IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

ALLAH-PAK PROPERTIES LLC,	§	
	§	
Plaintiff,	§	
	§	
v.	§	**CIVIL ACTION NO.: 2:23-CV-301**
	§	
CENTURY SURETY COMPANY,	§	
	§	
Defendant.	§	

DEFENDANT CENTURY SURETY COMPANY'S MOTION FOR SUMMARY JUDGMENT AND INCORPORATED MEMORANDUM OF LAW IN SUPPORT

ROBERT J. WITMEYER
Texas State Bar No. 24091174
Southern District Bar No. 2600115
Email: rwitmeyer@mayerllp.com
REAGAN F. EWING
Texas State Bar No. 24101162
Southern District Bar No. 3810196
Email: rewing@mayerllp.com

MAYER LLP
750 N. Saint Paul Street, Suite 700
Dallas, Texas 75201
Telephone: (214) 379-6900
Telecopy: (214) 379-6939

ATTORNEYS FOR DEFENDANT
CENTURY SURETY COMPANY

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Rules

COMES NOW, Defendant, Century Surety Company ("Century"), by and through the undersigned counsel, and pursuant to Federal Rule of Civil Procedure 56(c), moves this Court for an order granting summary judgment in its favor. In support of its Motion, Century provides this Incorporated Memorandum of Law and states as follows:

I. INTRODUCTION

This lawsuit concerns the alleged underpayment of a claim for property damage to a commercial building. Plaintiff, Allah-Pak Properties LLC ("Allah-Pak"), asserts that Century acted in bad faith, in violation of Texas law, and in breach of contract by not paying its claim. Allah-Pak's causes of action are wholly without merit because there is no coverage available for its alleged damages.

Allah-Pak asserts that its property was initially damaged by a windstorm that occurred in April 2022, and the property was further damaged as the result of water intrusion in August 2022 that was made possible by the windstorm. Allah-Pak also asserts that it suffered business income losses and incurred extra expenses related to power generators. But as explained below, the Century policy expressly and unambiguously excludes damages from windstorms along with any further damage stemming from those initial wind-related damages. The Century policy also makes clear that it does not provide coverage for business income or extra expenses as no premium was charged for such coverages. Because Allah-Pak's claimed damages are not covered by the Century policy, Century neither breached the terms of its insurance contract with Allah-Pak nor acted in bad faith in handling its claim.

Because there remain no genuine issues of material fact, Century is entitled to judgment as a matter of law.

II. PROCEDURAL POSTURE

Allah-Pak filed the instant lawsuit on November 16, 2023. (Pl.'s Original Compl. [Doc. 1].) Discovery commenced, with the parties exchanging written discovery. Century served its responses to Allah-Pak's discovery requests on March 28, 2024. Allah-Pak served its responses to Century's discovery requests on April 19, 2024. Depositions from relevant witnesses have also been taken.

The scheduling order that currently governs this matter is the Court's Second Amended Scheduled Order, entered December 9, 2024. (Second Am. Scheduling Order [Doc. 20].) That Order states that all discovery should be completed by March 3, 2025, and it sets a deadline for dispositive motions at April 2, 2025. (*Id.*) This Motion therefore comes after the close of discovery and before the deadline to file dispositive motions.

III. STATEMENT OF UNDISPUTED MATERIAL FACTS

A. Nature of the Case and Initial Denial

This case involves an insurance coverage dispute brought by Allah-Pak against Century. (*See generally* Pl.'s Original Compl. [Doc. 1].) Allah-Pak owns and operates the commercial property located at 2833 S. Padre Island Drive in Corpus Christi, Texas. (*Id.* ¶ 7.) On or about August 14 and 15, 2022, water penetrated the utility room in the building on that property. (*Id.* ¶ 9.) That water intrusion caused a surge in the electrical systems, resulting in a power loss that spanned several months. (*Id.*) Allah-Pak rented a portable generator to supply power to its property during that time. (*Id.*)

