DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

_____

No. 5D22-1404

_____

STATE FARM FLORIDA
INSURANCE COMPANY,

Appellant,

v.

JOERETHA M. JAMES,

Appellee.
_____/

On appeal from the Seventh Judicial Circuit Court in and for Volusia County, Florida
L.T. CASE NO.: 2019-30212-CICI

ANSWER BRIEF OF JOERETHA M. JAMES

The Nation Law Firm, LLP
Mark A. Nation, Esquire
Board Certified Civil Trial Attorney
Board Certified Business Litigation Attorney
Florida Bar No.: 968560
570 Crown Oak Centre Drive
Longwood, FL 32750
Phone: (407)339-1104
Fax: (407)339-1118
mnation@nationlaw.com

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STATEMENT OF THE CASE AND FACTS

A. Background

This case arises out of Appellee Joeretha James's (the "Insured's") insurance claim for water damages to her property due to a failed cast iron plumbing system. The Insured reported the claim to her insurer, State Farm Florida Insurance Company ("State Farm" or "Appellant"). State Farm investigated the claim, opened coverage, and determined the loss did not exceed the deductible. As a result, the Insured filed a lawsuit seeking coverage for (1) water damage to the home ("Water Damage") and (2) the cost of tearing out and replacing the particular parts of the home necessary to gain access to the specific point of the plumbing system from which water escaped ("Tear Out"). State Farm invoked appraisal. On March 3, 2020, an Appraisal Award was entered for Water Damage in the amount of $1,025.71 and Tear Out in the amount of $38,834.28.

Upon receipt of the Appraisal Award, the Insured sent State Farm a sworn proof of loss and a contract between the Insured and a general contractor to perform the Tear Out. Despite the policy language requiring payment, State Farm refused to pay any amount for the Tear Out awarded to the Insured and only made a payment for Water Damage. Then, State

Farm moved for summary judgment arguing only that it did not owe the Tear Out because the Insured's repair contract was not "legally binding" and, as such, she had not incurred the Tear Out.

The Insured cross moved for summary judgment arguing State Farm owed the Tear Out because the policy does not permit State Farm to withhold the payment, and in any event, the Insured had incurred the Tear Out costs—the Insured entered into a contract to perform the work and the contract was legally binding. The trial court denied State Farm's motion, granted the Insured's, and entered summary judgment in favor of the Insured finding that State Farm owed the Tear Out amount in the appraisal award.

The trial court correctly entered summary judgment in favor of the Insured and State Farm's appeal should be denied.

B. Procedural History and Disposition in the Trial Court

On February 1, 2019, the Insured filed a lawsuit alleging State Farm breached its insurance policy by failing to provide the full coverage afforded under the policy for the Insured's August 24, 2018 water damage loss. [R.321, R335.]

On February 14, 2019, the Insured entered into a contract with

Advanced Pace Technologies ("APT") to perform the Tear Out at her property. [R.356-60.]

On March 27, 2019, State Farm filed a motion to abate litigation and discovery and compel appraisal and informed the trial court:

> 3. STATE FARM extended coverage for the water damage to the property, but a dispute exists regarding the amount of loss.
>
> 4. To resolve a dispute regarding the amount of loss, STATE FARM demanded [appraisal] pursuant to the policy of insurance …"
>
> 5. The general preference in Florida is to resolve conflicts through any extrajudicial means. *See State Farm Fire & Casualty Company v. Middleton*, 648 So. 2d 1200 (Fla. 3d DCA 1995).
>
> 6. When an insurer extends coverage for a loss but the parties disagree as to the amount of the loss, appraiser may determine the amount of the loss. *Gonzalez v. State Farm Fire and Casualty Company*, 805 So.2d 814 (Fla. 3d DCA 2000). In Gonzalez, the court compelled appraisal when a party invoked appraisal to determine the amount of a covered loss. *Id*.
>
> 7. In the instant case, STATE FARM demanded appraisal to resolve disputes regarding the amount of the loss. STATE FARM demanded appraisal pursuant to the unambiguous terms of the policy of insurance.
>
> 8. When the language of a policy of insurance is unambiguous and plain, the policy of insurance must be enforced as written. *See Three Palms Pointe, Inc. v State Farm Fire and Casualty Company*, 250 F.Supp.2d 1357

> (11th Cir. 2004). Accordingly, STATE FARM requests that the Court abate litigation and discovery and compel the parties to proceed with appraisal.

