Exhibit B

STATE OF CONNECTICUT

DOCKET NO. CV-15-6009410-S

SUPERIOR COURT

DAVID R. ROY

JUDICIAL DISTRICT
OF TOLLAND

V.

LIBERTY MUTUAL FIRE
INSURANCE CO.

FEBRUARY 22, 2017

MEMORANDUM OF DECISION: DEFENDANT'S MOTION FOR SUMMARY JUDGMENT (#126)

This is one of many cases in Tolland County involving claims of extensive pattern cracking to basement walls caused by a chemical compound in the concrete provided by the J.J. Mottes Concrete Company that was used to construct the basement walls of numerous homes, including the plaintiff's.[1] This case arises out of an insurance policy coverage dispute between the plaintiff homeowner, David R. Roy, and the defendant insurer, Liberty Mutual Fire Insurance Company, regarding whether the plaintiff's 2014 insurance policy, issued by the defendant, provides coverage for damage to the plaintiff's basement walls that he claims resulted in a covered loss - that is a "collapse." The defendant claims that the policy does not cover the plaintiff's loss because he has not sustained a covered "collapse" under the policy, among other arguments.

The plaintiff's complaint is in two counts; breach of contract, and violation of the Connecticut Unfair Insurance Practice Act (CUIPA) and the Connecticut Unfair Trade Practices Act (CUTPA). The defendant has moved for summary judgment on both counts of the complaint claiming, as to count one, the breach of contract claim, that the plaintiff's loss is

[1]The judicial district of Tolland presently has over forty such cases pending. There are also numerous cases pending in federal court, including a class action.

The decision was mailed 2-22-17 to:
Howd + Ludorf LLC
Atty Jeffrey Richard Lindequist

not covered under the policy, and, therefore, there is no breach of contract. Furthermore, the defendant contends that, as to count two, the CUTPA/CUIPA claim, the plaintiff has failed to plead and prove that it relied on other similar crumbling foundation claims to deny the plaintiff's claim as part of a general business practice, and, therefore, there is no genuine issue of material fact.

The plaintiff opposes the defendant's motion for summary judgment arguing that his home has sustained a covered loss under the policy and that the record establishes that the defendant wrongfully denied his claim as part of a general business practice to wrongfully deny similar claims. The plaintiff argues that both claims involve disputed issues of material fact that must be determined by the jury.

Having considered the parties written submissions and oral arguments, the court concludes that as to count one, disputed issues of material fact exist that must be determined by the jury. As to count two, the defendant has not established that the plaintiff's allegations are insufficient and has not met its burden to establish that it is entitled to summary judgment. Accordingly, summary judgment is denied as to both counts.

The court finds that the following material facts are undisputed:

The plaintiff built his home at 18 Gulf Road in Stafford Springs in 1998. The concrete used to construct the basement walls was supplied by the J.J. Mottes Company.

The plaintiff insured the home with the defendant from 1998 to August 29, 2014; afterwards, the home was insured by the Covenant Insurance Company.[2] The 2014 policy, provided by the defendant and at issue here, is an "occurrence" policy and provided coverage for covered losses up to $476,200.

[2]The plaintiff has also sued Covenant Insurance Company. That case is also pending in this court and has been consolidated with this case. See *Roy* v. *Covenant Ins. Co.*, Docket No. TTD-CV16-6011084-S.

For purposes of this motion, the defendant relies on two sections of the policy. Section I of the policy, entitled "PERILS INSURED AGAINST," in "COVERAGE A – DWELLING and COVERAGE B – OTHER STRUCTURES," provides in pertinent part:

> We insure against risk of direct loss to property described in Coverages A and B only if that loss is a physical loss to property. We do not insure, however, for loss:
>
> 1. Involving collapse, other than as provided in Additional Coverage 8;
>
> 2. Caused by:
> . . . .
>
> (6) Settling, shrinking, bulging or expansion, including resultant cracking, of pavements, patios, foundations, walls, floors, roofs or ceilings; . . . .

