IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

4301 N. DELAWARE QOB, LLC **Plaintiff,**	:	
v.	:	**Civ. No. 23-03057**
SELECTIVE INSURANCE COMPANY OF SOUTH CAROLINA **Defendant.**	:	

O R D E R

Over one year after a break-in and fire at Plaintiff 4301 N. Delaware QOB, LLC's property, Plaintiff brought suit against its insurer Selective Insurance Company of South Carolina for breach of contract and bad faith based on the delay in paying the coverage claim and its cancellation of the underlying Policy. Selective moves for summary judgment on all claims, which I will grant.

I. FACTUAL BACKGROUND

I have construed the facts most favorably to Plaintiff.

A. Dispute with Recleim and Access Agreement with Recycle

In 2017, Recleim PA, LLC entered a lease for Building A (also called Building 1) at 4301 N. Delaware Ave. in Philadelphia. (Doc. No. 45-31 at 15-16; Doc. No. 45-32.) As of September 2020, Recleim occupied Building A to recycle appliances. (Doc. No. 45-6 at 11; Doc. No. 45-31 at 22.) On November 17, 2020, after defaulting on its lease, Recleim was evicted from Building A. (Doc. No. 45-21 at 15). Recleim left behind collateral—large-scale machinery, equipment, and other property. (Doc. No. 45-15 at 2.) After Recleim defaulted on its loan obligations, Recycle Phoenix Fund, LLC took a security interest in the lease and Collateral. (Id.)

On July 12, 2021, after acquiring 4301 N. Delaware Ave., Plaintiff—a real estate developer

based at 4 Hayden Lane in Ottsville, Pennsylvania—notified Recycle and Recleim that it would consider the Collateral abandoned unless action was taken to remove it. (Doc. No. 45-4 at 28; Doc. No. 45-7; Doc. No. 45-8 at 2.) Recycle and Plaintiff agreed on a $1,000 per day storage fee until the Collateral was removed. (Doc. No. 45-7.) On August 23, 2021, Plaintiff and Recycle entered into an Access and Indemnity Agreement, which allowed Recycle to access Building A:

> Monday through Friday during the hours 7:30 a.m. to 4:00 p.m. EST (subject to the reasonable availability of [Plaintiff's] agent, who will provide access to the Premises) for the sole purposes of (a) inspecting the Property and the Waste in order to determine (i) what will be required in terms of labor and equipment in order to remove the Property and the Waste, and (ii) how long that process is likely to take; (b) arranging for and completing the removal of the Property and the Waste; and (c) performing any necessary Repairs.

(Doc. No. 45-15 at 2.)

Due to Recycle's failure to remove the Collateral under that Agreement, Plaintiff sued Recycle in the Philadelphia Common Pleas Court in August 2022. (Doc. 45-32.) On April 18, 2023, Plaintiff and Recycle entered into a Consent Judgment in the amount of $500,000, under which Recycle agreed to additional payments in exchange for use of the Property so that the Collateral could be removed. (Doc. No. 45-5 at 6-7.) The Consent Judgment required removal of the Collateral by June 18, 2023. (Id. at 7.) Because Recycle failed to remove the Collateral, on June 19, 2023, Plaintiff assumed all rights to the Collateral. (Id.)

B. Selective Policy

Before 4301 N. Delaware Ave's prior owner sold the Property to Plaintiff, it maintained a commercial insurance policy through Selective. (Doc. No. 45-7 at 13.) On June 4, 2011, the prior-owner's insurance broker, Phil Coyne, contacted Selective to inquire as to whether Selective would be willing to write a similar policy for Plaintiff. (Id.) Selective asked Coyne if the tenants would remain the same, whether any new exposures existed, and whether any tenants would be moving in or out. (Id. at 12.) Coyne responded that the tenants would remain the same and that there

would be "[n]o changes in the operation for at least two years as the current leases are in place." (Id.) Plaintiff's managing member, Christopher Dardaris, does not recall having told Coyne that Recleim had been evicted from Building A, and Coyne did not inform Selective that event. (See id.; Doc. No. 45-31 at 12, 28.) "[B]ased on these emails," Selective agreed to prepare an insurance policy. (Doc. No. 45-7 at 12.)

Plaintiff submitted an Insurance Application, which lists five separate covered buildings, describing the building at issue here, Building A, as a "Recycling Center." (Doc. No. 45-8 at 7.) The Statement of Values also separately identifies Building A as a "Recycling Center." (Id. at 13.) Selective issued Policy number S 2481233, which insured the premises at 4301 N. Delaware Ave. (Doc. No. 45-4.) Like the Application, the Policy lists separately the five buildings at 4301 N. Delaware Avenue, including Building A—which is listed as "RECYCL." (Id. at 29, 52.)

The Policy includes a Vacancy Exclusion, which precludes coverage for losses or damage in connection with any building that had "been vacant for more than 60 consecutive days before that loss or damage." (Id. at 84.) Where the Policy is issued to the owner of a building, the Vacancy Provision states that:

> Such building is vacant unless at least 31% of its total square footage is:
>
> (i) Rented to a lessee or sublessee and used by the lessee or sublessee to conduct its customary operations; and or
>
> (ii) Used by the building owner to conduct customary operations.

(Id.)

The Policy also provides a "Notice of Acceptance or Denial of Claim" Provision, which requires that Selective, "within 15 working days after [it] receive[s] a properly executed proof of loss," notify Plaintiff if it accepts the claim, denies the claim, or needs more time to determine whether the claim should be accepted or denied. (Doc. No. 45-4 at 40.) Where an investigation

has not been completed, within 30 days of the initial notice, and every 45 days thereafter, Selective must provide additional notice, explaining why more time is needed and when Plaintiff can expect Selective to complete its investigation and reach a decision. (Id. at 41.)

