state and local agencies. They did not seek judicial intervention until Carl Coppersmith was sued in or about July 2008.[2] On or about November 3, 2008, Carl Coppersmith filed a motion to cite-in Edward Jazlowiecki as a counterclaim defendant and Catherine Coppersmith as a counterclaim plaintiff and filed a request for temporary injunction. Attached to the motion to cite-in was a six count proposed counterclaim which asserted claims against Jazlowieckis for malicious erection, intentional infliction of emotional distress, private nuisance and injunction; all of which relate to the Jazlowieckis' erection of the "spite fence" and other harassment as described above.

The motion to cite-in was granted on November 24, 2008, and the counterclaim dated December 8, 2008, was formally served on the Jazlowieckis on December 9, 2008. (Return of Service Coppersmiths' litigation docket entry number 114.00). The allegations of the counterclaim are identical to those of the proposed counterclaim that accompanied to Coppersmiths' motion to cite-in. Specifically, the first count of the counterclaim alleges malicious erection under the Connecticut General Statutes § 52-570[3]. The second count of the counterclaim sets forth a claim for malicious erection under Connecticut General Statutes § 52-483[4]. The third and fourth counts of the counterclaim sound in intentional infliction of emotional

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[2] Docket No. HHD-CV-084038491S, Felter-Jazlowiecki v. Coppersmith, W., Carl, hereinafter will be referred as a Coppersmiths' litigation.

[3] Sec. 52-570. Action for malicious erection of structure. Action for malicious erection of structure. An action may be maintained by the proprietor of any land against the owner or lessee of land adjacent, who maliciously erects any structure ...

[4] Sec. 52-483. Injunction against sale on execution; adjournment of sale. Injunction against sale on execution; adjournment of sale. When any temporary injunction is granted to restrain a sale on execution or tax warrant, the injunction order may direct the ...

distress and negligent infliction of emotional distress respectively. The fifth count sounds in private nuisance and the sixth count asserts a claim of injunction.

Rather than proceed with the hearing on the Coppersmiths' temporary injunction, the parties agreed to proceed to trial quickly and a trial date was set for October 27, 2009. On September 25, 2009, the Coppersmiths requested leave to amend their counterclaim to assert an additional claim of trespass based upon a survey which demonstrated that the alleged "spite fence" encroached on their property in various locations. The court granted the Coppersmiths' request to amend during the first day of the trial. The Jazlowieckis answered the amended counterclaim denying all liability but admitting to erecting the fence and the existence of signs and cameras.

On October 27, 2009, the court trial commenced and evidence was presented over the course of multiple days during October and November of 2009. Thereafter, the case was resolved by way of a stipulated judgment, whereby the Jazlowieckis agreed: pay the Coppersmiths' $50,000.00; take down the fence, signs, and cameras; cease and desist their harassing conduct; and refrain from contacting the Coppersmiths directly. [docket entry number 152 and 153].

B. The Present Litigation

On October 29, 2012, almost three years after the stipulated judgment entered, Edward Jazlowicki[5] filed the present lawsuit against Nationwide asserting claims for breach of contract, common law bad faith, and violation of CUTPA and CUIPA, all which stem from its denial of coverage for the counterclaim. Kozuria Insurance Agency (Kozuria) was added as an additional

[5] Hereinafter referred to as the plaintiff.

defendant[6]. The plaintiff amended the complaint multiple times. On January 2, 2014, the common law and statutory bad faith counts were stricken. On January 15, 2014, the plaintiff filed the operative substituted fourth amended complaint, wherein the only remaining count against the defendants ia for breach of contract.

On January 29, 2014, the defendants filed an answer and special defenses. Also on January 29, 2014, the defendants filed a motion for summary judgment. The plaintiff filed an objection to the motion for summary judgment on March 31, 2014. On April 7, 2014, the defendants filed a reply to the plaintiff's objection and lastly the plaintiff filed a surreply on April 23, 2014. The matter was heard at short calender on April 28, 2014.

DISCUSSION

A. Summary Judgment, Generally

"Practice Book § 17-49 provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any 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. The party moving 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." *Zielinski v. Kotsoris*, 279 Conn. 312, 318, 901 A.2d 1207 (2006). "A material fact has been defined adequately and simply as a fact which will make a difference in the result of the case." (Internal quotation marks omitted.) *United Oil Co. v. Urban Development Commission*, 158 Conn. 364, 379, 260 A.2d 596 (1969).

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[6] Nationwide and Kozuria are hereinafter referred to as the defendants.

In reviewing the evidence offered, the trial court must "view the evidence in the light most favorable to the nonmoving party."(Internal quotation marks omitted.) *Johnson v. Atkinson*, 283 Conn. 243, 253, 926 A.2d 656 (2007). When deciding a summary judgment motion, the trial court may not decide issues of material fact, but only determine whether such genuine issues exist. *Nolan v. Borkowski*, 206 Conn. 495, 500, 538 A.2d 1031 (1988).