The second section relied upon by the defendant is contained in the section entitled "ADDITIONAL COVERAGE," identified above, and provides in pertinent part:

> 8. Collapse. We ensure for direct physical loss to covered property involving collapse of a building or any part of a building caused only by one or more of the following: . . .
>
> b. Hidden decay; …
>
> f. Use of defective material or methods in construction, remodeling or renovation if the collapse occurs during the course of the construction, remodeling or renovation;
>
> Loss to an awning, fence, patio, pavement, swimming pool, underground pipe, flue, drain, cesspool, septic tank, foundation, retaining wall, bulkhead, pier, wharf or dock is not included under items b., c., d., e., and f. unless the loss is a direct result of the collapse of a building.
>
> Collapse does not include settling, cracking, shrinking, bulging or expansion.

The terms "collapse," "foundation," and "retaining wall" are not defined in the policy.

The plaintiff discovered the damage to his basement walls when he was moving Tupperware bins in the unfinished storage area of his basement, which had been there for

some time and had obscured the view of the walls. The plaintiff observed horizontal and vertical cracks in the concrete walls of the basement, which were jagged, in a spider web pattern. Concerned about these cracks, the plaintiff consulted with his brothers, who had helped him build the home and were familiar with persons in Tolland County who had similar problems with their basement walls. Although the plaintiff reported the claim to the defendant on September 22, 2014, it is disputed whether the plaintiff discovered the pattern of cracking in his home in August or September of 2014.

When the plaintiff reported his claim to the defendant he said: "I've got cracks," "my basement wall collapsed," and it was caused by "bad concrete that's deteriorating."

The defendant investigated the plaintiff's claim by sending a structural engineer to evaluate the plaintiff's basement walls. In his report, the defendant's engineer stated that the damage to the plaintiff's basement walls was the result of "shrinkage and settlement cracks" that are typical, not structural, or "lateral earth pressures." As a result of its expert report, the defendant denied the plaintiff's claim; asserting in the denial letter that the loss was not covered due to the policy exclusion for "faulty workmanship or materials," as well as other exclusions under the policy.

The plaintiff's basement walls were also inspected by the plaintiff's expert witness, David Grandpré, P.E., on September 12, 2014, who found that the structural integrity of the plaintiff's basement walls was "substantially impaired." Grandpré opined that the extensive pattern of horizontal and vertical cracking and deterioration throughout the basement wall structure suggested one of two possible chemical reactions; an alkali-silica reaction or the oxidation of iron sulfide in the aggregate used to make the concrete. Both reactions occur within the concrete on a microscopic level and cause the concrete to break down internally.

Grandpré opines that the concrete was so impaired that the plaintiff's basement walls are unreliable to perform their intended function of supporting the wooden portion of the home, and that the chemical reaction cannot be stopped. This chemical reaction cannot be stopped and will worsen over time such that they will eventually lose their strength and stop performing their intended function. The only viable remedy according the Grandpre is the complete removal of the basement walls and to replace them with new walls.

DISCUSSION

The defendant moves for summary judgment as to count one of the complaint, the breach of contract claim, asserting that the policy does not cover the plaintiff's loss because his basement walls have not suffered a "collapse," and the loss is not covered because of the exclusion for damage to the "foundation" or "retaining walls." As to count two of the complaint, the CUTPA/CUIPA claim, the defendant asserts that the plaintiff has failed to plead and prove that it engaged in an unfair business practice by denying the plaintiff's claim. The plaintiff has objected to the defendant's summary judgment motion asserting that there is a genuine issue of material fact as to whether there has been a "collapse" of his home that is covered by the policy, and that the foundation or retaining wall provision does not exclude his loss. As to the CUTPA/CUIPA claim, the plaintiff responds that there is a factual dispute as to whether the defendant's denial of coverage was wrongful, and that there is adequate factual support to establish that the defendant's denial of the claims derived from J.J. Mottes concrete is a general business practice.

A. Summary Judgment Standards

The standards for considering motions for summary judgment are well established. Practice Book § 17-49 provides that summary judgment "shall be rendered forthwith if the