C. Loss Event, Investigation, and Procedural History

On July 15, 2022—while the Access Agreement was in effect—Plaintiff's independent insurance agent ECBM filed a coverage claim with Selective related to a break-in, vandalism, theft of mechanical systems and building components, and a fire that occurred at Building A around July 5, 2022. (Doc. No. 45-11 at 2; Doc. No. 45-12 at 2 (police report).) Selective adjuster Robin Johnson contacted Dardaris on July 20, 2022 to discuss the claim. (Doc. No. 45-11 at 2; Doc. No. 45-19 at 3.)

On August 4, 2022, Selective emailed Dardaris requesting documentation and repair estimates and directed Plaintiff to obtain temporary services, which Selective would pay for. (Doc. No. 45-11 at 3.) Awaiting the documentation, Selective followed up on August 13, 2022. (Id.)

On August 31, 2022, Selective's Investigator conducted a "scene examination." (Doc. No. 45-10 at 2; Doc. No. 45-11 at 3; Doc. No. 45-19 at 3.) He determined there was no fire damage to Building A's structure and reported seeing a November 12, 2021 Notice of Distress on Building A's Door. (Doc. No. 45-10 at 2; Doc. No. 45-11 at 3; Doc. No. 45-12; Doc. No. 45-19 at 3.) Selective then retained Andrew Cohen, an engineering consultant of JS Held, to evaluate the needed repairs. (Doc. No. 45-11 at 3.) After Dardaris returned from a nine-day trip, on September 12, 2022, Dardaris, Cohen, and Selective General Adjuster Robert Thompson visited Building A. (Id.; Doc. No. 49-2 at 40; Doc. No. 45-31 at 33.)

On September 15, 2022, Thompson informed Dardaris that Selective was investigating

application of the Vacancy Provision. (Doc. No. 45-11 at 3; Doc. No. 45-14 at 2.) He emailed Dardaris a copy of the Vacancy Provision and requested documentation regarding Building A's use and occupancy. (Doc. No. 45-11 at 3; Doc. No. 45-14 at 2.) Dardaris provided Selective with the Access Agreement it entered into with Recycle. (Doc. No. 45-11 at 3.)

Upon receipt of the Access Agreement, on September 26, 2022, Selective issued Plaintiff a $190,000 advance payment "to protect the property from further damage" pending the investigation. (Id.; see also Doc. No. 494 (October 17, 2022 Supervisor Overview Note that Selective "advanced funds for security and debris removal").) On November 2, 2022, Thompson spoke to Dardaris regarding Building A's use and occupancy. (Doc. No. 45-11 at 3.) Although Dardaris was reportedly unsure of how often Recycle personnel were in Building A, he stated that he would provide documentation of payments and Recycle's contact information. (Id.) On November 4, 2022, Selective provided Dardaris a copy of JS Held's report, but stated that it did not constitute any agreement as to the claim's final outcome. (Id.) On November 16, 2022, Selective followed up on its September 26, 2022 request for payment and rent roll information. (Id.; Doc. No. 45-16 at 4.)

On November 28, 2022, Thompson spoke to Plaintiff's counsel, Jeff Scafaria, regarding the occupancy issue. (Doc. No. 45-11.) Scafaria emailed Thompson the rent roll and income statement on December 7, 2022. (Doc. No. 45-11 at 3; Doc. No. 45-16 at 2.) On December 8, 2022, Thompson requested additional documents and clarification, including "some narrative background on the circumstances of the loss location building and the arrangement of the occupancy such as parties involved, frequency of use by this occupant and others as the 'arrangement' is not a typical lease" and additional documents to show rental income because he was "unable to confirm the details of the potential loss of rent based on what ha[d] been provided."

(Doc. No. 45-11 at 4; Doc. No. 45-18 at 2.) On December 14, 2022, Scafaria responded that a different attorney would provide the requested information. (Doc. No. 45-18.) The record does not show whether or not the other attorney provided Selective with the requested information.

On January 5, 2023, Selective sent Plaintiff a reservation of rights letter detailing the ongoing investigation and possible application of the Vacancy Provision. (Doc. No. 45-19; Doc. No. 45-11 at 4.) Selective explained that the Access Agreement did not confirm occupancy and again requested documentation for payments under the Access Agreement, Recycle's contact information, and information regarding Building A's use and occupancy. (Doc. No. 45-11 at 4; Doc. No. 45-19 at 5.)

On January 9, 2023, Plaintiff sent Selective a "Renewed Demand for Payment." (Doc. No. 45-20.) Plaintiff argued that Selective's January 5, 2023 ROR Letter was untimely, that any requests for additional information were unwarranted, and that "building" as used in the Policy is ambiguous and should be interpreted in favor of the insured to mean the entirety of 4301 N. Delaware Ave. (Id. at 3-4.) On January 20, 2023, Selective rejected Plaintiff's allegation of untimeliness, nothing that Plaintiff had never provided a properly executed proof of loss, and because Selective had kept Plaintiff fully apprised of its investigation. (Doc. No. 45-11 at 4; Doc. No. 45-21 at 3.)) It also denied Plaintiff's contention that Selective waived its rights under the Policy and had already agreed to provide coverage. (Id. at 5.) Finally, Selective urged that the Vacancy Provision is unambiguous, as the Policy clearly lists out each building separately. (Id. at 4.) Selective again requested documentation and communications regarding Building A's occupancy, rent, and Recycle. (Id. at 5.)

