UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

REX D. TOWNSLEY, TODD A. TOWNSLEY, AND THE TOWNSLEY LAW FIRM, LLP	**CIVIL ACTION NO. 21-00293**
VS.	**JUDGE JAMES D. CAIN, JR.**
OHIO SECURITY INSURANCE COMPANY	**MAGISTRATE JUDGE KAY**

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT ON BAD FAITH

Respectfully submitted,

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Plaintiffs, Rex D. Townsley, Todd A. Townsley, and The Townsley Law Firm, LLC (collectively "Townsley"), respectfully submit this Memorandum in Opposition to Defendant's Motion for Summary Judgment on Bad Faith.

I. Overview

Plaintiffs are a law firm located in Lake Charles, Louisiana. At all relevant times, Plaintiffs were insured for both property damage and business interruption under a policy of insurance issued by Defendant. Following Hurricanes Laura and Delta, which both devastated Lake Charles and surrounding areas, Plaintiffs submitted a detailed proof of loss setting forth their loss of income and extra expenses incurred as a result of the storms. Plaintiffs sought payment under several coverages, including Business Income and Extra Expenses, Civil Authority, Off Premises Power Failure and Dependent Properties.

Despite its contention that it has not denied coverage under all of these provisions, Defendant has not paid a single cent towards any of Plaintiffs' business losses. Defendant's interpretations of its own policy are simply incorrect and Defendant has no good faith, reasonable basis for its refusal to pay anything towards Plaintiffs' losses. The Louisiana Supreme Court has

made clear that, as a matter of law, an insurance company's misinterprets its policy at its own risk and will be liable for penalties if it does so. At a minimum, factual questions preclude judgment as a matter of law on the issue of whether Defendant's failures were arbitrary and capricious.

I. Facts

The undisputed material facts supporting this Motion are set forth below and in the accompanying Statement of Undisputed Facts:

1. The Insurance Policy

Plaintiffs were insured under a policy of insurance bearing policy number BZS (21) 57 17 23 57 issued by Defendants with an effective period from June 28, 2020 to June 28, 2021 (herein "The Policy"). The Policy insured Plaintiffs' office located at 3102 Enterprise Boulevard, Lake Charles, Louisiana. A certified copy of the Policy is in the record at Doc. 25-2 at pg. 4, et seq.

a. Business Income and Extra Expense Coverage

As part of their insurance package, Plaintiffs paid additional premiums for coverage for Business Income and Extra Expenses. The Business Income coverage pays for the "actual loss of Business Income you sustain due to the necessary suspension of your "operations" so long as the "suspension [is] caused by direct physical loss of or damage to the property at the described premises." Doc. 25-2 at pg. 42. Concomitant with the Business Income coverage, Defendant must also pay all "necessary Extra Expenses…that [] would not have been incurred if there had been no direct physical loss or damage at the described premises." Doc. 25-2 at pg. 43.

b. Civil Authority Coverage

Among the various other business income coverages for which Plaintiffs paid, was a coverage referred to as "Civil Authority" coverage. That coverage provides in pertinent part as follows:

> We will pay for the actual loss of Business Income you sustain and necessary Extra Expense caused by action of a civil authority that prohibits access to the described premises due to direct physical loss or damage to property, other than at the described premises, caused by or resulting from any Covered Cause of Loss.

Doc. 25-2 at pg. 44. This coverage "begin[s] 72-hours after the time of [the Civil Authority] action and will apply for a period of up to three consecutive weeks…" Doc. 25-2 at pg. 44.

c. Dependent Property Coverage

Plaintiffs were also insured for "actual loss of Business Income…sustain[ed] due to physical loss or damage at the premises of a dependent property caused by or resulting from any Covered Cause of Loss." Doc. 25-2 at pg. 46. The Policy Endorsement covering the Businessowners Property Plus Extension Endorsement purchased by Plaintiffs describes the "Limits of Insurance or Change in Condition" for Dependent Property coverage to have a limit of "$50,000 or 30 days Actual Loss Sustained." Doc. 25-2 at pg. 125.

d. Off Premise Power Failure Coverage

Finally, as part of the Businessowners Property Plus Extension Endorsement purchased by Plaintiffs they were also insured for "up to $25,000 for loss of Business Income and Extra Expense caused by the failure of power or other utility service supplied to the described premises if the failure occurs away from the described premises…[and] result[s] from direct physical loss or damage by a Covered Cause of Loss." Doc. 25-2 at pg. 133.

