

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

CASE NO. 10-61485-CIV-DIMITROULEAS/SNOW

BANTA PROPERTIES, INC.,

Plaintiff,

vs.

ARCH SPECIALTY INSURANCE
COMPANY,

Defendant.

ORDER DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

THIS CAUSE is before the Court upon the Defendant's Motion for Summary Judgment [DE 83], filed on October 19, 2011. The Court has carefully considered the Motion, Plaintiff's Response in Opposition [DE 93], filed November 7, 2011, and Defendant's Reply [DE 111], filed November 21, 2011,¹ and is otherwise fully advised in the premises.

I. SUMMARY JUDGMENT STANDARD

In a summary judgment motion, the movant "bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). After the moving party has met its initial burden of production, that burden shifts to the nonmoving party to demonstrate that there is a genuine issue of fact for trial. *See id.* at 324. The party opposing a motion for summary judgment may not simply rest upon

¹ The Court notes that Defendant's Reply has been filed past the November 17, 2011, deadline prescribed by Southern District of Florida Local Rule 7.1(c). The Court warns the Defendant that future untimely filings may not be considered by the Court.

allegations or denials in the pleadings, but rather must go beyond the pleadings to show specific facts demonstrating that there is a genuine issue. *Celotex*, 477 U.S. at 324. The Court must evaluate the evidence and make all inferences in the light most favorable to the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

II. UNDISPUTED FACTS

Plaintiff, Banta Properties, Inc. (“Banta”), is a property management company that manages several multiple-building apartment complexes in Broward County, Florida. Banta had primary insurance on the three properties at issue in this case through General Star Indemnity Company, which covered up to \$2.5 million in physical damage. Defendant Arch Specialty Insurance Company (“Arch”) issued an excess insurance policy to Banta for these properties. The Arch Policy provided excess coverage for physical damage up to \$8,503,732.00 per occurrence. The terms of the General Star policy were incorporated into the Arch Policy. The Arch Policy had a notice provision: “The Insured, upon knowledge of any occurrence likely to give rise to a claim hereunder, shall give immediate written notice thereof.”

Hurricane Wilma made landfall in South Florida on or about October 24, 2005. Banta’s properties allegedly suffered damages as a result of the hurricane, so it filed a claim with General Star for its primary insurance coverage. General Star tendered the policy limits of \$2.5 million under that insurance contract in March 2008. On March 14, 2008, Banta filed an insurance claim against Arch for its excess coverage.

Arch issued a reservation of rights letter to Banta on April 10, 2008. It also sent another letter the same day stating that Banta had prejudiced Arch because Arch did not have the opportunity to inspect the alleged damages immediately after Hurricane Wilma and that Banta’s

repairs to the property obscured any damage. On May 5, 2008, Banta submitted to Arch a repair contract with Hunter R Contracting for \$11,855,549.54.² On May 8, 2008, Arch requested that Banta refrain from making any repairs until Arch had the full claim submission and had an opportunity to inspect the properties. On June 18, 2008, Arch inspected the properties. By that time, Banta had completed repairs to six of the thirteen covered buildings. On July 30, 2008, Banta filed a Proof of Loss with Arch. Banta alleges that Arch has failed to pay for Banta's losses under the insurance contract.

On August 17, 2010, Banta commenced this action, asserting claims for breach of contract and for declaratory relief [DE 1]. Banta seeks a declaratory judgment that the Arch insurance policy is valid and enforceable and that Banta is entitled to coverage, and further asserts a claim for breach of the Policy. Arch now moves for summary judgment against Banta.

III. ADDITIONAL MATERIAL FACTS AND DISPUTED FACTS

In its response in opposition to summary judgment, Banta directs the Court attention to additional facts in the record that it claims are material and raise genuine issues for resolution at trial. Banta indicates that it undertook repairs to the buildings after the storm in order to comply with its obligations under its primary insurance contract with General Star to "take all reasonable steps to protect the Covered Property from further damage." [DE 82-3 at 24]. The General Star provisions were incorporated into the Arch policy, so Banta argues that commencing repairs could not have prejudiced Arch because they were done pursuant to the contract.

² There is a dispute of fact as to whether the contract with Hunter R Contracting was made on March 4, 2008, or on April 30, 2008, but that issue is immaterial at this point.

In addition, Banta demonstrated that General Star did an extensive investigation, hiring several different consulting companies to investigate Banta's insurance claim and to inspect the properties. [DE 93-3 at 24:15-19; 44:10-15; 71:1-7; DE 93-2 ¶ 17]. These consultants eventually produced voluminous reports and pictures of the property. [DE 93-2 ¶¶ 16, 20, 22-23]. Banta provided these reports, images, and other documents to Arch, for a total production that exceeded 30,000 pages. [DE 93-2 ¶ 23; DE 7 ¶¶ 27-28].