On February 2, 2023, Plaintiff responded, arguing Selective's assertion that Plaintiff failed to submit the properly executed proof of loss was a stall tactic made in bad faith. (Doc. No. 45-22

at 2-3.) Insofar as the assertion was accurate, Plaintiff also argued that the Policy obligated Selective to send any required forms. (Id.) In a February 14, 2023 letter, Selective again rejected Plaintiff's allegations that Selective delayed its investigation or waived rights under the Policy, and that the Vacancy Provision is ambiguous. (Doc. No. 45-24.) Selective accused Plaintiff of delaying and prejudicing the investigation by, *inter alia*, failing to comply with the Policy's post-loss obligations. (Id. at 4.) Selective again explained the reasons for its document requests: determining "the use and occupancy of Building 1, i.e. who was physically present in the Building, how often, and for what purpose(s)." (Id.) Although Plaintiff had produced the Access Agreement, income statement, and rent rolls, Selective represented that those documents could not provide answers to its use and occupancy questions. (Id.) Because it had not received the other documents requested, Selective sought to examine Dardaris under oath, in accordance with the Policy. (Id.)

On March 16, 2023, Selective conducted an Examination Under Oath of Dardaris. (Doc. No. 45-11 at 4; Doc. No. 45-25.) He testified that Plaintiff is a real estate investment company, with no offices or employees, whose purpose is to own 4301 N. Delaware Ave. (Doc. No. 45-25 at 18, 19, 22, 26-30.) Dardaris runs his own real estate business from his barn, located at 4 Hayden Lane in Ottsville, Pennsylvania—the address listed as Plaintiff's mailing address in the Policy and on the docket. (Doc. No. 45-7 at 7; Doc. No. 45-25 at 23.) Elm City Property Management manages 4301 N. Delaware Ave. (Id. at 27.) Elm City has four employees but no office space. (Id. at 27-30.) In sum, Elm City and Plaintiff have no employees or offices located in Building A.

Dardaris recalled entering Building A in the 60 days before the loss, including once within two weeks of the loss, and was likely to have taken photographs because he "had been considering developing the property." (Id. at 91-92; Doc. No. 45-11 at 4.) He also recalled two superintendents

of Elm City and two real estate brokers entering Building A in the 60 days prior to loss. (Doc. No. 45-25 at 138.) He did not recollect seeing anyone else there, but he said that it was possible. (Id.)

On June 30, 2023, Selective again informed Plaintiff of the status of the investigation. (Doc. No. 45-27; Doc. No. 45-11 at 5.) Based on the Dardaris Examination, Selective requested all payroll records, communications, and documentation showing visits by individuals—particularly those affiliated with Plaintiff, Recycle, and Recleim—to Building A in the 60 days before the loss; payments from Recycle Phoenix consistent with the Access Agreement; and communications between Plaintiff and Coyne regarding Building A's use and occupancy. (Doc. No. 45-27 at 6-7.)

On October 17, 2023, during the pendency of this suit, Selective provided Plaintiff with an update on the investigation and coverage issues, and again asked Plaintiff to provide the documents listed in previous letters. (Doc. No. 45-29.) Around December 18, 2023, Plaintiff produced several documents, including a list of the dates and times that Elm City employees visited 4301 N. Delaware Ave. (Doc. No. 45-30; Doc. No. 45-30.) The Time Sheet showed that in the 60 days preceding the July 5, 2022 theft, Elm City employee Matthew Chaikin visited 4301 N. Delaware twice—on May 6, 2022 and May 12, 2022. (Doc. No. 45-33 at 9.) He also visited the premises on July 7, 2022. (Id.) Elm City did not record any other premises visits by its employees in the 60 days preceding the loss event. (See id.)

On January 31, 2024, Selective informed Plaintiff and Dardaris of its final determination: that the Policy does not provide coverage because the Vacancy Provision applies. (Doc. No. 45-11.) Selective provided a timeline of the investigation and this litigation and denied coverage because:

> Building A was not rented to a lessee and/or being used by a lessee to conduct

> customary operations. The Access and Indemnity Agreement specifically states it does not create any landlord-tenant relationship between 4301 N Delaware QOB LLC and Recycle Phoenix Fund, LLC. The Agreement only allowed Recycle Phoenix to enter the Building at certain times to remove equipment. Additionally, Recycle Phoenix was not using Building A, and no representatives of Recycle Phoenix entered Building A in the sixty days prior to the reported losses. We also note that the Declarations of the Policy identify the occupancy of Building A as Recycling.
>
> Furthermore, the Building was not being used by 4301 to conduct its customary operations. There were no employees or offices based inside Building A. The timesheet provided from Elm City shows employees were not regularly present in the Building, and that an individual entered Building A only twice within 60 days of the reported theft/vandalism incident.

(Id. at 6.) Selective also referred to its outstanding requests for information from Plaintiff. (Id. at 12-13.)

D. Procedural History

On February 2, 2023, Plaintiff sent Selective a "Notice of Breach and Intent to File Suit," alleging that: Selective acted in bad faith, Plaintiff fully cooperated in the investigation, and the Property was not vacant. (Doc. No. 45-22.) Plaintiff stated that failure to hear from Selective within seven days would result in legal action. (Id.) On February 4, 2023, Plaintiff filed a Praecipe Writ of Summons against Selective in the Philadelphia Common Pleas Court. (Doc. No. 45-23.) Selective removed to this Court. (Doc. No. 1.) Plaintiff has since filed two Amended Complaints, alleging breach of contract and bad faith. (Id. at 15-26.) I denied Selective's Partial Motion to Dismiss. (Doc. No. 26.) Plaintiff moved for partial judgment on the pleadings and partial summary judgment, which I denied. (Doc. Nos. 30, 47, 59.) Selective now moves for summary judgment on all claims. (Doc. No. 46.)

II. LEGAL STANDARDS

Upon motion of any party, summary judgment is appropriate "if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Fed. R.

