

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION**

KINGSHILL HOSPITALITY, INC.,

Plaintiff,

v.

Case No: 5:18-cv-520-Oc-30PRL

AMERICAN ECONOMY INSURANCE
COMPANY,

Defendant.

ORDER

Kingshill Hospitality, Inc. d/b/a Best Western (“Kingshill”) sued its property insurer, American Economy Insurance Company, in state court for breach of contract relating to a fire loss. Part of the damages Kingshill seeks in lawsuit are consequential damages for having to retain a public adjuster. American Economy removed the action and then moved to strike the consequential damages claim. In response, Kingshill argues, in part, that the Court is required to enter a default against American Economy because it failed to respond to the Complaint as ordered in state court. The Court concludes the Motion to Strike should be granted because Kingshill failed to plead a basis for consequential damages, and that a default is not warranted even though American Economy responded to the Complaint two days after the state court-ordered deadline.

BACKGROUND

American Economy issued an insurance policy to Kingshill, a hotel operating in Leesburg, Florida. On April 29, 2017, Kingshill's hotel was damaged by a fire.

American Economy sent a third-party adjuster to inspect the damage on May 9, 2017. On May 12, 2017, Kingshill hired a public adjuster to assist it in submitting its insurance claim. Kingshill estimated its damages to be \$114,526.04. On June 1, 2017, American Economy sent a letter partially denying Kingshill's claim and an estimate of the covered damage with payment of \$4,203.90 after deductible. Kingshill alleges that the partial denial of coverage and payment of only \$4,203.90 was a material breach of the insurance policy.

Kingshill filed a breach of contract suit against American Economy in Florida state court on September 10, 2018. Kingshill seeks "an award of compensatory damages, consequential damages, pre-judgment interest, post judgment interest, costs of this action, attorney fees; and such other and further relief as this Court may deem just and proper." (Doc. 1-1).

After being served with the Complaint, American Economy moved for an enlargement of time to respond to the Complaint until October 24, 2018, which was unopposed by Kingshill. (Doc. 1-8, p. 117–19). The state court entered an agreed order that stated, "American Economy must respond to Plaintiff's Complaint by October 24, 2018." (Doc. 1-8, p. 121).

On October 19, 2018, American Economy removed the action to this Court based on diversity jurisdiction. (Doc. 1). On October 26, 2018, American Economy moved to

strike Kingshill's claim for consequential damages. (Doc. 3). In response, Kingshill argues that the Court should allow its claim for consequential damages to proceed, and that the Court should enter a default against American Economy because it "agreed to file an Answer or a responsive pleading to the complaint on or before October 24, 2018" but failed to do so. (Doc. 8, p. 9).

DISCUSSION

A. Motion to Strike

Courts may strike from a pleading "any redundant, immaterial, impertinent, or scandalous matter." Fed. R. Civ. P. 12(f). Motions to strike are disfavored and will usually be denied unless it is clear a pleading is insufficient as a matter of law. *See, e.g., Meth Lab Cleanup, LLC v. Spaulding Decon, LLC*, 2011 WL 398047, *1 (M.D. Fla. 2011). Generally, a motion to strike will "be denied unless the allegations have no possible relation to the controversy and may cause prejudice to one of the parties." *PNC Bank v. Maranatha Properties, Inc.*, No. 5:15-CV-563-OC-30PRL, 2016 WL 1627115, at *1 (M.D. Fla. Apr. 25, 2016) (quoting *Seibel v. Soc'y Lease, Inc.*, 969 F. Supp. 713, 715 (M.D. Fla. 1997)).

The Court agrees with American Economy that Kingshill's request for consequential damages should be stricken because Kingshill has not pleaded a basis for awarding them. Consequential damages are "Losses that do not flow directly and immediately from an injurious act but that result indirectly from the act." DAMAGES, Black's Law Dictionary (10th ed. 2014); *see also Keystone Airpark Authority v. Pipeline Contractors, Inc., et al.*, No. 1D17-2897, 2018 WL 6174666, at *2 (Fla. Dist. Ct. App. Nov. 27, 2018) ("[C]onsequential damages ... stem from losses incurred by the non-

breaching party in its dealings, often with third parties, *which were a proximate result of the breach*, and which were reasonably foreseeable by the breaching party at the time of contracting.’ ”) (emphasis added); and *BPI Sports, LLC v. Labdoor, Inc.*, No. 15-62212-CIV-BLOOM, 2016 WL 739652, at *6 (S.D. Fla. Feb. 25, 2016). Because consequential damages are special damages, Kingshill was required to plead them specifically in the Complaint. Fed. R. Civ. P. 9(g).