On August 22, 2022, Allah-Pak provided notice to Century of the power loss. (*See* Loss Notice [Ex. A].) Century assigned Allah-Pak's claim to number 01-108340. (Pl.'s Original Compl. ¶ 9 [Doc. 1].) Crawford Global Technical Services ("Crawford") – Century's third-party

adjuster and administrator – immediately assigned an engineer to go to the property and investigate to determine the cause of the damage and the water leak. (Schaub Dep. 50:4-16, Oct. 24, 2024 [Ex. B].) Matthew Rem with YA Engineering Services, LCC ("YAES") visited the property on August 31, 2022. (*See* YAES Report, Sept. 23, 2022 [Ex. C].) At the conclusion of that investigation, YAES drafted a report outlining its conclusions. (*Id.*) In that report, YAES concluded that water had intruded into the utility room through elbow conduits on the roof. (*Id.*) That report concluded that the root cause of the water intrusion was improper maintenance practices relating to the roof-mounted conduit fittings and that there was evidence of prior water-intrusion events and repeated exposure to intrusive water. (*Id.*)

On October 12, 2022, Crawford sent Allah-Pak notice of its decision to decline coverage of Allah-Pak's claim. (Declination Letter, Oct. 12, 2022 [Ex. D].) That declination was based on the YAES engineer's determination that the damages were the result of ongoing water intrusions and lack of roof maintenance. (*Id.*) The declination letter further noted that there was no coverage for damages that arose because of windstorms or hail, and that there was additionally no coverage for lost business incomes or extra expenses. (*Id.*)

B. Allah-Pak's Response and Subsequent Lawsuit

After Century denied coverage, Allah-Pak sent a pre-suit notice under Chapter 542A of the Texas Insurance Code on June 23, 2023. Allah-Pak's pre-suit notice demanded payment for damages in the amount of $1,673,868.13. That amount included $803,625.71 for roof damage; $287,067.41 for rental generators; $124,238.01 for gas for rental generators; $144,237.00 for new electrical equipment; $14,700.00 for temporary roof repairs; and $300,000.00 for loss of rental income. On July 20, 2023, Century rejected Allah-Pak's demand due to lack of coverage.

On November 16, 2023, Allah-Pak filed suit against Century. In its lawsuit, Allah-Pak alleges that the Property suffered damage by a windstorm on April 11, 2022. (Pl.'s Original Compl. ¶ 9 [Doc. 1].) According to the lawsuit, "[u]nbeknownst to Plaintiff, the sustained winds on that date compromised the roofing system leaving it vulnerable to water intrusion and further damage." (*Id.*) Allah-Pak further alleges that "[i]t wasn't until the area, including Plaintiff's property was hit with over three inches of rain between August 14, 2022 and August 15, 2022 that water intruded the property through the roof and caused irreparable damage to the property's electrical panel and entire electrical system." (*Id.*)

Allah-Pak's lawsuit references an inspection by BNRB Construction on March 9, 2023. BNRB Construction submitted an estimate totaling $799,863.47 to repair the property. (*Id.* at ¶ 12.) According to the BNRB Construction estimate, the property's roof was damaged by wind. (Mike Norris Report at Century MSJ 000149-259 [Ex. E].)

During this litigation, Allah-Pak retained an engineer to investigate the cause of the damage to Property. (*See* A-One Engineering Report, Jan. 17, 2024 [Ex. F].) According to Mr. Cruz, the roofs suffered wind damage. In addition, the leak in the electrical room was caused by wind and rain. Specifically, Mr. Cruz stated that "a severe wind storm caused damage to the buildings roof," and later, on August 14 and 15, "a heavy rainstorm damaged the existing building" and "caused water to enter the electrical enclosure through penetrations in the roof which caused damage to the electrical panels." (A-One Engineering Report at Century MSJ 000263 [Ex. F].) Additionally, Mr. Cruz later confirmed in deposition that the damages to Allah-Pak's property were caused by wind and subsequent related water intrusion. (Cruz Dep. 49:10-25, 83:4-88:16, 121:13-123:8, 144:18-145:10 [Ex. G].)

Moreover, Allah-Pak admitted that a windstorm first damaged the Property and that there was then interior damage by rain that was made possible by the earlier windstorm:

> REQUEST FOR ADMISSION NO. 2: Admit the Property was damaged as a result of an April 11, 2022 windstorm.
>
> ANSWER: Admit as to partial damage caused to the Property as result of an April 11, 2022 windstorm. The Property was further damaged by rain that penetrated the roofing system into the Property's interior on August 14, 2022 and August 15, 2022.

(*See* Pl.'s Answers to Req. for Admiss. No. 2. at Century MSJ 000345 [Ex. H].)