pleadings, affidavits and other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Our Supreme Court has recently set forth the burden on each party: "In seeking summary judgment, it is the movant who has the burden of showing the nonexistence of any issue of fact. The courts are in entire agreement that the moving party for summary judgment has the burden of showing the absence of any genuine issue as to all the material facts, which, under applicable principles of substantive law, entitle him to a judgment as a matter of law. The courts hold the movant to a strict standard. To satisfy his burden the movant must make a showing that it is quite clear what the truth is, and that excludes any real doubt as to the existence of any genuine issue of material fact. . . . As the burden of proof is on the movant, the evidence must be viewed in the light most favorable to the opponent. . . . When documents submitted in support of a motion for summary judgment fail to establish that there is no genuine issue of material fact, the nonmoving party has no obligation to submit documents establishing the existence of such an issue. . . . Once the moving party has met its burden, however, the opposing party must present evidence that demonstrates the existence of some disputed factual issue. . . . It is not enough, however, for the opposing party merely to assert the existence of such a disputed issue. Mere assertions of fact . . . are insufficient to establish the existence of a material fact and, therefore, cannot refute evidence properly presented to the court under Practice Book [§ 17-45] . . . ." (Internal quotation marks omitted.) *State Farm Fire & Casualty Co.* v. *Tully*, 322 Conn. 566, 573, 142 A.3d 1079 (2016); see *Stuart* v. *Freiberg*, 316 Conn. 809, 820-21, 116 A.3d 1195 (2015).

"[S]ummary judgment is appropriate only if a fair and reasonable person could conclude only one way. . . . [A] summary disposition . . . should be on evidence which a jury

would not be at liberty to disbelieve and which would require a directed verdict for the moving party. . . . [A] directed verdict may be rendered only where, on the evidence viewed in the light most favorable to the nonmovant, the trier of fact could not reasonably reach any other conclusion than that embodied in the verdict as directed." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *Dugan* v. *Mobile Medical Testing Services, Inc.*, 265 Conn. 791, 815, 830 A.2d 752 (2003); see *Farrell* v. *Twenty-First Century Ins. Co.*, 301 Conn. 657, 662, 21 A.3d 816 (2011).

"In ruling on a motion for summary judgment, the court's function is not to decide issues of material fact, but rather to determine whether any such issues exist. . . . Because [l]itigants have a constitutional right to have factual issues resolved by the jury . . . motion[s] for summary judgment [are] designed to eliminate the delay and expense of litigating an issue when there is no real issue to be tried." (Citations omitted; internal quotation marks omitted.) *Maltas* v. *Maltas*, 298 Conn. 354, 365-66, 2 A.3d 902 (2010); see *Grenier* v. *Commissioner of Transportation*, 306 Conn. 523, 534-35, 51 A.3d 367 (2012).

B. Count One - Breach of Contract

1. Interpreting Insurance Policies - Standards

"[A]n insurance policy is to be interpreted by the same general rules that govern the construction of any written contract . . . ." (Internal quotation marks omitted.) *Shenkman-Tyler* v. *Central Mutual Ins. Co.*, 126 Conn. App 733, 742, 12 A.3d 613 (2011); see *Connecticut Ins. Guaranty Assn.* v. *Fontaine,* 278 Conn. 779, 784-85, 902 A.2d 18 (2006). "[P]rovisions in insurance contracts must be construed as laymen would understand [them] and not according to the interpretation of sophisticated underwriters and that the policyholder's expectations should be protected as long as they are objectively reasonable from the layman's point of

view." (Internal quotation marks omitted.) *Vermont Mutual Ins. Co.* v. *Walukiewicz*, 290 Conn. 582, 592, 966 A.2d 672 (2009). Where policy terms are unambiguous, they should be accorded their natural and ordinary meaning and "the courts cannot indulge in a forced construction ignoring provisions or so distorting them as to accord a meaning other than that evidently intended by the parties." (Internal quotation marks omitted.) *Jacaruso* v. *Lebski*, 118 Conn. App. 216, 233, 983 A.2d 45 (2009). "Contract language is unambiguous when it has a definite and precise meaning . . . concerning which there is no reasonable basis for a difference of opinion." (Internal quotation marks omitted.) *Isham* v. *Isham*, 292 Conn. 170, 181, 972 A.2d 228 (2009).

Where a policy term is susceptible to more than one meaning, the term should be construed against the insurance company. See *New London County Mutual Ins. Co.* v. *Zachem*, 145 Conn. App. 160, 165, 74 A.3d 525 (2013). Ambiguous policy terms are construed in favor of coverage. See *Lexington Ins. Co.* v. *Lexington Healthcare Group, Inc.* 311 Conn. 29, 66, 84 A.3d 1167 (2014); *Johnson* v. *Connecticut Ins. Guaranty Assn.*, 302 Conn. 639, 642, 31 A.3d 1004 (2011). Where an insurance policy is ambiguous, extrinsic evidence as to the parties' intent may properly be considered, and the determination of the parties' intent is a question of fact. *Hartford Accident & Indemnity Co.* v. *Ace American Reinsurance Co.*, 284 Conn. 744, 762-63, 936 A.2d 224 (2007).

