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SOLLECITO CUSTOM HOMES, LLC, Plaintiff, v. DANIEL COHEN, Defendant.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: MONMOUTH COUNTY DOCKET NO.: MON-L-2815-15 (CBL) CIVIL ACTION **ORDER**
DANIEL COHEN, Third-party Plaintiff, v. VINCENT SOLLECITO; MARY LYNN KEALY; FRANEL CONSTRUCTION, INC.; AL SOLLECITO; ANTIMO PLUMBING & HEATING; FRANK SILVA; BRAD ROBINSON; GLASS APPS, LLC; CUSTOM TRADES COMPANY, INC. d/b/a SORPETALER USA and/or SORPETALER WINDOWS AND DOOR; THE STONE GALLERY AT SEASIDE MATERIALS, INC.; NMG ELECTRIC, LLC; THE JANKO'S WOOD, LLC d/b/a MODAVIE DOORS; HELICAL & STRUCTURAL SYSTEMS, LLC; DOCTOR FIBERGLASS, INC.; ALL CITY GLASS & MIRROR CORP; WHOLESALE MARBLE DISTRIBUTORS, INC. a/k/a and/or d/b/a WHOLESALE MARBLE GRANITE; ACME PILING COMPANY, LLC; VINCENT RUSSO & SONS PLUMBING CONTRACTORS; NAPOLI HOME SERVICES, LLC; FABULOUS	

RAILINGS II, INC.; WAG ASSOCIATES, INC.; RKC CONSTRUCTION CORP.; WARREN MEISTER ARCHITECTS; DAVE BEATON FLOORING, SANDING, & REFINISH; CHUBB INSURANCE COMPANY OF NEW JERSEY; ANTAR GROUP RENOVATION; RES RENOVATIONS, INC.; JOHN DOES 1-1000, being fictitious parties; JANE DOES 1-1000, being fictitious parties; XYZ PLUMBING CONTRACTOR, a fictitious party; XYZ ELECTRICAL CONTRACTOR, a fictitious party; XYZ MASON CONTRACTOR, a fictitious party; XYZ WINDOW INSTALLATION CONTRACTOR, a fictitious party; XYZ TILE INSTALLATION CONTRACTOR, a fictitious party; XYZ STONE/MASONRY FAÇADE CONTRACTOR, a fictitious party; XYZ MASONRY/FOUNDATION CONTRACTOR, a fictitious party; XYZ WEATHER RESISTANT BARRIER INSTALLER CONTRACTOR, a fictitious party; XYZ EXTERIOR SEALANT CONTRACTOR, a fictitious party; XYZ WINDOW DOOR OR PENETRATION CONTRACTOR, a fictitious party; XYZ WATERPROOFING CONTRACTOR, a fictitious party; XYZ EXTERIOR TRIM CONTRACTOR, a fictitious party; XYZ GUTTER AND LEADER CONTRACTOR, a fictitious party; XYZ FRAMING CONTRACTOR, a fictitious party; XYZ STONE FAÇADE SUPPLIER, a fictitious party; XYZ STONE LINTEL SUPPLIER, a fictitious party; XYZ STRUCTURAL STEEL FABRICATOR, a fictitious party; XYZ STRUCTURAL STEEL TRADE CONTRACTOR, a fictitious party; XYZ ROOFING CONTRACTOR, a fictitious party; XYZ MISCELLANEOUS METAL FABRICATOR AND INSTALLATION CONTRACTOR, a fictitious party; JOHN DOE PRINCIPALS

OF THE CONTRACTORS WHO PERFORMED WORK ON THE COHEN RESIDENCE 1¬1000, being fictitious parties; JANE DOE PRINCIPALS OF THE CONTRACTORS WHO PERFORMED WORK ON THE COHEN RESIDENCE 1-1000, being fictitious parties; and ABC CONTRACTOR CORPORATIONS 1¬1000, being fictitious parties, jointly, severally, and in the alternative,

Third-Party Defendants.

SOLLECITO CUSTOMER HOMES, LLC VINCENT SOLLECITO; and MARY LYNN KEALY,

Fourth-Party Plaintiffs,

v.

WALTER PUCHAJDA and OCTAGON CONSTRUCTION,

Fourth-Party Defendants.

WALTER PUCHAJDA and OCTAGON CONSTRUCTION,

Fifth-Party Plaintiff,

v.

FRANEL CONSTRUCTION, INC.; FRANK SILVA; GLASS APPS, LLC; CUSTOM TRADES COMPANY, INC. d/b/a SORPETALER USA and/or a/k/a SORPETALER WINDOWS AND DOORS; NAPOLI HOME SERVICES, LLC; W.A.G. ASSOCIATES, INC.; RKC CONSTRUCTION CORP.; ANTAR GROUP RENOVATION; RES RENOVATIONS, INC.; ACME PILING COMPANY, LLC,

Fifth-Party Defendants.

CHUBB INSURANCE COMPANY OF NEW JERSEY as subrogee of DANIEL COHEN,

Plaintiff,

v.

SOLLECITO CUSTOM HOMES, LLC; VINCENT SOLLECITO; MARY LYNN KEALY; FRANEL CONSTRUCTION, INC.; AL SOLLECITO; ANTIMO PLUMBING & HEATING; FRANK SILVA; BRAD ROBSINON; GLASS APPS, LLC; CUSTOM TRADES COMPANY, INC. d/b/a SORPETALER USA and/or a/k/a SORPETALER WINDOWS AND DOORS; THE STONE GALLERY AT SEASIDE MATERIALS, INC.; NMG ELECTRIC, LLC; THE JANKO'S WOOD LLC d/b/a MODAVIE DOORS; HELICAL & STRUCTURAL SYSTEMS, LLC; DOCTOR FIBERGLASS, INC.; ALL CITY GLASS & MIRROR CORP.; WHOLESALE MARBLE DISTRIBUTORS, INC. a/k/a and/or d/b/a WHOLESALE MARBLE & GRANITE; ACME PILING COMPANY, LLC; VINCENT RUSSO & SONS PLUMBING CONTRACTORS; NAPOLI HOME SERVICES, LLC; FABULOUS RAILINGS II, INC.; W.A.G. ASSOCIATES, INC.; RKC CONSTRUCTION CORP.; WARREN MEISTER ARCHITECTS; DAVE BEATON FLOORING, SANDING & REFINISH; JOHN DOES 1-1000, being fictitious parties; JANE DOES 1-1000, being fictitious parties; XYZ PLUMBING CONTRACTOR, a fictitious party; XYZ ELECTRICAL CONTRACTOR, a fictitious party; XYZ MASON CONTRACTOR, a fictitious party; XYZ WINDOW INSTALLATION, a fictitious party; XYZ TILE INSTALLATION, a fictitious party; XYZ STONE/MASONRY FAÇADE CONTRACTOR, a fictitious party; XYZ

