

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

POSITANO PLACE AT NAPLES IV
CONDOMINIUM ASSOCIATION, INC.,
a Florida not-for-profit Corporation

CASE NO.: 2:21-cv-00186-SPC-MRM

Plaintiff,

v.

EMPIRE INDEMNITY INSURANCE
COMPANY,

Defendant.

ANSWER, AFFIRMATIVE DEFENSES AND DEMAND FOR JURY TRIAL

Empire Indemnity Insurance Company (“Empire”), by and through its undersigned counsel, responds to the Second Amended Complaint (Doc. 42) filed by Plaintiff, Positano Place at Naples IV Condominium Association, Inc. (the “Association”) as follows:

JURISDICTION AND VENUE

1. Admitted for jurisdictional purposes only.
2. Admitted.
3. Empire operates as a qualified surplus lines insurer in Florida.
4. Empire operates as a qualified surplus lines insurer in Florida.
5. Admitted that the Association purchased insurance from Empire;

without knowledge and therefore denied as to the remainder of the allegations.

6. Admitted that the Association purchased insurance, and that while Exhibit A to the Second Amended Complaint appears to be what it purports to be, Empire will rely on a verified copy of the insurance policy for accuracy and completeness therefore denied at this time that Exhibit A is a complete copy of the policy. Admitted there was a policy in full force and effect.

7. Admitted that the Policy, generally, provides coverage for physical loss as a result of a hurricane event, among other covered events, but denied that the Policy covers the damages the Association seeks in this case.

8. Admitted that the Policy was in full force and effect on or about September 10, 2017; denied as to the remainder of the allegations.

9. Denied.

10. Admitted that Empire inspected the property; remainder of allegations are denied as phrased.

11. Denied.

12. Without knowledge, therefore denied.

13. Admitted that the Association submitted the Proof of Loss attached as Exhibit B, which did not satisfy the terms and conditions of the Policy.

14. Denied.

15. Admitted.

16. Admitted.

17. Denied.

18. Admitted that the Association requested appraisal, but denied that the claim is suitable for appraisal and denied that the Association has complied with the policy terms and conditions entitling it to appraisal.

19. Denied, as the claim is not suitable for appraisal and the Association has not complied with the policy terms and conditions entitling it to appraisal.

20. Denied.

21. Denied.

22. Jurisdiction and venue are proper in this federal Court.

23. Without knowledge, therefore denied.

24. Denied.

Count I – Specific Performance

25. Empire re-alleges and incorporates paragraphs 1 through 24 as if fully set forth herein.

26. Denied.

27. Admitted that the Association and Empire entered into a contract; remainder of allegations are vague and therefore denied.

28. The Policy speaks for itself. Any allegations inconsistent with a fair reading of the Policy are denied. Denied that the claim is suitable for appraisal and denied that the Association has complied with the policy terms and conditions entitling it to appraisal.

29. Admitted that the Association demanded appraisal, but denied that the claim is suitable for appraisal and denied that the Association has complied with the policy terms and conditions entitling it to appraisal.

30. Without knowledge, therefore denied.

31. The Policy speaks for itself. Any allegations inconsistent with a fair reading of the Policy are denied. Admitted that the Association demanded appraisal, but denied that the claim is suitable for appraisal and denied that the Association has complied with the policy terms and conditions entitling the Association to appraisal.

32. Admitted to the extent that coverage issues exist in this case, and Empire has previously informed the Association of same.

33. Denied.

34. Denied.

35. Denied.

36. Denied.

37. Denied.

38. Denied.

39. Denied.

40. Denied.

41. Denied.

42. Denied.

43. Denied.

44. Denied.

Count II – Breach of Contract (in the alternative)

45. Empire re-alleges and incorporates paragraphs 1 through 24 as if fully set forth herein.

46. Admitted that this purports to be an alternative cause of action for breach of contract; denied that the Association is entitled to any relief.

47. Admitted.

48. Admitted that the Association demanded appraisal, but denied the claim is suitable for appraisal and denied that the Association has complied with the policy terms and conditions entitling it to appraisal.

49. Without knowledge, therefore denied.

50. Denied.

51. Denied.¹

52. Denied.

53. Denied.

Count III – Declaratory Judgment (in the alternative)

54. Empire re-alleges and incorporates paragraphs 1 through 24 as if fully set forth herein.

¹ To the extent that the Association is seeking consequential damages from the alleged breach, the Court has already ruled in this case that the Association is not entitled to such damages (Doc. 26).

55. Admitted that this purports to be a cause of action for Declaratory Judgment; denied that the Association is entitled to any relief.