2. Collapse

The defendant first asserts that the plaintiff's loss is not covered under the policy because there has not been a "collapse." The term "collapse" is not defined in the policy. The plaintiff contends that this court should follow *Beach* v. *Middlesex Mutual Assurance Co.*, 205 Conn. 246, 532 A.2d 1297 (1987), in which our Supreme Court found the undefined term

"collapse" as used in a similar homeowner's policy, to be ambiguous and then defined it to mean "any substantial impairment of the structural integrity of a building." Applying this definition, and based on the plaintiff's expert's opinion, the plaintiff argues that there is a genuine issue of material fact as to whether the standard for collapse annunciated in *Beach* has been met. The defendant acknowledges *Beach*, but urges this court to adopt nonbinding out-of-state case law further defining "collapse," to mean "a substantial impairment of the structural integrity of a building or part of a building that renders such building unfit for its function or unsafe in a manner that is more than mere settling, cracking, shrinkage, bulging, or expansion." *Queen Anne Park Homeowners Assn* v. *State Farm Fire & Casualty Co.*, 183 Wash. 2d 485, 492, 352 P.3d 790 (2015). The court agrees with the plaintiff that this court is bound by the definition of collapse set forth by the Connecticut Supreme Court in *Beach.*

The issue in *Beach* was whether the undefined term "collapse" in a homeowner's insurance policy was ambiguous. There, the homeowners noticed a crack in the foundation wall of their home, which included "a separation between the top of the foundation wall and the 'plate' or bottom of the building wall." *Beach* v. *Middlesex Mutual Assurance Co.*, supra, 205 Conn. 247. The plaintiffs claimed that the loss was covered under the "collapse" provision of their policy. The defendant denied the homeowners' claim asserting that the damage to their home was due to "settlement" and that the policy excluded coverage for damages arising from "settling, cracking, shrinkage, bulging or expansion." Id.

A few months later, the crack continued to widen to a width of nine inches, and the beams on top of the foundation had pulled apart. When the defendant continued to deny coverage, the homeowners began to arrange for the reconstruction of their home. By the time of trial in *Beach*, the homeowners' engineer testified that the "foundation wall had tipped over

into the basement from the top and was no longer supporting the house." Id., 248. The homeowners continued to occupy the house during the repairs. The trial referee found that "given the state of the structure, eventually the house would have fallen into the cellar" and "the foundation failed structurally, and that the function of the foundation, both as a support structure for the house and a retaining wall, had become materially impaired, constituting a collapse." Id., 249.

The defendant in *Beach* argued that word "collapse" in the policy required a "catastrophic" event and that the policy term "unambiguously contemplates a sudden and complete falling in of a structure." The Supreme Court rejected this interpretation of "collapse" and opted instead to follow the majority and "more persuasive" authorities nationwide that held that the term "collapse" "is sufficiently ambiguous to include coverage for ***any substantial impairment of the structural integrity of a building***." (Emphasis added) Id., 252.[3] The Supreme Court in *Beach* did not provide any further specificity as to what it meant by "any substantial impairment of the structural integrity of a building."

The defendant urges this court to go further than the *Beach* court and apply the definition of collapse adopted by the Supreme Court of Washington, under a certification from the Ninth Circuit. In *Queen Anne Park Homeowners Assn* v. *State Farm Fire & Casualty Co.*, supra, 183 Wash.2d 485, the Washington Supreme Court interpreted policy language similar,

[3]On January 12, 2017, the defendant filed supplemental authority in which it notes that District Court Judge Stefan Underhill invited the parties in a similar case, involving this defendant and this policy language, to submit briefs as to whether the court should certify to the Supreme Court the issue of what constitutes "substantial impairment of structural integrity." The parties have done so, but the court is not aware as of the date of this opinion that Judge Underhill has issued any ruling on certification. The defendant in this case filed a motion to stay this court's decision on summary judgment pending action by Judge Underhill. The plaintiff objected to the defendant's motion for certification in federal court and the motion to stay this decision. This court denied the defendant's motion for a stay without prejudice as premature, because Judge Underhill had not yet certified any questions to the Supreme Court. In addition, a trial in this case is not scheduled until next year. Should Judge Underhill certify any questions to the Supreme Court that are relevant to the trial in this matter, the defendant may renew its motion for a stay and the court will reconsider the issue.