2. <u>The Closure of Plaintiffs' Business</u>

Plaintiffs closed their business on August 25, 2020 in response to the Calcasieu Parish Police Jury's mandatory evacuation order issued the same day. Doc. 25-2 at pg. 175. This order was extended as a result of the devastation caused by Hurricane Laura and remained in effect until September 11, 2020. Doc. 25-2 at pg. 176.

Concurrent with the Parish's order, the City of Lake Charles also issued a business closure order due to "…the effects of a Category 4 Hurricane Laura which devastated the City…and the extensive physical damage to all areas of the City of Lake Charles and lack of electricity and potable water." Ex. A. This order required "all businesses that are not essential to the recovery effort…[to] remain closed until they have electricity, water and sewer service and are otherwise safe to occupy." This order was extended on September 11, 2020, despite the lifting of the Parish order.

While Plaintiffs did close in response to the actions of Civil Authority described above and remained close, in part, due to those actions, Plaintiff's office also sustained damage that caused a suspension in operations until at least September 28, 2020. Specifically, as set forth in Plaintiffs' Answers to Interrogatories, Plaintiffs not only had a few ceiling tiles fall, but had water intrusion in the equipment room that housed all its electronic files. Doc. 25-3 at pg. 2. Without access to the files, the law firm could not operate. Ex. A. The drive housing the files could not be returned until both the damage to the equipment room was repaired and there was a reliable source of electricity (which was also the condition required for relief from the City's business closure order). Ex. A. Even once the drive was returned to the office at the end of September 2020, access was limited to internal files only and external communication and access was impossible. Ex. A.

Despite efforts to set up remote work capabilities, due to the damage caused by Hurricane Laura to the Suddenlink internet grid, Plaintiffs were never able to get remote access working reliably. Ex. A. Unlike during the COVID-19 quarantine – which did not involve any physical damage to the premises or to off-site, dependent properties such as Suddenlink – after Hurricane Laura Plaintiffs' employees were not able to work remotely. Ex. A. It was not until at least September 28, 2020 that the building was safe and dry enough to return the drives and work could

resume. Ex. A. All of this was recently confirmed in the deposition of Eric Steen, whose testimony completely destroys Defendant's factual theory regarding remote work. Mr. Steen testified that "99.99%" if not 100% of the employees at the Firm were prohibited from working until at least September 28, 2020. Ex. A.

Similarly, in response to a mandatory evacuation order issued by the Calcasieu Parish Police Jury, the Firm was also closed for Hurricane Delta from October 7 through October 13th. Ex. A. The Firm was also without power during Hurricane Delta until October 11th. The 14th Judicial District Courthouse Complex was closed as a result of Hurricane Delta until October 15, 2020.

3. Plaintiffs' Proof of Loss

On November 6, 2020, Plaintiffs provided Defendants with two separate, detailed proofs of loss setting forth their lost business income as a result of both Hurricanes Laura and Delta. The proofs of loss are included in Defendant's claims file attached to its motion for summary judgment. The proofs included not only calculations of the amounts of the loss, but also evidence of the civil authority action and invoices of various extra expenses incurred.

Interestingly, Defendant asserts in support of its motion that Plaintiffs "never provided Ohio Security any information or documents showing that the Townsley Law Firm lost any revenue because of the mandatory evacuation orders." Doc. 25-1 at pg. 6. To the contrary, and as proven by Defendant's own exhibits in support of its motion, Plaintiffs provided Defendant with a plethora of financial information to support its lost revenues. Plaintiffs also provided Defendant with invoices for Extra Expenses actually incurred.[1]

1 As will be discussed in more detail, Defendant's untenable position that Plaintiffs were able to work remotely and, thus did not lose income, cannot be reconciled with its own failure to pay the invoice of Calcasieu Computers allegedly related to that remote work (which has now been proven never occurred).

4. Defendant's Denial of Plaintiffs' Claim

In response to receipt of Plaintiffs' proof of loss, on November 17, 2020, Defendant's adjuster sent two emails containing a total of 55 questions relating to the loss. Ex. A. These questions included specific questions about the evacuation orders and Plaintiffs' inability to access its office. Plaintiffs responded to the questions on December 9, 2020. Ex. A. Plaintiffs continued to provide additional information to Defendant relative to the business loss claim. Finally, on January 26, 2021, Plaintiffs received a denial letter. Ex. A. Plaintiffs have never been paid one cent for either lost revenues or business expenses incurred as a result of the Hurricanes. Ex. A.