C. Relevant Policy Provisions

Century issued a commercial property policy to Allah-Pak, bearing policy number CCP 1029261 for the policy period from November 12, 2021 to November 12, 2022 (the "Policy"). (Century Policy [Ex. I].) The Policy's declarations reflect that Allah-Pak did not pay a policy premium for extra expense or business income coverage:

DESCRIPTION OF PREMISES:

PREM	BLDG NO	LOCATION ADDRESS	CITY	ST	ZIP	CONST	OCCUPANCY	P/C
1	1	2833 S. Padre Island Drive	Corpus Christi	TX	78415	Masonry Non-Combustible	Flea Market & Mattress Store	PC - 2

COVERAGES PROVIDED - Insurance at the described premises applies only for which a limit of insurance is shown.

PREM	BLDG NO	OCC CODE	COVERAGE	LIMIT INSURED	VALUATION	COVERED CAUSES OF LOSS	COINS	RATE
1	1	0433	Building	$ 6,500,000	ACV	Special Form Including Theft	80%	0.22800

RC means Replacement Cost; ACV means Actual Cash Value; MP means Minimum Premium; AV means Agreed Value

OPTIONAL COVERAGES - Applicable only when entries are made in the schedule below

PREM	BLDG NO	CODE	COVERAGE	LIMIT INSURED	COVERED CAUSES OF LOSS	COINS	RATE

EB means Equipment Breakdown, BI means Business Income, EE means Extra Expense

PREM	BLDG NO	MONTHLY LIMIT OF INDEMNITY	MAXIMUM PERIOD OF INDEMNITY	EXTENDED PERIOD OF INDEMNITY

In addition, the Policy does not provide coverage for damage caused directly or indirectly by hail and windstorms. The Hail or Windstorm Exclusion specifically states:

> We will not pay for loss or damage:
>
> **1.** Caused directly or indirectly by Windstorm or Hail, regardless of any other cause or event that contributes concurrently or in any sequence to the loss or damage; or

> **2.** Caused by rain, water, snow, sand or dust, whether driven by wind or not, if that loss or damage would not have occurred but for the windstorm or hail.
>
> But if Windstorm or Hail results in a cause of loss other than rain, water, snow, sand or dust, and that resulting cause of loss is a Covered Cause of Loss, we will pay for the loss or damage caused by such Covered Cause of Loss, we will pay for the loss or damage caused by such Covered Cause of Loss. For example, if the Windstorm or Hail damages a heating system and a fire results, the loss or damage attributable to the fire is covered subject to any other applicable policy provisions.

(Century Policy at Century MSJ 000379 [Ex. I].)

The Century Policy also excludes interior damage unless the exterior is damaged by a "covered cause of loss" that then permitted water to enter and cause the damage:

> **A. Covered Causes Of Loss**
>
> When Special is shown in the Declarations, Covered Causes of Loss means direct physical loss unless the loss is excluded or limited in this policy.
>
> . . .
>
> **C. 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; or
>
> **(2)** The loss or damage is caused by or results from thawing of snow, sleet or ice on the building or structure.

(Century Policy at Century MSJ 000400; 000405 [Ex. I].)

IV. SUMMARY JUDGMENT STANDARD

Summary judgment should be granted when the pleadings, discovery responses, admissible evidence, and any affidavits show that there are no genuine issues as to any material fact and that the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(a); *see also Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994). Once the moving party satisfies its initial burden of showing the absence of any fact issue, the burden moves to the non-moving party, which must then produce evidence that raises such an issue of fact. *See Little*, 37 F.3d at 1075-76. Notably, in doing so, the non-moving party may not simply rest on the allegations of its pleadings. *Douglas v. State Farm Lloyds*, 37 F. Supp. 2d 532, 535–36 (S.D. Tex. 1999). Rather, the non-moving party must "present affirmative evidence, setting forth specific facts, to show the existence of a genuine issue for trial." *Id.* In other words, "conclusory allegations unsupported by concrete and particular facts will not prevent an award of summary judgment." *Duffy v. Leading Edge Products, Inc.*, 44 F.3d 308, 312 (5th Cir. 1995).

In making its determination, the court views all evidence and reasonable inferences drawn from the evidence in the light most favorable to the non-moving party. *Lincoln Gen. Ins. Co. v. Reyna*, 401 F.3d 347, 350 (5th Cir. 2005). "No genuine dispute exists 'if the record, taken as a whole, could not lead a rational trier-of-fact to find for the non-moving party.'" *Gulf & Miss. River Transp. Co. v. BP Oil Pipeline Co.*, 730 F.3d 484, 488 (5th Cir. 2013) (quoting *Kariuki v. Tarango*, 709 F.3d 495, 501 (5th Cir. 2013)). If the movant shows – and the non-moving party fails to refute – that there is no genuine issue of material fact, then the court must enter summary judgment for the moving party. *See Celotex Corp v. Catrett*, 477 U.S. 317, 322 (1986); *Unida v. Levi Strauss & Co.*, 986 F.2d 970, 975-76 (5th Cir. 1993) (quoting *Celotex*).

