UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

LAGUNA ENTERPRISES, LLC, Plaintiff, V. WESTCHESTER SURPLUS LINES INSURANCE COMPANY, *et al.*, Defendants.	§ § § § § § § § § §	CIVIL ACTION NO. 2:21-CV-00277

ORDER GRANTING DEFENDANT WESTCHESTER SURPLUS LINES INSURANCE COMPANY'S MOTION FOR SUMMARY JUDGMENT

Before the Court is Defendant Westchester Surplus Lines Insurance Company's ("Defendant's") motion for summary judgment. (D.E. 16). For the reasons stated below, the Court **GRANTS** the motion. (D.E. 16).

I. Background

This is an insurance policy suit, the facts of which are relatively straightforward. On February 16, 2021, a fire damaged Plaintiff Laguna Enterprises, LLC's ("Plaintiff's") property, which was insured by Defendant. *See* (D.E. 1-3, p. 5; D.E. 16-2, p. 3; D.E. 16-1, p. 3). Although Plaintiff made a claim with Defendant for damages, Defendant denied coverage because the property lacked smoke detectors as required by the insurance policy. (D.E. 16, p. 6). Plaintiff then filed claims against Defendant, alleging that Defendant wrongfully denied coverage under Texas law. *See* (D.E. 1-3, p. 14–18). Specifically, Plaintiff asserts claims against Defendant for (1) breach of contract, (2) violations of Texas Insurance Code for unfair settlement and failure to make prompt payment of claims; (3) breach of the common law duty of good faith and fair dealing; and (4) violations of Texas Insurance Code based on the conduct of Defendant's insurance adjuster, Jared

Dodson. *Id.* at 14–20.[1] Defendant now seeks summary judgment on all claims, arguing that the insurance policy provides no coverage for Plaintiff's claims as a matter of law. (D.E. 16, p. 14).

II. Legal Standard

Summary judgment is warranted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). A dispute is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A fact is material if it "might affect the outcome of the suit under the governing law . . . ." *Id.* In determining whether judgment as a matter of law is appropriate, the court must decide "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." *Id.* at 251–52. The "court must view the evidence 'in the light most favorable to the [nonmovant].'" *Tolan v. Cotton*, 572 U.S. 650, 657 (2014) (quoting *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970)).

The movant "bears the initial responsibility" to present evidence proving that no genuine dispute of material fact exists, but the movant does not have to present supporting evidence "negating the opponent's claim." *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (emphasis omitted). If the movant "fails to meet this initial burden, the motion must be denied, regardless of the nonmovant's response." *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994). If the movant meets this burden, then the burden shifts to the nonmovant to "go beyond the pleadings and designate specific facts showing that there is a genuine issue for trial." *Id.* (citing *Celotex*, 477 U.S. at 325). If the nonmovant fails to meet this burden, then the movant is entitled to judgment

[1] Plaintiff also initially asserted claims against Jared Dodson. *Id.* at 18–20. Jared Dodson is no longer a party to this suit. *See* (D.E. 11).

as a matter of law. *Id.* at 1076.

III. Analysis[2]

Defendant argues summary judgment is proper because it is undisputed that Plaintiff's premises did not have functioning smoke detectors when the fire occurred, as required by the plain language of the insurance policy. (D.E. 16, p. 6, 13). Plaintiff asserts "fact issues still exist due to a lingual ambiguity in the section titled 'Premises Fire Protection' in the Insurance Binder's Application of Insurance[,]" (D.E. 21, p. 8–9), and alternatively, contends that Defendant waived its right to deny coverage based on the smoke detectors because Defendant knew Plaintiff's property lacked smoke detectors before the fire, *id.* at 16–17.

