IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
FLORENCE DIVISION

Golf Colony Resort II at Deertrack HOA, Inc., Plaintiff, vs. Empire Indemnity Insurance Company, Defendant.	)	**Case No. 4:19-cv-03102-JD**

Golf Colony Resort III at Deertrack HOA, Inc.., Plaintiff, vs. Empire Indemnity Insurance Company, Defendant.	)	**Case No. 4:19-cv-03103-JD**

Golf Colony Resort IV at Deertrack HOA, Inc. Plaintiff, vs. Empire Indemnity Insurance Company, Defendant.	)	**Case No. 4:19-cv-03104-JD**

Golf Colony Resort V at Deertrack HOA, Inc. Plaintiff, vs. Empire Indemnity Insurance Company, Defendant.	)	**Case No. 4:19-cv-03105-JD**
Golf Colony Resort VI at Deertrack HOA, Inc., Plaintiff, vs. Empire Indemnity Insurance Company, Defendant.	)	**Case No. 4:19-cv-03106-JD**
Golf Colony Resort VII at Deertrack HOA, Inc., Plaintiff, vs. Empire Indemnity Insurance Company, Defendant.	)	**Case No. 4:19-cv-03107-JD**
Golf Colony Resort X at Deertrack HOA, Inc., Plaintiff, vs. Empire Indemnity Insurance Company, Defendant.	)	**Case No. 4:19-cv-03108-JD**

ORDER

This case is before the Court on Defendant Empire Indemnity Insurance Company's ("Empire" or "Defendant") Motion for Summary Judgment (DE 40) and Empire's Motion in Limine to Exclude the Testimony of Lewis O'Leary (DE 42).[1] Plaintiff Golf Colony Resort II at Deertrack HOA, Inc., ("Golf Colony" or "Plaintiff") has not filed a Response or otherwise objected to Empire's motions.[2] Because Defendant's motion is without opposition, the Court grants Defendant's Motion for Summary Judgment for the reasons stated herein. However, the Court declines to rule on Defendant's Motion in Limine to Exclude the Testimony of Lewis O'Leary because it is moot.

BACKGROUND

This is a breach of contract case filed by Plaintiff after waiting almost three years to notify Defendant of the claim. Plaintiff alleges Defendant breached insurance policy number PCP9466217-04 (the "Policy") and seeks declaratory judgment because Defendant purportedly denied Plaintiff's insurance claim, arising from alleged damages sustained by the insured as a result of Hurricane Matthew, which occurred on October 8, 2016 (the "Claim"). Empire provided commercial property insurance coverage to Plaintiff effective May 4, 2016 to May 4, 2017. (DE 1-2, p. 8.) The Policy provided coverage "for direct physical loss of or damage to Covered Property at the premises described in the Declarations caused by or resulting from any Covered Cause of Loss." (DE 1-2, p. 23) The Empire Policy has certain duties of promptness in the event

[1] This case is nearly identical, factually and legally, to six (6) other cases currently pending before the District (4:19-cv-03102 (this case), 4:19-cv-03103, 4:19-cv-03104, 4:19-cv-03105, 4:19-cv-03106, 4:19-cv-03107, and 4:19-cv-03108). This Order shall be filed simultaneously in all seven (7) cases listed herein as the decision of the Court in the herein referenced matters.

[2] As provided in the Court's Conference and Scheduling Order, "[a]s a general rule, when no timely response is filed to any motion, the Court will grant the motion with the notation that it is being 'granted without opposition.'" (DE 12, p. 3.)

of a claim being presented to the insurer that are described Section E (3) of the of the Condominium Association Coverage Form which provided:

> 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.