but not identical, to the language of the policy in this case and adopted a more limited definition of "collapse," as to compared to *Beach*. The *Queen Anne* court concluded that "'collapse' in the [p]olicy means the substantial impairment of structural integrity of a building or part of a building that renders such building or part of a building unfit for its function or unsafe in a manner that is more than mere settling, cracking, shrinkage, bulging or expansion." Id., 492. The defendant here urges this court to adopt the Ninth Circuit's conclusions in that case, applying and interpreting the Washington State's definition that under that policy, it is "simply implausible" that walls had "'collapsed' over seventeen years ago, given that the [building is] still standing today." *Queen Anne Park Homeowners Assn* v. *State Farm Fire & Casualty Co.*, 633 Fed. Appx. 415 (9th Cir. 2016).

The court declines to adopt and apply the Washington Supreme Court's definition of collapse, or the Ninth Circuit's application of that decision, because it is bound by the Connecticut Supreme Court's long standing definition of "collapse" that includes "***any*** substantial impairment of the structural integrity of the building." (Emphasis added.) *Beach* v. *Middlesex Mutual Assurance Co.*, supra, 205 Conn. 252. "[I]t is manifest to our hierarchical judicial system that [the Supreme Court] has the final say on matters of Connecticut law and that the Appellate Court and Superior Court are bound by [its] precedent." (Internal quotation marks omitted.) *Commissioner of Public Safety* v. *Freedom of Information Commission*, 137 Conn. App. 307, 324, 48 A.3d 694 (2012), aff'd, 312 Conn. 513, 93 A.3d 1142 (2014). "A trial court is required to follow the prior decisions of an appellate court . . . and [it] may not overturn or disregard binding precedent." *Potvin* v. *Lincoln Service & Equipment Co.*, 298 Conn. 620, 650, 6 A.3d 60 (2010).

In *Beach*, the Supreme Court conducted an extensive review of the courts around the country that had addressed this issue of what the word "collapse" means and specifically rejected what it termed the minority view of "collapse" that required a catastrophic event or "sudden falling in, loss of shape or flattening into a mass of rubble." Although the *Queen Anne* case may not go so far as to require the home to fall into itself before there is coverage under the policy, it is different, and more limited, than our Supreme Court's broader definition of collapse set forth in *Beach*, because *Queen Anne* requires that the building be unfit for its function and unsafe. The Washington courts appeared to conclude that no collapse could have occurred because the home was still standing and occupied. The *Beach* court's definition of collapse does not require that the home be uninhabitable as demonstrated by the fact that the plaintiff in *Beach* remained living in the home. Additionally, in *Beach*, the plaintiff's expert indicated that the home would "eventually" fall as the basement walls would be unable to hold up the structure. Here, the plaintiff remains living in the home and the plaintiff's expert has opined that the home has suffered a substantial impairment of its structural integrity and that the condition cannot be stopped and will worsen over time to the point of the walls falling in. The defendant's expert disputes that contention.

This court's view of the applicability of *Beach* in cases where the policy does not define "collapse" is supported by a recent Connecticut Federal District Court decision that has also rejected the defendant's argument urging adoption of Washington State's definition of "collapse," rather than applying the *Beach* definition. *Belz* v. *Peerless Ins. Co.*, United States District Court, Docket No. 3:13-cv-01315 (VAB) (D. Conn. September 2, 2016) ("the Connecticut Supreme Court has already held that a 'collapse' for home insurance purposes may include 'substantial impairment to the structural integrity of a building'").