A. Interpreting the Insurance Contract

In determining whether Defendant is entitled to summary judgment, Texas law applies. *See Cent. Mut. Ins. Co. v. Davis*, 576 F. Supp. 3d 493, 500 (S.D. Tex. 2021) (Tipton, J.) (citations omitted) (explaining that Texas law controls when the court has diversity jurisdiction and the "case involves an insured who is a Texas citizen[.]"). "Under Texas law, insurance policies are interpreted in accordance with the rules of construction that apply to all contracts generally." *Sharp v. State Farm Fire & Cas. Ins. Co.*, 115 F.3d 1258, 1260 (5th Cir. 1997) (citing *Nat'l Union Fire*

[2] Contained in Plaintiff's response brief is what the Court has construed as a request to delay consideration of the pending summary judgment until after December 15, 2022. *See* (D.E. 21, p. 17–19). In the request, Plaintiff argues the Court should continue its summary judgment determination until after December 15, 2022, because at the time Plaintiff filed its response discovery was on-going and, according to Plaintiff, more discovery was still needed. *See* (D.E. 21, p. 17–19). On November 14, 2022, the Court issued an order that extended the discovery deadline to December 15, 2022, pursuant to a joint motion filed by the parties. *See* (D.E. 18; D.E. 20). The extended discovery deadline has passed and neither party supplemented the summary judgment record. As such, the Court **DENIES as moot** Plaintiff's request for a continued summary judgment determination. (D.E. 21, p. 17–19). And alternatively, to the extent that Plaintiff's request is a motion for a hearing on the pending summary judgment, the Court **DENIES as moot** the motion, (D.E. 21, p. 17–19), as Plaintiff was given an opportunity to address matters relating to the summary judgment at the January 18, 2023, status conference.

Ins. Co. v. CBI Indus., Inc., 907 S.W.2d 517, 520 (Tex. 1995)). Insurance policies are to be strictly construed against the insurer. *Puckett v. U.S. Fire Ins. Co.*, 678 S.W.2d 936, 938 (Tex. 1984). However, this strict-construction rule applies only if the policy is ambiguous. *Sharp*, 115 F.3d at 1261.

Whether the policy is ambiguous is a question of law for the court to decide as a whole in light of the circumstances present when the contract was entered. *Nat'l Union Fire Ins. Co.*, 907 S.W.2d at 520 (citing *Coker v. Coker*, 650 S.W.2d 391, 394 (Tex. 1983)). "The fact that the parties disagree as to coverage does not create an ambiguity, nor may extrinsic evidence be admitted for the purpose of creating an ambiguity." *Sharp*, 115 F.3d at 1261 (citing *Nat'l Union Fire Ins. Co.*, 907 S.W.2d at 520). A court first examines a policy's language, and when there is no ambiguity, it is the court's duty to give the words their plain meaning. *Id.* (citing *Puckett*, 678 S.W.2d at 938). If, however, a court determines that a policy is in fact ambiguous, the use of extrinsic evidence is permitted to determine the parties' intent. *See Nat'l Union Fire Ins. Co.*, 907 S.W.2d at 520.

Before the Court examines the insurance policy's language, however, the Court must first determine which documents constitute the insurance policy and final agreement between the parties. The parties disagree on which document or documents constitute the insurance contract between the parties. Defendant proffers a certified copy of Policy Number FSF14852141002 between the parties (the "Policy"), (D.E. 16, p. 7; D.E. 16-1), and contends it constitutes the final and complete agreement between the parties, *see* (D.E. 22, p. 3). Conversely, Plaintiff appears to contend that statements contained in the "Insurance Binder's Application of Insurance" (the "Insurance Application") are incorporated into the insurance contract. *See* (D.E. 21, p. 13–16; D.E. 21-2). The Court disagrees with Plaintiff.