56. Denied.

57. Denied.

58. Denied.

59. Denied.

60. Denied.

61. Denied.

To the extent a response is required to the “Wherefore” clause and to its subparagraphs a through k, denied.

AFFIRMATIVE AND OTHER DEFENSES²

FIRST DEFENSE

As part of its claim, the Association is not seeking to recover amounts it actually spent on repairs or replacement. The Association is seeking to recover amounts for the replacement of windows and doors and other items, but the Association has not completed such repair or replacements. Further, the Association has not notified Empire of its intent to have the loss or damage settled on an actual cash basis.

² Some of these defenses are raised to ensure that the matters are clearly at issue, even though they may or may not be conditions precedent or affirmative defenses. Florida law is unclear on the matters concerning conditions precedent and affirmative defenses, and whether any policy terms, conditions, and limitations must be raised as unfulfilled conditions precedent, affirmative defenses, or neither. Therefore, out of an abundance of caution and clarity, such defenses, affirmative or otherwise, are raised here.

Therefore, Empire has not breached the Policy and the Association cannot recover for any amounts not within the terms of coverage for Replacement Cost coverage. The Policy provides, in relevant part:

G. Optional Coverages³

If shown as applicable in the Declarations, the following Optional Coverages apply separately to each item.

3. Replacement Cost

- a. Replacement Cost (without deduction for depreciation) replaces Actual Cash Value in the Loss Condition, Valuation, of this Coverage Form.

- c. You may make a claim for loss or damage covered by this insurance on an actual cash value basis instead of a replacement cost basis. In the event you elect to have loss or damage settled on an actual cash value basis, you may still make a claim for the additional coverage this Optional Coverage provides if you notify us of your intent to do so within 180 days after the loss or damage.

- d. We will not pay on a replacement cost basis for any loss or damage:

- (1) Until the lost or damaged property is actually repaired or replaced; and
(2) Unless the repairs or replacement are made as soon as reasonably possible after the loss or damage.

- e. We will not pay more for loss or damage on a replacement cost basis than the least of (1), (2) or (3), subject to f. below:

- (1) The Limit of Insurance applicable to the lost or damaged property;

³ The Declarations page of the Policy has the optional Replacement Cost coverage marked with an “X,” indicating that this Optional Coverage provision applies.

- (2) The cost to replace the lost or damaged property with other property;
 - (a) Of comparable material and quality; and
 - (b) Used for the same purpose; or
- (3) The amount actually spent that is necessary to repair or replace the lost or damaged property.

SECOND DEFENSE

The Association has not performed repairs as soon as reasonably possible and therefore is barred from recovering in any action based on actual repair costs. The Policy provides, in relevant part:

3. Replacement Cost

- d. We will not pay on a replacement cost basis for any loss or damage:
 - (1) Until the lost or damaged property is actually repaired or replaced; and
 - (2) Unless the repairs or replacement are made as soon as reasonably possible after the loss or damage.

THIRD DEFENSE

Ordinance or law related costs are not recoverable if repairs were not done as soon as reasonably possible after the loss or damage or in any event later than two years after the date of loss. The Association secured extensions, including a 180-day day extension, from Empire in writing, as allowed by the Policy, and still did not complete repairs. Further, such coverage applies only in response to the minimum requirements of the ordinance or law. The Policy provides, in relevant part:

ORDINANCE OR LAW COVERAGE

D. Coverage

3. Coverage C – Increased Cost of Construction Coverage

- a. With respect to the building that has sustained direct physical damage, we will pay the increased cost to:
- (1) Repair or reconstruct damaged portions of that building; and/or
 - (2) Reconstruct or remodel undamaged portions of that building, whether or not demolition is required;

when the increased cost is a consequence of enforcement of the minimum requirements of the ordinance or law.

However:

- (1) This coverage applies only if the restored or remodeled property is intended for similar occupancy as the current property, unless such property is not permitted by zoning or land use ordinance or law.
- (2) We will not pay for the increase cost of construction if the building is not repaired, reconstructed or remodeled.

The Coinsurance Additional Condition does not apply to Increased Cost of Construction Coverage.

E. Loss Payment

4. Unless Paragraph E.5. applies, loss payment under Coverage C – Increased Cost of Construction Coverage will be determined as follows:
 - a. We will not pay under Coverage C:
 - (1) Until the property is actually repaired or replaced, at the same or another premises; and
 - (2) Unless the repairs or replacement are made as soon as reasonably possible after the loss or damage, not to exceed two years. We may extend this period in writing during the two years.
 - b. If the building is repaired or replaced at the same premises, or if you elect to rebuild at another premises, the most we will pay under Coverage C is the lesser of:
 - (1) The increased cost of construction at the same premises; or
 - (2) The applicable Limit of Insurance shown for Coverage C in the Schedule above.
 - c. If the ordinance or law requires relocation to another premises, the most we will pay under Coverage C is the lesser of:
 - (1) The increased cost of construction at the new premises; or
 - (2) The applicable Limit of Insurance shown for Coverage C in the Schedule above.

