UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

BAYTREE, A CONDOMINIUM, SECTION EIGHT, INC.,

Plaintiff,

v. **Case No. 6:22-cv-2041-ACC-EJK**

CLEAR BLUE SPECIALTY INSURANCE COMPANY,

Defendant.

ORDER

This cause comes before the Court on the Motion for Summary Judgment as to Count I of the Complaint and Motion to Compel Appraisal (Doc. 30) filed by Plaintiff Baytree, A Condominium, Section Eight, Inc. ("Baytree") on April 20, 2023. Defendant Clear Blue Specialty Insurance Company ("Clear Blue") filed its Response (Doc. 35) and Baytree has filed a Reply (Doc. 36). Because there is a coverage dispute and appraisal is premature, the Motion will be denied as set forth below.

I. BACKGROUND

A. Factual Background

Plaintiff Baytree, a residential condominium association, instituted this action against Defendant Clear Blue, a surplus lines carrier. Baytree's property located at

80 Moree Loop in Winter Springs, Florida was covered under an insurance policy issued by Clear Blue, Policy No. AL92-0003560-00 (the "Policy"), covering the period from April 1, 2021 through April 1, 2022. (Doc. 30-2 ¶ 4; Doc. 34-1 (Winn Aff.[1]) ¶ 3). The Policy covers four separate buildings on the same premises—identified as Buildings 80, 90, 100, and 110—which have roofs covered with a combination of modified bitumen (low-slope roof) and shingles. (*Id.* ¶ 10). On January 27, 2022, Baytree notified Clear Blue of the loss to the property from sustained wind and water damage on April 11, 2021 as the result of a storm. (Doc. 30-2 ¶ 5; Doc. 34-1 ¶ 7).

On February 4, 2022, Clear Blue sent a "Reservation of Rights with Request for Information" advising that it would continue to investigate Baytree's claim "under a full and complete Reservations of Rights for late reporting" of the claim "approximately 8.5 months after the reported date of loss." (Doc. 34-1 at 122; *id.* ¶ 7). Clear Blue also stated:

> We are in the process of investigating the facts and circumstances of the loss as reported above and requesting additional time. In the meantime, we need some additional information in order to properly evaluate the claim for damage.
>
> **REQUEST FOR INFORMATION**
>
> To assist us with the investigation into your claim we request that you provide the following documents and information:

[1] Clear Blue submitted the affidavit of Terance E. Winn, Clear Blue's authorized representative. (Doc. 34-1).

1. Provide us with the roofing inspection report and estimate with photos.
2. Provide us with any receipts of damages associated with this loss, along with proof of payment associated with the receipts.
3. Documentation of roof maintenance and repairs, including supporting documentation on when the roof was last replaced.

(*Id.* at 122-23; *id.* ¶ 8). According to Clear Blue, Baytree did not provide documentation to Clear Blue responsive to the insurer's February 4, 2022 "Reservation of Rights with Request for Information" prior to initiating the lawsuit. (Doc. 34-1 ¶ 9).

Clear Blue assigned a claim number to the loss[2] and hired an independent adjuster who noted "what appeared to be long-term damages to the Property . . . prior repairs . . . [and] damage consistent with wind damage to ten (10) shingles on the roofs of the Property." (Doc. 34-1 ¶¶ 6, 11). The adjuster estimated the repair cost of roof damages due to wind at $2,022.48 (at replacement cost value), which constituted an amount below the Policy's applicable deductible. (*Id.* ¶ 11).

In addition, Clear Blue hired an engineer, Jaime S. Gold, P.E., to inspect Plaintiff's loss. Gold inspected the loss twice, on March 1, 2022, and again on May 11, 2022, and observed prior repairs to the roof coverings of the buildings, and to interiors of the condominium units reportedly damaged as a result of the April 11, 2021 loss. (*Id.* ¶ 12). Gold observed no evidence of wind or hail damage to the roof coverings of any of the four buildings, and he identified damages consistent with

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[2] Doc. 1-1 at 126; Doc. 34-1 ¶ 3 (Claim No. SWYCSCP00041 – the "Claim").

wind limited to: (i) two shingles on Building 90; (ii) three shingles on Building 100; (iii) five shingles on Building 110; and (iv) no evidence of wind or hail damage to the roof covering of Building 80. (*Id.*).