V. LEGAL ARGUMENT

A. Interpretation of Insurance Policies

At the outset, because this matter involves a dispute about insurance coverage, the rules governing the interpretation of insurance policies control. Under Texas law, insurance policies are construed using the general rules of interpretation that apply to all contracts. *See Nautilus Ins. Co. v. Country Oaks Apartments Ltd.*, 566 F.3d 452, 455 (5th Cir. 2009); *State Farm Life Ins. Co. v. Beaston*, 907 S.W.2d 430, 433 (Tex. 1995).

When interpreting a contract, the court's goal is to ascertain the intent of the parties. *Forbau v. Aetna Life Ins. Co.*, 876 S.W.2d 132, 133 (Tex. 1994). That intent is best found through the language used by the parties in the agreement. *Italian Cowboy Partners, Ltd. v. Prudential Ins. Co. of Am.*, 341 S.W.3d 323, 333 (Tex. 2011). Further, courts should presume that the parties "intend what the words of their contract say." *JAW The Pointe, L.L.C. v. Lexington Ins. Co.*, 460 S.W.3d 597, 602 (Tex. 2015) (quotation omitted). In determining the parties' intent, the court looks to the entire agreement and seeks to harmonize and give effect to all provisions such that "none will be meaningless." *Gilbert Tex. Constr., L.P. v. Underwriters at Lloyd's London*, 327 S.W.3d 118, 126 (Tex. 2010). In doing so, the court gives the policy's terms their ordinary and generally accepted meanings. *Id.* And where the language of the policy is clear and unambiguous, the court "must enforce the contract as made by the parties, and cannot make a new contract for them, nor change that which they have made under the guise of construction." *Fiess v. State Farm Lloyds*, 202 S.W.3d 744, 753 (Tex. 2006).

Where the contract has a clear and definite meaning, it is not ambiguous even if the parties interpret it differently. *See Gilbert*, 327 S.W.3d at 133. When evaluating contractual language, courts interpret contract language according to its "plain, ordinary, and generally accepted

meaning" unless the instrument directs otherwise. *URI, Inc. v. Kleberg City.*, 543 S.W.3d 755, 764 (Tex. 2018) (quotation omitted); *see also Great Am. Ins. v. Primo*, 512 S.W.3d 890, 893 (Tex. 2017) (internal citations and formatting omitted).

Moreover, under Texas law, the insured bears the burden of proving that it is initially entitled to coverage under an insurance policy. *Century Sur. Co. v. Hardscape Constr. Specialties, Inc.*, 578 F.3d 262, 265 (5th Cir. 2009). If the insured does so, the insurer has the burden of showing the applicability of an exclusion. *Id.* And once the insurer does so, the burden returns to the insured to show that an exception brings the claim back into coverage. *Id.*

Here, the Policy's language is clear and unambiguous: no coverage exists for damage caused by wind or enabled by wind-related damage. In addition, no coverage exists for business income or extra expense. Consequently, the plain and clear language of the Policy must be applied as written and in accordance with the intent of the parties.

B. Allah-Pak's Causes of Action

Allah-Pak asserts in its pleadings four causes of action against Century: (1) breach of the insurance agreement, (2) bad faith denial of coverage, (3) deceptive insurance practices, and (4) failure to timey pay. (*See generally* Pl.'s Original Compl.) As explained below, however, none of those causes of action can withstand summary judgment.

1. Allah-Pak's claim for breach of contract is untenable because its insurance did not cover the damages alleged.

Allah-Pak asserts a claim against Century for breach of contract. Specifically, Allah-Pak alleges that Century breached the terms of its insurance agreement by failing to honor its alleged obligation to provide coverage for Allah-Pak's claimed damages. To maintain a claim for breach of contract, Allah-Pak must prove (1) that a valid contract existed, (2) that it performed its obligation under that contract, (3) that the defendant breached the terms of the contract, and that

(4) the defendant's breach caused the Allah-Pak's damages. *Party Favors, LLC v. MarineMax E., Inc.*, 699 F. Supp. 3d 537, 544 (S.D. Tex. 2023); *Wright v. Christian & Smith*, 950 S.W.2d 411, 412 (Tex. App.—Houston [1st Dist.] 1997, no pet.).