Applying the test in *Beach*, the issue then is whether the defendant has established that there is no disputed issue as to whether there has been "any substantial impairment of the structural integrity" of the plaintiff's home. This is an issue of disputed fact, about which the parties' experts disagree. Because this issue involves a genuine issue of material fact, it must be decided by the jury. See *Straw Pond Associates, LLC* v. *Fitzpatrick, Mariano & Santos, P.C.*, 167 Conn. App. 691, 710, 145 A.3d 292 (2016) ("[w]hen a court, in ruling on a motion for summary judgment, is confronted with conflicting facts, resolution and interpretation of which would require determinations of credibility, summary judgment is not appropriate"); see also *Suarez* v. *Dickmont Plastics Corp.*, 229 Conn. 99, 107, 639 A.2d 507 (1994).[4]

3. Exclusion for "foundation" and "retaining walls"

The defendant next claims that the plaintiff's loss is excluded by language in the policy in the "Additional Coverage" section, which it claims is unambiguous, that excludes coverage for foundations and retaining walls. The defendant claims that the damage to the plaintiff's basement walls constitutes damage to the "foundation or retaining wall" of the home and, therefore, is not covered under the policy.[5] The plaintiff asserts that basement walls

[4]Because the policy in this case is an occurrence policy, coverage does not depend necessarily on when the plaintiff made his claim but rather when and if there has been a collapse under the terms of the policy on or before August 29, 2014. As discussed above, whether there has been a collapse and when it occurred, are disputed issues of fact that must be decided by the jury.

[5]The defendant appears to include an argument in its original memorandum of law in support, that the plaintiff's loss is also not covered under the policy exclusion that provides: "Collapse does not include settling, cracking, shrinking, bulging or expansion." However, this argument is not flushed out in the defendant's brief in any detailed way. See *Connecticut Light & Power* v. *Gilmore*, 289 Conn. 88, 124, 956 A.2d 1145 (2008). ("[a]nalysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly. . . ." [Internal quotation marks omitted]). Regardless of the inadequate briefing, the court finds that the defendant has failed to prove that there is no genuine issue of material fact as to this particular exclusion. See *Bacewicz* v. *NGM Ins. Co.*, United States District Court, Docket No. 3:08-CV-1530 (JCH) (D. Conn. August 2, 2010) ("[t]hat cracking and bulging may have been symptomatic of chemical decomposition occurring within the concrete of the basement walls of the . . . house would not, in the court's view, preclude a reasonable jury from concluding that [the insurer] is liable for failing to cover any substantial impairment to structural integrity caused by such decomposition").

are part of the building and are not part of the foundation or a retaining wall, and in any event these terms are ambiguous.

The specific language of the policy is as follows:

"ADDITIONAL COVERAGE"

. . .

8. Collapse. We ensure for direct physical loss to covered property involving collapse of a building or any part of a building caused only by one or more of the following: . . . .

b. Hidden decay; ...

f. Use of defective material or methods in construction, remodeling or renovation if the collapse occurs during the course of the construction, remodeling or renovation.

Loss to an awning, fence, patio, pavement, swimming pool, underground pipe, flue, drain, cesspool, septic tank, *foundation*, *retaining wall*, bulkhead, pier, wharf or dock is not included under items b., c., d., e., and f. unless the loss is a direct result of the collapse of a building.

Collapse does not include settling, cracking, shrinking, bulging or expansion.

(Emphasis added.)

The language of this section of the policy is circular, providing that the policy specifically covers losses due to the collapse of a building or part of a building from "hidden decay" or "defective material." This exclusion for foundation and retaining walls does not apply in the event of a "collapse of a building." The court has previously found above that there exist questions of fact as to whether, and when, there has been a "collapse" under the policy.

In addition, this section of the policy appears to exclude items that would be found outside of a building, and not inside a building, such as an awning, fence, patio, pavement, pool, septic tank. This list of outside items suggests that what was intended by this exclusion

language includes only items found outside of the home or at a minimum renders it ambiguous.