MASONRY/FOUNDATION CONTRACTOR, a fictitious party; XYZ WEATHER RESISTANT BARRIER INSTALLER CONTRACTOR, a fictitious party; XYZ EXTERIOR SEALANT CONTRACTOR, a fictitious party; XYZ WINDOW, DOOR OR PENETRATION FLASHING CONTRACTOR, a fictitious party; XYZ WATERPROOFING CONTRACTOR, a fictitious party; XYZ EXTERIOR TRIM CONTRACTOR, a fictitious party; XYZ GUTTER AND LEADER CONTRACTOR, a fictitious party; XYZ FRAMING CONTRACTOR, a fictitious party; XYZ STONE FAÇADE SUPPLIER, a fictitious party; XYZ STONE LINTEL SUPPLIER, a fictitious party; XYZ STRUCTURAL STEEL FABRICATOR, a fictitious party; XYZ STRUCTURAL STEEL TRADE CONTRACTOR, a fictitious party; XYZ ROOFING CONTRACTOR, a fictitious party; XYZ MISCELLANEOUS METAL FABRICATOR AND INSTALLATION CONTRACTOR, a fictitious party; JOHN DOE PRINCIPALS OF THE CONTRACTORS WHO PERFORMED WORK ON THE COHEN RESIDENCE 1¬ 1000, being fictitious parties; JANE DOE PRINCIPALS OF THE CONTRACTORS WHO PERFORMED WORK ON THE COHEN RESIDENCE 1-1000, being fictitious parties; and ABC CONTRACTOR CORPORATIONS 1¬1000, being fictitious parties, jointly, severally, and in the alternative,

Defendants.

THIS MATTER having been opened to the Court by McCarter & English, LLP, attorneys for Defendant/Third Party Plaintiff Daniel Cohen, for an Order granting plaintiff partial summary judgment against Third Party Defendant Chubb Insurance Company of New Jersey; and the Court having considered the arguments of counsel; and good cause appearing:

IT IS on this 18th day of May, 2022,

ORDERED that Daniel Cohen's partial summary judgment motion is **GRANTED IN PART** and **DENIED IN PART** for the reasons stated in the attached Statement of Reasons; and

1. Chubb is required to pay ensuing losses, meaning any loss that followed a covered event or peril, even if the chain of events began with an excluded loss such as defective or faulty construction unless subject to a different exclusion. There are, however, issues of fact regarding what construction was defective and what, if any, damages were caused by the defective construction. Accordingly, the court cannot declare what specific components are covered as an ensuing loss given the outstanding issues of fact ~~all ensuing covered loss from the contractors' faulty work (whether interior, exterior, or internal) in whatever amount the jury ultimately awards; and~~
2. ~~Chubb is required to pay (among other amounts) the cost for removing the home's exterior stone to the extent it is removed to repair the home's defective drainage systems or otherwise damaged; and~~

IT IS FURTHER ORDERED pursuant to R. 1:5-1(a) that a copy of this Order will be served on all parties not served electronically, nor served personally in court this date, within seven (7) days of the date of this Order.

/s/ MARA ZAZZALI-HOGAN, J.S.C.

Opposed (X)

Unopposed ( )

****See attached Statement of Reasons****

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SOLLECITO CUSTOM HOMES, LLC, Plaintiff, -against- DANIEL COHEN, Defendant/Counterclaimant, -against- SOLLECITO CUSTOM HOMES, LLC; VINCENT SOLLECITO; and MARY LYNN KEALY, Counterclaim Defendants.	SUPERIOR COURT OF NEW JERSEY MONMOUTH COUNTY LAW DIVISION Docket No. L-2815-15 Civil Action - CBLP ORDER

DANIEL COHEN,
Third-Party Plaintiff,

-against-

FRANEL CONSTRUCTION, INC., AL SOLLECITO, ANTIMO PLUMBING & HEATING, FRANK SILVA, BRAD ROBINSON, GLASS APPS, LLC, CUSTOM TRADES COMPANY, INC., et. al.,

Third-Party
Defendants.

THIS MATTER having been brought before the Court on the Motion of Rosner Nocera & Ragone, attorneys for Third-Party Defendant Chubb Insurance Company of

New Jersey ("Chubb") , on notice to all counsel of record, for an Order pursuant to Rule 4:46-1 and CBLP Rule 4:105-5 for Summary Judgment striking and dismissing with prejudice each of the seven Counts pleaded against Chubb in Defendant and Third-Party Plaintiff Daniel Cohen's ("Cohen") Sixth Amended Third-Party Complaint, and the Court having considered the matter and for good cause shown;

IT IS on this 18th day of May, 2022;

ORDERED that Chubb's Motion for Summary Judgment is **GRANTED IN PART** and **DENIED IN PART** as follows for the reasons stated in the attached Statement of Reasons:

- Count I (Declaratory Judgment) – **DENIED WITHOUT** PREJUDICE. There are issues of fact regarding what construction was defective and what, if any, damages were caused by the defective construction. Accordingly, the court cannot declare what specific components are covered as an ensuing loss given the outstanding issues of fact; and
- Count II (Breach of Contract) – **DENIED WITHOUT PREJUDICE**; and
- Count III (Breach of the Implied Covenant of Good Faith and Fair Dealing) – **DENIED WITHOUT PREJUDICE**; and
- Count IV (Bad Faith in Issuance of Policy and Denial of Claim) – **DENIED WITHOUT PREJUDICE**; and
- Count V (Equitable and Constructive Fraud) – **DENIED WITHOUT PREJUDICE** because it is intertwined with Count IV;
- Count VI (Fraud) – **DENIED WITHOUT PREJUDICE** because it is intertwined with Count IV;