[R.99-101.]

On June 25, 2019, the trial court entered an order granting Defendant's motion to abate action and compel appraisal. [R.194.]

On March 3, 2020, State Farm's appraiser and an Umpire agreed on the scope and amount of loss and executed the Appraisal Award:

We appraisers and/or umpire hereby appraise the amount of loss as follows:

Description	Replacement Cost Value	Actual Cash Value
1. Dwelling – The amount for repairing or replacing the plumbing system or appliance from which the water escaped (This does not include the cost for Tear Out and access which should be address in #2 below):	$3,500.00	$3,500.00
2. Dwelling – The amount (including labor) to tear out and replace only that particular part of the building or condominium unit owned by the insured necessary to gain access to the specific point of the system or appliance from which the water escaped as a result of the plumbing failure event with an assigned Claim No. 59-5500-W54:	$38,834.28	$38,834.28
3. Dwelling – The amount to repair or replace the accidental direct physical loss caused by the plumbing failure event with an assigned Claim No. 59-5500-W54 which does not fall within any of the above-listed categories:	$1,025.71	$1,025.71
4. Dwelling – Repair/replace mold damage	$-0-	$-0-
5. Other Structure	Did not appraise	
6. Contents	Did not appraise	
7. Additional Living Expenses / Loss of Use	Did not appraise	
8. Ordinance and Law	Did not appraise	
TOTAL:	$43,359.99	$43,359.99

[R.201-02.]

On March 24, 2020, "[p]ursuant to the enclosed apraisal award," State Farm issued a payment in the amount of $1,025.71 to the Insured for

Line Item 3 (Water Damage). [R.351.] State Farm did not make any payment to the Insured for Line Item 2 (Tear Out) that provides $38,834.28 for "2. Dwelling – The amount (including labor) to tear out and replace only that particular part of the building . . . necessary to gain access to the specific point of the system or appliance from which the water escaped as a result of the plumbing failure event with assigned Claim No. 59-5500-W54." [R.349.]

The insurance policy specifically grants the following Tear Out coverage:

> The following is added:
>
> 13. **Tear Out.** If a Loss Insured to Coverage A property is caused by water or steam escaping from a system or appliance, we will also pay the reasonable cost you incur to tear out and replace only that particular part of the building or condominium unit owned by you necessary to gain access to the specific point of that system or appliance from which the water or steam escaped. We will not cover the cost of repairing or replacing the system or appliance itself. This coverage does not increase the limit applying to Coverage A property.

[R.75.]

On April 28, 2020, State Farm informed the Insured, "[y]ou previously provided our office with a contract between Plaintiff and APT. However, the contract is illusory as it states that it may be voided by the Plaintiff at

any time. In order for tear out to be incurred, the Plaintiff must at a minimum have a binding and enforceable contract for the repairs per the appraisal award, and the Plaintiff must have a binding obligation to pay for tear out." [R.242-43.]

The Policy does not require that there be a binding and enforcable contract for repairs to trigger State Farm's duty to pay. And, the contract **does not** state that it may be voided by the Insured at any time.

Rather, the contract states that it can only be voided "only after": (1) the Insured makes an insurance claim with their insurance carrier **and** (2) the insurer will not cover the claim, **and** (3) the Insured has "exhausted all reasonable avenues of recovery" from her insurer, **and** (4) the work has not commenced, **and** (5) the Insured sumbits "satisfactory proof to APT that [she] has reasonably complied" with the terms of this section. [R. 357.]