At issue here is the breach element. That is, the critical question here is whether Century breached the insurance agreement by failing to pay Allah-Pak's claimed damages. Generally, the question of whether a breach occurred is a legal one to be addressed by the court. *Frew v. Janek*, 820 F.3d 715, 723 n.28 (5th Cir. 2016) (citing *E.P. Towne Ctr. Partners v. Chopsticks, Inc.*, 242 S.W.3d 117, 123 (Tex. App.—El Paso 2007, no pet.); *see also Bank One v. Stewart*, 967 S.W.2d 419, 432 (Tex. App.—Houston [14thDist.] 1998, pet. denied) ("[W]hether a party has breached a contract is a question of law for the court and not a question of fact for the jury.").

a. No Coverage For Roof Damage

In the present case, Allah-Pak's pre-suit notice demanded payment for damages in the amount of $1,673,868.13. That amount includes $803,625.71 for roof damage; $287,067.41 for rental generators; $124,238.01 for gas for rental generators; $144,237.00 for new electrical equipment; $14,700.00 for temporary roof repairs; and $300,000.00 for loss of rental income.

With respect to the roof damage, there is no coverage. The Policy unambiguously precludes coverage for any damage "[c]aused directly or indirectly by Windstorm or Hail, regardless of any other cause or event that contributes concurrently or in any sequence to the loss or damage." Here, Allah-Pak's complaint alleges that the property was damaged by wind. Further, Allah-Pak admitted in its discovery responses that there was "partial damage caused to the Property as result of an April 11, 2022 windstorm." (*See* Pl.'s Answers to Req. for Admiss. No. 2. [Ex. H].) Allah-Pak's building inspector (BNRB Construction) and expert (Cruz) both stated that the roof suffered damage as a result of wind. (Mike Norris Report at Century MSJ 000149-

259 [Ex. E] & Cruz Dep. 49:10-25, 83:4-88:16, 121:13-123:8, 144:18-145:10 [Ex. G].) However, the Policy does not provide coverage for damage directly caused by wind. As a result, Allah-Pak cannot recover $803,625.71 for roof repairs; $14,700.00 for temporary roof repairs; or any other amounts for roof damage.

b. No Extra Expense Coverage

According to the Policy's declarations, the Policy does not provide coverage for extra expenses because no premium was charged for such coverage. Extra expense coverage provides coverage to those losses sustained because of a suspension of business operations arising from damage to the building. *See Terry Black's Barbecue, LLC v. State Auto. Mut. Ins. Co.*, 514 F. Supp. 3d 896, 903–04 (W.D. Tex. 2021); *LDWB #2 LLC v. FCCI Ins. Co.*, No. 1:20-CV-425-LY, 2021 WL 2744568, at *5 (W.D. Tex. July 1, 2021). This can includes amounts to operate a temporary location or minimize suspension of operations at the insured location. *See Rimkus Consulting Group, Inc. v. Hartford Cas. Ins. Co.*, 552 F. Supp. 2d 637, 646–47 (S.D. Tex. 2007)

Here, Allah-Pak sought $287,067.41 for rental generators and $124,238.01 for gas for the rental generators. Because the Policy does not provide extra expense coverage, Allah-Pak cannot recover for these amounts or any other amounts for extra expense.

c. No Business Income Coverage

According to the Policy's declarations, the Policy does not provide coverage for extra expenses because no premium was charged for such coverage. Business income coverage means loss of business income sustained due to the suspension of operations during a period of restoration. *See Hanover Cas. Co. v. Seven Acres Jewish Care Servs., Inc.*, 654 S.W.3d 495, 500 (Tex. App.—Houston [14th Dist.] 2022, pet. denied).

Here, Allah-Pak sought $300,000 for loss of rental income. Because the Policy does not provide business income coverage, Allah-Pak cannot recover for these amounts or any other amounts for business income.

d. No Coverage for Interior Damages Resulting from an Uncovered Windstorm

The Policy excludes from coverage any damage caused by wind, as well as any damage caused by rain that would not have occurred but for a windstorm. Here, Allah-Pak seeks $144,237 for the cost of new electrical equipment. As discussed below, multiple Policy provisions establish that there is no coverage for these amounts.