- Count VII (Consumer Fraud Act) – **GRANTED**; and

IT IS FURTHER ORDERED that ~~the Sixth Amended Third-Party Complaint of Cohen and all Counts asserted therein against Third Party Defendant Chubb, consisting of Counts I, II, III, IV, V, VI and VII, as well as all of Cohen's claims for punitive or consequential damages and attorney's fees, be and are hereby dismissed with prejudice (except for the dispute remaining from Cohen's 2017 insurance claim to Chubb involving the liquidated amount $139,481.92, which is severed and continued for trial pursuant to Rule 4:46-3)~~ requests for summary judgment on the bad faith and punitive damages are **DENIED WITHOUT PREJUDICE**; and

IT IS FURTHER ORDERED that pursuant to Rule 4:46-2(c), the Court hereby adjudicates the following issues of fact and law and orders;

(1) Cohen's "Amended Financial Damages" for construction defect repair and/or incomplete contractor work at Cohen's summer home located at 15 Queen Anne Dr., Deal, New Jersey ("the Home"), claimed in the amount of $1,753,741 in Cohen's May 30, 2018 final expert report – **DENIED WITHOUT PREJUDICE** consistent with this Order and the Statement of Reasons; and

(2) the amount of $1,378,654, included within the total "Amended Financial Damages" in Cohen's May 30, 2018 final expert report, claimed for replacement of the Home's defective and improperly installed exterior limestone façade – **DENIED WITHOUT PREJUDICE** consistent with this Order and the Statement of Reasons; and

(3) correction of the Home's foundation defects in the amount of $320,094, claimed in Cohen's May 30, 2018 final expert report – **DENIED WITHOUT PREJUDICE**

consistent with this Order and the Statement of Reasons; and

(4) the amount of $5,934,722 first claimed in Scenario III of the January 6, 2020 I Grace Co. report for an alleged future demolition, disposal, and complete replacement of the Home's entire interior – **DENIED WITHOUT PREJUDICE** consistent with this Order and the Statement of Reasons; and

(5) all flooding or water infiltration loss to the Home's basement caused by surface water or ground water, which are excluded from coverage under the Chubb policy – **GRANTED** for the reasons stated in the papers and because Cohen does not oppose this request for relief; and

(6) all claimed damage that occurred or manifested after Cohen's June 16, 2017 cancellation of his Chubb Policy – **DENIED WITHOUT PREJUDICE**; and

IT IS FURTHER ORDERED pursuant to R. 1:5-1(a) that a copy of this Order will be served on all parties not served electronically, nor served personally in court this date, within seven (7) days of the date of this Order.

/s/ MARA ZAZZALI-HOGAN, J.S.C.

Opposed (X)

Unopposed ( )

****See attached Statement of Reasons****

STATEMENT OF REASONS PURSUANT TO R. 1:6-2(f)

SOLLECITO CUSTOM HOMES, LLC

v.

COHEN, DANIEL

DOCKET #: MON-L-2815-15 (CBL)

Both Chubb (Third-Party Defendant) and Daniel Cohen (Third-Party Plaintiff) have filed separate motions for summary judgment on the issue of coverage.

I. Facts

A. The Policy

Cohen purchased a "Chubb Masterpiece Policy," which was effective for the Policy Period June 16, 2015 to June 16, 2016, and then renewed for a second year until June 16, 2017. Consistent with the nature of an "all risk" policy, the Deluxe Coverage part obligates Chubb to pay "all risk of physical loss" to Mr. Cohen's home "unless stated otherwise or an exclusion applies." The Policy contained a $5 million limit for the home dwelling coverage, subject to a $50,000 deductible.

Among the policy's provisions is an exclusion of coverage, which is entitled "Faulty planning, construction or maintenance" and provides as follows:

> We do not cover any loss caused by the faulty acts, errors or omissions of you or any other person in planning, construction or maintenance. It does not matter whether the faulty acts, errors or omissions take place on or off the insured property. But we do insure ensuing covered loss unless another exclusion applies. "Planning" includes zoning, placing, surveying, designing, compacting, setting specifications, developing property and establishing building codes or construction standards. "Construction" includes materials, workmanship, and parts or equipment used for construction or repair. (Emphasis added).

In addition to the faulty construction exclusion, there are two other relevant

exclusions related to "gradual or sudden loss" and "structural movement." Those two exclusions read as follows:

> **Gradual or sudden loss**. We do not provide coverage for the presence of wear and tear, gradual deterioration, rust, bacteria, corrosion, dry or wet rot, or warping, however caused, or any loss caused by wear and tear, gradual deterioration, rust, bacteria, corrosion, dry or wet rot or warping. We also do not cover any loss caused by inherent vice, latent defect or mechanical breakdown. But we do insure ensuing covered loss unless another exclusion applies. (Emphasis added).
>
> **Structural movement.** We do not cover any loss caused by the settling, cracking, shrinking, bulging, or expansion of bulkheads, pavements, patios, landings, steps, footings, foundations, walls, floors, roofs, or ceilings except loss to glass that is part of building, storm door, or storm window. But we do insure ensuing covered loss unless another exclusion applies. (Emphasis added).

Similarly, there are two additional exclusions referred to as the "surface water" and "ground water" exclusions.

> **Surface water.** We do not cover any loss caused by:
>
> - flood, accumulation of rainwater on the ground, surface water, wave action, including tidal wave and tsunami, tides, tidal water, seiche, overflow of water from body of water, spray or surge from any of these, even if driven by wind;
> - water borne material from any of the above, including when any such waters or water borne material enters and backs up or discharges from or overflows from any sewer or drain, located outside of or on the exterior of fully enclosed structure, including gutters, rainwater pipes, downspouts, or underground drainage systems;
> - run off of water or water borne material from paved surface, driveway, walkway, patio, or other similar surface; or
> - escape, overflow, discharge or release for any reason of water or water borne material from canal, dam, reservoir, levee, dike, seawall, or any other boundary or containment.
>
> However, we do insure ensuing covered loss due to fire, explosion, or theft unless another exclusion applies. (Emphasis added).
>
> **Ground water.** We do not cover any loss caused by water or water borne material in the ground, or by its pressure, leakage, or seepage. But we do

insure ensuing covered loss due to fire, explosion, or theft unless another exclusion applies. (Emphasis added).

