UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 21-CV-81884-RS

KAWA ORTHODONTICS, LLP,

Plaintiff,

v.

DEPOSITORS INSURANCE COMPANY,

Defendant.
_____/

ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

This matter is before the Court on the parties' cross-motions for summary judgment: Plaintiff's Motion for Summary Judgment [DE 39] ("Plaintiff's Motion"), Defendant's Opposition [DE 47], and Plaintiff's Reply [DE 55]; and Defendant's Motion for Summary Judgment [DE 44] ("Defendant's Motion"), Plaintiff's Opposition [DE 50], and Defendant's Reply [DE 57]. For the reasons that follow, Plaintiff's Motion is granted, and Defendant's Motion is denied.

I. MATERIAL FACTS

Plaintiff, Kawa Orthodontics, LLP ("Kawa"), is a limited liability partnership offering dentistry services in Palm Beach County, Florida.[1] Kawa was formed in or around 1993 by Doctor Larry Kawa. Defendant, Depositors Insurance Company ("Depositors"), is an insurance company authorized to conduct business in Florida. Depositors provides customers commercial insurance policies and other insurance services.

Kawa and Depositors entered into a commercial insurance policy (the "insurance contract") with effective dates of June 23, 2020 through June 23, 2021. The insurance contract insures Kawa against direct physical loss subject to all applicable policy conditions, amendments, and

[1] The Court omits citations to the record where a fact is undisputed.

endorsements. The insurance contract insures "covered property," which is defined in the insurance contract as "business personal property." (Commercial Insurance Package at 21-22 [DE 43-2].) "Business personal property" is further defined as "personal property you own that is used in your business, including but not limited to furniture, fixtures, machinery, and equipment" as well as "tenant improvements and betterments [meaning] fixtures, alterations, installations, or additions made a part of the building you occupy but do not own and you acquired or made at your expense but cannot legally remove." (*Id.*)

The parties' insurance contract specifically provides "Additional Coverage" for "Equipment Breakdown." (*Id.* at 29.) "Equipment Breakdown" is defined as direct physical loss of or damage to covered property caused by or resulting from an "accident" to "covered equipment." (*Id.*) The insurance contract provides that if an initial accident causes other accidents, all will be considered one accident; all accidents that are the result of the same event will be considered one accident for insurance purposes. (*Id.*) The insurance contract defines "accident" as a fortuitous event that causes direct physical damage to "covered equipment," and, as pertains to additional coverage for equipment breakdown, specifically provides five enumerated instances in which an accident would be insured. (*Id.* at 57.) At issue here is the first instance, in which accident means "mechanical breakdown, including rupture or bursting caused by centrifugal force." (*Id.*) The insurance contract defines "covered equipment" as covered property which (1) "generates, transmits or utilizes energy, including electronic communications and data processing equipment" or (2) "during normal usage, operates under vacuum or pressure, other than the weight of its contents." (*Id.*) The insurance contract specifically excludes from the definition of "covered equipment" structures, foundations, cabinets, compartments or air supported structures or buildings, as well as insulating or refractory material. (*Id.*)

During the effective policy period of the insurance contract, Kawa had an aquarium system on its business premises consisting of two water tanks and a bridge that connected the two tanks. Together, the two tanks and the connecting bridge comprise one aquarium system; one part of the aquarium system would not function without the other parts. Kawa's operations manager testified that the aquarium system operates under a vacuum. The aquarium system operated in part via a submersible filtration pump and under pressure during its normal usage. The filtration pump utilized suction to create water pressure circulating throughout the aquarium system. Kawa's designated forensic engineering expert testified that the aquarium system operates under vacuum and pressure from the circulation of the plumbing system. The parties agree that the aquarium system is covered property under business personal property as defined by the insurance contract.

Kawa discovered a crack in the acrylic glass to the connecting bridge of the aquarium system on or about March 1, 2021. This was the first time Kawa had noticed any cracks or had any issues with the aquarium system. Kawa drained the aquarium system and removed the fish therein to avoid any safety concerns or disruptions to its business. Kawa's expert testified that there is no proper or industry-approved method to repair acrylic glass like that found in Kawa's aquarium system. Depositors' designated engineering expert testified that there was no long-term solution for the initial crack, and that the individuals he had spoken with recommended that the bridge be discarded, and the aquarium system rebuilt anew.