On June 27, 2022, Clear Blue sent Baytree's counsel a "Coverage Explanation" summarizing the engineer's findings and estimating a replacement cost of $2,022.48 for covered wind damage to Buildings 90, 100, and 110, and no damage to Building 80. (Doc. 30-3 (Hyman Aff.) at 3, 7-12). Clear Blue also notified Baytree that the Policy did not cover the claimed interior damage to the condominium units, and that repair costs for damages to the roofs—for the three roofs determined to be covered—would not exceed the applicable Policy deductible of $5,000. (*Id*. at 3, 7).[3] The "Coverage Explanation" also stated:

> Since there is not an amount of damage greater than your deductible, we are unable to provide you any payment of your claim at this time.
>
> If you believe you are owed more, please send us additional documentation in support of your claim. If we cannot agree on the final amount of your claim, your policy provides the right to invoke appraisal. . . . Invoking appraisal must be done prior to bringing any lawsuit against us on this matter.

(*Id*. at 7-8). Clear Blue concluded its June 27, 2022 Coverage Explanation with the following:

> All rights and defenses of . . . Clear Blue Specialty Insurance Company are reserved. . . .The company reserves the right to deny coverage to you or to anyone claiming coverage under this policy. . . . Clear Blue

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[3] The identical document was filed by Clear Blue. (Doc. 34-1 at 125-48).

> Specialty Insurance Company do[es] not, by this letter or otherwise, waive any rights or defenses.

(*Id.* at 12).

On July 27, 2022, Baytree disputed Clear Blue's valuation of the covered damage based on its own repair estimate, which valued the cost of the covered repairs at $1,191,799.52 for the four buildings at issue. (Doc. 30-3 at 3, 14).[4] At that point, Baytree asserted that it was invoking its right to appraisal under the Policy. (*Id.*)

On August 19, 2022, Clear Blue responded to Baytree and agreed "to participate in the appraisal of those areas of the subject claim in which coverage was extended" by Clear Blue. (Doc. 30-3 at 17). Clear Blue also stated:

> For any portion of the subject claim that goes beyond those areas specifically listed in the enclosed estimate, [Baytree's] demand for appraisal is hereby declined because coverage for same was not extended. As you know, appraisal is not available for claims, or portions of claims, wherein coverage is in dispute.

(*Id.*). Although Clear Blue also advised that Baytree could "reference the enclosed estimate" for a line-item list of those areas for which "coverage was extended," no separate estimate was actually enclosed or otherwise provided to Baytree. (*Id.* ¶ 7).

In an immediate response the same day, and a follow up on August 23, 2022, Baytree emailed Clear Blue requesting a copy of the omitted "estimate" listing the

[4] Although Baytree's July 27, 2022 letter refers to an "attached" repair estimate prepared by Covered Loss Consulting, a copy is not included in the version filed in the court record. (*See* Doc. 30-3 at 14).

areas Clear Blue was agreeing to appraise. (*Id*. at 19). According to Baytree, Clear Blue did not respond. (*Id.* ¶ 9). On August 29, 2022, Baytree notified Clear Blue its failure to provide the estimate (referred to in the August 19, 2022 correspondence) was viewed by Baytree as a breach of the Policy:

> On July 25, 2022, my office notified Clear Blue Insurance Company ("Clear Blue") that our client, [Baytree] was invoking appraisal in the above referenced claim.
>
> Despite appraisal being ripe and properly invoked in accordance with the policy, Clear Blue has rejected Baytree's request for an appraisal of the entire claim and refused to acknowledge which portions of the claim it is willing to appraise. Although your correspondence references an estimate outlining Clear Blue's proposed scope of appraisal, *no such estimate was enclosed* and your office has failed to respond to our repeated requests for clarification.
>
> Clear Blue's refusal to state what portions of the claim it is agreeing to appraise prevents the parties from completing appraisal and is a breach of the policy. In order to remedy the aforementioned issues, we request Clear Blue provide written confirmation clearly outlining [for] which buildings it is agreeing to an appraisal.

(*Id.* at 22 (emphasis added)).

B. Procedural Background

On September 16, 2022, Baytree filed its Complaint in state court, asserting that Clear Blue had accepted coverage for the loss but determined that the loss was less than Baytree's deductible. (Doc. 1-1). Clear Blue removed the case to this Court on November 4, 2022 on the basis of diversity jurisdiction pursuant to 28 U.S.C. § 1332. (Doc. 1 ¶ 4).