B. The 2016 and 2017 Claims

Water intruded into the house in early 2016 and then again in 2017. In May 2016, Chubb partially denied coverage for the $1.53M claim, relying on exclusions for faulty construction, gradual or sudden loss (deterioration, wear and tear), structural movement, surface water and ground water. See Chubb's 5/11/16 Letter at ¶ 4. Chubb did advise, however, that "ensuing interior water damage in the home's front window by the staircase, and rear room off the kitchen is covered" in the amount of $15,000.00. Although Chubb admitted that the "ensuing water loss" constituted an "ensuing loss" under the policy, that $15,000.00 loss was applied to the $50,000.00 deductible, and therefore, Cohen recovered nothing.

In 2016, Chubb granted Cohen's request for reconsideration. The parties dispute what the subsequent investigation revealed. While Cohen contends there was "interior" moisture within the walls, Chubb asserts that the investigation confirmed that "any moisture or water infiltration was limited to small areas of water droplets or staining, occasionally with adjacent wallboard damage, localized around the kitchen rotunda, the front entrance floor and adjacent 'window wall' assembly and certain windowsills." Ultimately, Chubb concluded that the claim of hidden moisture trapped behind the home's walls (even if true) did not appear to represent a covered ensuing loss.

In 2017,[1] a new claim was filed based upon a "sudden weather event", i.e., a

[1] Chubb requested to sever the 2017 claim but provides no legal support.

nor'easter. The driving rain penetrated through the windows and façade, into the upper rooms in the turret portion of the home. Chubb contends that the 2017 storm damages were confined to the turret and did not manifest otherwhere. Chubb advised that "ensuing water damage is covered and we have processed payment for the undisputed" loss, referring specifically to the ensuing damage in the turret rooms. Chubb also deemed charges related to interior dry wall, internal insulation, dumpster charges and designed commission fees to be covered ensuing loss damages. According to Chubb, the reimbursed amount represented ensuing loss water damage to non-defective building materials, contents and interior finishes. It did not, however, approve coverage for correction of the window leakage, including but not limited to the removal and replacement of windows, window flashing and exterior façade work.

Cohen made a claim for $248,058.00 in rainstorm damage for which Chubb has paid $108,576.27 as follows: dwelling ($93,766.67), dwelling-mold remediation ($10,000.00) and contents ($4,809.60), leaving $139,481.00 in liquidated damages. Chubb also contends that the home repairs completed in 2017 remediated the water intrusions. In response, Cohen contends that the ensuing water damage caused by features that were not defective should be covered. In total, Cohen has claimed approximately $1.78 million in damages for the faulty construction, of which $1,378,654.00 is attributed to the limestone facade. Below is a summary of the damages as set forth in Ronan's May 30, 2018 report:

Item	Cost Prepared By:	Financial Damage
Incomplete Contract Work	Actual Costs – Cohen	To Be Determined
Repairs to Contract Work		
Chandelier Support	Actual Costs – Cohen	To Be Determined
Rotunda Façade	HJCG Estimate	$ 30,336
Foyer Floor	HJCG Estimate	$ 7,500
Rear Terrace Joint	HJCG Estimate	$ 10,786
Patio Fireplace	HJCG Estimate	$ 1,761
Exterior Façade Replacement	HJCG Estimate	$1,378,654
Low Slope Roof and Copings	HJCG Estimate	$ 4,610
Rear Foundation Walls	HJCG Estimate	$ 265,965
Front Foundation Wall	HJCG Estimate	$ 15,804
Rotunda Sill Plates	HJCG Estimate	$ 38,325
	Financial Damages:	$1,753,741

In breaking down the cost of the façade, there are four items on the chart that are not part of the façade exterior work and total $22,010, which Chubb claims goes to the deductible: demolition interior walls, wall board, first coat of plaster for interior walls and second coat of plaster for interior walls.

II. Summary Judgment

A motion for summary judgment is governed by R. 4:46-2 of the New Jersey Court Rules. The rule provides that summary judgment shall be "rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2.

The case of Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520 (1995), sets forth the standard for a trial court to apply when determining whether an alleged disputed issue should be considered "genuine" for purposes of R. 4:46-2. The Brill court stated that:

> Under this new standard, a determination whether there exists a "genuine issue" of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party.
> 142 N.J. 540.

The Brill court further clarifies that, "[i]f there exists a single, unavoidable resolution of the alleged disputed issue of fact, that issue should be considered insufficient to constitute a 'genuine' issue of material fact for purposes of R. 4:46-2." Id. Rather, when

the evidence "is so one-sided that one party must prevail as a matter of law, the trial court should not hesitate to grant summary judgment." Id. (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986)).

Cohen moves for summary judgment under R. 4:46-2, and asserts he is entitled to judgment compelling Chubb to pay the costs of removing the home's exterior stone to the extent it is removed to repair the home's defective drainage systems or otherwise damaged.

Meanwhile, Chubb moves under R. 4:46-2(c) and -3. Under R. 4:46-2(c), the court may render "[a] summary judgment or order, interlocutory in character…on any issue in the action (including the issue of liability) although there is a genuine factual dispute as to any other issue (including any issue as to the amount of damages)." If the court does so, it "shall, if practicable, ascertain what material facts, including facts as to the amount of damages, exist without substantial controversy and shall thereupon make an order specifying those facts and directing such further proceedings in the action as are appropriate." R. 4:46-3(a). At trial, "the facts so specified shall be deemed established." Id.; see Pressler & Verniero, Current N.J. Court Rules, comment 2 on R. 4:46-3 (Gann 2019) (stating that R. 4:46-3 "permits a partial summary judgment in respect of a portion of damages claimed even though the entire amount of damages is in dispute").