Kawa hired a company to address the initial crack in the acrylic glass of the connecting bridge on or around April 24, 2021. When this company attempted to dismantle and remove the bridge, a new crack developed in a wall of the aquarium system. Because there is no industry-approved method to repair acrylic glass like that found in Kawa's aquarium system, there was inherent risk in the third-party's repair and removal job. Kawa's forensic engineering expert testified that the second crack was a function of trying to remove the connecting bridge. However,

Depositors' engineering expert testified that the third-party company placed unnecessary weight on the connecting bridge during the removal process which may have led to the second crack. Nevertheless, according to this expert, a subsequent crack to the aquarium system's wall was "an accident waiting to happen" due to the initial crack in the acrylic glass. Additionally, Depositors' corporate representative testified that the entire incident involving the aquarium system was an accident, and that Kawa had experienced direct physical loss to covered property.

Kawa informed Depositors about the damage to the aquarium system and filed an insurance claim on or around April 29, 2021. Defendant's corporate representative testified that Plaintiff provided timely notice of the insurance claim to Defendant. (*See* Holland Dep. at 108:9-12 [DE 33].) Although some damaged pieces of the aquarium system had by then been discarded, Depositors' corporate representative stated that any insurance contract provisions regarding preservation of property from further damage at or after time of loss was inapplicable to the parties' dispute. Kawa's public adjuster prepared an estimate detailing a total replacement cost value of $569,371.52 to replace the aquarium system. (*See* Northern Inc. Public Adjusters & Appraisers' Report [DE 43-7].) Depositors' adjuster prepared an estimate detailing an actual cash value of $326,004.33 for the aquarium system. (*See* Mechanical Engineering Investigation at 10 [DE 38-27].) The difference in the two values represents a deduction for depreciation; although Depositors' adjuster accounted for depreciation in his estimate, Kawa's adjuster did not. Depositors, in a letter addressed to Kawa dated June 7, 2021, denied coverage of the insurance claim, stating in relevant part: "[t]he reasons for this denial of coverage are as follows: our investigation determined that the loss was due to the negligent work of [third-party repair company] Erisa Improvements . . . because your loss was caused by the negligent work of the contractor, which is excluded in the language quoted above, we must regretfully deny coverage for your claim and will be unable to compensate you for the repairs." (Denial Letter [DE 33-7].)

Based on these factual allegations, Plaintiff's Complaint [DE 1-9 at 6-9] brings one count for breach of contract against Defendant based on Defendant's denial of coverage for Plaintiff's insurance claim regarding its aquarium system.

II. STANDARD

Under Federal Rule of Civil Procedure 56, "summary judgment is proper if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). "[G]enuine disputes of facts are those in which the evidence is such that a reasonable jury could return a verdict for the non-movant." *Mann v. Taser Int'l, Inc.*, 588 F.3d 1291, 1303 (11th Cir. 2009) (internal marks omitted). A fact is material if, under the applicable substantive law, it might affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

A party seeking summary judgment bears the initial responsibility of supporting its motion and identifying those portions of the record which it believes demonstrate the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323. "[A]t the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson*, 477 U.S. at 249. The Court "must view all the evidence and all factual inferences reasonably drawn from the evidence in the light most favorable to the nonmoving party and must resolve all reasonable doubts about the facts in favor of the non-movant." *Rioux v. City of Atlanta, Ga.*, 520 F.3d 1269, 1274 (11th Cir. 2008) (internal marks omitted).

In opposing a motion for summary judgment, the non-moving party may not rely solely on the pleadings, but must show by affidavits, depositions, answers to interrogatories, and admissions that specific facts exist demonstrating a genuine issue for trial. *See* Fed. R. Civ. P. 56(c), (e); *see*

also Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986). A mere "scintilla" of evidence supporting the opposing party's position will not suffice; instead, there must be a sufficient showing that the jury could reasonably find for that party. *Anderson*, 477 U.S. at 252; *see also Walker v. Darby*, 911 F.2d 1573, 1577 (11th Cir. 1990).