FOURTH DEFENSE

The Policy requires that the Association give prompt notice of the loss or damage. That did not happen as Hurricane Irma struck on September 10, 2017, and the Association gave first notice of loss to Empire six months later on or around March 16, 2018. The Policy requires:

3. Duties In the Event Of Loss Or Damage

- 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.

(3) As soon as possible, give us a description of how, when and where the loss or damage occurred.

FIFTH DEFENSE

To the extent the Association did not make supplemental claims within three years after Hurricane Irma, such claims are barred under section 627.70132, Florida Statutes.

SIXTH DEFENSE

There are buildings for which there was no covered damage and, therefore, if appraisal is appropriate at all, it cannot include those buildings.

SEVENTH DEFENSE

Whether interior damage is covered is also not a proper matter for appraisal given that it involves application of policy terms to determine whether such damage is covered.

EIGHTH DEFENSE

Empire denied coverage for roofs, windows and doors and the individual roofs, windows and doors denied entirely by Empire should not be the subject of appraisal, else the appraisal would improperly determine whether Empire breached by denying

coverage. Having appraisers, not subject to any arbitration code, determine that Empire should have covered roofs, windows and doors claimed as damaged would amount to a determination by the appraisers that Empire breached by denying coverage, improperly ousting this Court of jurisdiction of determining whether Empire breached and depriving Empire of Due Process and the right to a jury trial under the U.S. Constitution.

NINTH DEFENSE

Empire informed the Association that it did not agree with the Association's plans to replace the roofs in their entirety and that if the Association replaced the roofs, the Association was doing so as a business decision and the Association would be solely responsible for the costs.

TENTH DEFENSE

The Association is barred by the equitable doctrine of "unclean hands" because either it or its agents submitted a grossly inflated claim with no legitimate basis in well-founded expert opinion on causation, scope of damage, and scope of repairs and pricing. In summary, the claim is founded upon arbitrary methodology, *i.e.*, "junk science." The Association, through the agents it hired to prepare the claim, either knew or have reason to know that the damages and pricing are grossly inflated. The Association's claim, therefore, amounts to a sham.

The claim that all of the roofs require replacement due to Hurricane Irma and that every single window and door were damaged and require replacement is a sham. Claiming that the roof tiles were damaged by "uplift" and "chattering," for instance,

is based on wild supposition without any scientific bases. As far as the windows and doors, only a fraction of them were sampled, and the testing and assessments were based on methodologies used by the Association's agents to knowingly inflate the claim with the goal of having an appraisal consider and compromise a sham claim rather than one presented in good faith based on legitimate expert opinions.

ELEVENTH DEFENSE

By submitting claims for the replacement of the roofs, windows and doors based on "junk science," as outlined in the preceding defense, the Association, through its agents and representatives, has breached its duty to cooperate under the Policy. The Policy provides, in part:

3. Duties In The Event Of Loss or Damage

- a. You must see that the following are done in the event of loss or damage to Coverage Property:

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

TWELFTH DEFENSE

The Policy contains payment limitations. For instance, the Policy does not cover the cost to replace the entire roof where only a few tiles needed to be replaced but the original tiles were discontinued by the manufacturer. The Policy covers the *least* of the cost to replace the lost or damaged property (*i.e.*, roof tile) with other tile of comparable material and quality and used for the same purpose or the amount actually

spent that is necessary to repair or replace the lost or damaged tile. The Policy provides, in relevant part:

3. Replacement Cost

- e. We will not pay more for loss or damage on a replacement cost basis than the least of **(1)**, **(2)** or **(3)**, subject to **f.** below:
- (1)** The Limit of Insurance applicable to the lost or damaged property;
 - (2)** The cost to replace the lost or damaged property with other property;
 - (a)** Of comparable material and quality;
 - and
 - (b)** Used for the same purpose; or
 - (3)** The amount actually spent that is necessary to repair or replace the lost or damaged property.

THIRTEENTH DEFENSE

The Policy requires each party to “select a competent and impartial appraiser.” The Association retained Keys Claims Consultants, LLC, which is not an impartial appraiser. Therefore, the Association breached the Policy and is not entitled to appraisal.