"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." *Ramirez v. Health Net of the Northeast, Inc.*, 285 Conn. 1, 11, 938 A.2d 576 (2008).

In the present case, the plaintiff contends that the defendant Nationwide breached the homeowner's insurance policy by failing to provide coverage and failing to defend and indemnify with respect to the Coppersmiths' amended counterclaim dated September 25, 2009. This matter implicates two Elite II Homeowners policies issued to the plaintiff. The two policies issued and are written on Form HO 6. The relevant parts of the coverage on Form HO 6 are set forth herein.[7]

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[7] **Section II**
Liability Coverages
Additional Definitions Applicable to These Coverages
For purposes of these coverages only:

1. "**BODILY INJURY**" means bodily harm, including resulting care, sickness or disease, or death. Bodily injury does not include emotional distress, mental anguish, humiliation, mental distress or injury, or any similar injury unless the direct result of bodily harm.
2. "**PROPERTY DAMAGE**" means physical injury or destruction of tangible property. This includes its resulting loss of use.
4. "**OCCURRENCE**" means bodily injury or property damage resulting from an accident, including

The parties at the oral arguments and by their briefs have narrowed the issues. The plaintiff concedes in his surreply dated April 7, 2014, that there is no coverage with respect to the original Coppersmiths' counterclaim dated December 8, 2008. Furthermore, the plaintiff admits that there is no coverage with respect to counts one, two, three, four, five, and seven of the Coppersmiths' amended counterclaim dated September 25, 2009. The *only* remaining issue left is whether the newly added counterclaim for trespass, the sixth count sets forth a claim for property damage caused by the occurrence.

B. Count Six (Trespass of Amended Counterclaim)

The plaintiff in his opposition to the defendants' motion for summary judgment undertakes great pains to disect each paragraph of count six. He argues that count six does not

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continuous or repeated exposure to the same general condition. The occurrence must be during the policy.

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COVERAGE AGREEMENTS

COVERAGE E-PERSONAL LIABILITY

We will pay damages an insured is legally obligated to pay due to an occurrence resulting from negligent personal acts or negligence arising out of the ownership, maintenance or use of real or personal property. We will provide a defense at our expense by counsel of our choice. We may investigate and settle any claim or suit. Our duty to defend a claim or suit ends when the amount we pay for damages equals our limit of liability.

Liability Exclusions
(Section II)

1. **Coverage E-Personal Liability** . . . . do[es] not apply to bodily injury or property damage:
   a) caused intentionally by or at the direction of an insured, including wilful acts the result of which the insured jnows or ought to know will follow from the insured's conduct.

   This exclusion 1. a) applies only to the insured who committed or directed the act.

   [the "intentional injury exclusion"]

Liability Conditions
(Section II)

3. **Duties after Loss.** In case of a loss, you must perform the following duties. You must cooperate with us in seeing that these duties are performed.
   a) give notice to us or our agent as soon as practicable setting forth:
      1) identity of the policy and insured.
      2) time, place, and facts of the accident or occurrence.
      3) names and addresses of the claimants and witnesses.
   b) immediately forward to us every document relating to the accident or occurrence

include any allegations of intentional conduct. The plaintiff focuses on paragraph ten of count six, and points out that the intentional conduct is with respect to the workers' repeated trespasses but not the encroachment or trespass of the fence itself. Furthermore, the plaintiff argues that when reasonably reading and in the light most favorable to the plaintiff, the fence was nonintentionally and/or accidently and/or negligently erected partially on the Coppersmiths' property. He asserts that kind of mistake is clearly covered by the subject homeowner's policy. The plaintiff emphasizes that the mislocation of the fence was an accident or mistake or the result of negligence – all of which circumstances result in coverage.

With respect to the property damage, the plaintiff asserts that clearly encroachment caused physical damage to the Coppersmiths' property to the extent of holes in the ground for the fence posts, resulting in the loss of use of the property, which triggered the defendants' duty to defend. The plaintiff asserts that the court should note and be mindful that allegations of count six do not need to result in literal or actual coverage to trigger the duty to defend, but said allegations merely need to "appear" or "possibly potentially" come within the scope of coverage.

The defendants counter that the plaintiff's tortured reading of the sixth count cannot be reconciled with the allegations contained therein, and his eve of the trial demand for the defense and indemnification violated the policy's notice provisions, thereby obviating any coverage that might have otherwise existed. The defendants emphasize that the plaintiff's reading of paragraph ten is tortured and unreasonable. In support of their argument, the defendants assert that the Connecticut Supreme Court has made clear such antics are not permitted, stating: "[A] court should not attempt to impose the duty to defend on an insurer through a strained implausible reading of the complaint that is linguistically conceivable but tortured and unreasonable . . . ."