Civ. P. 56(c). I "must view the facts in the light most favorable to the non-moving party," and take every reasonable inference in that party's favor. Hugh v. Butler Cnty. Family YMCA, 418 F.3d 265, 267 (3d Cir. 2005).

The moving party must initially show the absence of any genuine issues of material fact. See Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). An issue is material only if it could affect the result of the suit under governing law. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986). The opposing party must then support each essential element with concrete evidence in the record. See Celotex, 477 U.S. at 322-23; Jones v. UPS, 214 F.3d 402, 407 (3d Cir. 2000) (requiring more than "unsupported allegations" to defeat summary judgment); Hugh, 418 F.3d at 267 ("[T]he non-moving party cannot solely rest upon her allegations.").

III. DISCUSSION

A. Breach of Contract

To make out breach of contract under Pennsylvania law, a plaintiff must establish "(1) the existence of a contract, including its essential terms, (2) a breach of a duty imposed by the contract[,] and (3) resultant damages." Ware v. Rodale Press, Inc., 322 F.3d 218, 225 (3d Cir. 2003) (quoting CoreStates Bank, N.A. v. Cutillo, 723 A.2d 1053, 1058 (Pa. Super. Ct. 1999)).

Plaintiff pursues two theories of breach against Selective. First, Plaintiff argues that Selective breached the Policy by refusing to grant Plaintiff's coverage claim (ultimately denying the claim after Plaintiff filed this case). (Doc. Nos. 18, 49.) Second, Plaintiff alleges Selective breached the Policy by failing to adhere to its notice deadlines and requirements. (Doc. Nos. 18, 49.) Selective moves for summary judgment on both theories.

1. Vacancy Provision, Denial, and Delay

When an insured alleges breach of contract based on an insurer's failure to provide coverage, the must show that coverage exists. N. Ins. Co. of N.Y. v. Aardvark Assocs., Inc., 942 F.3d 189, 194-95 (3d Cir. 1991). The insurer must then show that an exclusion applies. Id. Selective argues that the Policy's Vacancy Provision applies as a matter of law, and thus precludes coverage of Plaintiff's claim. (Doc. No. 45-2 at 5.) Plaintiff responds that the building was leased to Recycle, and thus not vacant, or that, in the alternative, the Vacancy Provision is ambiguous and must be interpreted in Plaintiff's favor. (Doc. No. 49.) I disagree and conclude that the Vacancy Provision precludes coverage as a matter of law.

i. Building A Was Not Rented to a Lessee

Although "no particular form of words is necessary to constitute a lease," there must be evidence of an "intention of one party voluntarily to dispossess himself of the premises, for a consideration, and of the other to assume the possession." Morrisville Shopping Ctr. Inc. v. Sun Ray Drug Co., 112 A.2d 183, 186 (Pa. 1955). "A lease embraces any agreement, whether express or implied, which gives rise to the relationship of landlord and tenant." Lasher v. Redevelopment Auth. Of Allegheny Cnty., 211 Pa. Super. 408, 412 (Pa. Super. Ct. 1967). It "only differs from what is called a deed, in being limited to a term certain, and leaving a reversionary interest in the grantor . . . From the moment of letting, the land becomes the tenant's and remains such until the lease terminates; the house, if there be one, is his castle." In re Pittsburgh Sports Assocs. Holding Co., 239 B.R. 75, 84 (Bankr. W.D. Pa. 1999).

The Access Agreement leaves no room for interpretation: plainly, it is not a lease. The Agreement states that it is not intended to create "any landlord/tenant relationship or tenancy." (Doc. No. 45-15 at 3.) Plaintiff contends that this language is irrelevant, as the terms "landlord"

and "tenant" are not used in the Vacancy Provision. (Doc. No. 49 at 16-17.) This is simply wrong. Pennsylvania courts have defined "lease" in terms of the landlord-tenant relationship. Lasher, 211 Pa. Super. at 412. Black's Law Dictionary defines "lessee" as a "tenant," using both to refer to leases, as does Pennsylvania's Landlord and Tenant Act of 1951. See, e.g., BLACK's LAW DICTIONARY 890 (11th ed. 2019) ("Lessee" as one with "possessory interest in real or personal property under a lease; TENANT.") 68 P.S. § 250.105 (using "lessor" and "lessee" in discussing leases); 68 P.S. § 250.202 (using "landlord" and "tenant" is discussing leases). The Oxford English Dictionary defines "rent" as paid by a "tenant" to an "owner or landlord." Rent, Oxford English Dictionary, https://www.oed.com (last visited May 9, 2024). Plaintiff provides no reason why these terms should be read differently.

The remainder of the Access Agreement confirms it is not a lease. Plaintiff gave no indication that it would voluntarily dispossess itself of Building A. Rather, Recycle could gain access to the Building only from Monday through Friday during the hours of 7:30 a.m. to 4:00 p.m. (subject to the reasonable availability of [Plaintiff's] agent, who will provide access to the Premise) for" limited purposes. (Doc. No. 45-15 at 2.) Moreover, both the Agreement and Plaintiff describe Recycle's payments as "storage fees," not rent. (Id.; Doc. No. 45-5 at 6.) Accordingly, the Access Agreement does not constitute a lease, and Building A was not leased to Recycle.

ii. Recycle did not Use Building A to conduct its customary operations

Recycle was not conducting its customary operations in the Building. The Insurance Application and Policy both list Building A as a Recycling Center, but the Access Agreement shows that it was not being used as such. (Compare Doc. No. 45-5 at 29, Doc. No. 45-8 at 7, 13, and Doc. No. 45-32 with Doc. No. 45-15 at 2); see Cameron v. Frances Slocum Bank & Tr. Co.,