Even taking the terms "foundation" and "retaining wall" outside of the list of other terms, they remain ambiguous. The Connecticut Federal District Court has consistently decided this issue against this particular defendant. See *Belz* v. *Peerless Ins. Co.*, 46 F. Supp. 3d 157 (D. Conn. 2014) (finding both terms "foundation" and "retaining wall," as used in a similar Liberty Mutual insurance policy, to be ambiguous); *Karas* v. *Liberty Ins. Corp.*, 33 F. Supp. 3d 110 (D. Conn. 2014) (same); *Metsack* v. *Liberty Mutual Fire Ins. Co.*, United States District Court, Docket No. 3:14-CV-1150 (VLB) (D. Conn. September 30, 2015) (same); *Gabriel* v. *Liberty Mutual Fire Ins. Co.*, United States District Court, Docket No. 3:14-CV-1435 (VAB) (D. Conn. September 28, 2015) (same); see also *Bacewicz* v. *NGM Ins. Co.*, United States District Court, Docket No. 3:08-CV-1530 (JCH) (D. Conn. August 2, 2010) (determining that the term "foundation" is ambiguous because "a person of ordinary intelligence could reasonably conclude . . . that the term 'foundation' refers to the piece of concrete at the base of the wall, rather than a concrete basement wall itself" [Internal quotation marks omitted]); *Roberge* v. *Amica Mutual Ins. Co.*, United States District Court, Docket No. 3:15-CV-1262 (WWE) (D. Conn. December 29, 2015) (determining that the term "foundation" is ambiguous).[6] As a result, it is apparent that "any ambiguity in the terms of an insurance policy must be construed in favor of the insured because the insurance company

[6]In its notice of supplemental authority provided in support of its argument concerning the word "foundation," the defendant cites to a December 30, 2016 report by the Department of Consumer Protection on deteriorating concrete in residential foundations, and in particular a sentence in a footnote of the report which addresses "foundation." The notation states that "[a] foundation for a residential structure consists of three essential parts. The footing provides the base which supports the foundation walls and the slab forms the floor." The defendant provides no legal authority that would allow the court to consider this report as legal authority for interpreting the word foundation that is found in the insurance policy at issue in this case, and the court is aware of none. Thus the court does not give this report any weight in interpreting "foundation."

drafted the policy." (Internal quotation marks omitted.) *Lexington Ins. Co.* v. *Lexington Healthcare Group, Inc.*, supra, 311 Conn. 38; see *Johnson* v. *Connecticut Ins. Guaranty Assn.*, supra, 302 Conn. 643.

Thus, the court concludes that the defendant has not met its burden to establish that it is entitled to summary judgment on the plaintiff's breach of contract claim.[7]

C. Count Two - CUTPA/CUIPA

The defendant argues that it is entitled to summary judgment on count two of the plaintiff's complaint, which asserts that it violated CUTPA/CUIPA, because the plaintiff failed to "plead" and "prove" that the defendant engaged in a general business practice of unfair claim handling. By this compound assertion, the defendant challenges (1) the legal sufficiency of the plaintiff's CUTPA/CUIPA claim, which is generally an issue for a motion to strike, and (2) the plaintiff's failure to prove this claim, which is the ultimate issue in this case and is not the standard on summary judgment.

The summary judgment standards and burden are well established and set forth infra. Although a motion for summary judgment may be used to challenge the legal sufficiency of a complaint, "when the complaint fails to set forth a cause of action and the defendant can establish that the defect could not be cured by repleading;" *Ferri* v. *Powell-Ferri*, 317 Conn. 223, 236-37, 116 A.3d 297 (2015); that is not the case here, and the defendant has not actually argued that this principle applies in the present action. The court finds that the plaintiff's allegations are sufficient.

[7]To the extent that the defendant continues to claim that the plaintiff's claim is not within the policy period because he did not discover the damage to the basement walls or notify the defendant of the damage until after the expiration of the policy, the court concludes that this issue involves disputed issues of fact that must be decided by the jury.

In the present case, the plaintiff alleges that the defendant engaged in an industry wide practice of denying coverage for concrete decay claims as part of its general business practice. The plaintiff asserts that the defendant's conduct violates General Statutes § 38a-816 (6) (F), which provides that it is a violation for an insurance company to not attempt "in good faith to effectuate prompt, fair, and equitable settlements of claims in which liability has become reasonably clear." See *Lees* v. *Middlesex Ins. Co.*, 229 Conn. 842, 847-49, 643 A.2d 1282 (1994).

