UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

BAGELHEADS, INC.,

Plaintiff,

v. **Case No. 3:24cv258-TKW-ZCB**

INDIAN HARBOR INSURANCE COMPANY,

Defendant.

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ORDER GRANTING SUMMARY JUDGMENT

This case is before the Court based on Defendant's motion for summary judgment (Doc. 21). Upon due consideration of the motion and its attachments, Plaintiff's response in opposition (Doc. 26) and its attachment, and Defendant's reply (Doc. 27), the Court finds that the motion is due to be granted.

Facts

Plaintiff's commercial property was insured under an "all-risks" policy issued by Defendant. The policy states that Defendant will pay "for direct physical loss of or damage to Covered Property … caused by or resulting from any Covered Cause of Loss."

The policy defines Covered Cause of Loss to include all risks of direct physical loss unless the loss is expressly excluded or limited under the policy. The

policy excludes coverage for loss caused by "wear and tear" and "deterioration."

In September 2020, while the policy was in effect, the covered property was damaged by Hurricane Sally. Plaintiff reported the loss to Defendant, and Defendant accepted coverage and paid Plaintiff a total of $171,010.62. *See* Doc. 21-1 at 2.

That amount is more than the $138,986.71 in total repair costs estimated by Defendant's expert for the covered property. *See* Doc. 21-3 at 21, 24. That estimate did not specify which costs were attributable to hurricane-related damage and which costs were attributable to wear and tear or other excluded causes because "the overall condition of the property suffered from significant wear, tear [and] deterioration resulting from substandard and deferred routine maintenance making it extremely difficult to differentiate between loss related damage and conditions resulting from general and long-term neglect." *Id.* at 3.

Plaintiff asserts that Defendant "underpaid the claim," but it did not present any evidence to support that assertion. Indeed, the only evidence Plaintiff presented was two invoices showing that it paid more for roof and air conditioner repairs than Defendant's expert estimated for those items.[1]

With respect to the roof, Defendant's expert estimated that repairs would cost $76,130.16, *see id.* at 10, but Plaintiff spent $102,503.26, *see* Doc. 26-1 at 161,

[1] Plaintiff's response makes a passing reference to a $309,780.18 estimate that was provided to Defendant's adjuster, *see* Doc. 26 at 1 (¶2), but that estimate is not in the record.

which is a difference of $26,373.10. And, with respect to the air conditioner, Defendant's expert estimated that repairs would cost $20,987.50, *see* Doc. 21-3 at 19, but Plaintiff spent $23,820, *see* Doc. 26-1 at 162, which is a difference of $2,832.50.

Even if the amounts paid by Plaintiff for roof repairs and the air conditioner are used instead of the costs estimated for those items by Defendant's expert, that would only increase the total repair costs to $168,182.31—which is still less than the amount that Defendant paid on the claim.

Procedural Background

In April 2024, Plaintiff filed suit against Defendant in state court. The complaint alleged that Defendant breached its obligations under the policy "by failing to pay all benefits due under the policy." Defendant timely removed the case to this Court based on diversity jurisdiction under 28 U.S.C. §1332(a).

Discovery closed in October 2024, after which Defendant filed a motion for summary judgment. The motion is fully briefed and is ripe for ruling.[2] No hearing is needed to rule on the motion.

Standard of Review

"The court shall grant summary judgment if the movant shows that there is no

[2] The Court extended the mediation deadline to January 20, 2025, at the parties' request, *see* Doc. 20, but the parties did not ask the Court to defer consideration of the motion for summary judgment pending the outcome of the mediation.

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). An issue of fact is "material" if it would change the outcome of the litigation, and a dispute about a material fact is "genuine" if the evidence as a whole could lead a reasonable factfinder to find for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

The party seeking summary judgment has the initial burden to demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the moving party meets that burden, the non-movant must go beyond the pleadings and identify evidence of record showing a genuine factual dispute for trial. *Id.* at 324.