824 F.2d 570, 572 n.2 (7th Cir. 1987) (focusing on fact the "contract between the parties contemplated that the building would be used as a pumping station by the Water Company, not as a storage facility"). Recycle stored collateral there—paying "storage fees," not rent—and could access Building A only to inspect it, remove the Collateral, and perform repairs—not to operate a recycling center. (Doc. No. 45-5 at 6; Doc. No. 45-15 at 2; Doc. No. 49 at 2, 7); see Icarus Holdings 2, LLC v. AmGUARD Ins. Co., 601 F. Supp. 3d 314 (N.D. IL. 2022) ("Customary operations" cannot include repairs or renovations given the inclusion of a separate construction or renovation clause in Vacancy Provision); Keren Habinyon Hachudosh D'Rabeinu Yoel of Satmar BP v. Phila. Indem. Ins. Co., 462 F. App'x 70, 72-73 (2d Cir. 2012) (storage of school supplies and one-day teachers' meeting at school did not constitute school's customary operations, which were instruction of students); JJD Assocs. of Palm Beach, Ltd. v. Am. Empire Surplus Lines Ins. Co., No. 11-80247, 2011 WL 5873061, at *2 (S.D. Fla. Nov. 22, 2011) (storage and sporadic entry for maintenance not customary operations of shopping center); Travelers Cas. Ins. Co. of Am. v. Wild Waters, LLC, No. 12--00481, 2013 WL 4710271, at *6 (D. Idaho Aug. 30, 2013) ("[M]ere incidental use as a storage facility and the performance of occasional maintenance does not constitute customary operations.").

Remarkably, Plaintiff nonetheless contends that Selective's arguments to this effect "miss the point that the Access Agreement satisfies Section (b)(i) of the Vacancy Provision as a matter of law." (Doc. No. 49 at 11.) I do not agree. First, even if the Access Agreement constituted a lease, the "mere fact that . . . insured buildings . . . were leased is not enough to show that they were not vacant." Bedford Internet Office Space, LLC v. Travelers Cas. Ins. Co., 41 F. Supp. 3d 535, 547 (N.D. Tex. 2014) (citing Oakdale Mall Assocs. v. Cincinnati Ins. Co., 702 F.3d 1119, 1125 (8th Cir. 2013) ("To interpret the contract to require only a lease to overcome the vacancy

exclusion would be to render the second prong of the 'vacancy' definition—that either the building owner or its lessee was using the property to conduct customary operations—without effect."); Oakdale, 702 F.3d at 1125 (interpretation that "valid lease satisfies the vacancy provision because leasing space is [owner's] customary operation" is "unreasonable")

Second, Plaintiff suggests that Recycle used Building A in accordance with the Access Agreement and thus used it to conduct its customary operations "related to the Collateral." (Doc. No. 49 at 16.) The Vacancy Provision explicitly states, however, that the lessee must use the building "to conduct *its* customary operations," not to conduct customary operations "related to the Collateral," or as described in an Access Agreement or Lease. (See Doc. No. 45-4 at 84 (emphasis added).) There is no record evidence that Recycle used Building A as a recycling center.

iii. Plaintiff Did Not Use Building A to Conduct its Customary Operations

Building A was not rented to a lessee or used to conduct that lessee's customary operations. The Building was thus vacant unless Plaintiff used at least 31% of Building A to conduct customary operations. (See Doc. No. 45-4 at 84.) It did not.

Plaintiff's customary operations involve leasing the buildings at 4301 N. Delaware Ave. (See Doc. No. 45-25 at 21-22, 24.) Accordingly, "[t]he building that they use to conduct customary operations would be the location where their offices are located, where their phones are received, and their mail is sent." Hollis v. Travelers Indem. Co. of Conn., No. 08-2350, 2010 WL 1050991, at *9 (W.D. Tenn. Mar. 19, 2010). Dardaris confirms that Plaintiff had no offices or employees in Building A. (Doc. No. 45-25 at 22, 27.) Its management company also had no offices or employees in Building A. (Id. at 27-30.) Moreover, Plaintiff's mailing address—as listed on the Policy—is not Building A or the premises more generally. (Id. at 22-23; Doc. No. 45-4 at 28; Doc.

No. 45-8 at 2.)

Although Dardaris believes he was in Building A two weeks before the loss event, he explains that he was only there to take photographs related to a possible development of the property. Conducting single inspections or "merely showing the Property to prospective tenants" are insufficient to establish the Building was being used for Plaintiff's customary operations. See 7th & Allen Equities v. Hartford Cas. Ins. Co., No. 11-015672012 WL 5392167, at *6 (E.D. Pa. Nov. 2, 2012); Wilheit Fam. Props., L.P. v. Netherlands Ins. Co., No. 11--00300, 2013 WL 12291715, at *3 (N.D. Ga. Jan. 24, 2013); Oakdale, 702 F.3d at 1124 (a building owner trying to rent space not using that space to conduct customary operations); Icarus, 601 F. Supp. at 324-25 (where customary operations meant conducting business associated with leasing units to tenants, "holding the property without tenants and listing for sale" not customary operations). Rather, the Building was "simply a product involved in [Plaintiff's] customary operations, not used to conduct them." Hollis, 2010 WL 1050991, at * 9.

The primary purpose of vacancy provisions is to reduce the risk of the exact loss that occurred here. Were posting vacancy listings or attempting to rent property—without physically using the property—to qualify as customary operations, the purpose of the provision would not be met. See Oakdale, 702 F.3d at 1124 (given purpose of vacancy provision, interpretation that would allow mall to be completely vacant but "deemed fully occupied for purposes of the vacancy provision if the owner simply posted a sign outside or placed an advertisement online or in the newspaper" is "unreasonable, bordering on the absurd.") The record shows that only Recycle's machines were located at Building A. And, for the same reasons discussed by the Eighth Circuit in Oakdale, storage of collateral does not constitute customary operations for purposes of a Vacancy provision. See id.; Keren, 2011 WL 891347 at *3; Hollis, 2010 WL 1050991, at *9

(unwanted property left by lessee at a property was not counted toward square footage being used for customary operations).

