IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT
IN AND FOR MANATEE COUNTY, FLORIDA

SFR SERVICES, L.L.C.,
Plaintiff

Vs. **Case No. 2021-CA-971**

AMERICAN COASTAL
INSURANCE COMPANY,
Defendant.
_____/

ORDER ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

THIS CAUSE having come to be heard pursuant to the Defendant's Motion for Summary Judgment, said Motion having been filed on August 24, 2023, and the Court having reviewed and considered said Motion, having reviewed and considered, as well, the Plaintiff's Memorandum of Law in Opposition to the Defendant's Motion for Summary Judgment, said Response having been filed on January 10, 2024, having reviewed and considered the Defendant's Reply to Plaintiff's Memorandum of Law in Opposition to the Defendant's Motion for Summary Judgment, said Reply having been filed on January 26, 2024, having considered the deposition transcripts, or portions thereof, of Kevin Huff, Helen P. Singletary, James Cirillo, Frank Shortt, Daniel Dell´Armi, and Grant Renne, having considered the affidavit of Grant Renne, having reviewed, of course, the policy in question, and various other filings made in anticipation of the hearing on the Defendant's motion, having considered the argument of counsel at the hearing on the motion and the case law provided, and being otherwise fully advised in the premises, finds as follows:

Standard of Review

In May of 2021, the Florida Supreme Court revised Florida Rule of Civil Procedure 1.510, saying, in effect, that Florida's summary judgment standard should be construed and applied in accordance with the Federal summary judgment standard as spelled out in *Celotex Corporation vs. Catrett*, 477 U.S. 317 (1986); *Anderson vs. Liberty Lobby, Inc.*, 477 U.S. 242 (1986) and *Matsushita Elec. Indus. Co. vs. Zenith Radio Corp.*, 475 U.S. 574 (1986). The Court indicated that it agreed with the Supreme Court that "[s]ummary judgment is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of [our rules] as a whole." *Celotex*, 477 U.S. at 327. The Court found the Supreme Court's reasoning compelling, saying, "One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses, and we think it should be interpreted in a way that allows it to accomplish this purpose". *Id* at 323-324.

Analysis

Appling the above-referenced standard, while never-the-less recognizing the high burden that attaches to a motion of this nature, and with a clear understanding that summary judgment is not a substitute for the trial of disputed facts, the Court has come to the conclusion that the Defendant's Motion is supported by the facts and the law, and, as such, must be granted. Said another way, there is no reasonable argument that can be made that the Wild Oak Bay Owners Association or SFR Services, LLC, acted "promptly" in notifying the Defendant insurance carrier of the damages after the date of the loss and no reasonable argument can be made that American Coastal did **not** suffer prejudice as a result of the inexplicably long delay. Ultimately, after thorough review of the facts here, this is not a close call.

According to the Plaintiff's Memorandum in Opposition, "[A]t issue is whether Hurricane Irma caused damage to fifty-five (55) condominium locations within the commercial properties known as Wild Oak Bay Villas, I, II, and III Homeowner's Association". At the hearing on the Defendant's motion, it was indicated that the Plaintiff is seeking over five million dollars in damages for the replacement of forty-eight condominium roofs as a result of wind damage caused by Hurricane Irma (*See* Sworn Statement in Proof of Loss from September 9, 2020, wherein Plaintiff alleges $5,642,125.34 in total losses).

American Coastal seeks summary judgment arguing that the insured, Wild Oak Bay Owners Association, failed to provide prompt notice of the claim thereby prejudicing its investigation and its ability to determine the cause and extent of the claimed damage. Specifically, the Defendant seeks summary judgment saying in its motion that "the factual record indisputably demonstrates that the Insured failed to provide prompt notice of its claims as a matter of law. American Coastal's investigation was prejudiced due not only to the failure to provide prompt notice, but also due to the passage of time, repairs made before the claim was reported, and Plaintiff's lack of cooperation during the investigation, including the failure to provide the requested documentation and submit to Examination Under Oath" (*See* Motion).

The Plaintiff counters that "the following arguments support a complete denial of American Coastal's Summary Judgment Motion:

i. The "Prompt Notice" Standard will not allow American Coastal to meet its burden to establish a material breach of the Policy due to a failure to provide prompt notice of the Claim.

ii. American Coastal cannot overcome the burden to prove the loss was not timely reported and prejudice is not presumed.

iii. American Coastal was not prejudiced as a matter of law and American Coastal cannot prejudice itself to avoid coverage.

iv. The Insured and/or SFR had no obligation to comply with policy conditions precedent after a denial of coverage.

v. American Coastal cannot establish a material breach of the Policy by the failure to provide requested documents or submit to an examination under oath."