Schilberg Integrated Metals Corp. v. *Continental Cas. Co.*, 263 Conn. 245, 259-60, (2003).

The defendants correctly argue that count six does not seek damages for the property damage. The defendants contend that even assuming arguendo that the sixth count alleges unintentional and /or negligent conduct, summary judgment is still warranted because the count does not allege the property damage within the meaning of the policy. The relevant part of the policy provides that: "The policy only provides coverage for damages an insured becomes legally obligated to pay due to an occurrence – i.e., property damages resulting from negligence." See Defendants' Exhibit A–Policy Form HO 6; Defendant's Exhibit B-Policy Form Fire 2502. "Property damage" is defined by the policy as "physical injury or destruction to the tangible property."

It is important to note from the foregoing that coverage is only triggered if the sixth count alleges physical injury or destruction to the tangible property; loss of use alone does not trigger coverage. The reading of the sixth count reveals that the trespass disturbed the Coppersmiths' quiet and peaceful enjoyment of their home and diminished the value of their property. See Defendant's Exhibit DD–counterclaim pp-2-7. The defendants, on the very issue of property damage, cite a list of cases from different jurisdictions which support its position. The court is mindful that those cases are not binding.

The defendants also correctly argue that the sixth count is devoid of any allegation of "fence post holes" causing physical injury to the Coppersmiths' loss of use of the encroached area and/or suffered damages as a result of said loss of use. Also, according to the policy, the loss of use constitutes property damage only if it results from physical injury or destruction to tangible property. After reviewing the record, the court concludes that loss of use was not alleged. The

court further concludes that the sixth count fails to allege property damage sufficient to trigger coverage. Hence, the defendant's motion for summary judgment is granted.

C. The Untimely Tender

Next, the defendants argue that they did not receive notice of claims against the plaintiff (or even the existence of the underlying litigation) until shortly before the start of the trial. The defendants received a letter from the plaintiff's attorney dated October 15, 2009, and that is how they became aware of the litigation. By that time, both parties had disclosed expert witnesses and the trial management conference had been completed. The record indicates that the defendants upon receipt of notice of litigation, assigned a representative to the plaintiff and an investigation was conducted. On Friday, October 23, 2009, the plaintiff informed the defendants for the first time that the trial was set to commence the following Tuesday.

The plaintiff concedes that he was obligated to provide notice of the counterclaim as soon as practical– i.e. as soon as can reasonably be expected under the circumstances. See *Arrowood Indem. Co. v. King,* 304 Conn. 179, 199, (2012). Furthermore, the record indicates that the defendant did not receive notice of counterclaim until October 15, 2009, a year after the Coppersmiths filed their counterclaim and a mere two weeks before the trial commenced. Despite the foregoing, the plaintiff argues this notice was timely because it was given seven days after it occurred to him that he might have coverage for the counterclaim and that the defendants suffered no prejudice because he was represented by experienced trial counsel who "debriefed" the defendants on litigation.

As stated by the Connecticut Supreme Court, the duty to give notice under an insurance

policy arises once facts develop which would "suggest to person of ordinary and reasonable prudence that the liability may have been occurred, and is complied with if notice is given within a reasonable time after situation so assumes as aspect suggestive of a possible claim for damages." (Emphasis added.) *Arrowood Indem. Co. v. King*, 304 Conn. 179.

The defendants counter that a reasonable person (and, certainly, a reasonable attorney such as the plaintiff) would have recognized the possibility of liability and damages when a counterclaim was asserted in the litigation. Accordingly, in this case, the duty to provide notice arose, at minimum, in December 2008 when the counterclaim was formally served on the plaintiff. The defendants assert that the plaintiff violated that duty by waiting for *ten months* before giving notice on the eve of trial.

Additionally, the defendants assert that they suffered prejudice due to the delay of the receipt of notice. By the time the defendants learned of the litigation, discovery had closed, experts had been retained and disclosed, the trial management conference had been completed, and the trial was scheduled to commence within days. As a result, the defendants argue they were robbed of the opportunity to evaluate the strength of the plaintiff's defense and the feasibility of settlement, to participate in discovery including the selection of expert witnesses, to retain independent and unbiased counsel, and /or to participate in any tactical decisions; citing *SNET v. Zurich American Ins. Co.*, CV010456771, 2013 WL 21213385 Conn. Sup. Ct. May 15, 2003), finding prejudice where notice was provided two weeks before jury selection began, after discovery was completed, strategic decisions had already been made, and the case was on track for imminent trial). The court finds that the plaintiff's untimely notice prejudiced the defendants. Hence, the defendants' motion for summary judgment is granted for lack of timely notice.

CONCLUSION

For the foregoing reasons, the defendants' motion for summary judgment is granted.

M. Nawaz Wahla, J.