In its response to Selective's Motion, Plaintiff fails to address its customary operations or use of Building A. (See Doc. No. 49.) There thus appears to be no dispute of material fact to warrant denial of Selective's Motion.

iv. The Vacancy Provision is not Ambiguous

Plaintiff contends that even if the Access Agreement does not constitute a lease, I must deny Selective's Motion because the Vacancy Provision is ambiguous. (Doc. No. 49 at 15.) As I discussed in denying Plaintiff's Motions for Judgment on the Pleadings and Summary Judgment, however, the Provision is not ambiguous.

I must give "effect to the exclusion if it is clearly worded and conspicuously displayed in the policy" and "[e]ffectuate the intent of the parties as manifested by the language" of the Policy. Mannino v. Westfield Ins. Co., No. 15-6487, 2016 WL 6582661, at *4 (E.D. Pa. Nov. 7, 2016) (quoting Nationwide Mut. Ins. Co. v. Cosenza, 258 F.3d 197, 206 (3d Cir. 2001)). Where a provision is ambiguous—i.e., "reasonably susceptible of difference constructions and capable of being understood in more than one sense"—however, I must construe the exclusion strictly against the insurer and in favor of the insured. McMillan v. State Mut. Life Assur. Co. of Am., 922 F.3d 1073, 1075 (3d Cir. 1990); Medical Protective Co. v. Watkins, 198 F.3d 100, 103 (3d Cir. 1999). Nevertheless, I may "not torture the language to create ambiguities but should read policy provision to avoid it." USX Corp. v. Liberty Mut. Ins. Co., 444 F.3d 192, 198 (3d Cir. 2006). "If the terms of the policy are clear and unambiguous, the general rule in Pennsylvania is to give effect to the plain language of the agreement." Bensalem Twp. v. Int'l Surplus Lines Ins. Co., 38 F.3d 1303, 1309 (3d Cir. 1994). "Words of common usage in an insurance policy are to be construed

in their natural, plain, and ordinary sense, and we may inform our understanding of these terms by considering their dictionary definitions." Madison Const. Co. v. Harleysville Mut. Ins. Co., 557 Pa. 595, 608 (1999).

The vacancy provision here is unambiguous. "Vacant" and "vacancy" are clearly defined in the Policy. (Doc. No. 45-4 at 84.) Moreover, although the Vacancy Provision does not in itself define "entire building," it is clear that "entire building" refers to the entirety of each of the five separate buildings when read in conjunction with the remainder of the Policy. See JJD Assocs., 2011 WL 5873061, at *2 (reading policy as a whole to determine definition of "building"). The Schedule of Coverage defines "Premise" as 4301 N. Delaware Ave—the entire insured property. (Doc. No. 45-4 at 29.) The Schedule then separately lists out five "Buildings," defining "Building 1" as "Bldg A – Recycl." (Id.) Similarly, the Protective Safeguards and Commercial Property Coverage Declaration use "premises" to refer to the entire insured area but separate out each of the five buildings. (Id. at 52, 54.) "Entire building" within the vacancy provision thus refers to the entirety of each separate building. See JJD Assocs., 2011 WL 5873061, at *2 (Mention of separate buildings in Declarations indicates building refers to independent structure and not entire insured premises). "This is the only reasonable construction in light of the policy as a whole and also has the benefit of better conforming to the ordinary use of the term building, which would rarely by used to include a group of seven premises, not all of which are bounded by the same walls and roof." Id.

Moreover, Plaintiff provides no reasonable constructions of "rented," and "lessee" distinct from those I have discussed. I will not "torture" the terms "lessee" and "rent" to create ambiguities, where their common usage is consistent and clear. See, e.g., Lasher, 211 Pa. Super. at 412.

Finally, although "customary" and "operations" are undefined, the meanings—which I

have also discussed—are clear, and Plaintiff provides no other interpretation. Dictionaries define "customary" as "common practiced, used, or observed" and "operation" as "the action of operating . . . a business" or "a business transaction." Customary, Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/customary (last visited May 9, 2024); Operation, Oxford English Dictionary Online, https://www.oed.com (last visited May 9, 2024); Icarus, 601 F. Supp. 3d at 324; Keren, 462 F. App'x at 73. Accordingly, as I have discussed—and several courts have found—in the context of a real estate company, "conduct customary operations" means "conducting ordinary business at [the property] associated with leasing . . . to tenants." Icarus, 601 F. Supp. 3d at 324-25; see also Oakdale, 702 F.3d at 1124. Plaintiff provides no other meaning of this unambiguous phrase.

Because the Vacancy Provision is unambiguous, I will give effect to the exclusion. See, e.g., Mannino v. Westfield Ins. Co., No. 15-6487, 2016 WL 6582661, at *6 (E.D. Pa. Nov. 7, 2016); 1 W. Main St., LLC v. Tower Nat'l Ins. Co., No. 14-6967, 2016 WL 1043545, at *6 (E.D. Pa. Mar. 15, 2016). Accordingly, Selective's refusal of Plaintiff's coverage claim does not constitute a breach of the Policy, and Plaintiff's breach of contract claim fails as a matter of law.