III. DISCUSSION

This is a breach of contract action concerning a commercial insurance policy. Plaintiff contends that Defendant breached the parties' insurance contract following Defendant's denial of coverage for Plaintiff's insurance claim for damages to its aquarium system. Plaintiff argues that summary judgment should be entered in its favor as there are no material facts in dispute and because the aquarium system is covered property pursuant to the insurance contract. On the other hand, Defendant argues that it is entitled to summary judgment because Plaintiff's claim is not a covered loss pursuant to the parties' insurance contract, and because Plaintiff failed to provide timely notice of its loss or prove its damages.

The interpretation of an insurance contract is a matter of law to be decided by the Court. *Smith v. State Farm Mut. Auto. Ins. Co.*, 231 So. 2d 193, 194 (Fla. 1970); *Gulf Tampa Drydock Co. v. Great Atlantis Ins. Co.*, 757 F.2d 1172, 1174 (11th Cir. 1985). "When analyzing an insurance contract, it is necessary to examine the contract in its context and as a whole, and to avoid simply concentrating on certain limited provisions to the exclusion of the totality of others." *Swire Pac. Holdings, Inc. v. Zurich Ins. Co.*, 845 So. 2d 161, 165 (Fla. 2003). Insurance contracts are construed in accordance with the plain meaning of the language in the policy for which the parties bargained. *Auto-Owners Ins. Co. v. Anderson*, 756 So. 2d 29, 34 (Fla. 2000). If the relevant policy language is susceptible to more than one reasonable interpretation, one providing coverage and the other limiting coverage, the insurance policy is considered ambiguous. *Id.* Ambiguous policy provisions will be construed in favor of the insured and strictly against the drafter. *Id.*

Coverage clauses in insurance contracts are to be construed in the broadest possible manner to affect the greatest extent of coverage. *Lenhart v. Federated Nat'l Ins. Co.*, 950 So. 2d 454, 457 (Fla. 4th DCA 2007).

The Court finds that Plaintiff's aquarium system is covered property under the parties' insurance contract, and that the insurance contract's additional coverage for equipment breakdown applies; as such, Defendant's denial of Plaintiff's insurance claim with respect to the aquarium system represents a breach of the parties' insurance contract. Summary judgment will therefore be entered for Plaintiff on the sole count in Plaintiff's Complaint.

A. Attempted Repair of the Aquarium

At the outset, the Court notes that the parties are in agreement regarding the existence of a valid contract (the insurance contract) and the reason for Defendant's denial of Plaintiff's insurance claim, which is the alleged negligent repair work of the third-party company hired following the initial crack to the aquarium's connecting bridge. Defendant argues that its denial was appropriate given the allegedly negligent repair work of the third-party company and given that the parties' insurance contract excludes coverage for damage caused by or resulting from faulty, inadequate, or defective workmanship, repair, or maintenance. However, Defendant has not demonstrated how the repair work was negligent, or how Plaintiff's damage was caused by faulty, inadequate, or defective workmanship, repair, or maintenance.

Instead, it is Plaintiff that has demonstrated that the repair work was not negligent, and that Plaintiff's damages were caused by an accident to covered equipment. Indeed, Defendant's own expert testified that a subsequent crack to the aquarium system's wall was "an accident waiting to happen" due to the initial crack in the acrylic glass. The same expert admitted that there was no long-term solution for the initial crack to the aquarium system, and that all individuals he consulted recommended that the bridge be discarded, and the aquarium system rebuilt anew. Moreover, the

parties agree that there is no industry-approved methodology to repair acrylic glass of the type found in Plaintiff's aquarium system. Because there is no such methodology, there is no identifiable standard of care applicable to the repair work in this instance. As such, the Court cannot hold that the repair company breached its duty of care, and was therefore negligent, in the attempted repair of Plaintiff's aquarium system. Because the parties agree that the repair company's work is the only basis for Defendant's denial of Plaintiff's insurance claim, and because the Court has held that the repair company's work was not the cause of Plaintiff's loss, there remains no basis for Defendant to deny Plaintiff's insurance claim. Nevertheless, the Court will address the arguments in Defendant's Motion in turn.