In Count I of the Complaint, Baytree sought a declaratory judgment for interpretation of the Policy to "determine the basis for how Plaintiff's loss is to be appraised [because] [w]ithout such a declaratory decree, Plaintiff is unable to obtain additional insurance benefits under the Policy." (Doc. 1-1 ¶ 21). Baytree sought to "have all damages assessed for each building for which Defendant accepted coverage under the appraisal provision in the Policy, not just the items that Defendant selects in its sole discretion." (*Id*. ¶ 24). Baytree also asserted a second claim for breach of the insurance policy. (*Id.* ¶¶ 41-48 (Count II)).

Clear Blue filed an Answer and affirmative defenses denying liability and coverage for damages, asserting that "the only covered damage to the property was outlined in the Coverage Explanation" and denying that Baytree complied with "all conditions precedent to the lawsuit." (Doc. 6 ¶¶ 7, 19, 23, 43; *id*. at 7-9 (affirmative defenses)). Clear Blue also contended that Baytree did not provide prompt notice of the loss or the requested responsive documentation to Clear Blue, which the insurer treated as Baytree's failure to satisfy conditions precedent to coverage, and prejudicial to Clear Blue. (*Id.*; *see also* Doc. 34-1 ¶¶ 17-18).

On April 20, 2023, Baytree filed its Motion seeking summary judgment on Count I of its Complaint and seeking to compel appraisal, attaching the Policy, Clear Blue's "Coverage Explanation," and an affidavit in support. (Docs. 30, 30-1 to 30-3). On May 4, 2023, Clear Blue filed its Response (Doc. 35) attaching a supporting affidavit and exhibits, to which Baytree timely filed a Reply. (Doc. 36). On June 5,

2023, Magistrate Judge Embry Kidd denied Plaintiff's Motion to Stay Discovery finding it unpersuasive, noting "in this district, the pendency of a motion to dismiss or a motion for summary judgment will not justify a unilateral motion to stay discovery pending resolution of the dispositive motion" thus, "[s]uch motions for stay are rarely granted." (Doc. 37 at 2-3 (citing Middle District Discovery (2021) at § I(E)(4)).

C. Relevant Policy Provisions

The Policy at issue contains the following appraisal provision:

> **Appraisal**
>
> If we and you disagree on the value of the property or the amount of loss, either may make written demand for an appraisal of the loss. In this event, each party will select a competent and impartial appraiser. The two appraisers will select an umpire. If they cannot agree, either may request that selection be made by a judge of a court having jurisdiction. The appraisers will state separately the value of the property and amount of loss. If they fail to agree, they will submit their differences to the umpire. A decision agreed to by any two will be binding . Each party will:
>
> a. Pay its chosen appraiser; and
> b. Bear the other expenses of the appraisal and umpire equally.
>
> If there is an appraisal, we will still retain our right to deny the claim.

(Doc. 30-1 at 35). The Policy also sets forth the following limitation:

> **Limitations**
>
> The following limitations apply to all policy forms and endorsements, unless otherwise stated:
>
> 1. We will not pay for loss of or damage to property, as described and limited in this section. In addition, we will not pay for any loss that

> is a consequence of loss or damage as described and limited in this section. . .
>
> * * *
>
> c. The interior of any building or structure, or to personal property in the building or structure, caused by or resulting from rain, snow, sleet, ice, sand or dust, whether driven by wind or not, unless:
>
> (1) The building or structure first sustains damage by a Covered Cause of Loss to its roof or walls through which the rain, snow, sleet, ice, sand or dust enters. . .

(*Id*. at 46). The Policy sets forth the duties and loss conditions which include the requirement to give "prompt notice of the loss" and provide certain documentation:

> **E. Loss Conditions**
>
> The following conditions apply in addition to the Common Policy Conditions and the Commercial Property Conditions . . . .
>
> * * *
>
> **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. . . .
>
> * * *
>
> (5) At our request, give us complete inventories of the damaged and undamaged property. Include quantities, costs, . values and amount of loss claimed.
>
> (6) As often as may be reasonably required, permit us to inspect the property proving the loss or damage and examine your books and records . . . .
>
> * * *
>
> (8) Cooperate with us in the investigation or settlement of the claim.