(*See* Response).

Ultimately, as will be explained herein, Wild Oak Bay Owners Association breached its obligation under the policy via its inexplicably long two year, ten month and nineteen day delay in reporting its alleged loss to American Coastal Insurance. As will be explained herein, Wild Oak Bay's failure to comply with the policy's post-loss duties prejudiced American Coastal.

The policy imposed on Wild Oak Bay Owners Association certain "Duties in the Event of Loss or Damage" and provides:

> In the case of a loss to covered property, we have no duty to provide coverage under this Policy if the failure to comply with the following duties is prejudicial to us. These duties must be performed either by you, an insured seeking coverage, or a representative of either
>
> a. You must see that the following are done in the event of loss or damage to Covered Property
>
> ***
>
> (2) ***Give us prompt notice of the loss or damage***. Include a description of the property involved. (emphasis added)
>
> (3) **As soon as possible, give us a description of how, when and where the loss or damage occurred.** (emphasis added)
>
> ***
>
> (6) At our request, give us complete inventories of the damaged and undamaged property. Include quantities, costs, value and amount of loss claimed.
>
> Attach all bills, receipts and related documents that justify the figures in the inventory.
>
> (7) As often as may be reasonably required, permit us to inspect the property proving the loss or damage and examine your books and records.

***

(9) Cooperate with us in the investigation or settlement of the claim.

b. We may examine you or any insured under oath, and take recorded statements; while not in the presence of any other insured and at such times as may be reasonably required, about any matter relating to this insurance or the claim, including an insured's books and records.

In the event of an examination, an insured's answers must be signed.

c. If you are an association, corporation or other entity; any members, officers, directors, partners or similar representatives of the association, corporation or other entity must:

(1) Submit to examinations under oath and recorded statements, while not in the presence of any other insured; and

(2) Sign the same;

d. Your agents, your representatives, including any public adjusters engaged on your behalf, and anyone insured under this policy other than b. or c. above; must

(1) Submit to examinations under oath and recorded statements, while not in the presence of any insured; and

(2) Sign the same.

***

The duties above apply regardless of whether you, an "insured" seeking coverage, or a representative of either retains or is assisted by a party who provides legal advice, insurance advice, or expert claim advice, regarding an insurance claim under this Policy.

Under the policy, there is no duty to provide coverage if Wild Oak Bay Owners Association's failure to comply with the contractual Duties in the Event of Loss or Damage is prejudicial to Coastal.

Significantly, on July 29, 2020, the insured reported a claim for damage to the property caused by Hurricane Irma two years, ten months and nineteen days after the reported date of loss,

September 10, 2017. Over the course of the next several months, the Defendant sought information relevant to its determination of coverage. In this Court's estimation, that back and forth, marked by the Plaintiff's inexplicable resistance to providing the necessary proof of loss, is well documented in pages four through eight of the Defendant's motion.

Ultimately, there really is no argument that can reasonably be made that the Plaintiff did not know, or reasonably should have known, of the damages/loss allegedly caused by Hurricane Irma. There really is no reasonable argument that can be made that the Plaintiff reported it promptly. Said another way, the Court hereby finds that the Plaintiff failed to promptly report the claim as a matter of law. The Court would point specifically to Wild Oak Bay Owners Association board meeting minutes from November 1, 2017 (less than two months after the hurricane) that indicated that there were nine separate recent roof leaks that were "probably due to Hurricane Irma".[1] The Court would point to the significant and extensive clean-up efforts after the storm as described by the property manager, Daniel Dell'Armi (*See* transcript, page 47-48). The Court would point to Mr. Dell'Armi's testimony wherein he said that "some shingles were blown off... some concrete tiles loose" as a result of the hurricane (*See* Dell'Armi deposition, page 45, lines 11 – 15). The Court would point to an email in the record from January of 2018 wherein a homeowner reported a roof leak and indicated that "we assume that it had something to do with Hurricane Irma". The Court would point to Frank Shortt's report (Exhibit 10) that indicated under Summary of Conditions Observed, that repairs had been made to "nearly every roof, in multiple areas on nearly every roof". The Court would point to Mr. Dell'Armi's deposition transcript, page 58, wherein he testified, somewhat inexplicably, that the Association did not know that multiple roofs