The contract provision relied on by State Farm states:

> Further, if such insurance claim(s) are made by OWNER and OWNER is thereafter notified that its insurance carrier will not cover such claim(s) and/or remit payment for the necessary repairs to the claimed losses, and only after OWNER has exhausted all reasonable avenues of recovery from its insurance carrier(s), this Proposal is voidable by the OWNER any time prior to APT commencing work on the Property, upon satisfactory proof to APT that OWNER has reasonably complied with this section of the Proposal.

[R.357.]

On July 11, 2020, the Insured submitted a signed Sworn Proof of Loss to State Farm. [R.366.]

The policy's loss payment provision states:

> 8. **Loss Payment**. We will adjust all losses with you. We will pay you unless some other person is named in the policy or is legally entitled to receive payment. Loss will be payable:
>
> a. 20 days after we receive your proof of loss and reach agreement with you; or
>
> b. 60 days after we receive your proof of loss and:
>
> (1) there is an entry of a final judgment; or
>
> (2) there is a filing of an appraisal award with us.

[R.55.]

Accordingly, pursuant to the policy, payment was due to the Insured 60 days after she submitted the sworn proof of loss or on or before September 9, 2020 (the appraisal award was previously filed on 3/28/20). [R.200.] State Farm continued to refuse to pay the Tear Out amount awarded in the appraisal award.

On July 29, 2020, State Farm moved for summary judgment arguing only that because the Insured had not "enter[ed] into a legally binding contract for the tear out awarded through appraisal, payment of the tear out awarded through apprsaisal is not owed at this time." [R.227.]

The Insured filed a response and cross motion arguing that State Farm owed the Insured $38,834.28 (Line Item 2 (Tear Out) of the appraisal award). The insured argued State Farm had no basis to withhold the Tear Out payment awarded to the Insured. Pursuant to the policy's loss payment provision, the Insured provided State Farm with a sworn proof of loss with an Appraisal Award and payment was due by September 9, 2020. Additionally, the Insured had incurred the Tear Out costs because the Insured entered into a contract with a contractor to perform the Tear Out and that contract is legally binding. [R.301-14.]

On May 16, 2022, the trial court held a hearing on the parties' cross motions. [R.533.] The trial court stated, "the way the policy reads, you could read it in a way that it's incurred as soon as the loss happens. So I think that if State Farm wants to say this is what has to happen before we pay, you ought to say it." [R.540.] The trial court held that "I find that incur could be read several ways and we're going to construe it against State Farm." [R.540-41.] On May 23, 2022, the trial court entered an order denying State Farm's motion for summary judgment and granting summary judgment in favor of of the Insured. [R.529.]

SUMMARY OF THE ARGUMENT

The only issue State Farm raised on appeal is "whether an insured 'incurs' an expense by signing a contract that can be voided by the insured." [Initial Brief at 9.] As an initial matter, this Court never has to reach this issue because pursuant to the terms of the policy, State Farm cannot withhold the Tear Out amount awarded during appraisal.

Additionally, State Farm's argument that it does not owe the Tear Out because the Insured's contract with a general contractor is unenforceable is both factually and legally incorrect. The Insured entered into a contract with a general contractor to perform the Tear Out. State Farm does not dispute that entering into a contract can satisfy its made-up incurred requirement. Rather, State Farm's only issue on appeal is the specific language in the Insured's contract, which State Farm claims is "not legally binding." Like it did below, State Farm again inaccurately states the terms of the Insured's contract with a general contractor to perform the Tear Out. The contract is not illusory, there are conditions and restrictions required for a party to void the contract, and State Farm's mistaken conclusion, contrary to the clear terms of the contract, that the Insured is not obligated to pay for the Tear Out is wrong.

ARGUMENT

A. Standard of Review

"The construction of an insurance contract involves a question of law, and an appellate court applies a *de novo* standard of review." *Arias v. Affirmative Ins. Co.*, 944 So. 2d 1195, 1197 (Fla. 4th DCA 2006). Additionally, "[a]n appellate court reviews *de novo* the propriety of the grant of summary judgment." *State Farm Mut. Auto. Ins. Co. v. Colon*, 880 So. 2d 782, 783 (Fla. 2nd DCA 2004).