(*Id*. at 35). The Policy also provides:

> **D. LEGAL ACTION AGAINST US**

> 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. . . .

(*Id*. at 51).

II. LEGAL STANDARD

Summary judgment is appropriate when the moving party demonstrates "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The movant must satisfy this initial burden by "identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact." *Norfolk S. Ry. Co. v. Groves*, 586 F.3d 1273, 1277 (11th Cir. 2009) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)). In response, "a party opposing a properly supported motion for summary judgment may not rest upon mere allegations or denials of [her] pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 248, 256 (1986) (citation and internal quotation marks omitted).

The movant is entitled to summary judgment where "the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof." *Celotex,* 477 U.S. at 323. In deciding whether to grant summary judgment, the Court resolves all ambiguities and draws all

permissible factual inferences in favor of the non-moving party. *Anderson*, 477 U.S. at 255; *Shotz v. City of Plantation, Fla.*, 344 F.3d 1161, 1164 (11th Cir. 2003) (citation omitted).

"Federal courts sitting in diversity apply the substantive law of the state in which the case arose." *Pendergast v. Sprint Nextel Corp.*, 592 F.3d 1119, 1132–33 (11th Cir. 2010); *Winn- Dixie Stores, Inc. v. Dolgencorp, LLC*, 746 F.3d 1008, 1020 (11th Cir. 2014) (holding that the substantive law of the forum state applies in a diversity case). In this case, the parties acknowledge that Florida law applies to the substantive issues in this diversity case. (Doc. 30 at 7; Doc. 34 at 9). "Under Florida law, an appraisal provision in an insurance policy is enforceable by a court upon a motion or a petition to compel appraisal." *Shealey v. Geovera Specialty Ins. Co.*, No. 6:18-cv-1635-Orl-31GJK, 2019 WL 1093447, at *1 (M.D. Fla. Jan. 10, 2019), *report and recommendation adopted*, 2019 WL 1161630 (M.D. Fla. Mar. 13, 2019) (citing *U.S. Fid. & Guar. Co. v. Romay*, 744 So. 2d 467, 468 (Fla. 3d DCA 1999)).

III. DISCUSSION

In its summary judgment motion, Baytree seeks a determination that it is entitled to appraisal under the Policy for Buildings 90, 100, and 110 as a matter of law based on Clear Blue's alleged "acknowledgement of covered storm damage." (Doc. 30 at 3; *id.* at 10 ("Appraisal in the subject insurance claim is ripe because

Defendant acknowledged some covered storm damage to Buildings 90, 100, and 110.”).[5]

Whether the parties can be compelled to participate in the appraisal process depends on the provisions of the policy. *J&E Investments, LLC v. Scottsdale Ins. Co*., No. 16-61688-CIV, 2016 WL 8793337, at * 2 (S.D. Fla. Aug. 18, 2016). Under Florida law, appraisal requirements in an insurance contract are treated as arbitration provisions, “narrowly restricted to the resolution of specific issues of actual cash value and amount of loss.” *Galindo v. ARI Mut. Ins. Co*., 203 F.3d 771, 776 (11th Cir. 2000) (quoting *U.S. Fid. & Guar. Co. v. Romay*, 744 So. 2d 467, 469 (Fla. Dist. Ct. App. 1999)).

Florida courts have held that, where an insurance policy includes an appraisal requirement, any dispute regarding the amount of a covered loss is a matter “for determination by an appraisal panel,” but a challenge to coverage itself remains a matter “for determination by a court.” *SB Holdings I, LLC v. Indian Harbor Ins. Co*., No. 20-14729, 2021 WL 3825166, at *1 (11th Cir. Aug. 27, 2021) (citations omitted). Courts considering insurance contracts under Florida law have held that “[a]n insured’s compliance with post-loss obligations mandated in the policy raises

[5] In Count I—the only Count on which Baytree moves for summary judgment—Baytree sought “a declaratory judgment that [its] *entire claim* be appraised and not solely the portion Defendant selected.” (Doc. 1-1 at 8 (emphasis added); *see id*. ¶ 16 (Baytree’s “position is that each building for which [Clear Blue] afforded coverage is ripe for appraisal”). At a minimum, it appears that a dispute of material fact exists as to whether the damage to Building 80 would be covered by the Policy, and, thus, outside the scope of appraisal. Therefore, Court considers Baytree’s Motion seeking appraisal as limited to Buildings 90, 100, 110.