[1] The property manager confirmed that at least nine (9) roof repairs were made after Hurricane Irma but before the date the loss was reported to American Coastal.

had been damaged during Hurricane Irma until August of 2020 "when SFR became involved".[2] The Court would point out that Wild Oak Bay was concerned about the roofs worsening condition because they brought this concern to their insurance agent before contacting the Plaintiff and reporting the loss (*See* Exhibit K, page 14, lines 3-6). The Court would point to the fact that the property manager produced over twenty-five emails wherein homeowners reported leaks in their units as early as three months after the storm. Finally, the Court would point to Mr. Shortt's deposition transcript, pages 48 through 50, wherein he discusses the multiple repairs to the roofs of multiple buildings, saying specifically, "it was a lot of them".

Under Florida law, "the failure of an insured to give timely notice of loss in contravention of a policy provision is a legal basis for the denial of recovery under the policy. *Ideal Mut. Ins. Co. v. Waldrep*, 400 So.2d 782, 785 (Fla. 3d DCA 1981). "The purpose of a provision for notice and proofs of loss is to enable the insurer to evaluate its rights and liabilities, to afford it an opportunity to make a timely investigation, and to prevent fraud and imposition upon it." *Perez v. Citizens Prop. Ins. Co.*, 343 So.3d 140 (Fla. 3d DCA 2022). In Florida, courts apply a two-step analysis to determine whether an insured's failure to promptly report a loss can result in the denial of coverage. *Rodriguez v. Avatar Prop. & Cas. Ins. Co.*, 290 So.3d 560, 564 (Fla. 2d DCA 2020). Essentially, the inquiry involves a determination of whether the notice of loss was timely and, if not, a determination of whether the untimely notice prejudiced the insurer. *LoBello v. State Farm Fla. Ins. Co.*, 152 So.3d 595, 599 (Fla. 2d DCA 2014).

[2] It never became entirely clear what SFR was able to see that had not been visible to the Wild Oak Bay homeowners, property manager and association for nearly three years. At the hearing, the Court heard a somewhat vague reference to a new board member being the impetus to secure the services of SFR and pursue the claim and potentially some question as to whether, initially, it was believed that the damages would exceed the deductible.

To determine if the notice was "prompt", the court considers whether the insured notified its insurer "with reasonable dispatch and within a reasonable time in view of all of the facts and circumstances of the particular case." *Laquer v. Citizens Prop. Ins. Corp.,* 167 So.3d 470, 474 (Fla. 3d DCA 2015). The reasonableness of the timing largely turns on when the insured became aware and/or should have become aware of the damage based on the undisputed factual record. *Id.* Florida courts thus consider whether damage was caused by a known event, such as a hurricane, or whether the Insured was on-site when readily apparent problems developed to determine whether notice was prompt. *Yacht Club of the Intracoastal Condominium Ass'n, Inc. v. Lexington Insurance Company*, 599 Fed. Appx. 875 (11th Cir. 2015). For example, in *1500 Coral Tower Condominium Association, Inc.* vs Citizens, 112 So. 3d 541 (3rd DCA 2013), the insured association admitted that it had knowledge of damage within a month after Hurricane Wilma and made some repairs to the roof. However, it did not report the insurance claim until several years later. Based on that record, the court found that there was "no factual dispute that Coral Towers failed to give timely notice of the loss." *Id* at 543.

As indicated, it simply cannot be reasonably argued that Wild Oak Bay Owners Association was not aware of multiple areas of direct physical damage as a result of Hurricane Irma soon after the hurricane. As indicated, it simply cannot be reasonably argued that Wild Oak Bay Owners Association provided prompt notice to American Coastal as required by the policy. As indicated, it cannot be reasonably argued that Wild Oak Bay Owners Association gave American Coastal a description of how, when and where the loss or damage occurred **"as soon as possible"** (see policy, emphasis added).

The next question is whether that extended delay – with the multiple repairs made in the interim, with the multiple storms in the interim, and the with additional wear and tear on the

multiple roofs in the interim - prejudiced American Coastal's ability to respond to and properly evaluate the claim. Just as the question as to whether the Insured failed to properly notify its Insurer of the claimed loss promptly was not a close question, neither is whether that long delay significantly impacted and prejudiced American Coastal's ability to timely investigate the claim.