Banta also provided evidence that in June 2008, Arch sent two consultants to inspect the properties. Arch gave these consultants narrow scopes of work. They did not inspect the interiors, ceiling damage, flooding damage, doors, mold, pool, pool decks, pool house, or patios. *See* [DE 93-4 at 89:10-90:23]. These inspectors also did not review any invoices for any repairs Banta had already completed. [DE 93-5 at 44:22-46:1, 77:18-24, 151:9-16]. In fact, Arch's consultants stated that they did not review any documents from General Star's investigation record, so these consultants never saw the photographs or reports made by General Star's several consultants [DE 93-4 at 76:23-77:22; DE 93-5 at 44:13-15, 68:12-69-4].

IV. ARCH'S ARGUMENTS FOR SUMMARY JUDGMENT

Arch seeks summary judgment on two bases. First, Arch argues that it has no duty to pay Banta's insurance claim because Banta made an untimely notice of its claim. Banta filed its claim nearly two and a half years after Hurricane Wilma damaged Banta's property. Arch asserts that this delay entitles it to summary judgment as a matter of law. Second, Arch argues that Banta failed to follow its post-loss obligations and conditions precedent to filing this lawsuit, and thus Arch is entitled to summary judgment on this ground as well.

A. *Untimely Notice of Claim*

A notice condition in an insurance policy gives an insurer an opportunity to investigate and mitigate damages that potentially are covered under the policy. *Ideal Mut. Ins. Co. v. Waldrep*, 400 So. 2d 782, 785 (Fla. 3d DCA 1981).³ If an insurance policy requires timely notice of a claim under the policy, then an insured's failure to give that notice may be a legal basis to deny recovery. *Id.* If an insured provides late notice, however, the insured may still recover if it overcomes a presumption that the insurer was prejudiced as a result of the late notice. *H.S. Equities, Inc. v. Hartford Accident & Indemnity Co.*, 334 So. 2d 573, 575 (Fla. 1976). Thus, this Court must address first whether there is a genuine issue of fact that Banta's notice was untimely. If Banta's notice was untimely as a matter of law, the Court must then determine whether Banta demonstrated a genuine issue of fact regarding whether Arch was prejudiced by the notice.

1. *Timeliness*

Arch cites *Kroener v. Fla. Ins. Guar. Ass'n*, 63 So. 3d 914, 916 (Fla. 4th DCA 2011), for the proposition that an insured's notice to its insurer two years and two months after an event giving rise to a claim makes notice untimely *per se*. In *Kroener*, Hurricane Wilma damaged an insured's house, that insured never made a claim against its insurer, and then the insured sold the house to purchasers. *Id.* at 915. The purchasers then obtained an assignment of the insured's rights under the insurance contract and made a claim against the insurer more than two years after Hurricane Wilma caused the damage. *Id.* Without considering prejudice to the defendant,

³ Because this Court is sitting in diversity on an action arising under Florida law, Florida law applies to this action and this Court must follow the interpretations of the law set forth by the Florida Supreme Court, *Shapiro v. Associated Int'l Ins. Co.*, 899 F.2d 1116, 1118 (11th Cir. 1990), or the Florida District Courts of Appeals in the absence of Florida Supreme Court precedent, *Blanchard v. State Farm. Mut. Auto. Ins. Co.*, 903 F.2d 1398, 1399 (11th Cir. 1990).

the Court ruled that the insurer was entitled to summary judgment because that notice was untimely as a matter of law. *Id.* at 916. On the basis of *Kroener*, Arch argues that it is entitled to summary judgment because Banta's notice of claim was *per se* untimely.⁴

Most Florida courts, however, consider timeliness an issue to be decided on the circumstances of each case and do not set a *per se* bar on timeliness. *See Renuart-Bailey-Cheely Lumber & Supply Co. v. Phoenix of Hartford Ins. Co.*, 474 F.2d 555, 558 (5th Cir. 1972)⁵; *see also Employers Cas. Co. v. Vargas*, 159 So. 2d 875, 877 (Fla. 2d DCA 1964); *Laster v. U.S. Fid. & Guar. Co.*, 293 So. 2d 83, 86 (Fla. 3d DCA 1974). The former Fifth Circuit, interpreting Florida law, found that a delay of four years was not untimely as a matter of law. *See Phoenix of Hartford*, 474 F.2d at 558. This Court agrees that there is no *per se* timeliness bar for filing a notice of a claim and that notice must be considered under the circumstances.