(DE 1-2, pp. 31-32.) On or about October 8, 2016, Hurricane Matthew made landfall in South Carolina. (DE 21, p. 1, ¶ 1.) Prior to Hurricane Matthew hitting South Carolina in October of 2016, the buildings belonging to the various Golf Colony plaintiffs had experienced numerous leak issues. (DE 41, pp. 4-5.) However, the various Golf Colony plaintiffs did not keep a master log or list of unit owners' complaints. Therefore, Plaintiff does not know definitively if there were leaks or if other repairs were made to the units. (DE 41-1, pp. 3-4.) In addition, on March 20, 2018, 18 months before Empire was notified of the Hurricane Matthew claim, a roofer, Mr. Jason Grice of Lennox Roofing Solutions, Inc. ("Lennox") informed Plaintiff that a hailstorm had damaged the Plaintiff's roofs. (DE 41-6, pp. 3-4.) On May 15, 2018, Mr. Couture, Plaintiff's property manager, reported damage to the roofs of the condominium buildings by hail and/or wind (unrelated to Hurricane Matthew) to their property insurer at that time, certain Underwriters at Lloyd's, London, whose claims were administered by a company called ICAT Boulder Claims (those insurers are collectively referenced as "ICAT Boulder Claims"), Policy Number 39-8590110006-S-00. The date of loss for this hail and/or wind damage was listed as March 20, 2018. (DE 41-7, DE 41-2, pp. 3-4.)

Between June 1, 2018 and June 20, 2018, engineers hired by ICAT Boulder Claims, Christopher C. Basile, P.E. and J. Parks Payne, Jr., P.E. of Rimkus Consulting Group, Inc.

("Rimkus"), inspected Plaintiff's property. (DE 41-8, p. 6.) On July 20, 2018, J. Parks Payne Jr., P.E. of Rimkus prepared a Report of Findings (the "Rimkus Report") regarding the hail claim made by Plaintiff. The Rimkus Report concluded that the roofs on the Plaintiff's buildings were old and were in overall poor condition and showed normal wear, tear and deterioration due to normal aging and exposure to environmental conditions over the years. In addition, any hail that possibly impacted the roofs did not cause significant damage or alter the remaining service life of the roof. Id. at pg. 2.

On September 3, 2018, ICAT Boulder Claims wrote to Plaintiff declining Plaintiff's request for coverage, citing the wear and tear exclusion and the faulty or inadequate maintenance exclusion. ICAT Boulder Claims indicated that its investigation determined that the Plaintiff suffered no storm-related damage and that all existing damage was due to age, wear and tear, decay, deterioration, cracking, shrinking or expansion, marring, and maintenance. (DE 41-9 .)

Shortly after the ICAT Boulder Claims denial, Plaintiff retained a new consultant, Lewis O'Leary of ProBuilders of the Carolinas ("ProBuilders"), to verify or dispute the Rimkus Report's findings. (DE 41-6, p. 5.) Mr. O'Leary is not a licensed professional engineer, but rather is a licensed general contractor. (DE 41-6, p. 6.) Mr. O'Leary conducted six (6) inspections of the Golf Colony properties on June 1, 4, 5, 7, 2018, November 27, 2018, and March 4, 2019, and thereafter compiled his Preliminary Report of Findings dated May 20, 2019 (the "ProBuilders Report"). (DE 41-10.) In his Report, Mr. O'Leary indicated his agreement with the Rimkus Report that the hail damage to the Plaintiff's property was relatively minor. (DE 41-10, p. 23.) In addition, the ProBuilders Report opined that Hurricane Matthew may have caused damage to the roof, structure, sheetrock and interiors. (DE 41-10, pp. 23-24.)

On September 10, 2019, nearly three (3) years after the date of loss, Plaintiff sent its first property loss notice to Empire. (DE 41-2.) Between the time Hurricane Matthew made landfall in South Carolina in 2016, this region of South Carolina has experienced three separate major hurricanes: Hurricane Irma in 2017, Hurricane Florence in 2018, and Hurricane Dorian in 2019. (DE 41-1, p. 5.) Empire attempted to investigate the claims, despite the late notice. However, Plaintiff filed this suit 15 days after sending notice of its claim to Defendant. The case was later removed to the District of South Carolina. (DE 1-1.)

LEGAL STANDARD

Federal Rule of Civil Procedure 56

The party seeking summary judgment bears the initial burden of demonstrating that there is no genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). "A fact is 'material' if proof of its existence or non-existence would affect disposition of the case under applicable law. An issue of material fact is 'genuine' if the evidence offered is such that a reasonable jury might return a verdict for the non-movant." Wai Man Tom v. Hosp. Ventures LLC, 980 F.3d 1027, 1037 (4th Cir. 2020) (citation omitted). Once the movant has made this threshold demonstration, the nonmoving party, to survive the motion for summary judgment, must demonstrate specific, material facts that give rise to a genuine issue. Celotex Corp., 477 U.S. at 323. Under this standard, 'the mere existence of a scintilla of evidence' in favor of the non-movant's position is insufficient to withstand the summary judgment motion. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). "Likewise, conclusory allegations or denials, without more, are insufficient to preclude granting the summary judgment motion." Wai Man Tom, 980 F.3d at 1037.