B. Construction of Insurance Policies

"The terms of an insurance policy should be construed in a manner that provides the broadest coverage to the insured." *Northbrook Prop. & Cas. Ins. Co. v. R & J Crane Service, Inc.*, 765 So. 2d 836, 840 (Fla. 4th DCA 2000). It is black letter law that if a policy term is ambiguous or susceptible to more than one meaning or reasonable interpretation, the Policy must be interpreted against the insurer and in favor of coverage. *State Farm Mut. Auto. Ins. Co. v. Pridgen*, 498 So. 2d 1245, 1248 (Fla. 1986) ("[E]xclusionary provisions which are ambiguous or otherwise susceptible to more than one meaning must be construed in favor of the insured, since it is the insurer who usually drafts the policy."); *Container*

Corp. of Am. v. Maryland Cas. Co., 707 So. 2d 733, 736 (Fla. 1998) ("However, because this particular policy language is susceptible to differing interpretations, it too should be construed in favor of the insured."); *Florida Ins. Guar. Ass'n v. Branco*, 148 So. 3d 488, 491 (Fla. 5th DCA 2014) ("Courts should resort to rules of interpretation only when the policy language is ambiguous or otherwise susceptible to multiple meanings.").

C. State Farm Cannot Withhold the Tear Out Awarded During Appraisal

State Farm has no basis to withhold payment for the Tear Out amount stated in the Appraisal Award. Appraisal awards "are valid and are binding upon the parties if they are appropriately invoked." *New Amsterdam Casualty Co. v. J.H. Blackshear, Inc*., 156 So. 695, 695 (Fla. 1934); *see also Scottsdale Ins. Co. v. Desalvo*, 666 So. 2d 944, 947 (Fla. 1st DCA 1995) ("we construe the language of the appraisal provision as intended to permit either party to request an appraisal, the results of which will be binding as to the value of the property and the amount of loss. Should the insurer make the request, it thereby waives any coverage defense it might otherwise have had."); *State Farm Fire & Cas. Co. v. Middleton*, 648 So. 2d 1200, 1202 (Fla. 3d DCA 1995) ("The treatment of

appraisal clauses as binding arbitration agreements is similarly well-established.")

The Florida Supreme Court has conclusively stated that an appraisal sets the amount of loss, which is binding on the parties. In *Johnson v. Nationwide Mut. Ins. Co.*, 828 So.2d 1021, 1025 (Fla. 2002), the Court stated that "when the insurer admits that there is a covered loss, but there is a disagreement on the amount of loss, it is for the appraisers to arrive at the amount to be paid." (Quotation omitted.)

Here, State Farm compelled appraisal and informed the court that "State Farm demanded appraisal to resolve disputes regarding the amount of the loss" and "[t]he general preference in Florida is to resolve conflicts through any extrajudicial means." [R.99-101.] However, after an appraisal award was entered, State Farm has refused to pay the award and instead made-up requirements (not set forth in the policy) about acceptable contractual language an insured must provide to State Farm before it will issue a payment.

The Policy's Loss Payment provision is clear: State Farm "will pay you" within "60 days after we receive your proof of loss and…there is a filing of an appraisal award with us." [R.55.] Sixty days expired on

September 9, 2020. The Policy does not allow State Farm to withhold the Tear Out amount it owes to the Insured. [R.200; R.266.]