Looking to the circumstances of this case, Banta provided the deposition of Arch's corporate representative who stated that a claim under the Arch policy did not accrue until the primary insurer, General Star, tendered the policy limits. [DE 93-1 at 163:22-164:3]. Two days after General Star tendered the policy limits, Banta made a claim against Arch. Banta therefore argues that its claim was timely. Arch argues that notice should have been made immediately

⁴ In Arch's Reply in support of its Motion for Summary Judgment [DE 111], Arch raises a new argument regarding whether the insurance contract was "unambiguous." This argument goes beyond the issues raised in the Response. Such an argument is improper. *See* S.D. Fla. L.R. 7.1(c) (limiting a reply strictly to issues raised in the response). Even if this Court were to consider whether the contract was unambiguous, it would not end this Court's analysis, because Banta can still survive summary judgment by showing a question of fact of whether Arch was prejudiced by untimely notice, as discussed in the next section of this Order.

⁵ The Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit issued prior to October 1, 1981. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981).

upon damage to the properties and that a delay of more than two years is clearly untimely. In Arch's Reply in support of its motion for summary judgment, Arch also argues that when a claim "accrues" under an excess policy is irrelevant to whether notice was timely provided. Normally, the issues of when a duty to give notice of a claim arises and whether the elapsed time after that duty arose makes the notice untimely are questions of fact for the fact-finder. *Ideal*, 400 So. 2d at 785; *Vision I Homeowners Ass'n, Inc. v. Aspen Specialty Ins. Co.*, 674 F. Supp. 2d 1333, 1338-39 (S.D. Fla. 2009). The Court need not reach the issue of whether a reasonable fact-finder could find that Banta's notice was timely when its insurance policy required "immediate" notice but its claim did not "accrue" until more than two years later, because as the next section of this Order describes, even assuming that the notice was untimely, Arch is still not entitled to summary judgment.

2. *Lack of Prejudice*

Even supposing that this Court could conclude that Banta's notice was untimely as a matter of law, summary judgment would still be inappropriate. Banta has presented enough evidence to create an issue of fact as to whether the delay, if any, prejudiced Arch. As noted above, an insured may still be entitled to insurance coverage if it filed an untimely claim if it can rebut the presumption that the insurer was prejudiced by the delay. *H.S. Equities*, 334 So. 2d at 575. This Court will address two ways that an insured may rebut the presumption of prejudice to survive a motion for summary judgment. First, an insured may rebut the presumption by showing that another insurer using competent individuals made a complete investigation of the claim. *Hartford Accident and Indemnity Co. v. Mills*, 171 So. 2d 190, 195 (Fla. 1st DCA 1965). Second, an insured may show that the insurer had access to "substantial information" regarding

the claim, creating an issue of fact of whether the delay prejudiced the insurer. *Robinson v. Auto Owners Ins. Co.*, 718 So. 2d 1283, 1284-85 (Fla. 2d DCA 1998) (reversing summary judgment in favor of an insurer on late notice when insurer was notified of accident four years after it occurred).

The Court finds that there is a genuine issue of material fact as to whether Arch was prejudiced by a delay in reporting the claim. Based on the evidence in the record, a fact-finder could conclude that General Star used several competent individuals to completely investigate Banta's insurance claim. This conclusion would be further supported by the evidence of the narrow scope of Arch's inspectors' investigation, because Arch arguably saw no need to investigate further. Alternately, the fact-finder could conclude that Arch's access to more than 30,000 pages of pictures, expert reports, and other documents gave Arch "substantial information," removing any prejudice that could have arisen from untimely notice. Therefore, even if Banta's claim was untimely, there is a genuine dispute of material fact as to whether Arch suffered prejudice, so Arch's claim for summary judgment on the grounds of untimeliness still should be denied.

B. Failure to Satisfy Conditions Precedent

Arch also argues that Banta failed to satisfy a condition precedent to seeking relief in the courts. The Arch policy incorporated General Star's policy, which stated, "No one may bring a legal action against us under this Coverage Part unless: 1. There has been full compliance with all of the terms of this Coverage Part; and 2. The action is brought within 2 years after the date on which the direct physical loss or damage occurred." As to the first point, Arch seems to be rearguing the same "untimeliness" argument. As noted in the preceding section, this argument

fails to show Arch is entitled to judgment as a matter of law because there are important issues of material fact.

The second point, however, raises an issue on the validity of contractual limitations periods. Such provisions are void if the contractual time period is less than the statutory limitations period. § 95.03, Fla. Stat. Under Florida law, actions based on a written contract must be brought within five years. § 95.11, Fla. Stat. Because the contractual period is shorter than the statutory period, this provision of the policy is void. Arch appears to rely solely on the limitation period in the contract and has not advanced any arguments that Banta's claim falls outside of Florida's statute of limitation. Therefore, as a matter of law, Arch cannot succeed on a contractual limitation argument here.

V. CONCLUSION

Accordingly, it is **ORDERED AND ADJUDGED** that the Defendant Arch Specialty Insurance Company's Motion for Summary Judgment [DE 83] is **DENIED**.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 22nd day of November, 2011.


WILLIAM P. DIMITROULEAS
United States District Judge

Copies furnished to:
Counsel of record