FOURTEENTH DEFENSE

The damages complained of are the result of settling, cracking or expansion, which the Policy does not cover. The Policy states:

A. Covered Causes Of Loss

When Special is shown in the Declarations, Covered Causes of Loss means Risks Of Direct Physical Loss unless the loss is:

1. Excluded in Section **B.**, Exclusions; or
2. Limitations in Section **C.**, Limitations;

that follow,

B. Exclusions

2. We will not pay for loss of damage caused by or resulting from any of the following:

- (4) Settling, cracking, shrinking or expansion;

FIFTEENTH DEFENSE

The damages complained of consist of pre-existing design and construction defects as evidenced by the Association's prior construction defect litigation that concerned the stucco, roofs, windows and doors, among other things, and repairs were not made to the stucco, roofs, windows and doors following the litigation that ended in 2014. The Policy does not cover faulty, inadequate or defective design, workmanship and materials used in construction. The Policy provides:

A. Covered Causes Of Loss

When Special is shown in the Declarations, Covered Causes of Loss means Risks Of Direct Physical Loss unless the loss is:

1. Excluded in Section **B.**, Exclusions; or
2. Limitations in Section **C.**, Limitations;

that follow,

B. Exclusions

3. We will not pay for loss or damage caused by or resulting from any of the following, **3.a.** through **3.c.** But if an excluded cause of loss that is listed in **3.a.** through **3.c.** results in a Covered Cause of Loss, we will pay for the loss or damage caused by that Covered Cause of Loss.

c. Faulty, inadequate or defective:

- (1) Planning, zoning, development, surveying, siting;
- (2) Design, specifications, workmanship, repair, construction, renovation, remodeling, grading, compaction;
- (3) Materials used in repair, construction, renovation or remodeling; or
- (4) Maintenance;

of part of all of any property on or off the described premises.

SIXTEENTH DEFENSE

Count I for specific performance does not state a proper cause of action because an adequate remedy at law exists, disqualifying specific performance to compel appraisal as an available remedy.

SEVENTEENTH DEFENSE

Count I for specific performance actually seeks a mandatory injunction, but Count I fails to sufficiently state entitlement to injunctive relief. To successfully compel

Empire into appraisal through injunctive relief, the Association must plead that: “(1) it has a substantial likelihood of success on the merits; (2) irreparable injury will be suffered unless the injunction issues; (3) the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (4) if issued, the injunction would not be adverse to the public interest.” *KH Outdoor, LLC v. City of Trussville*, 458 F.3d 1261, 1268 (11th Cir. 2006). A court should not grant a mandatory injunction “except in rare instances in which the facts and law are clearly in favor of the moving party.” *Haddad v. Arnold*, 784 F.Supp. 1284, 1295 (M.D. Fla. 2010) (quoting *Exhibitors Poster Exch. v. Nat’l Screen Serv. Corp.*, 441 F.2d 560, 561 (5th Cir. 1971)).

EIGHTEENTH DEFENSE

Count II for breach of contract fails to state a cause of action because it improperly seeks damages not governed by the terms and conditions of the insurance policy. Further, to the extent that Count II seeks consequential damages, such damages are improper and disallowed, which this Court has already ruled (Doc. 24).

NINETEENTH DEFENSE

Count II seeks breach of contract for Empire’s alleged failure to agree to appraisal; however, Empire did not breach where there are no covered damages. Appraisal is not appropriate where there is no covered damage and so Empire could not have breached the insurance contract.

DEMAND FOR JURY TRIAL

Empire demands a jury trial on such triable issues.

BUTLER WEIHMULLER KATZ CRAIG LLP

/s/ Ryan K. Hilton

J. PABLO CÁ CERES, ESQ.

Florida Bar No.: 131229

pcaceres@butler.legal

RYAN K. HILTON, ESQ.

Florida Bar No.: 0304610

rhilton@butler.legal

Secondary tbarry@butler.legal

mratliff@butler.legal

cjenkins@butler.legal

400 N. Ashley Drive, Suite 2300

Tampa, Florida 33602

Telephone: (813) 281-1900

Facsimile: (813) 281-0900

*Counsel for Defendant, Empire Indemnity Insurance
Company*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by electronic notification generated by CM/ECF system on June 22, 2021, on all counsel or parties of record on the Service List below:

Justin B. Mazzara, Esq.

Pavese Law Firm

P.O. Box 1507

Fort Myers, FL 33902-1507

Email : justinmazzara@paveselaw.com

Counsel for Plaintiff

/s/ Ryan K. Hilton

RYAN K. HILTON, ESQ.