Generally, if the insured breaches its duty to provide prompt notice, there is a rebuttable presumption of prejudice to the insurer. *Bankers Insurance Co. v. Macias*, 475 So.2d 1216, 1218 (Fla. 1985). Here, however, the policy's language requires that American Coastal set forth evidence that the failure to promptly report the claim actually prejudiced its investigation. *See Perez v. Citizens Prop. Ins. Corp.*, 345 So.3d 893, 895 (Fla. 4th DCA 2022) (holding that Citizens was not entitled to a presumption of prejudice because its policy language required an express showing of prejudice).

Florida courts have weighed the following considerations to determine prejudice to an insurer when it has been deprived of its ability to timely investigate a loss:

> (a) whether better conclusions could have been drawn without the delay in providing notice,
>
> (b) whether those conclusions could have been drawn more easily,
>
> (c) whether the repairs to the affected areas that took place in the interim would complicate an evaluation of the extent of the damage or [the insured's] efforts to mitigate its damages, or
>
> (d) whether an investigation conducted immediately following the occurrence would not have disclosed anything materially different from that disclosed by the delayed investigation.

PDQ Coolidge Formad, LLC v. Landmark Am. Ins. Co., 566 F. App'x 845 (11th Cir. 2014). Prejudice is properly resolved on summary judgment where an insured fails to present evidence sufficient to rebut the presumption. *1500 Coral Towers vs Citizens,* 112 So.3d 541 (Fla. 3d DCA

2013); *Soronson v. State Farm Fla. Ins. Co.*, 96 So.3d 949, 953 (Fla. 4th DCA 2012); *City Mgmt. Grp. Corp. v. Am. Reliance Ins. Co.*, 528 So.2d 1299, 1300 (Fla. 3d DCA 1988).

The Plaintiff's delay and resistance to providing the necessary and requested documentation during the adjustment phase of the dispute precluded American Coastal from being able to properly investigate and determine the date, nature and extent of the repairs that had obviously been made during the post-loss period.[3] Due to the lengthy delay, American Coastal was prejudiced in its ability to accurately assess whether another storm – or wind event – contributed to the damaged roofs. The Plaintiff's delay and failure to respond to multiple RFI requests and to participate in the Examinations Under Oath process contained in the policy, prejudiced American Coastal's ability to determine the extent that on-going wear and tear over the several year period after Hurricane Irma impacted the roof issues. The bottom line here is that there is nothing in the record that, in any meaningful way, overcomes the clear and obvious prejudice as a result of the Insured's 1053 day delay. See *1500 Coral Towers*, supra, "[A]lthough the issue of whether an insured has overcome the presumption of prejudice to insurer caused by an insured's late notice of alleged loss to property is generally reserved for the trier of fact, it is appropriately raised on summary judgment where the insured fails to present evidence sufficient to overcome the presumption".

The Court must make mention of Mr. Grant Renne's report and affidavit – and the relevance of the recent case of *Yalina Perez vs. Citizens Property Insurance Corp.*, 343 So.3d 140 (Fla. 3rd DCA 2022). As an initial matter, it must be pointed out that Mr. Renne's inspection took place three years after the loss in the Perez case. In the instant case, Mr. Renne's "examination"

[3] *See* Mr. Shortt's report wherein he indicates that "We cannot determine when or how broken tiles occurred but throughout the roof inspection we found an abundance of tile repairs on nearly every roof, in multiple areas of nearly every roof."

(he did not actually visit the property and personally inspect the roofs, but "examined" it via a "virtual streaming platform") took place four years after the alleged date of loss. In *Perez* the Third District found that Mr. Renne "did not have access to any information following the initial loss because Ms. Perez waited over two years to report her claim to Citizens. Instead, Mr. Renne formed his opinion based solely on his investigation conducted nearly three years after the incident, after repairs had already been conducted on the roof. This lapse in time, as well as the intervening repairs, rendered Mr. Renne's opinion wholly conclusory as to whether the current damage was caused by the Hurricane or some other event from the intervening three years", *Id* at 144. Finding Mr. Renne's affidavit seriously flawed, the Third District held that "Mr. Renne's affidavit was insufficient to rebut the presumption of prejudice to Citizens resulting from Ms. Perez's delay in reporting the claim. The trial court was therefore eminently correct in its decision to grant summary judgment in favor of Citizens" *Id* at 144.