a question of liability, not the value or amount of the loss." *Vintage Bay Condo. Ass'n v. Lexington Ins. Co.*, No. 2:18-cv-729-FtM-99CM, 2019 WL 211433, *1-*2 (M.D. Fla. Jan. 16, 2019); *see Gulfside, Inc. v. Lexington Ins. Co.*, No. 2:19-cv-851-SPC-MRM, 2021 WL 3471631, at *2 (M.D. Fla. Aug. 6, 2021) (failure to comply with a "common, enforceable post-loss condition" deprives the insurer "of a valuable right for which it had contracted") (citation omitted). "[C]ausation is a coverage question for the court when an insurer wholly denies that there is a covered loss and an amount-of-loss question for the appraisal panel when an insurer admits that there is covered loss, the amount of which is disputed." *Vintage Bay*, 2019 WL 211433, at *1 (citing *Johnson v. Nationwide Mut. Ins. Co.*, 828 So. 2d 1021, 1022 (Fla. 2002)).

Therefore, an insured's compliance with post-loss obligations mandated by the policy, such as timely notice of the loss and cooperation with the insurer's investigation, is a coverage question. *SB Holdings,* 2021 WL 3825166, at *2 (citing *State Farm Fire & Cas. Co. v. Licea*, 685 So. 2d 1285, 1288 (Fla. 1996)). "It is well-settled in Florida that all post-loss obligations must be satisfied before a trial court can exercise its discretion to compel appraisal." *State Farm Fla. Ins. Co. v. Fernandez*, 211 So. 3d 1094, 1095 (Fla. Dist. Ct. App. 2017).

Baytree initially argued in its Motion for Summary Judgment that Clear Blue "never wholly denied coverage" or "alleged that [Baytree] failed to comply with post-loss conditions under the policy." (Doc. 30 at 10). This is incorrect. At the time

Baytree notified Clear Blue of the claim, Clear Blue asserted that the notice was untimely and requested certain documentation, with a reservation of rights. Clear Blue subsequently disputed Baytree's post-loss compliance and coverage in its Answer and affirmative defenses (Doc. 6), and in its Response to Baytree's Motion to compel appraisal. (*See* Doc. 34 at 10-15) (arguing that Baytree's demand for appraisal is premature because coverage issue exists concerning whether Baytree materially breached the parties' insurance policy when it refused to comply with its post-loss obligations)).[6]

Other courts have considered and rejected arguments similar to the one Baytree asserted in its Motion in this case. In *Gulfside, Inc. v. Lexington Insurance Co.*, No. 2:19-cv-851-SPC-MRM, 2021 WL 3471631, *3 (M.D. Fla. 2021), the insured sought to compel appraisal and the insurer resisted, arguing it was premature. Judge Chappell found that "there is no rule . . . that insureds invoking appraisal automatically cuts off insurers' ability to demand compliance with post-loss obligations." *Id.*

The *Gulfside* court analyzed two cases involving post-loss failures to comply which are also relevant here. In *Vintage Bay Condo. Ass'n v. Lexington Ins.*, No. 2:18-cv-729-FtM-99CM, 2019 WL 211433 (M.D. Fla. Jan. 16, 2019), the district court denied the insured's motion to compel appraisal because the insured's

[6] The cases that Baytree relies on its Motion are inapposite in that Clear Blue *has* disputed coverage. The Court therefore focuses on the "waiver" cases that Baytree discusses in its Reply.

failure to cooperate in post-loss conditions and sit for an examination under oath ("EUO") made the appraisal premature, even though the insured had invoked appraisal before the insurer requested the examination. *See Gulfside*, 2021 WL 3471631, at *3 (citing *Vintage Bay*, 2019 WL 211433, at *2–3). In analyzing the second case, *SafePoint Ins. v. Hallet*, No. 5D20-206, 2021 WL 2599656 (Fla. Dist. Ct. App. June 25, 2021), Judge Chappell explained:

> [In] *SafePoint Ins. v. Hallet*, . . . the parties agreed to appraise. They went through the process for months before insurer demanded an EUO and reams of documents. Insureds sat for EUOs. Their public adjuster appeared too, but insurer then rescheduled his EUO to a day he was unavailable. So insurer denied the claim. Even so, the court held:
>
>> [Insureds'] policy does not condition [insurer's] ability to garner post-loss information on the state or existence of the appraisal process. Instead, it directs that [insureds] may not sue [insurer] unless they have complied with "all of" the policy's terms. Furthermore, the policy's post-loss cooperation provisions are untethered from its appraisal provisions. The policy permits [insurer] to ask for post-loss information "as often as it reasonably requires." [Insureds] tacitly encourage us to add the language, "unless we have begun the appraisal process," to this provision. We cannot accept this invitation.
>
> *Id.* at *3 (alterations accepted). The same holds true here. Nothing in the Policy limits Lexington's ability to impose post loss conditions after Gulfside invoked appraisal. Nor was the EUO request unreasonable in response to the Adjuster's e-mail. Lexington valued the claim far lower than the Adjuster. So its reaction to request an EUO was predictable.
>
> [*Vintage Bay* and *Hallet*] clarify there is no rule (as Gulfside contends) that insureds invoking appraisal automatically cuts off

> insurers' ability to demand compliance with post-loss obligations. *See also Galindo v. ARI Mut. Ins.*, 203 F.3d 771, 773-74, 776-77 (11th Cir. 2000); *U.S. Fid. & Guar. Co. v. Romay*, 744 So. 2d 467, 468-69, 471 (Fla. Dist. Ct. App. 1999). . . . To be sure, sometimes an insured's failure to comply with post-[loss] conditions is excused. *See, e.g.*, *Perez v. Brit UW Limited*, No. 1:19-cv-22024-JLK, 2021 WL 1430832 (S.D. Fla. Mar. 4, 2021); *Abdo v. Avatar Prop. and Cas. Ins. Co.*, 302 So. 3d 926 (Fla. Dist. Ct. App. 2020); *Willis v. Huff*, 736 So. 2d 1272, 1274 (Fla. Dist. Ct. App. 1999). Yet aside from frustration with the adjustment process, Gulfside offers no reason to excuse compliance.

Gulfside, 2021 WL 3471631, at *3. Similar to the facts in *Gulfside*, Clear Blue valued the damage in this case at $2,022.48, more than a million dollars below the $1,191,799.52 that Baytree's adjuster calculated from the alleged storm damage. Clear Blue had requested documentation of any prior repairs, roofing inspections, receipts, payments, etc. by the time Baytree gave notice of its claim. Baytree has not disputed that it did not produce the responsive documentation, and the post-loss request for documentation was not unreasonable in light of the significant disparity in the claims valuation. As recognized in *Gulfside*, there is "no rule" that the insured's "invoking appraisal automatically cuts off insurers' ability to demand compliance with post-loss obligations." Baytree's invocation of the appraisal provision did not impact the insurer's ability to demand compliance with post-loss obligations. Because Clear Blue alleges Baytree did not comply, and Baytree has not refuted the point at this juncture, coverage remains an issue and appraisal is not warranted at this time.

Although Baytree now argues in its Reply[7] that Clear Blue "waived" its ability to raise forfeiture by Baytree (Doc. 36 at 2-4), its arguments are no more persuasive. Baytree contends that Clear Blue "waived" its coverage defense by not raising it earlier, at the point when Baytree invoked appraisal in July 2022. Baytree argues that Clear Blue failed to inform Baytree—after Baytree invoked appraisal—of any specific post-loss failures. (Doc. 36 at 1-2). Baytree describes Clear Blue as representing "there was continued existence of coverage under the Policy" because Clear Blue "acknowledged covered storm damage to Buildings 90, 100, and 110" and did not assert that appraisal was premature or that Baytree had not complied with conditions precedent. (*Id.*). Thus, Baytree argues, Clear Blue "waive[d] any basis to assert that coverage ha[d] been forfeited for failing to comply with conditions under the Policy or that appraisal was premature." (Doc. 36 at 3).

Baytree argues that "[i]t was only after [Baytree] filed suit to enforce its right to appraisal that [Clear Blue], for the first time in litigation, asserted that coverage was forfeited and appraisal was premature." (*Id*. at 5). Baytree contends that "[t]here is substantial evidence upon which this Court can rely to determine [Clear Blue], through its continued recognition of coverage under the Policy, has waived any right to assert that coverage has been forfeited or that appraisal is now premature." *Id.* Thus, Baytree essentially argues that once Baytree invoked appraisal, Clear Blue

[7] By changing tack in the Reply to now argue waiver and abandoning its previous argument, Baytree implicitly concedes that Clear Blue disputed coverage.

could not dispute coverage based on a post-loss failure or an untimely notification. Notably, Baytree does not argue that it complied with post-loss obligations, merely that these post-loss failures were asserted by Clear Blue as part of a "boilerplate reservation of rights." (Doc. 36 at 4).