Under Texas law, "the 'mere application for insurance' is not a contract." *Cent. Mut. Ins.*

Co., 576 F. Supp. 3d at 503 (citing *Minn. Mut. Life Ins. Co. v. Newman*, 157 S.W.2d 667, 671 (Tex. App.—Fort Worth 1941, writ ref'd)). However, representations made in an insurance application could be part of the insurance contract if they were incorporated into the contract by reference. *See id.* Here, the Insurance Application's statements were not incorporated into the Insurance Policy. The Policy plainly provides that the "CHUBB Westchester Binding Common Policy Declarations[,]" the "Coverage Declarations, Common Policy Conditions and Coverage Conditions (if applicable), Coverage Form(s) and Forms and Endorsements, if any, . . . complete the [Policy]." (D.E. 16-1, p. 6). The Insurance Application is not referenced here, nor is the application incorporated in any other section of the Policy. *See id.* As such, the Court finds that the Insurance Application is not part of the insurance contract. Instead, the insurance application is extrinsic evidence that would only be relevant to the summary judgment analysis if the Court determines that the policy is ambiguous. *See Vought Aircraft Indus., Inc. v. Falvey Cargo Underwriting, LTD,* 749 F. Supp. 2d 814, 847 (N.D. Tex. 2010) (Fitzwater, J.).

The Court now examines the Policy's language to determine whether it is ambiguous. The relevant section is the Protective Safeguards Endorsement. *See* (D.E. 16-1, p. 133–34). The Protective Safeguard Endorsement states that "[a]s a condition of this insurance, [Plaintiff is] required to maintain the protective devices or services listed in the Schedule above." *Id.* at 133. The Schedule provides:

SCHEDULE

Premises Number	Building Number	Protective Safeguards Symbols Applicable
1	Building #1	P9
Describe Any "P-9": Functioning and operating smoke detectors in all units and/or occupancies		
Information required to complete this Schedule, if not shown above, will be shown in the Declarations.		

Figure 1: Schedule from the Policy.

Id. The Protective Safeguards Endorsement also states that Defendant "will not pay for loss or

damage caused by or resulting from fire if, prior to the fire," Plaintiff "[k]new of any suspension or impairment in any protective safeguard listed in the Schedule above and failed to notify [Defendant] of that fact;" or "[f]ailed to maintain any protective safeguard listed in the Schedule above, and over which you had control, in complete working order." *Id.* at 134.

This language is not ambiguous. The plain meaning of the Policy's Protective Safeguards Endorsement clearly requires that Plaintiff maintain working smoke detectors in all units—here, the premises damaged by fire. *See id.* at 133–34 It is uncontested that Plaintiff failed to maintain smoke detectors in functioning and operating order on its premises. (D.E. 16, p. 14; D.E. 21, p. 7). Because Plaintiff failed to comply with the policy, based on the plain language of the Policy, Defendant was not required to pay for loss or damage resulting from the fire and thus did not wrongfully deny Plaintiff coverage. *See* (D.E. 16-1, p. 133–34).

B. Waiver

Notwithstanding the Policy's plain language, Plaintiff alternatively argues that Defendant waived its right to assert the Protective Safeguards Endorsement as a reason to deny coverage because Defendant's "intentional conduct [was] inconsistent with the right of disclaiming coverage for fire damages . . . ." (D.E. 21, p. 16–17). Under Texas law, "[w]aiver requires intent, either the 'intentional relinquishment of a known right or intentional conduct inconsistent with claiming that right.'" *In re Gen. Elec. Cap. Corp.*, 203 S.W.3d 314, 316 (Tex. 2006) (quoting *Sun Expl. & Prod. Co. v. Benton*, 728 S.W.2d 35, 37 (Tex. 1987)). In the insurance context, "[t]he general principle is that waiver cannot create insurance coverage where none exists." *Valley Forge Ins. Co. v. Shah*, No. H-05-3056, 2009 WL 291080, at *12 (S.D. Tex. Jan. 30, 2009) (Johnson, Mag. J.) (citing *Ulico Cas. Co. v. Allied Pilots Ass'n*, 262 S.W.3d 773, 787 (Tex. 2008), *recommendation adopted*, No. H-05-3056, 2009 WL 774115, at *1 (S.D. Tex. Mar. 24, 2009) (Miller, J.); *see also Tex.*