First, the Policy contains the Hail or Windstorm Exclusion that applies to the roof damage. Specifically, the Policy explicitly states that Century will not pay for loss or damage:

> **1.** Caused directly or indirectly by Windstorm or Hail, regardless of any other cause or event that contributes concurrently or in any sequence to the loss or damage; or
>
> **2.** Caused by rain, water, snow, sand or dust, whether driven by wind or not, if that loss or damage would not have occurred but for the windstorm or hail.

(Ex. I Policy at Endorsement.)

In the same vein, the Policy states that there is no coverage for [t]he interior of any building or structure, or to personal property in the building or structure, caused by or resulting from rain . . . unless . . . [t]he 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." (Century Policy at Century MSJ 000405 [Ex. I].)

As these provisions establish, interior rain-related damages that were enabled by a windstorm are not covered because a windstorm is not a covered cause of loss under the Policy. Here, it is undisputed that the property was originally damaged by a windstorm, and later, the electrical room equipment suffered damage by rain entering through the wind-damaged roof.

Indeed, Allah-Pak conceded this in its pleadings, which stated that the alleged damage was caused after "sustained winds" on April 11, 2022 "compromised the roofing system leaving it vulnerable to water intrusion and further damage." (Pl.'s First Am. Compl. ¶ 9.) Allah-Pak continued to press these assertions in the Joint Discovery/Case Management Plan. (*See* Joint Discovery/Case Management Plan [Doc. 8].) Allah-Pak then maintained that assertion in its responses to Century's discovery requests:

> REQUEST FOR ADMISSION NO. 2: Admit the Property was damaged as a result of an April 11, 2022 windstorm.
>
> ANSWER: Admit as to partial damage caused to the Property as result of an April 11, 2022 windstorm. The Property was further damaged by rain that penetrated the roofing system into the Property's interior on August 14, 2022 and August 15, 2022.

(*See* Pl.'s Answers to Req. for Admiss. No. 2. at Century MSJ 000345 [Ex. H].) Finally, Allah-Pak's expert made clear that an opening in the electrical room roof conduit was created by wind, which permitted the rain to enter the electrical room. (Cruz Dep. 49:10-25, 83:4-88:16, 121:13-123:8, 144:18-145:10 [Ex. G].) In other words, Allah-Pak's own position describes the precise damage not covered by the Policy.

Allah-Pak is not entitled to coverage under the Policy. Consequently, Century did not breach the terms of the insurance contract by failing to cover Allah-Pak's claimed damages.[1]

2. Allah-Pak's extra-contractual claims fail on the evidence.

Allah-Pak next asserts a cause of action against Century for common-law bad faith denial of Allah-Pak's claim under the Century policy. "Under Texas law, there is a duty on the part of the insurer to deal fairly and in good faith with an insured in the processing of claims."

[1] Century anticipates that Allah-Pak will attempt to argue the exception to the Windstorm or Hail Exclusion. Allah-Pak will have the burden of proof to establish the applicability of an exception to the policy exclusion. *Century Sur. Co. v. Hardscape Constr. Specialties, Inc.*, 578 F.3d 262, 265 (5th Cir. 2009). However, Allah-Pak will be unable to meet its burden because the windstorm did not result in a covered cause of loss other than rain.

Higginbotham v. State Farm Mut. Auto. Ins. Co., 103 F.3d 456, 459 (5th Cir. 1997) (citing *Arnold v. Nat'l Cty. Mut. Fire Ins. Co.*, 725 S.W.2d 165, 167 (Tex. 1987)). A claim for breach of that duty of good faith arises if the insurer denies or delays in paying a claim without a reasonable basis for doing so. *Id.*; *Stewart Info. Servs. Corp. v. Great Am. Ins. Co.*, 997 F. Supp. 2d 650, 671 (S.D. Tex. 2014).

To maintain a claim for bad faith in handling an insurance claim, the plaintiff must show (1) that the insurer denied a claim under the policy, (2) that the insurer's denial was unreasonable that the insurer had no reasonable basis for denying that claim, and (3) that the insurer knew or should have known of the absence of such a reasonable basis. *Stewart Info. Servs. Corp.*, 997 F. Supp. 2d at 671; *see also Higginbotham*, 103 F.3d at 459. In other words, an insurer can be held liable if "the insurer knew or should have known that it was reasonably clear that the claim was covered." *Universe Life Ins. Co. v. Giles*, 950 S.W.2d 48, 56 (Tex. 1997); *see also Alhamzawi v. GEICO Cas. Co.*, 216 F. Supp. 3d 764, 768 (N.D. Tex. 2016).