III. Law and Argument

In this case there exists no good faith dispute regarding coverage and Defendant's failure to pay any amounts towards lost business income or extra expenses was arbitrary and capricious. At a minimum, a genuine issue of material fact precludes judgment as a matter of law on Plaintiffs' bad faith claims and Defendant's motion for summary judgment should be denied.

1. Summary Judgment Standard

The standard for summary judgment is found in Federal Rule of Civil Procedure 56, and its provisions are familiar to this Honorable Court. In short, Plaintiff is entitled to move for summary judgment, in part, if there is no genuine dispute of material fact and Plaintiff is entitled to judgment as a matter of law. Fed. R. Civ. P. 56. This Honorable Court has diversity jurisdiction over the present case, and as such Louisiana substantive law applies. *Erie R.R. Co. v. Tompkins,* 304 U.S. 64, 78, 58 S.Ct. 817, 82 L.Ed. 1188 (1938). The applicable Louisiana "substantive law will identify which facts are material." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 2510, 91 L. Ed. 2d 202 (1986).

2. Louisiana Law on Bad Faith

In *Louisiana Bag Co. Inc. v. Audubon Indemnity Co.*, 2008-453 (La. 12/2/08), 999 So.2d 1104, 1117 the Louisiana Supreme Court made clear the consequences of an insurer's misinterpretation of its own insurance policy, explaining as follows:

> Louisiana jurisprudence is clear that, when there is a dispute over the extent of coverage afforded by an insurance policy, **the insurer bears the risk of misinterpreting its own policy and will be liable for penalties for its errors.** (Citations omitted). This court has found that an insurer "must take the risk of misinterpeting its policy provisions" and that, if an insurer "errs in interpreting its own insurance contract, such error will not be considered as a reasonable ground for delaying payment of benefits, and it will not relieve the insurer of the payment of penalties and attorney's fees. (Citations omitted). "In other words, insurers should not have their policy provisions interpreted at the expense of the insured, especially when they are charged with knowledge of their policy's contents." (Citations omitted).

Fifth Circuit precedent further confirms the Louisiana Supreme Court's holding in *Louisiana Bag*. In *Fidelity & Casualty Co. of New York v. Superior Casing Crews, Inc.*, 642 F.2d 147, 149 (5th Cir. 1981), the Fifth Circuit found that "[m]isinterpretation by an insurer of its policy of insurance is not a reasonable ground for delaying payment of benefits and does not relieve an insurer of the payment of attorney's fees." Moreover, where coverage is acknowledged – as in this case – the failure to pay after receipt of satisfactory proof of loss is a per se statutory violation under *Louisiana Bag* and its progeny.

Defendant's receipt of satisfactory proof of loss triggered the running of the applicable statutory time limits within which it was required to pay. *Boudreaux v. State Farm Mutual Automobile Insurance Company*, 896 So.2d 230, 234, 2004-1339 (La. App. 4 Cir. 2/2/05). Proof of loss is a flexible requirement and is not required to be in any formal style. *Louisiana Bag Company, Inc. v. Audubon Indemnity Company*, 975 So.2d 187, 190, 2007-1103 (La. App. 3 Cir. 1/30/08), *affirmed*, 999 So.2d 1104, 2008-0453 (La. 12/02/08). It can be as simple as: (1) a

handwritten estimate of the cost of repairs (*Sevier v. United States Fid. & Guar. Co.*, 497 So. 2d 1380 (La. 1986)); (2) personal inspection of an insured's property by an independent adjuster (*J.R.A. Inc. v. Essex Ins. Co.*, 2010-0797 (La. App. 4 Cir. 5/27/11), 72 So. 3d 862, 881)); (3) proof of insurance, photographs, and salvage information (*State Farm Mut. Auto. Ins. Co. v. Norcold, Inc.*, 2011-1355 (La.App. 3 Cir. 4/4/12), 88 So. 3d 1245)); and (4) an independent adjuster's opportunity to discover damages but failure to do so (*Aghighi v. Louisiana Citizens Prop. Ins. Corp.*, 2012-1096 (La. App. 4 Cir. 6/19/13), 119 So. 3d 930, 934, *writ denied*, 2013-1737 (La. 10/20/13), 124 So.3d 1102)).

