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United States District Court, S.D. Florida.

FLORIDA GAMING CORPORATION, Plaintiff,
v.
AFFILIATED FM INSURANCE COMPANY, Defendant.

Case No. 07-20897-CIV-UNGARO
|
Signed 04/18/2008

Attorneys and Law Firms

Robert Wayne Hudson, Infante Zumpano Hudson & Miloch LLC, Coral Gables, FL, for Plaintiff.

Adam Brian Leichtling, Nilda Alejandra Arroyave, Lapin & Leichtling, LLP, Coral Gables, FL, for Defendant.

ORDER ON DEFENDANT'S MOTION FOR RECONSIDERATION

URSULA UNGARO, UNITED STATES DISTRICT JUDGE

***1** THIS CAUSE is before the Court on Defendant's Motion for Reconsideration of This Court's March 19, 2008 Order, filed April 2, 2008 (D.E. 89).

THE COURT has considered the Motion and the pertinent portions of the record and is otherwise fully advised in the premises. By way of background, this action arises out of an insurance dispute between Plaintiff and Defendant over damage to Plaintiff's facility allegedly sustained during Hurricane Wilma. On September 3, 2007, in accordance with the parties' insurance policy (the "Policy"), the Court referred the matter for appraisal of all aspects of Plaintiff's claim, mandating that the appraisal umpire "issue an Itemized Appraisal Award per the [Policy's] terms." (*See* D.E. 55 at 1.) The appraisal was finally completed on February 19, 2008, when the appraisal umpire and Plaintiff's appraiser signed an Appraisal Award Form listing the categories of items, the actual cash value and loss with respect to each item so categorized and the total appraisal award. However, Defendant believes that the recently completed Appraisal Award Form does not comply with the Court's September 3, 2007 Order (the "September 3 Order") or the Policy and requested in its February 26, 2008 Motion (D.E. 73) that the Court compel Plaintiff's appraiser and the appraisal umpire to comply with the September 3 Order and the Policy on the basis that the Policy requires a more detailed itemization of costs and losses. (*See* D.E. 73 at 3-5.) Specifically, Defendant argues that several items listed in the Appraisal Award Form–"Temp Repairs," "Roofs," Law & Ordinance," "Alarm System," and "Fire Watch"–need to be further itemized because "separate sublimits of coverage may apply to the various unspecified items and because the Court cannot be assured that the unspecified items have not been duplicated within the Appraisal Award Form." (D.E. 73 at 4.)

On March 19, 2008, the Court denied Defendant's Motion to Compel. Defendant brings the instant Motion for Reconsideration of the Court's Order of March 19, 2008 (the "March 19 Order"). Because the March 19 Order is an interlocutory order, the Court has power to reconsider the March 19 Order under Rule 54(b), which provides, in pertinent part, that an interlocutory order "is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties." Fed. R. Civ. P. 54(b). The text of Rule 54(b) does not specify a standard to be used by courts in exercising authority under the Rule, but the Advisory Committee Notes make clear that "interlocutory judgments are not brought within the restrictions of [Rule 60(b)], but rather they are left subject to the complete power of the court rendering them to afford such relief as justice requires." Fed. R. Civ. P. 54(b) advisory committee's note.

In this Circuit, Courts have taken the position that a motion for reconsideration should only be granted if there is (1) an intervening change in controlling law, (2) newly discovered evidence; or (3) the need to correct clear error or prevent manifest injustice. *Burger King Corp. v. Ashland Equities, Inc.*, 181 F. Supp. 2d 1366, 1369 (S.D. Fla. 2002). Additionally, a motion for reconsideration should not "be used as a vehicle to present authorities available at the time of the first decision or to reiterate arguments previously made." *Z.K. Marine, Inc., v. M/V Archigetis*, 808 F. Supp. 1561, 1563 (S.D. Fla. 1992) (*citing Above the Belt, Inc. v. Mel Bohannan Roofing, Inc.*, 99 F.R.D. 99, 101 (E.D. Va. 1983); *Moog, Inc. v. United States*, No. 90-215 E, 1991 U.S. Dist. Lexis 17348, at *2 (W.D.N.Y. Nov. 21, 1991)). A motion for reconsideration is not an opportunity "to rethink what the Court already thought through--rightly or wrongly." *Id.* The moving party "must set forth facts or law of a strongly convincing nature to induce the court to reverse its prior decision." *Sussman v.*

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Salem, Saxon & Nielsen, P.A., 153 F.R.D. 689, 694 (M.D. Fla. 1994).