When reviewing a motion for summary judgment, the Court must view the evidence in the light most favorable to the non-moving party. *Pennington v. City of Huntsville*, 261 F.3d 1262, 1265 (11th Cir. 2001). The Court's role at the summary judgment stage is not to weigh the evidence, but rather to "conclude whether [the evidence] is so one-sided that the result of any trial is inevitable." *Turner v. Phillips*, 2022 WL 458238, at *4 (11th Cir. Feb. 15, 2022). Thus, when ruling on a motion for summary judgment, "the judge must ask himself … whether a fair-minded jury could return a verdict for the [non-moving party] on the evidence presented." *Anderson*, 477 U.S. at 252.

Analysis

Defendant argues it is entitled to summary judgment because the evidence of record refutes Plaintiff's claim that Defendant failed to pay all benefits due under the policy. The Court agrees.

In cases involving an all-risks policy, the insured has the initial burden to prove that the covered property suffered a loss while the policy was in effect. *See Meija v. Citizens Prop. Ins. Corp.*, 161 So. 3d 576, 578 (Fla. 2d DCA 2014). Once the insured meets that burden, as it has done here,[3] the burden shifts to the insurer to prove the cause of loss was excluded from coverage. *Id.*

To satisfy its burden of proof, Defendant presented a report prepared by an expert building contractor with experience in evaluating wind claims. *See* Doc. 21-3. The expert prepared a detailed estimate in which he calculated that the total cost to repair the damage to the covered property was only $138,986.71, irrespective of the cause of the damage. *Id.* at 9-24.

Plaintiff argues that this evidence is insufficient to meet Defendant's burden of proof because the expert admitted that he was unable to differentiate between hurricane-related damages and wear and tear. The problem with that argument is that even if all repair costs in the expert's estimate are attributable to hurricane-

[3] It is undisputed that a loss occurred during the policy period and that Defendant accepted coverage of the claim.

related damages (and none are attributable to wear and tear or other excluded causes), the estimate is still less than the amount that Defendant has already paid on the claim.

Plaintiff has not challenged the expert's qualifications or his methodology, nor has it presented its own expert opinion about the costs to repair the damages to the covered property. On that issue, the Court did not overlook Plaintiff's argument that expert testimony is not necessary because a property owner can provide lay opinion testimony about the value of his property, *see* Doc. 26 at 13 (citing *B & B Tree Service, Inc. v. Tampa Crane & Body, Inc.*, 111 So. 3d 976 (Fla. 2d DCA 2013), and *Indian River Cnty. v. Ocean Concrete, Inc.*, 308 So. 3d 1010, 1016 (Fla. 4th DCA 2020)), but Plaintiff did not cite (nor could the Court find) any case extending that principle to a property owner providing lay opinion testimony about the cost to repair damage to the property.[4] Moreover, even if that principle would allow Plaintiff to rely on the property owner's lay opinion testimony to establish the costs to repair the covered property, the summary judgment record does not include any such testimony.

[4] In fact, this and other district courts have concluded that expert testimony is generally necessary to establish both the cause *and scope* of property damage. *See, e.g., McPherson v. Lexington Ins. Co.*, 2022 WL 22883136, at *3 (N.D. Fla. July 6, 2022); *Porben v. Atain Specialty Ins. Co.*, 546 F. Supp. 3d 1325, 1330 (S.D. Fla. 2021).

The Court also did not overlook Plaintiff's argument that a factual dispute exists because the repair estimates provided by Defendant's expert for the roof and air conditioner were less than what Plaintiff actually paid for the repairs. However, that argument does not preclude summary judgment because even when the evidence related to those two costs is viewed in the light most favorable to Plaintiff, the total repair costs are still less than the amount that Defendant has already paid on the claim.

Conclusion

In sum, for the reasons stated above, there is no record evidence from which a reasonable jury could find that Defendant failed to pay all benefits due under the policy as alleged in the complaint. Accordingly, it is

ORDERED that:

1. Defendant's motion for summary judgment (Doc. 21) is **GRANTED**.

2. The Clerk shall enter judgment for Defendant and close the case file.

DONE and ORDERED this 20th day of December, 2024.

T. KENT WETHERELL, II
UNITED STATES DISTRICT JUDGE