This is not the first time State Farm has tried to make this "incurred" argument. In *State Farm Florida Ins. Co. v. Nichols*, 21 So. 3d 904, 905 (Fla. 5th DCA 2009), this Court rejected this same argument from State Farm and explained:

> In these consolidated appeals, we address disputes between State Farm and its insureds concerning when it is obligated to pay for subsurface sinkhole repairs under its homeowners' policies. **Relying on a statute**, State Farm contends that it need not pay for these repairs until after the **homeowners enter into contracts for the performance of the repairs**, **notwithstanding language in its policies to the contrary**. The insureds contend that the policy language, not the statute, controls and that payment is due within sixty days after the amount of the loss is settled by appraisal. We agree with the insureds and accordingly affirm.
>
> In each of the cases here, appraisal awards separately listed the amount of above-ground damages and the amount of subsurface damages caused by sinkholes. State Farm promptly tendered a check to each of the homeowners for the total amount designated as above-ground damages, but it did not tender the amount designated as subsurface damages, contending that that amount was not due until the homeowners entered into contracts for those repairs.
>
> The homeowners' policies clearly require State Farm to pay the full amount of an appraisal award within sixty days of the award.

Id. at 904–05 (Fla. 5th DCA 2009)(emphasis added).

In this action, State Farm cites to no statutes, or other authority, that permits it to withhold payments for the Tear Out coverage or elect an alternative payment method. Here, like in *Nichols*, the Loss Settlement and Loss Payment language is clear and unambiguous and requires State Farm to pay the full amount for the Tear Out costs whether or not the costs have been incurred. This language controls and State Farm cannot withhold any portion of the Tear Out coverage.

Even if State Farm could permissively withhold payments by using a payment mechanism other than the one set forth in the Loss Settlement and Loss Payment provisions of the Policy, it "must clearly and unambiguously elect the permissive payment methodology in order to rely on it." *Geico Gen. Ins. Co. v. Virtual Imaging Services, Inc.*, 141 So. 3d 147, 158 (Fla. 2013). Here, State Farm has not clearly and unambiguously elected an alternative permissive payment methodology and the Loss Settlement and Loss Payment provisions in the Policy must be followed. This is particularly true here, where the term "incur" is not defined by the Policy and State Farm has failed to explain in the policy what or when costs are incurred such that it will actually pay the Tear Out costs.

A recent opinion denied a similar argument requiring proof of "incurred" expenses before State Farm would pay an appraisal award. In *State Farm Florida Ins. Co. v. Shotwell*, 336 So. 3d 64, 67 (Fla. 3d DCA 2021), State Farm argued it was not required to pay for Additional Living Expense ("ALE") until it was "incurred." The court rejected State Farm's argument:

> Though the [ALE] provision does state "incurred," the provision is without a requirement that the insured submit receipts or any other documentation verifying the cost incurred. Additionally, requiring the trial court to examine extrinsic evidence when the amount of the ALE award has already been determined by appraisal is problematic. State Farm essentially argues that the policy requires receipts but concedes that the amounts on those receipts do not matter. Because this demand goes beyond the plain language of the provision, the trial court correctly determined that the second ALE award is covered by the policy and immediately payable.

Id. at 68.[1]

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[1] *Shotwell* also found that the Tear Out provision did not cover tearing out and replacing the building structure needed to access the pipe. 336 So. 3d at 66. Here, this is not an issue. There is no dispute that the policy affords the Tear Out coverage. And unlike, *Shotwell*, *id*., in this case, the appraisal award specifically stated: "2. Dwelling – The amount (including labor) to tear out and replace only that particular part of the building . . . necessary to gain access to the specific point of the system or appliance from which the water escaped as a result of the plumbing failure event with assigned Claim No. 59-5500-W54." [R.349.] The appraisal award separately awarded amounts for the Water Damage and the Tear Out. [R.349.] Here,

Like the ALE provision in *Shotwell*, *id*., here the Tear Out provision is without a requirement that the Insured submit documents and State Farm's "demand goes beyond the plain language of the provision" *id*. There is no requirement in the policy that the Insured submit a contract for the Tear Out, let alone that the contract include or not include specific language.