B. Equipment Breakdown

Defendant argues that Plaintiff's loss does not meet the definition for "Equipment Breakdown" coverage under the parties' insurance contract because there has been no "accident to covered equipment." For coverage under the insurance contract's additional coverage for Equipment Breakdown to apply, there must be an "accident to covered equipment," as defined by the insurance contract. Plaintiff has demonstrated that this is precisely what occurred with respect to its aquarium system.

First, the aquarium system is covered equipment, in that it is covered property[2] which, during normal usage, operates under vacuum or pressure, other than the weight of its contents. The record shows that the aquarium system operated in part via a submersible filtration pump and under pressure during its normal usage. The filtration pump utilizes suction to create water pressure circulating throughout the aquarium system. Thus, the aquarium operates under vacuum.

[2] The parties agree that the aquarium system is covered property as business personal property pursuant to the insurance contract.

Second, an "accident" occurred, in that the aquarium system was subject to a "mechanical breakdown." The insurance contract specifically defines an accidental event in relevant part as a "mechanical breakdown, including rupture or bursting caused by centrifugal force." (Commercial Insurance Package at 57.) The record shows that the damage to the aquarium system was caused by a mechanical breakdown such as a rupture[3] to the component parts of the aquarium system.

Although Defendant argues that the rupture need be caused by centrifugal force for an "accident" to have occurred, the Court will not credit this interpretation for two reasons: (1) because ambiguous coverage clauses in insurance contracts are to be construed liberally to affect the greatest extent of coverage, *Lenhart*, 950 So. 2d at 457, and (2) due to the rule of the last antecedent. Here, the undefined phrase "mechanical breakdown, including rupture or bursting caused by centrifugal force" is ambiguous because it is susceptible to more than one reasonable interpretation, one providing coverage and the other limiting coverage. *Anderson*, 765 So. 2d at 34. To interpret the phrase so that the clause "caused by centrifugal force" modifies the noun "rupture" would arguably limit coverage of Plaintiff's loss. But the opposite interpretation, where the clause modifies only the noun that it immediately follows, would extend coverage for Plaintiff's loss. In such a scenario, the ambiguity is resolved in favor of the insured. *Id.* Thus, the Court will interpret the phrase "caused by centrifugal force" to modify only the noun it immediately follows. Because "mechanical breakdown" would therefore entail a "rupture," and because Plaintiff's aquarium system suffered a rupture, coverage for Plaintiff's loss would be extended under the insurance contract's additional coverage for equipment breakdown.

[3] "Rupture" is not defined by the insurance contract; it is defined in the dictionary as "breach [of peace or concord]; the tearing apart [of a tissue]; a breaking apart or the state of being broken apart." *Rupture*, Merriam-Webster (11th ed. 2019). In the case at bar, a breach, tear, or break is what occurred to the component parts of the aquarium system.

Moreover, an application of the rule of the last antecedent to the phrase at issue resolves the ambiguity and leads to the conclusion that Plaintiff's loss was indeed a mechanical breakdown. That rule provides that "a limiting clause or phrase . . . should ordinarily be read as modifying only the noun or phrase that it immediately follows." *Lockhart v. United States*, 577 U.S. 347, 351 (2016) (quoting *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003)). For the present inquiry, an application of the rule means that the rupture to Plaintiff's aquarium system need not be caused by centrifugal force to qualify as an accident. Plaintiff need only show that its aquarium system suffered a rupture to meet the definition of mechanical breakdown and thus an accident pursuant to the insurance contract. The crack, breach, tear, or break to the component parts of the aquarium system qualifies as such a rupture.[4]

The Court notes here as well that Depositors' corporate representative testified that the entire incident involving the aquarium system was an accident, and that Kawa had experienced direct physical loss to covered property. Even putting this admission aside, the Court holds that Plaintiff has suffered an accident to covered equipment such that the insurance contract's additional coverage for equipment breakdown must apply.

C. Compliance with Insurance Contract

Defendant next argues in its Motion that Plaintiff failed to provide component parts of the aquarium system for Defendant's inspection. However, Plaintiff provides evidence from Defendant's representatives stating Defendant was not prejudiced by the lack of preserving some pieces of the aquarium system. Moreover, Defendant's corporate representative testified the insurance contract provision regarding preservation of property from further damage at or after the time of loss was inapplicable to the parties' dispute. The evidence is thus undisputed that the

[4] See *supra* note 3.

preservation of property provision is inapplicable, and the Court will not permit Defendant to argue the issue on summary judgment where it has conceded it during discovery. In any event, the Court holds that Defendant was not prejudiced by a lack of preservation of property.