2. Notice and Determination Deadlines

Because neither Party had addressed Plaintiff's breach of contract claim based on Selective's alleged lack of adherence to the Policy's notice and determination deadlines, I ordered both Parties brief the issues. Plaintiff argues Selective violated the Policy's notice deadlines by failing to provide the required notice every 45 days. (Doc. No. 56.) Selective responds that the Policy's deadlines nonetheless do not apply because Plaintiff never submitted a properly executed proof of loss. (Doc. No. 57.) Again, I agree with Selective.

The Policy explicitly states that notice is required "within 15 working days after [Selective]

receive[s] a properly executed proof of loss." (Doc. No. 45-4 at 40.) Delivery of the proof of loss is a clear condition precedent: without such delivery, the notice requirements were never triggered. There is no other reasonable reading of this provision—indeed, without delivery, there is no event to which the fifteen-day window would refer.

Selective contends that Plaintiff failed to satisfy the condition precedent because it never delivered the proof of loss. Plaintiff provides no evidence to the contrary. Indeed, in response to Plaintiff's suggestion that the January 2023 Reservation of Rights Letter was untimely, Selective notified Plaintiff that the deadlines did not apply because Selective had not received a properly executed proof of loss. Rather than submit the required proof of loss, Plaintiff responded that Selective was acting in bad faith and stalling by failing to raise this issue earlier. (Doc. No. 45-22.) Over one year later, there is still no evidence that Plaintiff has ever submitted an executed proof of loss triggering the Policy's deadlines. The record contains mostly communications between the Parties, rather than any underlying documents themselves—including Plaintiff's July 13, 2022 claim submission—that might be construed as a proof of loss. Moreover, Plaintiff's briefs include no assertion that Plaintiff submitted a properly executed proof of loss. (See Doc. Nos. 49, 56.)

In sum, Plaintiff's breach of contract claim fails because Selective had no duty to provide notice on the schedule Plaintiff cites under the Policy.

B. Bad Faith

Plaintiff's bad faith claim is premised on Selective's purportedly unreasonable denial of benefits and delayed investigation. Plaintiff's claims fail as a matter of law.

1. Selective had a reasonable basis for denying benefits

"Bad faith is a frivolous or unfounded refusal to pay, lack of investigation into the facts, or a failure to communicate with the insured." Frog, Switch & Mfg. Co. v. Travelers Ins. Co., 193 F.3d 742, 751 n.9 (3d Cir. 1999). Plaintiff must demonstrate by clear and convincing evidence that: (1) Selective" lacked a reasonable basis for denying benefits;" and (2) Selective "knew of or recklessly disregarded its lack of reasonable basis in denying the claim." Northwestern Mut. Life Ins. Co. v. Babayan, 430 F.3d 121 at 187 (3d Cir. 2005). "Thus, the plaintiff's burden in opposing a summary judgment motion is commensurately high in light of the substantive evidentiary burden at trial." J.C. Penney Life Ins. Co. v. Pilosi, 393 F.3d 356, 367 (3d Cir. 2004) (citing Kosierowski v. Allstate Ins. Co., 51 F. Supp. 2d 583, 588 (E.D. Pa. 1999)).

Because the Vacancy Provision applies, Plaintiff cannot show by clear and convincing evidence that Selective lacked a reasonable basis for denying benefits. Clear Hearing Sols., LLC v. Cont'l Cas. Co., 513 F. Supp. 3d 566, 579 (E.D. Pa. 2021) ("[I]f a bad-faith claim is premised solely on the denial of coverage, the claim must necessarily fail if a court finds that no coverage exists."); Gold v. State Farm Fire & Cas. Co., 880 F.Supp.2d 587, 597 (E.D. Pa. 2012) ("Resolution of a coverage claim on the merits in favor of the insurer requires dismissal of a bad faith claim premised on the denial of coverage.").

Even if the Provision did not apply, however, the Access Agreement's language and circumstances surrounding the use of Building A provide a reasonable basis for Selective's belief that the Vacancy Provision might apply. See Pilosi, 393 F.3d at 367 ("A reasonable basis is all that is required to defeat a claim of bad faith.").

Accordingly, Plaintiff's bad faith claim fails as a matter of law.

2. Selective had reasonable grounds for its lengthy investigation

To show bad faith premised on delay, Plaintiff must show by clear and convincing evidence that Selective "(1) 'had no reasonable basis for causing the delay', and 'knew or recklessly disregard the lack of reasonable basis for the delay.'" Parisi v. State Farm Mut. Auto. Ins. Co., 2018 WL 2107774, at *11 (W.D. Pa. May 7, 2018) (quoting Mirarchi v. Seneca Specialty Ins. Co., 564 F. App'x 652, 655-56 (3d Cir. 2014)). "[I]t is not bad faith to conduct a thorough investigation into a questionable claim." Babayan, 430 F.3d at 138. Moreover, the delay must be attributable to the defendant. Thomer v. Allstate Ins. Co., 790 F. Supp. 2d 360, 370 (E.D. Pa. 2011) (quoting Wiedinmyer v. Harleysville Mut. Ins. Co., No. 94-19450, 1999 WL 1324202, at *215 (Pa. Commw. Ct. Aug. 5, 1999); see also Quaciari v. Allstate Ins. Co., 998 F. Supp. 578, 582-83 (E.D. Pa. 1998), aff'd, 172 F.3d 860 (3d Cir. 1998) (granting summary judgment for insurer in part because periods of delay were "equally attributable" to insured and insurer).

Although delay may give rise to a bad faith claim, the Third Circuit has suggested that such claims may also require policy coverage. Treadways LLC v. Travelers Indem. Co., 467 F. App'x 143, 146 (3d Cir. 2012). Because the Vacancy Provision precludes coverage, Plaintiff's bad faith claim based on delay also fails.