In this case, even setting aside the business income claim and the amount thereof, Defendant has acknowledged certain coverages and, as a result, should have paid certain indisputable amounts such as invoices for extra expenses and payroll (which is a continuing operating expense to be considered separate and apart from the lost revenue/business income under the Policy). Defendants arguments completely ignore their failures to pay these amounts, focusing instead solely on the business income, which is just one part of the claimed and covered loss.

a. The insurer's duty of good faith is broad.

La. R.S. 22:1973(A) states that "[a]n insurer…owes to his insured a duty of good faith and fair dealing" and states further that "[t]he insurer has an affirmative duty to adjust claims fairly and promptly and to make a reasonable effort to settle claims with the insured…" In *Kelly v. State Farm Fire & Cas. Co.*, 169 So.3d 328 (La. 5/5/15), the Louisiana Supreme Court answered two certified questions under this statute from the United States Fifth Circuit Court of Appeals. In *Kelly*, the Louisiana Supreme Court discussed Section 1973(A) as imposing an affirmative duty on an insurer to take positive action to comply with this legal standard when dealing with its on insureds on first-party claims. The court in *Kelly* held that an insurer did not have to receive a firm

offer to settle from an insured for its obligations under Subsection A to be implicated. The *Kelly* court also held that misrepresentations under La. R.S. 22:1973(B) are not limited to only misrepresentations about coverage under the policy, but also extend to any conduct by the insurer that amounts to an assertion that is not in accord with the facts.

More recently, in October 2019, the Louisiana Supreme Court decided the case of *Smith v. Citadel Insurance Company*, 285 So.3d 1062 (La. 10/22/19) wherein it held that "in every case, the insurance company is held to a high fiduciary duty to discharge its policy obligations in good faith." In *Smith*, the Louisiana Supreme Court made clear that while the "duty of good faith owed by the insurer to the insured is codified in La. R.S. 22:1973, the bad faith cause of action by an insured against the insurer does not rest solely on this statute." *Id.* In other words, the duty of good faith as it related to a first party claim by an insured, is not limited to merely enumerated violations but includes a general duty to adjust claims fairly and promptly.

b. The insurer's duty of good faith is continuing.

An insurer's duty of good faith and fair dealing is continuing until the insurer complies with that duty. *Montgomery v. State Farm Fire & Cas. Co.*, 103 So.3d 1222, 1230 (2012). In *Montgomery*, the insurer paid the claimants original claim in full. It then received a supplemental claim that contained some errors. State Farm, relying on those errors, failed to conduct any additional investigation and refused to pay the supplemental claim in its entirety. In upholding an award of penalties to the claimant, the Louisiana Court of Appeals for the Third Circuit held that "[b]y adopting such a defensive stance in this matter, State Farm acted at its own peril and subjected itself to being liable for statutory penalties and attorney fees in the event its action were later determined to be arbitrary and capricious." *Montgomery*, 103 So.3d at 1231; *see also OBrian v. Allstate Ins. Co.*, 420 So.2d 1222 (1982) (finding an insurer in bad faith where it disputed the

amount of a claim but did nothing to further investigate or determine the value actually owed).

c. The insurer's duty of good faith requires proper application of policy.

d. The insurer's failure to act amounts to a denial of the claim.

3. **Business Income and Extra Expense Coverage**

Contrary to Defendant's claim that the damage to the Firm was "quickly and easily repaired", the fact is that Plaintiffs could not return to their office (nor could their electronic filing system) until September 28, 2020. Defendant's own policy makes clear that it is not the amount or cost of the damage to the property that is relevant, but rather whether the "suspension [of operations is] caused by direct physical loss of or damage to the property."

Defendant was provided sufficient information beginning on November 6, 2020 and continuing through the Deposition of Eric Steen of Calcasieu Computers taken September 27, 2021 proving that Plaintiffs had suffered both physical damage and economic loss at the covered property. Defendant has not provided any evidence or argument that Plaintiffs could have operated despite the damage and the uncontradicted evidence from Plaintiffs proves otherwise. Thus, at a minimum, the issue of whether Defendant had any good faith basis to deny the claim is a question of fact to be resolved by the jury.