If Cohen's entire coverage claim is not dismissed, Chubb contends that the following specific claims and damages should be declared to be excluded or outside the coverage of Chubb's policy, and dismissed pursuant to R. 4:46-2(c): (1) Cohen's "Amended Financial Damages" for construction defect repair and/or incomplete contractor work claimed in the amount of $1,753,741; (2) the amount of $1,378,654 in

Cohen's "Amended Financial Damages" for replacement of the home's defective exterior limestone façade; (3) foundation repairs in the amount of $320,094; (4) all claimed damage that occurred or manifested after Cohen's June 16, 2017 cancellation of this Chubb policy; (5) the $5,934,722 that Cohen claimed in January 2020 for the alleged future removal and replacement of the home's entire interior; and (6) all claims and loss caused by surface water or ground water.

III. Analysis

A. Insurance – Declaratory Judgment

"An insurance policy is a contract that will be enforced as written when its terms are clear in order that the expectations of the parties will be fulfilled." Flomerfelt v. Cardiello, 202 N.J. 432, 441 (2010) (citing Kampf v. Franklin Life Ins. Co., 33 N.J. 36,43 (1960); Scarfi v. Aetna Cas. Sur. Co., 233 N.J. Super. 509, 514 (App. Div. 1989)). "In considering the meaning of an insurance policy, we interpret the language 'according to its plain and ordinary meaning.'" Ibid. (quoting Voorhees v. Preferred Mut. Ins. Co., 128 N.J. 165, 175 (1992)). "If the plain language of the policy is unambiguous, we will 'not engage in a strained construction to support the imposition of liability or write a better policy for the insured than the one purchased.'" Templo Fuente de Vida Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, 224 N.J. 189, 200 (2016) (quoting Chubb Custom Ins. Co. v. Prudential Ins. Co. of Am., 195 N.J. 231, 238 (2008)). Where the terms are ambiguous, they are construed against the insurer and in favor of the insured. Flomerfelt, 202 N.J. at 441. An ambiguity exists when the "phrasing of the policy is so confusing that the average policyholder cannot make out the boundaries of coverage." Lee v. Gen, Accident Ins. Co., 337 N.J. Super 509, 513 (App. Div. 2001). Thus, if the policy language

would support two meanings, "one favorable to the insurer and the other to the insured, the interpretation favoring coverage should be applied." Lundy v. Aetna Cas. & Sur. Co., 92 N.J. 550, 559 (1983).

Insurance policies commonly contain exclusions from coverage. "Exclusionary clauses are presumptively valid[,]" ibid., and will be enforced if the clauses are "'specific, plain, clear, prominent, and not contrary to public policy,' notwithstanding that exclusions generally 'must be narrowly construed,' and the insurer bears the burden to demonstrate they apply." Abboud v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa., 450 N.J. Super. 400, 407 (App. Div. 2017) (quoting Flomerfelt, 202 N.J. at 441-42).

Ensuing loss clauses commonly appear in “all-risk” insurance policies, which differ from “named-peril” policies, which are more limited and afford protection to only specific risks contained in the policy. See Ariston Airline & Catering Supply Co. v. Forbes, 211 N.J. Super. 472, 479 (Law Div. 1986). In other words, an all-risk policy is the opposite of a named peril policy because it starts with the proposition that all risks are covered, unless explicitly excluded. All-risk policies generally allocate risk to the insurer, while specific peril policies place more risk on the insured.

To understand the application of an “ensuing loss” clause, however, it is important to contextualize its genesis in the early 1900’s after massive fires were sparked by the infamous 7.9 magnitude San Francisco Earthquake. See Chris French, The “Ensuing Loss” Clause in Insurance Policies: The Forgotten and Misunderstood Antidote to Anti-Concurrent Causation Exclusions, 13 Nev. L.J. 215, 216 (2012). After the earthquake, the insurance companies refused to pay for the losses, even though they were caused by fires, because the policy excluded losses caused “directly or indirectly” by earthquakes.

After the legislature addressed that issue, insurance companies responded by adding "Ensuing loss" provisions to cover losses by fires, even if they were caused by an underlying cause that was not covered. In other words, if only part of a loss is covered by a defined peril, the loss is covered even if the loss was caused in part by an excluded peril. Its purpose is to preserve coverage for perils not excluded without "resurrecting" coverage for a loss that is excluded such as a natural disaster. Unfortunately, application of such clauses is not clear cut and in fact, jurisdictions are divided.

As noted by Chubb's outside counsel, New Jersey law concerning ensuing loss is sparse. Sparse does not mean, however, that the issue is unsettled. Similarly, that other jurisdictions take other positions, does not necessarily mean that the law in New Jersey is unsettled. That debate, however, goes to the bad faith claim, which is not being adjudicated for the reasons set forth herein.

For purposes of this motion, within the state's jurisprudence, only one case has formally defined what "ensuing loss" means in this context. See Ariston Airline & Catering Supply Co. v. Forbes, 211 N.J. Super. 472, 511 (1986). There, the court indicated that an ensuing loss clause states that the exclusion applies "unless loss by a peril not otherwise excluded *ensues* and then the Company shall be liable for only such ensuing loss…" Ibid. In Ariston Airline, the plaintiff's warehouse heaved and cracked because of frost, causing structural damage. Specifically, the insulation system in the floor failed to prevent the cold from penetrating and ultimately, it negatively affected the footings, walls and floor slabs. The defendant's expert opined that the damages were attributed to design or construction defects, with which the plaintiff did not disagree.

Two policies were at issue in that case. The first policy (from Aetna) insured against "all risks of direct physical loss subject to exclusions." Id. at 475. Those exclusions included loss caused by "earth movement, including, but not limited to earthquake, landslide, mudflow, earth sinking, earth rising or 'shifting'" and "water below the surface" including any "which exerts pressure on or flows, seeps or leaks through…foundations, walls, basement or other floors." It also included problems "caused by wet or dry rot and settling, cracking, shrinkage, bulging or expansion on pavements, foundations, walls, floors…unless loss by a peril not otherwise excluded ensues and the company shall be liable for only such ensuing loss." Id. at 477. In interpreting the Aetna policy, the court emphasized that the "movement of water and ice coupled with freezing temperatures and design or construction defects caused the loss," emphasizing that there was a difference between ice and water. Id. at 482. Likewise, the court noted that the "earth movement" was not only caused by natural events but that the policy never defined "earth movement." Id.