Insofar as policy coverage is not required, Plaintiff's bad faith claims also fail because Selective had reasonable bases for the delay: discovery that Building A might be vacant and Plaintiff's delay in providing requested information concerning vacancy. There is no evidence that Selective was aware of the Vacancy Provision's possible application until its investigator's August 31, 2022 site visit, when the investigator saw that Building A might be vacant. (See Doc. No. 45-10.) Although it did not send the ROR Letter until January, by September 15, 2022, Selective had informed Plaintiff that the Vacancy Provision might apply and had requested

clarification and documentation regarding Building A's use and occupancy. (Doc. No. 45-14.)

As it received and reviewed the slowly provided information, more questions emerged regarding occupancy, and Selective regularly requested additional information—or repeated its requests for documentation that Plaintiff had not provided. For example, upon review of the terms of the Access Agreement—which Dardaris represented was a lease—Selective reasonably questioned Building A's occupancy. Plaintiff contends this was unreasonable and demonstrates bad faith. In particular, Plaintiff argues that the $190,000 advance demonstrated Selective's acceptance of the claim, but that Selective changed course after receiving the JS Held Estimate, which it hoped to "manipulate." (Doc. No. 49 at 21-22.) Selective raised the vacancy issue in September—before paying the advance—however, and there is no evidence Selective had the estimate before late October. (Compare Doc. Nos. 45-11 at 3 (vacancy issue raised September 15, 2022) with Doc. No. 49-4 (Selective awaiting estimate as of October 26, 2022).) Moreover, Plaintiff distorts Selective's emails: Thompson did not ask that Selective alter the estimate *amount*, but rather suggested that Selective or JS Held "manipulate" the document to *clarify the scope* of the estimate—i.e., that the document is meant to provide "a general understanding of what the value of the claim is for reserving purposes" and "should not be construed as an amount that [Selective is] willing to pay." (Doc. No. 49-3.)

Plaintiff also calls Selective's late assertion that the proof of loss was never submitted a "stall tactic[]" evidencing bad faith. (Doc. No. 45-22 at 2-3.) But, Selective belatedly raised this issue only in *response* to Plaintiff's assertions that the ROR Letter was untimely. (See Doc. Nos. 45-20, 45-21, 45-22.) Rather than stall, Selective had been trying to determine whether a ROR Letter was even necessary. (See Doc. No. 49-4 (Noting ROR Letter not necessary if legal confirms Access Agreement can pass as a lease but "may be needed if [legal] cannot verify.").

Up until its denial of the coverage claim, Selective was in regular contact with Plaintiff and repeatedly sought information pertinent to its investigation. Selective's failure to provide the formal notice that Pennsylvania law requires—and the Policy prescribes upon delivery of a properly executed proof of loss—between June 30 and October 17 does not in itself constitute bad faith. Shawnee Tabernacle Church v. GuideOne Ins., 383 F. Supp. 3d 460, 469 (E.D. Pa. 2019); see Williams v. Hartford Cas. Ins. Co., 83 F. Supp. 2d 567, 576-77 (E.D. Pa. 2000) ("The record reveals that Hartford and the plaintiffs' counsel communicated regularly. While Hartford may have been negligent in failing to inform plaintiffs of the progress of its investigations in a manner mandated by the regulations, such negligence does not constitute bad faith.").

I have also considered evidence that Plaintiff was responsible for the delay. See Thomer, 790 F. Supp. 2d at 370. Although Plaintiff turned over certain documentation, it was slow to provide information and failed to respond timely to all Selective's requests, or in some cases, it failed to respond at all. For example, despite Selective's January 20, 2023 letter asking Plaintiff to advise Selective in writing if certain requested documents were not in existence or if more time was needed to provide them, there is no evidence that Plaintiff provided those documents. (See Doc. No. 45-21.) Although Dardaris testified that Plaintiff provided all requested documentation, he could not identify when or where such documentation was provided, and Plaintiff has provided no evidence of its compliance with Selective's requests. (See Doc. No. 45-31 at 50, 52, 60.) There is no indication that Plaintiff ever provided a narrative background—separate from documents like the Access Agreement—on the circumstances of occupancy and frequency of use. There is also no evidence that Plaintiff provided Recycle's contact information, despite numerous requests. Moreover, Dardaris was unable to provide a complete list of Building A's visitors or an accurate portrayal of Recycle's operations and usage of Building A. (See Doc. No. 45-25.) Given

Selective's need to understand Building A's vacancy, Plaintiff's delay and inability to provide Recycle's contact information and other information on how and how often Recycle used Building A caused Selective to extend its investigation and determination of coverage.

In sum, because Selective was in regular communication with Plaintiff, and Plaintiff failed timely to respond with all requested information, there was a reasonable basis for the delay and thus Selective did not act in bad faith. See Kosierowski, 51 F. Supp. 2d at 596 (E.D. Pa. 1999) (summary judgment appropriate where correspondence and requests for information occurred throughout pendency of claim); Albert v. Nationwide Mut. Fire Ins. Co., No. 3-991953, 2001 WL 34035315, at *10 (M.D. Pa. May 22, 2001) ("a long period of time between demand and settlement, does not, on its own, necessarily constitute bad faith. The primary consideration is 'the degree to which a defendant insurer knew it had no basis to deny the claimant: if delay is attributable to the need to investigate further or even to simple negligence, no bad faith has occurred.'").

IV. CONCLUSION

In sum, I will grant Selective's Motion for Summary Judgment on all claims.

* * *

AND NOW, this 14th day of May, 2024, it is hereby **ORDERED** that Selective's Motion for Summary Judgment is **GRANTED**. The Clerk of Court **SHALL** close this case.

AND IT IS SO ORDERED.

/s/ Paul S. Diamond

Paul S. Diamond, J.