State Farm is not a party to the contract it is incorrectly claiming is unenforceable and has no right to challenge the validity of the contract. A tenet of contract law is that a non-party to the contract (that is, someone not in privity with the contracting parties) cannot challenge the validity of the contract. In *Lugassy v. Independent Fire Insurance Company*, 636 So. 2d 1332 (Fla. 1994), the Florida Supreme Court held that an insurance company that is neither a party to a fee contract between an insured and their attorney nor a third-party beneficiary thereof could not challenge that agreement. The supreme court stated:

> Here, the insurance company was neither a party to the contract nor a third-party beneficiary, so it cannot argue that there was a lack of consideration. *See Thompson v. Commercial Union Ins. Co*., 250 So. 2d 259, 262 (Fla. 1971)

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there is no dispute that there is Tear Out coverage for the Insured's claim. The only issue State Farm raised on appeal is whether the Insured's contract is sufficient to "incur" the Tear Out.

> (third party cannot maintain action on a contract unless the clear intent and purpose of contract is to benefit the third party); *see also Stanfield v. W.C. McBride, Inc.*, 149 Kan. 567, 88 P.2d 1002 (Kan. 1939)."

Lugassy at 1335. In *Corvette Shop & Supplies, Inc. v. Coggins*, 779 So. 2d 529 (Fla. 2nd DCA 2000), the court found that a non-party to a contract did not have standing to challenge the contract, even when the validity of the contract would result in the non-party having to pay proceeds as a result of the contract. Here, State Farm is not a party to the contract and cannot challenge the enforceability of the Insured's contract with APT. State Farm has no ground to argue that the contract is not legally binding.

For these reasons alone, this Court should affirm the denial of State Farm's motion for summary judgment and the granting of summary judgment in favor of the Insured.

D. The Insured Incurred the Tear Out

1. The Insured Incurred the Tear Out Costs When She Entered Into a Contract to Perform the Work

As the Florida Supreme Court has explained, "'to incur' means to become liable for the expense, but not necessarily to have actually expended it." *Ceballo v. Citizens Prop. Ins. Corp.*, 967 So. 2d 811, 815 (Fla. 2007). State Farm agrees.

On February 14, 2019, the Insured entered into a contract with APT to perform the Tear Out repairs and entry into a contract for the repairs shows that Plaintiff incurred the Tear Out costs. [R.356-60.] The Policy does not define the term "incur." Pursuant to *Ceballo*, *id*., the Insured "incurred" the Tear Out costs when she entered into a contract for APT to perform the work on February 14, 2019.

2. State Farm Incorrectly Claims the Contract is Not Legally Binding and the Tear Out Costs Have Not Been Incurred

In this case, State Farm takes its incorrect arguments from *Nichols*, 21 So. 3d at 905 and *Shotwell*, 336 So. 3d at 67, a step further. Here, not only is State Farm incorrectly requiring the Insured to submit a contract, but it is also arguing that the contract must contain only certain language State Farm (who is not a party to the contract) deems acceptable. There is no requirement in the policy that the Insured must submit a contract, let alone the terms that a contract must contain (or not contain). Specifically, State Farm's argument that because the Insured's contract has a clause by which a party can void the contract means the Tear Out costs in this case have not been incurred is without merit.

Somehow, State Farm concludes that because the contract contains a contingency – which did not occur in this case – means she has not

incurred the Tear Out. State Farm does not claim that the Insured has actually voided her contract, or even that given the specific facts in this case she can void her contract—because she cannot.

As noted above, the contract can be voided in one specific circumstance, and "only after": (1) the Insured makes an insurance claim with their insurance carrier **and** (2) the insurer will not cover the claim, **and** (3) the Insured has "exhausted all reasonable avenues of recovery" from her insurer, **and** (4) the work has not commenced, **and** (5) the Insured sumbits "satisfactory proof to APT that [she] has reasonably complied" with the terms of this section. [R. 357.]

Each of these steps evidences mutuality of obligation between the parties to the contract. And, not only is there mutuality of obligation, the Insured is actually performing her duties under the contract and continues to do so. Failure of the Insured to perform her duties under the contract would result in a breach of the contract by the Insured.