The second policy (from American) insured against "all risks of direct physical loss or damage occurring…from any insured and external cause, subject to exclusions." Id. at 475. Among those exclusions were design and workmanship errors "unless the collapse of the property or a part thereof ensues and then only for the ensuing loss" as well as loss or damage caused by cracking, settling, shrinkage, or expansion in foundations, walls, floors, ceilings or patios. Id. at 477-78. It found that "cracking" was a result and not the cause. Id. at 485. Because the property essentially collapsed because of the design and construction defects, the court concluded that the exclusions did not apply to the American policy. Id. at 486.

Thereafter, the court explained that an "additional important reason" made the exclusions inapplicable. Id. at 486. "Numerous cases hold that coverage is provided whenever the policy does not exclude the efficient cause of the damage even though it excludes other contributing causes." Ibid. (Citations omitted).

As explained by the court in Ariston, New Jersey has adopted a broader rule, relying on Franklin Packaging Co. v. California Union Ins. Co., 171 N.J. Super. 188 (App.Div.1979). In Franklin Packaging Co., vandals caused damage that blocked a drain and resulted in loss of inventory. Although vandalism was deemed a covered risk, water damage was not.

The court held that there was coverage, citing 5 Appleman, Insurance Law and Practice (1970), § 3083:

> Where a peril specifically insured against sets other causes in motion which, in an unbroken sequence and connection between the act and final loss, produced the result for which recovery is sought, the insured peril is regarded as the proximate cause of the entire loss. It is not necessarily the last act in a chain of events which is, therefore, regarded as the proximate cause, but the efficient or predominant cause which sets into motion the chain of events producing the loss. An incidental peril outside the policy, contributing to the risk insured against, will not defeat recovery… In other words, it has been held that recovery may be allowed where the insured risk was the last step in the chain of causation set in motion by an uninsured peril, or where the insured risk itself set into operation a chain of causation in which the last step may have been an excepted risk. (Emphasis added).

In Ariston, the court concluded that the Appleman rule would require coverage. Id. at 487.

There are only two federal court decisions that interpret New Jersey law and "ensuing loss clauses." GTE Corporation v. Allendale Mut. Ins. Co., 372 F.3d 598 (3d Cir. 2004) and Spiniello Cos. v. Hartford Fire Ins. Co., 2008 U.S. Dist. LEXIS 95009, at *2

(D.N.J. Nov. 21, 2008). Chubb contends that it is not responsible for any loss caused by an excluded peril, relying on GTE Corporation, but that it is has a coverage obligation "when an excluded cause of loss results in a new peril that causes covered damage to non-defective property." Chubb contends that here, it applied the ensuing loss exception "to the defective construction exclusion when new covered damage was caused to property that was not itself defective, e.g., not part of the defective façade, the improperly installed windows, or their components."

In response, Cohen is somewhat inconsistent. On one hand, Cohen contends that the policy covers all ensuing loss from the contractors' faulty work and should include among other things, the cost for removing the exterior limestone to the extent it is removed to repair the home's defective systems. Cohen relies on the Webster's dictionary definition of "ensue" which means to "take place afterward or as a result." Cohen also relies on various cases that are not binding on this court but generally define "ensuing" similarly. Ultimately, Cohen appears to concede that Chubb is not responsible for coverage of defective construction but only "[a]ll ensuing water damage to those features (and other covered features) that were not defective."

As noted by the court in GTE Corp., 372 F.3d at 613-14, several courts considering similar policy provisions have concluded that the cost of correcting design defects cannot be covered under an ensuing loss provision where it was incurred to correct an excluded peril. Id. (citing Swire Pac. Holdings Inc. v. Zurich Ins. Co., 284 F.3d 1228, 1231 (11th Cir. 2002) (hereinafter Swire II)). That is, "an ensuing loss provision does not cover loss caused by the excluded peril, but rather covers loss caused to other property wholly separate from the defective property [or defective construction] itself." Swire Pac.

Holdings, Inc. v. Zurich Ins. Co., 139 F. Supp. 2d 1374, 1380 (S.D. Fla. 2001) (hereinafter Swire I), certified on appeal 284 F.3d 1228 (11th Cir. 2002). Said another way, "ensuing loss provisions are best read as permitting recovery where a covered peril or damage results from the design defect or inherent vice." GTE Corp., 372 F.3d at 614.

In support of excluding specific items for coverage, Chubb appears to rely on cases that require an "intervening cause" or that the property be "wholly separate from the defective property itself, relying on GTE. Its argument, however, is misplaced because GTE is merely referring to how a different case interpreted "ensuing losses" in a footnote and which GTE did not follow. In fact, GTE clearly states that "the ensuing loss provisions are best read as permitting recovery where a covered peril or damage results from the design defect or inherent vice." Ibid. at 614; see also Spiniello Cos. v. Hartford Fire Ins. Co., 2008 U.S. Dist. LEXIS 95009, at *10 (D.N.J. Nov. 21, 2008) (reaching similar findings about meaning of "covered loss" and concluding that absent specific language, there is no requirement for a "separate intervening cause").[2]

Likewise, Chubb's reliance on Asbury Blu and cases that stand for a similar proposition are also unpersuasive for three reasons. First, those cases tend to improperly weave in tort concepts such as "foreseeability" and "intervening cause," which are inapplicable in a contract case such as this. See, e.g., Asbury Blu, slip op. at 58 (stating

[2] Spiniello has limited value to this court because it is not binding and because it is unpublished. Rule 1:36-3 provides that no unpublished opinion shall constitute precedent or be binding upon any court. For the same reasons, the court cannot rely on the unpublished case of Asbury Blu Condominium Assoc., Inc. v. Great Northern Ins. Co., Mon-L-4138-18 (Law Div. June 1, 2021), which Chubb relies on.

"the court does not see how water damage is an unforeseeable loss"). The issue is what the contract terms say, not whether damages are foreseeable.