***2** Because Defendant has alleged neither an intervening change in controlling law nor newly discovered evidence, the Court assumes Defendant brings the instant Motion because it believes that there is a need to correct clear error or prevent manifest injustice. *See Burger King Corp.*, 181 F.Supp. 2d at 1369. However, the Court stands by its decision in the March 19 Order, based on the following analysis.

In its Motion for Reconsideration, Defendant first argues that the Court committed error in its "misinterpretation of the itemization requirement of the Appraisal provision of the Policy." (Def.'s Mot. 5.) In the March 19 Order, the Court quoted the relevant portion of the Policy that regards appraisal. (*See* March 19 Order at 2.) Defendant chides the Court for its omission of the words "to each item" from the quoted Policy language; however, the language was not omitted.

Judging from Defendant's argument, it appears that it is Defendant who has misapprehended its own insurance policy. As the Court stated in the March 19 Order, the Policy requires that the appraiser itemize and state separately the amount of actual cash value and loss as to each item.[1] The Appraisal Form reflects that the appraisers indeed did categorize each item, and the actual cash value and loss with respect to each item so categorized, before establishing a total loss amount. Yet, Defendants contend there should have been a greater level of detail with respect to the itemization. The Policy, however, is devoid of any discussion or language supporting Defendant's contention. Moreover, when interpreting insurance contracts, Florida courts may consult references commonly relied upon to supply the accepted meanings of words. *Garcia v. Federal Ins. Co.*, 969 So.2d 288, 291-92 (Fla. 2007). Merriam-Webster defines "item" as "a distinct part in an enumeration, account, or series." Merriam-Webster Collegiate Dictionary, Eleventh Edition (2005). As is evident from the definition, how an "item" is defined in each circumstance will depend on how the relevant list breaks itself down into component parts. In other words, it is only once a list is formed that each of the components will become an "item" in reference to the list. The key to itemization appears to be that some reasonable listing of components must be generated so as to create separate items. In the instant case, the Court found that the Appraisal Award Form complies with the Policy's mandate, as there is a listing, reasonably broken down into component items, which states the actual cash value and loss for each item (*See* D.E. 20-2 at 2.) and is unpersuaded that she erred in reaching that conclusion.

Defendant then argues that the Court "misapplied the law regarding contract application." (Def.'s Mot. 6.) Specifically, Defendant argues that the Court failed to interpret the Policy according to its plain language, for it claims that the Policy language is unambiguous. (Def.'s Mot. 6.) However, in the March 19 Order, the Court applied the plain language of the Policy, which requires only that the appraisal award be itemized and state separately the amount of actual cash value and loss, which the Appraisal Award Form did. (*See* March 19 Order at 2.) The Court broached the subject of the Policy's potential ambiguity merely to remind Defendant that were Defendant to argue that the Policy is ambiguous, the Court would be forced to construe any such ambiguity against Defendant as the drafter of the Policy. It is hereby

***3** ORDERED AND ADJUDGED that Defendant's Motion for Reconsideration is DENIED.

DONE AND ORDERED in Chambers at Miami, Florida, this 18th day of April, 2008.

All Citations

Not Reported in Fed. Supp., 2008 WL 11407176

Footnotes

1 This sentence reads: "An award in writing, so itemized, of any two when filed with this Company shall determine the amount of actual cash value and loss." (D.E. 20-2 at 2.)

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