Importantly, however, an insurer cannot be held liable for bad faith "if there was *any reasonable basis* for the denial of" coverage. *Weiser-Brown Operating Co. v. St. Paul Surplus Lines Ins. Co.*, 801 F.3d 512, 525-26 (5th Cir. 2015) (quoting *Henry v. Mut. of Omaha Ins. Co.*, 503 F.3d 425, 428-29 (5th Cir. 2007)). That is, "[a] bona fide controversy is sufficient reason for failure of an insurer to make a prompt payment of a loss claim." *Stewart Info. Servs. Corp.*, 997 F. Supp. 2d at 671 (quoting *Higgonbotham*). Even where the insurer's initial basis is later found to be in error, if that basis was reasonable at the time, then there was no bad faith. *Id.* In determining whether a reasonable basis existed, the court looks to the facts available to the insurer when the claim was denied. *See Viles v. Sec. Nat'l Ins. Co.*, 788 S.W.2d 566, 567 (Tex. 1990). If the evidence shows a reasonable basis for denying the claim – that is, a bona fide controversy

about whether the claim is covered by the policy – no bad faith occurred. *Douglas v. State Farm Lloyds*, 37 F. Supp. 2d 532, 537 (S.D. Tex. 1999).

In addition to its common-law claim for bad faith, Allah-Pak has also asserted claims for deceptive insurance practices and failure to timely pay a claim, which are actionable under the Texas Insurance Code and the Texas Deceptive Trade Practices Act. (*See generally* Pl.'s First Am. Compl.) Notably, there is a "close relationship between common law bad faith claims and the statutory bad faith claims found in the Texas Insurance Code and the DTPA." *Blueitt v. Crestbrook Ins. Co.*, 643 F. Supp. 3d 651, 658 (N.D. Tex. 2022). Consequently, the "bona fide dispute rule also applies to those statutory bad faith claims under the Deceptive Trade Practices Act and the Texas Insurance Code." *Id.*

The Southern District Court's decision in *Erazo v. State Farm Lloyds* serves as a useful example of how those principles are applied. That case involved a coverage dispute brought by the plaintiff, Adolfo Erazo, against his insurer, State Farm. *Erazo v. State Farm Lloyds*, No. 4:23-CV-1965, 2024 WL 2805328, at *1 (S.D. Tex. May 3, 2024), *report and recommendation adopted*, No. CV H-23-1965, 2024 WL 2806177 (S.D. Tex. May 31, 2024). The plaintiff alleged that his property was damaged in a severe storm in March 2022, and he submitted a claim with State Farm to cover the damages. *Id.* In September 2022, State farm tasked an adjuster to inspect the property to determine the extent of any damages. *Id.* The adjuster found no wind or hail damages to the property. *Id.* State Farm therefore denied the claim. *Id.*

In response, the plaintiff hired his own independent adjuster to inspect the property. *Id.* That inspector provided a letter to State Farm outlining the repair estimate, photographs of the damages, and a request for State Farm to perform an additional inspection. *Id.* State Farm

reviewed those additional materials and again declined coverage, stating that its prior findings remained unchanged. *Id.*

Following that second denial, the plaintiff filed a petition in Texas state court asserting breach of contract, bad faith, deceptive trade practices, and violations of the Texas Insurance Code. *Id.* State Farm subsequently removed the case to the Southern District Court and moved for summary judgment as to all claims asserted against it. *Id.* While the court denied the motion as to the plaintiff's claim for breach of contract, it found that summary judgment was warranted as to the non-contractual claims. *Id.* at *4-5. Specifically, after reciting the relevant legal principles, the court emphasized that State Farm "promptly responded to [the plaintiff's] claim by sending an adjuster to inspect the property" and that that adjuster found only damage consistent with normal "wear, tear, and deterioration." *Id.* at *5. The court held that based on the adjuster's inspections and conclusions, State Farm had a reasonable basis to deny the plaintiff's claim. *Id.* The fact that the plaintiff's adjuster came to an opposite finding from State Farm's adjuster supported the court's conclusion because "the fact that qualified experts on each side . . . disagree about whether the damage . . . was caused by hail and wind is further evidence that this case is, at heart, a bona fide coverage dispute, not one of bad faith." *Id.* (internal quotation and formatting omitted). Consequently, the court concluded that State Farm was entitled to summary disposition of the plaintiff's bad faith claim. *See also Lee v. Catlin Specialty Ins. Co.*, 766 F. Supp. 2d 812, 814 (S.D. Tex. 2011) (granting summary judgment in favor of the insurer on bad faith claims).