Moreover, if Chubb intended for an intervening occurrence or event to trigger coverage, it should have stated so in the policy language. See, e.g., Cypress Point Condo. Ass'n v. Adria Towers, LLC, 226 N.J. 403 (2016) (citing Mazzilli v. Acci. & Casualty Ins. Co., 35 N.J. 1, 7 (1961) ("[I]n evaluating the insurer's claim as to the meaning of the language under study, courts necessarily consider whether alternative or more precise language, if used, would have put the matter beyond reasonable question")). Here, the policy fails to define "ensuing," "ensuing loss," "intervening cause" or "separate cause." To be clear, Chubb defined ensuing loss elsewhere such as within the "surface water" and "ground water" exclusions, which state that the policy exempts from its purview only "ensuing covered loss due to fire, explosion or theft." If Chubb intended to limit the defective workmanship clause to such narrow perils, it should have explicitly said so.

Second, to the extent Chubb relies on "Appleman's Rule," it is not considering the complete rule as did the court in Ariston Airline, where the court concluded that the Appleman rule would require coverage. 211 N.J. Super. 472, 487 (1986). According to the court,

> If the efficient cause of the loss was a design or construction defect, it was a cause which set in motion a series of events, the last of which was the formation of ice lenses and the consequent heaving of the earth which caused the damage. This opinion holds that both first and last events are covered. Either is enough. Ibid. (Emphasis added).

Lastly, the policies in Asbury Blu and TMW Enterprises, Inc. v. Federal Insurance, 619 F.3d 574, 576 (6th Cir. 2010), which Chubb relies on, were issued to business entities, which do not receive the same benefit of having contractual ambiguities

construed against the insurer. Oxford Realty Group Cedar v. Travelers Excess & Surplus Lines Co., 229 N.J. 196, 208 (2017), Auto Lenders Acceptance Corp. v. Gentilini Ford, Inc., 181 N.J. 245, 257 (2004). Here, the policy was issued to Mr. Cohen, an individual.

In this case, the policy language states that even if there is defective workmanship, "we do insure ensuing covered loss unless another exclusion applies," meaning that there is coverage for ANY ensuing loss NOT excluded. To the extent Chubb argues that an intervening or proximate cause theory is applicable, the clause is ambiguous, in which case it must be interpreted in a manner that is favorable to the insured. See also GTE Corp., 372 F.3d at 613-614 (exclusions apply "unless loss or damage from a peril insured herein ensues and then this policy shall cover for such ensuing loss or damage." (Emphasis added)).

In short, the court finds that reading the clause and interpreting it as Chubb does would be inconsistent with the insured's reasonable expectations. The court appreciates the tenet that an ensuing loss provision "cannot be construed so broadly that the rule (the exclusions) is swallowed by the exception." GTE Corp., 372 F.3d at 613-614. Here, the interpretation, however, is not swallowing the exceptions because it is not reading the clause to allow "any ensuing loss" but rather, any loss that followed a covered event or peril, even if the chain of events began with an excluded loss like faulty workmanship such as the windows, doors and other items opined on by experts.

In light of the foregoing, both Cohen's and Chubb's respective motions for summary judgment are granted in part and denied in part regarding declaratory judgment/Count one. Specifically, Cohen is not entitled to any and all losses that relate to replacement of the defective or faulty workmanship. Rather, he is only entitled to

covered losses that followed after the allegedly negligent installation/design of the windows, façade, doors and other similar items. To be clear, the ensuing loss provision does not cover a loss caused by an excluded peril. Rather, it covers losses to other property apart from the defective construction. There are, however, issues of fact regarding whether Cohen has ultimately demonstrated specific defects and whether each defect is the proximate cause of damages incurred. Consequently, the court cannot specify which items are covered; it will be within the jury's discretion based upon the guidelines set forth herein.

B. Other Specific Declaratory Relief Requested – Claims/Damages that Chubb Asks to Be Excluded

Applying the reasoning and conclusions set forth above, the court will address each of Chubb's specific requests. With the exception of the last request, the court cannot declare any relief without the jury deciding the defects, causation and damages.

1. Exclusion of Construction Defect Repair and/or Incomplete Work ($1,753,741.00)

According to Chubb, Cohen "attempted to surmount the faulty construction exclusion by claiming that moisture, which naturally migrated into the (defective) drainage system behind the permeable limestone façade, should be considered an 'ensuing loss.'" To the extent plaintiff can demonstrate that "moisture" trapped behind the interior walls caused damages, and the moisture is not excluded from the policy, it should be deemed an ensuing and therefore, a covered loss – even if the moisture resulted from defective workmanship. There are issues of fact regarding whether there is moisture. Moreover, to the extent that Cohen attempts to argue that the problem was with the drainage cavity

rather than the façade, there are issues of fact regarding what the façade is actually composed of and what construction is defective.

Regardless, any repair to or replacement of defective workmanship itself is, however, excluded from coverage under the defective workmanship exclusion for the reasons set forth above. In light of the foregoing, the court cannot declare that the $1.7M is not covered for the reasons set forth above and therefore the motion is **DENIED WITHOUT PREJUDICE**.

2. Exclusion of Replacement of Home's Defective Limestone Façade ($1,378,654.00)

According to Cohen, Chubb has improperly refused to cover exterior water damage even though there is no distinction between exterior or interior water damage in the policy. The court disagrees with Cohen's interpretation of Chubb's position. Chubb excluded the defective workmanship, which happened to be on the exterior of the façade, but not the ensuing losses such as water damage not falling within the surface and ground water exclusions. It did not make a per se interior or exterior distinction. Moreover, to the extent that some of the interior items were not covered, some fell within the $50K deductible. For the reasons articulated above, if the limestone was defectively constructed, Cohen is not entitled to any replacement or repair costs. Therefore, the motion for summary judgment on this issue is **DENIED WITHOUT PREJUDICE**.

3. Foundation Repairs ($320,094.00)

For the reasons articulated above, if the foundation was defectively constructed, Cohen is not entitled to any replacement or repair costs. Therefore, the motion for summary judgment on this issue is **DENIED WITHOUT PREJUDICE.**

4. All claimed damage that occurred or manifested after Cohen's June 16, 2017 Cancellation of the Chubb Policy

As stated earlier, Cohen cancelled the Chubb policy, effective June 16, 2017, and then obtained homeowner's coverage from Cincinnati Insurance Company with no gap in coverage. In May 2018, Cohen filed a claim with the second company in May 2018 for rainstorm water infiltration that included the basement. According to Chubb, that infiltration manifested itself in April/May 2018 from surface water and ground water, which was a "new" event according to Ronan.