State Farm completely ignores these factors and just baldly and wrongly states the contract is always voidable at will by the Insured. Nothing could be further from the truth.

State Farm also ignores the relevant case law on contracts which contain contingencies. "[T]he fact that a contract may, under certain definite circumstances, be terminable at the option of one of the parties does not, as a matter of law, render the contract unenforceable for want of mutuality." *Sugar Cane Growers Co-op. of Florida, Inc. v. Pinnock*, 735 So. 2d 530, 537 (Fla. 4th DCA 1999) (quoting *Bossert v. Palm Beach County Comprehensive Community Mental Health Ctr., Inc.,* 404 So.2d 1138, 1139 (Fla. 4th DCA 1981) (the requirement of two weeks notice of the right to terminate or restrict was sufficient consideration so as to avoid a claim of lack of mutuality); *see also Thompson v. Shell Petroleum Corp.,* 130 Fla. 652, 178 So. 413, 419 (1938)). Here, there is no dispute that the Insured and APT have mutual obligations under the contract.

Contracts that restrict the power of a party to terminate the contract are valid and enforceable. See *Lauren, Inc. v. Marc & Melfa, Inc.*, 446 So. 2d 1138, 1139 (Fla. 3d DCA 1984). In *Lauren*, the court explained:

> Our central disagreement with the judgment under review is the conclusion reached therein that the subject contract is terminable at the will of the plaintiff and is therefore unenforceable for lack of consideration. If the contract were subject to such unrestricted termination at the pleasure of the plaintiff, we agree that this contract would fail for

> want of consideration. *Pick Kwik Food Stores, Inc. v. Tenser,* 407 So.2d 216 (Fla. 2d DCA 1981), *pet. for rev. denied,* 415 So.2d 1361 (Fla.1982); *Restatement (Second) of Contracts* § 77, Illustration 2 (1981). **Such is not, however, the case here. The plaintiff may cancel the contract only upon certain stated conditions, as set out in some detail above, and is not authorized to cancel the contract at its whim or caprice. These stated conditions, although not stringent, represent, we think, legally viable restrictions on the power of the plaintiff to terminate the subject contract.** This being so, the plaintiff's promises to perform as contained in the contract are not illusory and constitute sufficient consideration to render this contract enforceable. This result is in accord with the weight of modern authority on this subject.

Id. at 1139 (emphasis added). *See also Serra v. Saturn of Clearwater, Inc.*, 808-CV-856-T-33MAP, 2008 WL 5412213, at *2 (M.D. Fla. Dec. 29, 2008) ("Where the contract can be cancelled only upon certain stated conditions, even if they amount to only slight restrictions, the contract is considered to be supported by adequate consideration.")

Here, like in the cases above, there are stated conditions that the Insured must comply with to cancel her contract and the contract is enforceable.

Nor do any of the cases State Farm relies on support its position that the terms of the Insured's contract are insufficient to incur the Tear Out.

None of the cases State Farm relies on involve the same policy language at issue here, nor do any of the cases involve the payment of an appraisal award. Additionally, in *Reliance Mut. Life Ins. Co. of Ill. v. Booher*, 166 So. 2d 222, 224 (Fla. 2d DCA 1964), the court found "[t]he plaintiff's engagement of the services of the surgeon to perform the necessary reconstructive surgery, although admittedly made during the 52-week period, was not the incurring of an expense at that time, for at that time the fees of the surgeon were neither understood nor agreed upon." Here, unlike *Booher*, *id*., the contract terms and payment amount were clearly defined and were understood and agreed upon. In *Brown v. Omega Ins. Co.*, 322 So. 3d 98, 102 (Fla. 4th DCA 2021), the court simply considered an assignment of benefits and found that the insureds retained their standing to sue their insurer for breach of contract. The case has no bearing on the facts or issues before this Court.

This same analysis applies to the out-of-state cases on which State Farm relies – they do not address appraisal, the policy language at issue here, similar facts, nor contractual terms, as in this case. There is simply no support for State Farm's incorrect claim that the Insured's contract is insufficient to incur the Tear Out.