Here, Allah-Pak's extra-contractual claims are based on Century's refusal to provide coverage or its alleged unreasonable basis for denying coverage. But the undisputed evidence on record reveals a reasonable basis to deny Allah Pak's claim or, at minimum, that a bona fide dispute exists about whether coverage was available.

As explained above, Allah-Pak retained BNRB Construction, which stated that the roofs were damaged by wind. And the Policy does not provide coverage for such wind damage. The Policy declarations also make clear that there is no coverage for business income or expense.

Further, after Allah-Pak provided notice of a claim to Century, Century assigned YAES to inspect the property and investigate the source of the electrical room leak and the cause of the damages. YAES concluded that Allah-Pak failed to properly maintain its property based on evidence of prior water leaks. According to YAES, this was the cause of the damage to the subject property. Consequently, Century notified Allah-Pak that it was denying the claim. Century included in its denial reasons for that denial that were based (1) on YAES's findings; (2) on the allegations that Allah-Pak itself had made regarding the cause of the leak, which implicated separate exclusions under the Century policy; and (3) on the specific damages that Allah-Pak sought to recover, which were expressly not covered under the Century policy.

Moreover, Allah-Pak's own retained expert provided separate opinions as to the cause of the electrical room water leak and damages. A-One Engineering concluded that there was no failure to maintain the property and that the water leak arose because of a prior windstorm. But simply because there is a difference in agreement between YAES and A-One Engineering as to the cause of the damage does not mean that Century's initial denial was in bad faith. Indeed, as in *Erazo*, the fact that two sets of experts arrive at opposite conclusions merely underscores the bona fide nature of the dispute.

Moreover, even accepting as true both the position of A-One Engineering and Allah-Pak's allegations in this case, Allah-Pak's claim remains uncovered by the policy. As outlined in detail above, Allah-Pak's complaint alleges, Allah-Pak admits, and Allah-Pak's own expert agrees that the damage to Allah-Pak's property was the result of sustained winds, which ultimately permitted

the water to intrude. In other words, even if Allah-Pak's position regarding the cause of its damages were accurate, it would still not be entitled to coverage under the Century policy.

VI. CONCLUSION

Allah-Pak's claims against Century are untenable. Allah-Pak cannot show that Century breached its insurance agreement because the damages that Allah-Pak claims are not covered by the Policy. Further, Allah-Pak cannot maintain any of its extra-contractual claims because the undisputed evidence on record shows Allah-Pak's claim was never covered and that Century had a reasonable basis to deny coverage; or at most, a bona fide dispute about whether the claim was covered existed.

No genuine issue of material fact remains for trial. Because Allah-Pak is unable to prove one or more essential elements of each of its causes of action against Century, Century is entitled to judgment as a matter of law.

WHEREFORE, PREMISES CONSIDERED, Century Surety Company respectfully requests that the Court grant its motion for summary judgment, find that it owes no duty to pay any amount to Allah-Pak, and for such other, and further, relief in law or in equity, that Century would show itself justly entitled and would ever pray.

Respectfully submitted,

By: */s/ Robert J. Witmeyer*

ROBERT J. WITMEYER
Texas State Bar No. 24091174
Southern District Bar No. 2600115
rwitmeyer@mayerllp.com
REAGAN F. EWING
Texas State Bar No. 24101162
Southern District Bar No. 3810196
rewing@mayerllp.com

MAYER LLP
750 N. Saint Paul Street, Suite 700
Dallas, Texas 75201
Telephone: (214) 379-6900
Telecopy: (214) 379-6939

ATTORNEYS FOR DEFENDANT,
CENTURY SURETY COMPANY

CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of April 2025, a true and correct copy of the foregoing document was served on counsel of record using the Court's ECF filing service:

Nohayia Javed
Javed Law Firm, PLLC
attorney@javedlawfirm.com
1107 Babcock Road, Suite 4
Balcones Heights, Texas 78201
Tel: (832) 360-0476
Fax: (281) 605-5020
Attorney for Plaintiff

/s/ Robert J. Witmeyer
ROBERT J. WITMEYER