4. **Civil Authority Coverage**

With respect to the Policy's Civil Authority Coverage, Defendant continues to rely on its misinterpretation of its own insurance policy as a grounds to avoid the imposition of penalties. Louisiana law is clear that an insurer bears the "risk of misinterpreting its policy provisions" and if the insurer "errs in interpreting its own insurance contract, such error will not be considered as a reasonable ground for delying payment of benefits, and it will not relieve the insurer of the payment of penalties and attorney's fees." *Louisiana Bag Co., Inc. v. Audubon Indem. Co.*, 2008-

0453 (La. 12/2/08) 999 So.2d 1104, 1117 quoting *Carney v. Am. Fire & Indem. Co.*, 371 So.2d 815, 819 (La. 1979) citing *Albert v. Cuna Mut. Ins. Soc'y*, 255 So.2d 170 (La. App. 3 Cir. 1971). If there is a reasonable dispute as to the amount of loss, the insurer can avoid the imposition of penalties by unconditionally tending the undisputed portion, but an insurer will not be relieved of paying penalties and attorney's fees where it denies coverage based on a misapplication of its own policy. *See Id; see also LeBlanc v. Underwriters at Lloyd's, London*, 402 So.2d 292, 299-300 (La. App. 3 Cir. 7/22/81); *see also Chrysler Credit Corp. v. Dairyland Ins. Co.*, 491 So.2d 402, 405 (La. App. 1 Cir. 1986)(an error in an insurer's interpretation of its own insurance policy is not a reasonable ground for delaying payment).

Defendant continues to cite to the *Brennan's* case as justification for its failure to tender amounts under the applicable Civil Authority Coverage. The problem for Defendant is that the facts of *Brennan's* are not the same as the facts here. In that case, Hurricane Gustav never impacted the New Orleans area; thus, while the evacuation order did qualify as an action of civil authority, there was no attendant physical damage to property necessary to complete the conditions to coverage. Here, it is indisputable that every element of Civil Authority coverage was present in this case, was public knowledge, and was provided to Defendant in November 2020 as part of Plaintiff's Proof of Loss.

5. Dependent Property Coverage

Interestingly, with regards to the Dependent Property coverage, Defendant takes the position that it has neither denied nor accepted coverage, even now, 13-months after the storm. This position does not relieve Defendant of a finding of bad faith. To the contrary, it seems to suggest that Defendant is definitely acting in bad faith. As cited above, Defendant has a continuing obligation to adjust this claim even after litigation commences. Despite being provided a wealth

of information, Defendant has not made any tender of any amount whatsoever under Dependent Property Coverage. Defendant's claim that it needs more information is a factual question for the jury to resolve.

6. Off Premises Power Failure Coverage

Remarkably, with regards to Plaintiff's claim under the Off Premises Power Failure (OPPF) provision in the Policy, Defendant now claims that it has accepted coverage under both hurricane claims for OPPF. This is an interesting judicial confession considering that not a single penny has been paid to Plaintiff towards any business income loss or extra expenses under OPPF or any other coverage. Under this coverage, Plaintiff agrees that the limit of liability is $25,000 (per storm), which begs the question of why Defendant has not paid Plaintiff at least $50,000 or any of the Extra Expenses it incurred as a result. The Proof of Loss submitted by Plaintiffs demonstrates that one day of revenue far exceeds the $25,000 per storm limit – there is no question that the entire $25,000 is owed and there is no excuse for Defendant's failure to pay it.

This also begs the question of why Defendant has not paid the invoices from Calcasieu Computers for the relocation of Plaintiffs' servers to Lafayette. Defendant has now admitted that it owes two policy limits under this coverage plus expense and yet has paid nothing. It is hard to fathom what the defense to bad faith is on these amounts, but Defendant is certainly not entitled to judgment as a matter of law based on this acknowledgement of coverage yet failure to pay.

IV. Conclusion

Plaintiffs purchased business income coverage from Defendant with the reasonable expectation that its lost business income would be compensated in the event of a catastrophic Hurricanes devastating the surrounding area and preventing Plaintiffs from accessing its office.

Defendant had and still has no excuse for its actions and is not entitled to judgment as a matter of law dismissing Plaintiff's bad faith claims.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on 1st day of October, 2021, a copy of the foregoing pleading was filed and sent to all counsel of record by operation of the Court's CM/ECF system.

s/Somer G. Brown
SOMER G. BROWN