Kingshill argues it pleaded a basis for consequential damages when it alleged “it had to retain the services of an insurance claims professional (Public Adjuster) to pursue its claim.” (Doc. 8, p. 6). Assuming that is true, the expenses of obtaining a public adjuster did not flow from American Economy’s alleged breach of contract.¹ Instead, Kingshill chose to incur those costs just three days after American Economy sent an adjuster to inspect the fire damage and before American Economy made a coverage determination. Because these costs were incurred in May—before the alleged breach occurred when American Economy partially denied coverage on June 1—Kingshill’s public adjuster expenses cannot be categorized as consequential damages. And because Kingshill points to no other allegations supporting a claim of consequential damages in this action, the Court concludes Kingshill failed to plead a basis for them. As such, the Court will strike the request for consequential damages as immaterial and impertinent.

¹ Kingshill does not argue that it would have been entitled to recover its public adjuster expenses had there not been a breach of contract, nor is the Court aware of any case law that would support such an argument. So the injurious act from which the consequential damages must flow in this case is American Economy’s alleged breach of contract and not the fire loss.

While that conclusion resolves the Motion to Strike, another of American Economy's arguments merits a brief discussion. American Economy argues that Kingshill's request to be compensated for the expenses of its public adjuster should be categorized as extracontractual damages that can only be recovered in a bad faith lawsuit. The Court agrees with the major premise, although it is misapplied to the facts of this case.

If an insured believes that its insurer is not attempting to settle a claim in good faith and hires a public adjuster to refute the damage estimate or coverage determination proffered by an insurer, such expenses could be considered consequential damages. And under those facts, the consequential damages would be extracontractual damages that could only be recovered in a bad faith action, pursuant to *QBE Ins. Corp. v. Chalfonte Condominium Apartment Ass'n, Inc.*, 94 So.3d 541 (Fla. 2012).

But those are not the facts before the Court. Kingshill does not allege that it retained its public adjuster because American Economy acted in bad faith. Instead, it alleges it retained a public adjuster to assist it in submitting its claim.

B. Construed Motion for Default

Kingshill argues that the Court should enter a default against American Economy because it did not file an Answer or responsive pleading by October 24, 2018, as required by a state court order. American Economy argues in response that its Motion to Strike should be considered a response, and that default judgments are otherwise disfavored.

The Court concludes neither party is entirely in the right. First, Kingshill goes too far in arguing that American Economy was ordered to file "an Answer or a responsive pleading." (Doc. 8, p. 9). The state court order only required American Economy to respond

to the Complaint by October 24, 2018—it did not specify the form of the response as a pleading as opposed to a motion. So the Court concludes Kingshill is incorrect that American Economy was required to file an Answer or other pleading by October 24, 2018.

But American Economy *was* ordered to respond to the Complaint by October 24, 2018, and failed to do so. It filed its Motion to Strike on October 26, 2018, two days after the agreed date for it to file a response. So the Court concludes that American Economy failed to respond to the Complaint in the time required by the state court order.

Defaults are generally disfavored because of the strong policy of determining cases on the merits. *Surtain v. Hamlin Terrace Found.*, 789 F.3d 1239, 1244–45 (11th Cir. 2015). “[D]istrict courts have broad discretion to determine whether a default judgment is appropriate in a given case.” *Estate of Faull by Jacobus v. McAfee*, 727 F. App’x 548, 552 (11th Cir. 2018).

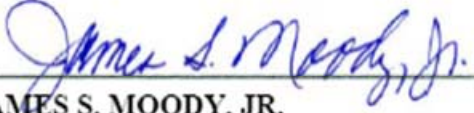
Although American Economy failed to respond by the deadline ordered in state Court, the Court concludes a default is not warranted. American Economy filed a meritorious Motion to Strike two days after the deadline, and there is no information before this Court that the two-day delay was willful or that it prejudiced Kingshill. So in light of the strong policy in favor of deciding cases on their merits, the Court concludes Kingshill’s construed motion for entry of default should be denied.²

² The Court also notes that Kingshill did not comply with Local Rule 3.01(g) before requesting the Court enter a default against American Economy. Both parties are reminded of their obligation to confer in good faith before filing motions with the Court.

Accordingly, it is ORDERED AND ADJUDGED that:

1. Defendant American Economy Insurance Company's Motion to Strike Plaintiff's Claim for Consequential Damages (Doc. 3) is GRANTED.
2. Plaintiff's construed motion for entry of default (Doc. 8) is DENIED.

DONE and **ORDERED** in Tampa, Florida, this 5th day of December, 2018.



JAMES S. MOODY, JR.
UNITED STATES DISTRICT JUDGE

Copies furnished to:
Counsel/Parties of Record