The particular provision relied on by State Farm actually contemplates two separate scenarios. State Farm's Initial Brief focuses only on the second scenario. It is anticipated that in the face of the above cases State Farm may shift its attention in its Reply Brief from the second part to the first part.

The first part of the provision does not discuss voidability, but merely discusses a change in the scope of work if certain conditions arise. The first part of the modification section states:

> OWNER and APT acknowledge that OWNER may or has made a claim against the insurance polic(ies) covering the subject property for certain losses sustained on the Property. If such insurance claim(s) are made by OWNER and OWNER is thereafter notified by its insurance carrier that the settlement paid to OWNER is less than the Total Value of this Proposal as identified above (excluding any deductible or non-recoverable depreciation due pursuant to any of the OWNER's insurance polic(ies)), then in that event OWNER and APT do hereby agree to amend the scope of this Proposal to reflect a Total Value equal to but not less than the total settlement paid to OWNER by its insurance carrier.

[R.357.]

Like the second part of this same provision, this first part contains mutual obligations for the parties, and for the same reasons set forth above is likewise enforceable.

Of course, State Farm has not mentioned this first part of the provision. Nor has State Farm argued that modification renders the contract illusory. However, the Insured wanted to pint out this section in the event State Farm raises it for the first time in its reply. Any arguments it might make would not only be improper, but also without merit.

E. Trial Courts Around the State Have Rejected Similar Arguments

In cases throughout the state, State Farm has invoked appraisal and then refused to pay the Tear Out amount awarded to insureds during appraisal even after the insureds entered into contracts with a general contractor to perform the Tear Out. Like in this case, trial courts have denied nearly identical arguments that State Farm does not owe the Tear Out amount and entered summary judgment in favor of insureds requiring State Farm to pay the appraisal award amount for Tear Out:

- *Burns v. State Farm Insurance Co.*, 2018-CA-004156 (Polk County, Judge Steven L. Selph) (March 1, 2021);
- *Gant v State Farm Insurance Co.*, 2D22-2590, 19-CA-004299 (Hillsborough County, Judge Rex M. Barbas) (July 15, 2022);
- *Hester v. State Farm Insurance Co.*, 6D23-1022, 19-CA-001129 (Polk County, Judge James A. Yancey) (October 26, 2022);

- *Gordon v State Farm Insurance Co.*, 2019-CA-000714 (Duval County, Judge Virginia Norton) (November 4, 2022);
- *McClendon v. State Farm*, 1D22-4099, 16-2019-CA-002324 (Duval County, Judge Katie Dearing) (November 18, 2022).

See also Notice of Related Issue.

CONCLUSION

For the reasons stated herein, Appellee Joeretha M. James, respectfully requests that this Court affirm the trial court's order granting summary judgment in favor of the Insured.

Dated: February 1, 2023

Respectfully Submitted,

Mark A. Nation, Esquire
Board Certified Civil Trial Attorney
Board Certified Business Litigation Attorney
The Nation Law Firm
Florida Bar No.: 968560
570 Crown Oak Centre Drive
Longwood, FL 32750
Phone: (407)339-1104
Fax: (407)339-1118
Email: bhirt@nationlaw.com (Primary)
mnation@nationlaw.com;
mglassman@forthepeople.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic mail to Scot E. Samis, Esq., 55 First Street South, St. Petersburg, FL 33701 [ssamis@tlsslaw.com; sschneider@tlsslaw.com] and David W. Molhem, Esq., 320 W. Kennedy Boulevard, Tampa, FL 33606 [molhem.efile@molhemfraley.com] this 1st day of February, 2023.

Mark A. Nation, Esq.

CERTIFICATE OF COMPLIANCE

In compliance with Florida Rules of Appellate Procedure 9.045 and 9.210(2), counsel for Appellees certifies this document is in conformity with all font type and word count requirements used in this brief are 14 point type, Arial Style.

Mark A. Nation, Esq.