Baytree cites Florida cases holding that "forfeiture clauses," such as failing to file timely notice of claim or proofs of loss, generally can be invoked by the insurer to avoid liability to an insured where the loss "was covered in the first instance but has been lost by the insured's actions or inactions." (Doc. 36 at 3 (citing *e.g.*, *Axis Surplus Ins. Co. v. Caribbean Beach Club Ass'n*, 164 So. 3d 684, 687 (Fla. 2d DCA 2014) and cases cited therein). However, Baytree points to additional cases holding that, because "Florida law abhors forfeitures of coverage," the insurer "must inform the insured as soon as practicable after it has ascertained facts upon which it bases its forfeiture" argument. (*Id*.). Thus, Baytree continues, "[w]hen an insurer has knowledge of the existence of facts justifying a forfeiture of coverage, any unequivocal act which recognizes the continued existence of coverage or which is wholly inconsistent with forfeiture, constitutes waiver," and "even if it has provided a reservation of rights letter or has a nonwaiver clause in the policy." (*Id*. (citing *Axis Surplus*, 164 So. 3d at 687-89)).

The case on which Baytree primarily relies, *Axis Surplus*, is easily distinguished because it turned on whether a two-year expiration clause could be invoked by the insurer even after the parties had been cooperating in coverage for

repairing the subject building for two years, until they belatedly learned that the county requiring the building to be totally replaced. Only at that point—26 months after the initial claim—did the insurer suddenly notify the insured-building owner that based on the two-year limitation clause it would deny payment for the projected increased construction costs. The appellate court held that the insurer had waived the two-year limitation clause based on its "failure to bring the provision to [the insured's] attention despite knowing that the insured expected the entire claim to be paid and [the insurer's] continued adjustment of the entire claim after the two-year period expired [because they] were unequivocal acts wholly inconsistent with invoking a forfeiture." *Axis Surplus*, 164 So. 3d at 689. "When an insurer acquiesces to an insured's failure to strictly adhere to a timetable of payment or performance, courts are inhospitable to the insurer's sudden invocation of strict enforcement of forfeiture provisions.". *Id.*

In this case, Clear Blue did not delay in requesting information from Baytree, asking for it within two weeks of the claim notification and specifying the roofing inspection report/estimate, photos, receipts of damages, proof of payment, and documentation of roof maintenance and repairs. Baytree has not disputed that it failed to provide the responsive documentation to Clear Blue prior to initiating the lawsuit, and it is not clear at this juncture that it has even produced these documents.[8]

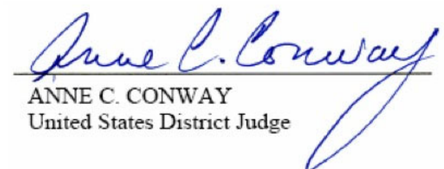
[8] The coverage issues in Count II of the Complaint are not before the Court on the current Motion, and discovery in the litigation is proceeding. (*See* Doc. 37). "Parties may even use

At a minimum, the coverage disputes that Clear Blue identifies raise issues of material fact and require denial of summary judgment on the claim for appraisal because the coverage issue remains unresolved. *See, e.g.*, *Gulfside*, 2021 WL 3471631 at *4 (denying motion to compel appraisal and holding that the insured's compliance on other matters did not excuse its failure to comply with the insurer's post-loss condition, a request for examination under oath) (citation omitted).

Based on the foregoing, it is ordered as follows:

1. Plaintiff Baytree, A Condominium, Section Eight, Inc.'s Motion for Summary Judgment as to Count I of the Complaint and Motion to Compel Appraisal (Doc. 30) is **DENIED**.

DONE and **ORDERED** in Chambers, in Orlando, Florida on July 11, 2023.



Copies furnished to:

Counsel of Record

discovery to cure defective compliance or outstanding obligations." *Gulfside*, 2021 WL 3471631, *4 (citations omitted).