In other words, when the incidents in 2016 and 2017 occurred, there was no claim made for water damage in the basement. Ronan's final May 30, 2018 report refers to Cohen separately handling the basement water infiltration problem although he described the intrusion as follows: "Due to the lack of waterproofing along the foundation and buried wood framing, water is actively intruding the structure and causing ensuing damages." Ronan's report does not specify whether this water is surface or ground water but he does make reference to IRC 2009, Section R408.6 which states:

> The finished grade of under-floor surface may be located at the bottom of the footings; however, where there is evidence that the groundwater table can rise to within 6 inches (152 mm) of the finished floor at the building perimeter or where there is evidence that the surface water does not readily drain from the building site, the grade in the under-floor space shall be as high as the outside finished grade, unless an approved drainage system is provided. (Emphasis added). (Page 18 of 64).

To Chubb's point, there is only coverage for "occurrences that take place while this policy is in effect." There are, however, issues of fact as to when some of these occurrences "took place" and whether any of these losses are continuing losses and thus covered in their entirety. Although plaintiff cites some case law, he does not guide the

court with any binding precedent. Moreover, Chubb does not cite to any law to supports its position. Therefore, summary judgment on this issue is **DENIED WITHOUT PREJUCE.**

5. Exclusion of $5,934,722.00 Cohen claimed in January 2020 for "alleged future removal and replacement of the home's entire interior"

Because Cohen relies on the "trapped interior moisture theory" to support the $5,934,722.00 interior gutting claim, Chubb asserts the argument must fail because it relies on the "same flawed moisture investigation" previously discussed above. There are, however, issues of fact whether moisture is trapped behind the interior walls and whether other construction defects have caused this alleged moisture. Chubb adds that Cohen's expert report from Kirkpatrick "failed to prove the existence of ensuing loss interior damage." The issue, however, is whether there is moisture that caused damages. If so, it would be a covered ensuing loss because of shoddy construction. Therefore, summary judgment on this issue is **DENIED WITHOUT PREJUCE.**

6. All claims and loss caused by surface water or ground water

The surface water and ground water exclusions are clear. Neither party addresses, however, there is the issue of concurrent cases. Because of the issues of fact, the jury can decide those issues. Therefore, summary judgment on this issue is **DENIED WITHOUT PREJUCE.**

C. Breach of Contract and Implied Covenant of Good Faith and Fair Dealing

Likewise, the requests for summary judgment on counts two and three are also **DENIED WITHOUT PREJUDICE** because of the general issues of material fact. The

record is conflicting regarding who, if anyone, breached any contracts and whether they caused any damages.

D. Bad Faith and Punitive Damages

The motion for summary judgment on the bad faith and "fairly debatable" standard are premature. Judge Quinn stated in his order that "all discovery on bad faith/punitive damages counts are severed and stayed." Although in some cases, only the trials on bad faith issues are stayed and severed, that is not what Judge Quinn's order states.

Courts are hesitant to grant summary judgment motions when discovery is not complete. Comment 2.3.3 to R. 4:46-2 directly addresses the granting of summary judgment before the completion of discovery. Relying upon Jackson v. Muhlenberg Hospital, 53 N.J. 138 (1969), the Comment clarifies that the Court should exercise great caution in considering a motion for summary judgment on a meager record. The Comment states that the "trial court should not grant a summary judgment sua sponte, particularly when the matter is not yet ripe for such consideration such as when discovery has not been completed." R. 4:46-2, C 2.3.3 (*citing* Velantzas v. Colgate-Palmolive Co., 109 N.J. 189 (1988)). "Where discovery on material issues is not complete the respondent must, therefore, be given the opportunity to take discovery before disposition of the motion." Id. (*citing* Wilson v. Amerada Hess Corp., 168 N.J. 236, 253-54 (2001)). In most cases, it is "inappropriate to grant summary judgment when discovery is incomplete." Velantzas, 109 N.J. at 193. In light of the foregoing, the request to grant summary judgment on count IV (bad faith) and all claims for punitive/consequential damages is **DENIED WITHOUT PREJUDICE**.

E. Equitable and Legal Fraud

These counts are inextricably linked with the bad faith claim. For the reasons stated above, the request for summary judgement issue is **DENIED WITHOUT PREJUDICE.**

F. Consumer Fraud Act (CFA)

According to Chubb, Cohen fails to state a claim under the CFA and therefore Count 7 of the third-party Complaint should be dismissed. The Appellate Division has definitively held that the Consumer Fraud Act (the "CFA") is inapplicable to claims for denial of benefits. Myska v. New Jersey Mfrs. Ins. Co., 440 N.J. Super. 458, 485 (App. Div. 2015), certif. dismissed as improvidently granted, 224 N.J. 524 (N.J. 2016); see also Granelli v. Chicago Title Ins. Co., 569 F. App'x 125, 133 (3d Cir. 2014) ("New Jersey courts [] have consistently held that the payment of insurance benefits is not subject to the Consumer Fraud Act.") (quoting Van Holt v. Liberty Mut. Fire Ins. Co., 163 F.3d 161, 168 (3d Cir. 1998)).

Under the CFA, "a plaintiff must establish three elements: (1) unlawful conduct by defendant; (2) an ascertainable loss by plaintiff; and (3) a causal relationship between the unlawful conduct and the ascertainable loss." Myska, 440 N.J. Super. at 484.New Jersey courts have consistently held that claims premised on the denial of benefits do not constitute "unlawful conduct" under the CFA. See id. at 485 (holding the CFA "was not intended as a vehicle to recover damages for an insurance company's refusal to pay benefits"); Pierzga v. Ohio Cas. Group of Ins. Companies, 208 N.J. Super. 40, 42, 46 (App. Div. 1986); Kuhnel v. CNA Ins. Companies, 322 N.J. Super. 568, 582 (App. Div. 1999).

Here, given that Cohen's allegations only involve Chubb's investigation and denial of coverage (i.e., a coverage dispute), these allegations do not form the basis of an actionable claim under the CFA. Therefore, the request for summary judgment regarding Count 7 is **GRANTED**.

/s/ MARA ZAZZALI-HOGAN, J.S.C.