Remarkably similar to the conclusion of the trial court in *Perez*, this Court finds Mr. Renne's opinions, made four years after the date of loss, made without even stepping onto the property, to be unsupported generalizations, void of any meaningful quantitative analysis, conclusory, inconsistent and overly simplistic. For instance, Mr. Renne's suggestion that he can distinguish between roof damage cause by one hurricane versus another, or one significant wind event versus another, is, frankly, preposterous. His opinions ultimately did very little to rebut the clear and obvious prejudice to the Defendant as a result of the long delay between the alleged date of loss and the claim. ("...the fact that Mr. Renne's opinion is based on an investigation conducted nearly three years after the claimed date of loss renders it impossible for Citizens to determine which, if any, of the current damage to the roof came as a result of the Hurricane, and which, if any, of the current damage was caused by some other event." *Id* at 142.) *See* also *Kendall Lakes*

Towers Condo. Association vs. Pacific Insurance Co., WL 10004851 (S.D. March, 26, 2012), which held that a four year delay in notifying its insurer was prejudicial:

> "As a result, Pacific was entitled to prompt notice of the loss following Hurricane Wilma, not, as occurred here, to notice more than four years later. There is no genuine factual dispute that Kendall Lakes did not provide timely notice and Pacific is entitled to judgment as a matter of law on this issue."

Kendall Lakes, 2012 WL 266438, at *4.

In its Reply, the Defendant indicated that "American Coastal was forced to investigate a loss almost three years after the fact for 48 buildings with prior repairs to nearly every roof and no records regarding the repairs". After review of the available evidence, the Court find this to be a true statement. *See* also *De La Rosa vs. Florida Peninsula Insurance, Co.*, 246 So. 3d 438 (Fla. 4th DCA 2018), wherein the Court held that "even though there may be disputed issues of fact as to whether the insurer was prejudiced in determining the cause of the loss, the facts, even as presented by the insured's adjuster and engineer, show that the insurer would be prejudiced by the passage of time in investigating the extent of the loss, and thus, the cost of repair. The insured did not overcome the presumption of prejudice." *Id* at 334.

The Court certainly recognizes that, by entry of this Order, the Plaintiff is unable to seek redress for what it claims is a breach of the contract between the assignor, Wild Oak Bay Owners Association and American Coastal. At the risk of repetition, the argument here that the insured "promptly" notified its insurer of the damage is wholly unpersuasive, as is the Plaintiff's argument that American Coastal was not prejudiced by said lengthy delay.

In its Motion, the Defendant states that "Based upon the factual record, it is undisputed that the Insured was aware of direct physical damage attributable to Hurricane Irma shortly after the hurricane. It is also undisputed that the Insured became further, both directly and constructively,

aware of the damage based on the numerous repairs before notifying American Coastal. Nevertheless, the Insured inexcusably waited over two years – 1053 days – to report the claim to American Coastal. Therefore the insured failed to provide prompt notice as a matter of law." This Court agrees. The Defendant also argued in its Motion that "the passage of time, the numerous repairs performed on the roofs throughout the property, and lack of information provided by the insured prejudiced American Coastal's ability to determine the cause and extent of damages claimed". As indicated by American's Coastal Corporate. Rep., prior repairs and the lack of information regarding same, "really prejudiced [American Coastal's] investigation because the condition of the property was altered before [American Coastal] had the chance to inspect [the property]". This Court agrees.

Conclusion

Ultimately, although revised, Rule 1.510 indicates that summary judgment may be granted "if the pleadings and summary judgment evidence on file shows that there is no genuine [dispute] as to any material fact and that the moving party is entitled to a judgment as a matter of law". Fla. R. Civ. P. 1.510(c); In re: Amendments to Fla. Rule of Civil Procedure 1.510, No. SC20-1490, 2020 WL 7778179 at *4, 309 So.3d 192 (Fla. 31, 2020) (*amending language to replace "genuine issue" with "genuine dispute"). Based upon the foregoing, the Court has come to the inescapable conclusion that the insured here breached its post-loss obligation under the policy by failing to promptly notify its insurance carrier of the claimed loss and, consequently, prejudicing its ability to timely investigate whether the claimed loss was, in fact, a result of Hurricane Irma. There is no genuine existence of any material fact at to those issues. As indicated, this is not a particularly close call. As such, the Defendant's Motion for Summary Judgment is GRANTED.

DONE AND ORDERED in Chambers, in Manatee County, Florida this 9th day of February, 2024.

Edward Nicholas
Circuit Court Judge

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