This court has had occasion to address the sufficiency of allegations in the context of motions to strike in other similar cases involving coverage for claims in similar basement foundation cases, and has consistently found such allegations sufficient. See *Lincoln* v. *USAA*, Docket No. CV-14-6008330, Superior Court, judicial district of Tolland; *Cote* v. *Travelers*, Docket No. CV-15-6008838, Superior Court, judicial district of Tolland. In reaching these conclusions, the court has adopted the more liberal pleading standard for CUTPA/CUIPA claims articulated in *Active Ventilation Products, Inc.* v. *Property & Causality Ins. Co. of Hartford*, Superior Court, judicial district of Hartford, Docket No. X09-CV-08-5023757, (July 15, 2009, *Shortall, J.*), and the reasoning of *Smith* v. *United States Automobile Assn.*, Superior Court, judicial district of Tolland, Docket No. CV-14-6007862-S (August 31, 2015, *Bright, J.*), in denying a motion to strike. Although not binding, this court also found persuasive the reasoning of two Connecticut Federal District Court cases denying motions to dismiss similar claims. See *Panciera* v. *Kemper Independence Ins.Co.*, United States District Court, Docket No. 3:13-CV-1009 (JBA) (D. Conn. April 29, 2014); *Gabriel* v. *Liberty Mutual Fire Ins. Co.*, supra, United States District Court, Docket No. 3:14-CV-01435 (VAB). The court sees no reason to depart from this analysis in the present case.

Even if the court were to find that the allegations were insufficient, the defendant has not even argued that repleading could not cure the defect; any assertion or supporting evidence regarding the ability of the plaintiff to cure the insufficiency by repleading is absent from the defendant's submissions to this court. Therefore, the court concludes that the plaintiff's CUTPA/CUIPA claim is legally sufficient.

The defendant's other contention – that the plaintiff has failed to "prove" this claim– prematurely and wrongly places the summary judgment burden of proof on the plaintiff. It is the movant's, in this case the defendant's, burden to establish that there is no genuine issue of material fact, and then and only then, the burden shifts to the plaintiff to submit evidence to establish that there is a genuine issue of material fact. "[I]t is only [o]nce [the] defendant's burden in establishing his entitlement to summary judgment is met [that] the burden shifts to [the] plaintiff to show that a genuine issue of fact exists justifying a trial. . . . Summary judgment should be denied where the affidavits of the moving party do not affirmatively show that there is no genuine issue of fact as to all of the relevant issues of the case. . . . Accordingly, the rule that the party opposing summary judgment must provide evidentiary support for its opposition applies only when the moving party has first made out a prima facie case for summary judgment. . . . [I]f the party moving for summary judgment fails to show that there are no genuine issues of material fact, the nonmoving party may rest on mere allegations or denials contained in his pleadings." (Citations omitted; internal quotation marks omitted.) *Romprey* v. *Safeco Ins. Co. of America*, 310 Conn. 304, 320-21, 77 A.3d 726 (2013); see *Stuart* v. *Freiberg*, supra, 316 Conn. 820-21, 116 A.3d 1195 (2015).

In this case, the defendant has presented no evidence to establish that there is no genuine issue of material fact that it did not engage in a general business practice of denying

these types of concrete claims. In its memorandum in support, the defendant relies on the notes of the claims adjuster as evidence that it did not engage in the alleged general business practice. Specifically, the defendant avers that the absence of a reference to the other concrete basement cases in the claim notes, or the court cases relating to these claims, establishes that it did not deny the plaintiff's claim as part of a general business practice. The absence of this discussion in the claims notes does not establish that there is no genuine issue of material fact as to the denial of the plaintiff's claim as part of its general business practice. In addition, in response to the court's inquiry at oral argument, the defendant proffered the report of its expert engineer, as well as the motion to dismiss hearing transcript in the case *Alexander* v. *General Ins. Co. of America*, United States District Court, Docket No. 3:16-CV-0059 (SRU) to establish that it is entitled to judgment as a matter of law on this count. None of these documents establish that there is no genuine issue of material fact that the defendant was not engaged in a general business practice. The defendant could have easily produced any affirmative evidence, such as affidavits, to establish no genuine issue of material fact as to this count, yet it failed to do so.

Thus, because the defendant has not met its burden to establish no genuine issue of material fact, the plaintiff may rely on his allegations in the CUTPA/CUIPA count, which the court has found to be sufficient. The court concludes, therefore, that the defendant has not met its burden to establish that it is entitled to summary judgment on the plaintiff's CUTPA/CUIPA claim.

CONCLUSION

For all of the forgoing reasons, the defendant's motion for summary judgment is denied as to both counts of the complaint. So ordered.

Cobb, J.