Regarding Defendant's timeliness arguments, the parties agree that Plaintiff complied with all conditions precedent under the insurance contract prior to filing its insurance claim. One such condition relates to timely notification of the insured's loss. Defendant's corporate representative testified that Plaintiff provided timely notice of the insurance claim to Defendant. Defendant has therefore conceded the timeliness argument, and the parties are in agreement that Plaintiff complied with all conditions under the insurance contract, including conditions related to timely notification of loss.

D. Damages

Defendant's final argument concerns Plaintiff's damages. Proof of damages resulting from a material breach of contract is a necessary element in any breach of contract claim. *Friedman v. New York Life Ins. Co.*, 985 So. 2d 56, 58 (Fla. 4th DCA 2008); *Jovine v. Abbott Labs, Inc.*, 795 F. Supp. 2d 1331, 1341 (S.D. Fla. 2011). Defendant argues that Plaintiff's damages should be limited to "actual cash value," generally defined as "fair market value" or "replacement cost minus normal depreciation," where depreciation is defined as a "decline is an asset's value because of use, wear, obsolescence, or age." *Trinidad v. Fla. Peninsula Ins. Co.*, 121 So. 3d 433, 438 (Fla. 2008) (quoting Black's Law Dictionary 506, 1690 (9th ed. 2009)). Defendant has submitted evidence showing that the actual cash value for Plaintiff's loss is $326,004.33. On the other hand, Plaintiff argues that it is entitled to "replacement cost value." Replacement cost is measured by what it would cost to replace the damaged structure on the same premises. *Trinidad*, 121 So. 3d at 438. Replacement cost value does not consider depreciation. Plaintiff has submitted evidence showing that the replacement cost value for Plaintiff's loss is $569,371.52.

An insurance company's liability for replacement cost does not arise unless and until the repair or replacement has been completed. *Ceballo v. Citizens Prop. Ins. Corp.*, 967 So. 2d 811, 815 (Fla. 2007). The parties' insurance contract does not provide any differently.[5] In the case at bar, the evidence is uncontroverted that Plaintiff has not completed the repair or replacement of its aquarium system. Therefore, pursuant to Florida law and the parties' insurance contract, Plaintiff's damages must be calculated utilizing an actual cash value theory and not, as argued by Plaintiff, a replacement cost value theory. Here again the evidence is clear and it is undisputed: under an actual cash value theory, Plaintiff's loss is equal to a sum total of $326,004.33.

IV. CONCLUSION

For the reasons stated herein, Defendant's Motion is denied, and Plaintiff's Motion is granted. The Court holds that Plaintiff's aquarium system is covered equipment as defined by the parties' insurance contract. An accident occurred to this piece of covered equipment which caused direct physical loss of and damage to the covered equipment during the policy period. This accident was a fortuitous event and can be best understood as a mechanical breakdown due to the rupture and breach of the aquarium system wall and connecting bridge. Because there was a direct physical loss of and damage to covered property resulting from an accident to covered equipment, Defendant was obligated to insure Plaintiff's loss pursuant to the parties' insurance contract. The failure to do so constitutes a material breach of the parties' insurance contract, and Plaintiff suffered damages as a result. Summary judgment will therefore be entered for Plaintiff on the sole count of Plaintiff's Complaint.

Accordingly, it is hereby,

ORDERED that:

[5] The insurance contract states: "we will not pay on a replacement cost basis for any loss or damage until the lost or damaged property is actually repaired or replaced." (Commercial Insurance Package at 48.)

1. Plaintiff's Motion for Summary Judgment [DE 39] is **GRANTED**.
2. Defendant's Motion for Summary Judgment [DE 44] is **DENIED**.
3. All pending motions not otherwise ruled upon are **DENIED as moot**.
4. The Court will enter a separate final judgment.
5. This case is **CLOSED**.

DONE AND ORDERED in Fort Lauderdale, Florida on this 29th day of September 2023.

RODNEY SMITH
UNITED STATES DISTRICT JUDGE

cc: All Counsel of Record