"Summary judgment cannot be granted merely because the court believes that the movant will prevail if the action is tried on the merits." Jacobs v. N.C. Admin. Office of the Courts, 780 F.3d 562, 568 (4th Cir. 2015) (quoting 10A Charles A. Wright et al., Federal Practice & Procedure § 2728 (3d ed. 1998)). The court may grant summary judgment only if it concludes that the evidence could not permit a reasonable jury to return a favorable verdict. "Therefore, courts must view the evidence in the light most favorable to the nonmoving party and refrain from weighing the evidence or making credibility determinations." Variety Stores, Inc. v. Wal-Mart Stores, Inc., 888 F.3d 651, 659 (4th Cir. 2018) (internal quotation marks omitted and alterations adopted). A court improperly weighs the evidence if it fails to credit evidence that contradicts its factual conclusions or fails to draw reasonable inferences in the light most favorable to the nonmoving party. Id. at 659-60.

DISCUSSION

Defendant contends that this Court should grant it summary judgment because Plaintiff failed to provide it prompt notice of its alleged loss as required by the Policy. Defendant asserts that Plaintiff's two year and eleven month delay in providing notice of its claim bars recovery under the Policy's Duties in the Event of Loss or Damage provision. Plaintiff does not contest or object to Defendant's motion or grounds for dismissal. Since Plaintiff does not interpose an objection, this Court agrees. As a general rule, breach of an insurance policy's notice clause automatically relieves the insurer of its obligations under the contract, including the payment of proceeds due, and the duty to defend and to indemnify the insured. See Lee v. Metropolitan Life Ins. Co., 186 S.E.2d 376, 381 (S.C. 1936) ("No rule of law is more firmly established in this jurisdiction than that one suing on a policy of insurance, where the notice required by the policy is not timely given, cannot recover.") The burden of proof for the insured's failure to notice rests

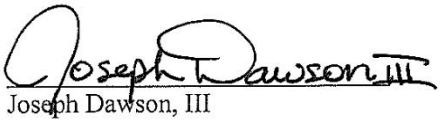
with the insurer. See Vt. Mut. Ins. Co. v. Singleton by & ex rel. Singleton, 316 S.C. 5, 11, 446 S.E.2d 417, 421 (1994). "The purpose of a notification requirement is to allow for investigation of the facts and to assist the insurer in preparing a defense." Id. "Where the rights of innocent parties are jeopardized by a failure of the insured to comply with the notice requirements of an insurance policy, the insurer must show substantial prejudice to the insurer's rights." Id.

It is undisputed that Empire did not receive a formal notice of loss from Plaintiff until nearly three (3) years after the storm event. Specifically, Hurricane Matthew hit South Carolina on or about October 8, 2016. Empire knew nothing of Plaintiff's Hurricane Matthew damage claims until, at the earliest, September 10, 2019, which was the date of Plaintiff's property loss notice. To construe "prompt" as encompassing a 35-month delay would remove all meaning from the word and fail to give effect to the intentions of the parties. See Schulmeyer v. State Farm Fire & Cas. Co., 579 S.E.2d 132 (2003) ("When a contract is unambiguous a court must construe its provisions according to the terms the parties used; understood in their plain, ordinary, and popular sense.") Moreover, the rights of innocent parties are not in jeopardy. Rather, the insurance in question here is first-party coverage; and therefore, Plaintiff cannot be an "innocent party" that "did nothing to jeopardize coverage." Here, under the terms of Section E(3) of the of the Condominium Association Coverage Form, the Plaintiff had an express duty to "[g]ive [Empire] prompt notice of the loss or damage, include a description of the property involved." Accordingly, Plaintiff cannot meet the innocent party exception because it had a duty under the Policy to inform Empire of any loss or damage as soon as possible.

CONCLUSION

For the foregoing reasons, Defendant's Motion for Summary Judgment (DE 40) is granted, and the Court declines to rule on Defendant's Motion in Limine to Exclude the Testimony of Lewis O'Leary (DE 42) because it is moot.

IT IS SO ORDERED.



Joseph Dawson, III
United States District Judge

December 2, 2021
Greenville, South Carolina