

NOTICE: Summary decisions issued by the Appeals Court pursuant to M.A.C. Rule 23.0, as appearing in 97 Mass. App. Ct. 1017 (2020) (formerly known as rule 1:28, as amended by 73 Mass. App. Ct. 1001 [2009]), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 23.0 or rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

21-P-1050

ANWAR FAISAL¹ & another²

vs.

UNITED NATIONAL INSURANCE COMPANY.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

Plaintiff Anwar Faisal (plaintiff or Faisal) appeals from a summary judgment in favor of the defendant, United National Insurance Company (United), and from a declaratory judgment ordering Faisal to reimburse United for \$351,426.79 that United paid to Faisal on the mistaken belief that the policy covered his fire loss claim.³ Faisal argues that reversal of the part of the judgment ordering reimbursement is appropriate on three separate grounds. We affirm.

¹ Individually and as trustee of the Coolidge Webster Realty Trust.

² Adil Lamtioui, trustee of the Coolidge Webster Realty Trust. Following Lamtioui's resignation as trustee, Faisal, in his capacity as trustee, was "substituted" for Lamtioui.

³ As noted by the parties without comment, the judge's decision and the declaratory judgment contain a typographical error. The actual amount paid by United to Faisal was \$351,426.99.

Background. We summarize the relevant undisputed facts and procedural history. Faisal purchased 26-30 Webster Street in Brookline (the property) in mid-February of 2015. At the time of purchase, the property was vacant; before that time, the property was last occupied by a nursing home. United issued a commercial property policy to Faisal insuring the property from February 20, 2015, to February 20, 2016. The policy required that the property remain vacant⁴ for coverage to remain effective. The policy contained exceptions to this vacancy requirement, allowing the first floor to be used for offices, and excluding showings to prospective buyers or renters as an activity that would render the property nonvacant.

On November 24, 2015, the town of Brookline entered a lease with a trust controlled by Faisal to use the property as a temporary elementary school. To prepare the property for this lease, Faisal undertook various construction projects, including but not limited to removing and installing fixtures, removing walls, plumbing and electrical work, and cleaning and maintenance.

On February 9, 2016, during a time period when this construction activity was still ongoing, a fire occurred on the

⁴ The policy defined "vacant" as follows: "A building is not vacant when any portion of it is used for any activity whatsoever except showing it to prospective buyers or renters for the purpose of selling or leasing it."

property. Faisal made an insurance claim to United for the fire loss in accordance with the terms of the commercial property policy. United conducted a claim investigation, which ended on September 19, 2016, when United gave Faisal a check for \$351,426.99 (the payment). The check, which was not timely negotiated, was later reissued at Faisal's request.

Faisal sued United, claiming that United did not pay the full amount owed for the loss. In response, United counterclaimed, alleging that Faisal must reimburse United for the full amount of the payment because "there is no coverage available for the claimed loss and damage" and because the "[p]ayment was issued in error." United filed a motion for summary judgment, which the judge granted. The court's order and declaration required Faisal to reimburse United for the payment.

Discussion. We review the allowance of a motion for summary judgment de novo. Fraco Prods., Ltd. v. Bostonian Masonry Corp., 84 Mass. App. Ct. 296, 299 (2013). "The standard of review of a grant of summary judgment is whether, viewing the evidence in the light most favorable to the nonmoving party, all material facts have been established and the moving party is entitled to a judgment as a matter of law." Augat, Inc. v. Liberty Mut. Ins. Co., 410 Mass. 117, 120 (1991). In considering a motion for summary judgment, we do not analyze the

credibility of witnesses or determine the weight of the evidence. Shawmut Worcester County Bank, N.A. v. Miller, 398 Mass. 273, 281 (1986). However, bare assertions and conclusions are not enough to withstand a well-pleaded motion for summary judgment. Polaroid Corp. v. Rollins Env'tl. Servs. (NJ), Inc., 416 Mass. 684, 696 (1993).

The motion judge allowed United's motion for summary judgment on Faisal's claims, ruling that the policy language was clear and unambiguous, and that the loss was not covered because the property was not vacant, and therefore United did not violate the policy. The judge also dismissed Faisal's G. L. c. 93A claims based on the lack of evidence in the record. Next, turning to the counterclaims for declaratory judgment and reimbursement, the motion judge ruled that United was entitled to a declaration regarding the lack of coverage. She also ruled in United's favor on the reimbursement claim, reasoning that, because United was not required to pay the claim in the first instance, the erroneous payment must be returned back to United because it would be inequitable for Faisal to keep the payment, and the mutual mistake by the insurance company and Faisal could not serve as a waiver of the vacancy language when the clear language of the policy did not cover the loss.

Faisal does not dispute that the construction activities conducted on the property violated the vacancy requirement of

the contract.⁵ Instead, Faisal has but one request, that this Court vacate the portion of the order and declaratory judgment that requires him to pay back \$351,426.99 to United. Faisal makes three arguments in support of this request: waiver, estoppel, and unjust enrichment because United failed to preserve a "right of reimbursement" for the claim payment. However, Faisal's claims of estoppel and unjust enrichment were not raised by the plaintiff in either his written opposition to United's motion or at oral argument, and as such are not properly preserved. As we reasoned in Fidelity Management & Research Co., "[a]t the hearing on the summary judgment motion, [the defendant] did not advance the legal theories that [he] now offers as to why the judge should not have granted summary judgment. We 'will [not] consider theories or issues raised for the first time on appeal.'" Fidelity Mgt. & Research Co. v. Ostrander, 40 Mass. App. Ct. 195, 200 (1996), quoting J.W. Smith & H.B. Zobel, Rules Practice § 56.10 (1977).

A review of the record shows that in opposition to the motion for summary judgment, Faisal presented two arguments before the motion judge. He claimed that the language of the contract was vague and ambiguous, and that summary judgement

⁵ Faisal confirmed during oral arguments that he was not suggesting that there was coverage under the original terms of the policy.

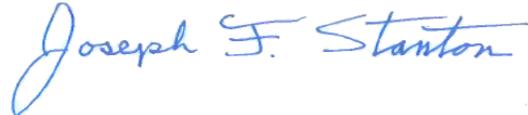
should be denied because a material issue of fact existed as to whether the property was vacant. Faisal had ample opportunity to address his claim that he should not be obligated to return the payment under theories of estoppel, and unjust enrichment or failure to reserve rights. He failed to raise any of these claims before the motion judge, and we will not consider them for the first time on appeal.

As to Faisal's argument that United waived its right to recoup the payment made it error especially given the long delay between final payment and its request for reimbursement, the motion judge correctly reasoned that the principles of waiver cannot operate to extend coverage for a claim that was unambiguously excluded in the policy. See Merrimack Mut. Fire Ins. Co. v. Nonaka, 414 Mass. 187 (1993). There, the court stated that "[a]n insurance company is obliged to provide coverage to an insured who has violated a provision of the policy if the company has waived its right to assert the policy breach as a ground for denying liability. Waiver consists of the insurer's voluntary or intentional relinquishment of a known right." Id. at 189. "[W]hatever may be the scope of waiver in the law of insurance, it does not extend to the broadening of the coverage, so as to make the policy cover a risk not within its terms. That would require a new contract, and cannot be accomplished by waiver" (citation omitted). Id. at 191. See

French King Realty Inc. v. Interstate Fire & Cas. Co., 79 Mass.
App. Ct. 653, 666-667 (2011).

Declaratory judgment and
order granting summary
judgment affirmed.

By the Court (Rubin, Henry &
Walsh, JJ.⁶),



Clerk

Entered: November 23, 2022.

⁶ The panelists are listed in order of seniority.