Farmers Ins. Co. v. McGuire, 744 S.W.2d 601, 603 (Tex. 1988) ("Waiver and estoppel may operate to avoid a forfeiture of a policy, but they have consistently been denied operative force to change, re-write and enlarge the risks covered by a policy. In other words, waiver and estoppel cannot create a new and different contract with respect to risks covered by the policy.") (internal quotations omitted); *Pac. Indem. Co. v. Acel Delivery Serv., Inc.*, 485 F.2d 1169, 1173 (5th Cir. 1973) ("It is well settled in Texas that [the wavier doctrine] will not operate to create coverage in an insurance policy where none originally existed."). "The reasons underlying this rule is that the insurer should not be held liable for a risk which goes beyond the contractual agreement and for which no premium was collected." *Pac. Indem. Co.*, 485 F.2d at 1173.

Here, Plaintiff is attempting to expand the coverage of the insurance policy by arguing that Defendant waived its right to assert the Protective Safeguards Endorsement. *See* (D.E. 21, p. 16). This is not permitted by Texas law, *see, e.g.*, *McGuire*, 744 S.W.2d at 603; *Minn. Mut. Life Ins. Co. v. Morse*, 487 S.W.2d 317, 320 (Tex. 1972) ("[W]aiver and estoppel cannot enlarge the risks covered by a policy and cannot be used to create a new and different contract with respect to the risk covered and the insurance extended."), and courts applying Texas law have routinely rejected arguments akin to Plaintiff's, *see, e.g.*, *Morse*, 487 S.W.2d at 320, *Great Am. Reserve Ins. Co. v. Mitchell*, 355 S.W.2d 707, 708 (Tex. App.—San Antonio 1960, writ ref'd), *Nautilus Ins. Co. v. Southern Vanguard Ins. Co.*, 899 F. Supp. 2d 538, 549–50 (N.D. Tex. 2012) (Lindsay, J.). As such, because the Policy excludes coverage based on the failure to maintain working smoke detectors in all units, waiver cannot be used to "enlarge the risks covered by a policy and cannot be used to create a new and different contract with respect to the risk covered and the insurance extended." *Morse*, 487 S.W.2d at 320.[3]

[3] Plaintiff relies on three exhibits, D.E. 21-4, D.E. 21-5, and D.E. 21-6, to support its waiver argument. (D.E. 21, p. 16–17). Defendant objects to the admissibility of D.E. 21-4, D.E. 21-5, and D.E. 21-6. *See*

C. Extra-Contractual Claims

Defendant has also shown that summary judgment is proper for Plaintiff's extra-contractual claims. *See id.* at 6–7. In addition to its breach of contract claim, Plaintiff asserts claims against Defendant for violations of the Texas Insurance Code and breach of the common law duty of good faith and fair dealing. *See supra* section I; (D.E. 1-3, p. 15–18). But under Texas law, "[w]hen the issue of coverage is resolved in the insurer's favor, extra-contractual claims do not survive." *State Farm Lloyds v. Page*, 315 S.W.3d 525, 532 (Tex. 2010) (citing *Progressive Cnty. Mut. Ins. Co. v. Boyd*, 177 S.W.3d 919, 921 (Tex. 2005) (per curiam)). Because the Court resolved the issue of coverage in Defendant's favor, *see supra* sections III.A., B., Plaintiff's extra-contractual claims do not survive. *See Page*, 315 S.W.3d at 532. As such, Defendant is entitled to summary judgment on Plaintiff's extra-contractual claims.

IV. Conclusion

For the reasons stated above, the Court **GRANTS** Defendant's motion for summary judgment. (D.E. 16). A final judgment will be entered separately.

SO ORDERED.

DAVID S. MORALES
UNITED STATES DISTRICT JUDGE

Dated: Corpus Christi, Texas
January 31, 2023

(D.E. 22, p. 6) (objecting to Plaintiff's Exhibits D, E, and F). Plaintiff did not respond to Defendant's objections. Because the Court has determined the insurance policy is unambiguous, and because Plaintiff cannot utilize a waiver argument here, the Court need not consider the admissibility of D.E. 21-4, D.E. 21-5, and D.E. 21-6. Defendant's objections are therefore moot.