

IN THE CIRCUIT COURT OF THE  
16TH JUDICIAL CIRCUIT, IN AND FOR  
MONROE COUNTY, FLORIDA

CASE NO.: 19-CA-000269-M

TREASURE CAY CONDOMINIUM  
ASSOCIATION INC A/K/A TREASURE  
CAY CONDO ASSOC. INC.,

Plaintiff,

vs.

FRONTLINE INSURANCE UNLIMITED  
COMPANY,

Defendant.

**ORDER ON PARTIES' MOTIONS FOR SUMMARY JUDGMENT AND ORDER  
ENTERING FINAL JUDGMENT IN FAVOR OF DEFENDANT**

THIS MATTER having come before the Court on March 5, 2024, on Defendant's Motion for Summary Judgment on Plaintiff's Failure to Comply with the Insurance Policy's "Duties After Loss and Plaintiff's Motion for Summary Judgment, and the Court having considering said motions, the respective oppositions, the summary judgment evidence, pertinent legal authority, argument of counsel, the Court file, having heard argument of counsel and being otherwise fully advised in the premises, it is,

**ORDERED AND ADJUDGED:**

1. Defendant's Motion for Summary Judgment is hereby **GRANTED**.
2. Plaintiff's Motion for Summary Judgment is hereby **DENIED**.

**OPINION**

**BERK, MERCHANT & SIMS**  
PLC

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The Court finds that there are no genuine issues of material fact and that the decision in favor of the Defendant is based on the application of the terms of the insurance policy and the relevant provisions of law to those undisputed facts which the Court finds to be accurately recited in the Defendant's motion.

The Court finds that Plaintiff's claim of approximately \$3,000,000.00 submitted about 2 years after the Plaintiff had been informed of the Defendant's coverage decision was a supplemental claim<sup>1</sup>. The Court notes, however, that whether or not the claim is characterized as a supplemental claim or the original claim is of no import under the facts of this case. Defendant denied coverage for Plaintiff's supplemental claim because, prior to filing suit, Plaintiff refused: (1) appear for an examination under oath; (2) produce documents; and, (3) allow inspections of the property as often as reasonably required. Plaintiff's refusal prevented Defendant from completing its own independent evaluation of the supplemental claim presentation.

The Court finds that Plaintiff was not relieved from these post-loss obligations as set forth in the insurance policy as follows:

**RELEVANT PORTIONS OF THE INSURANCE POLICY**

**3. *Duties In The Event Of Loss Or Damage***

***a. You must see that the following are done in the event of loss or damage to Covered Property;***

\* \* \*

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<sup>1</sup> Florida Statute 627.70132 states, in part, "...the term 'supplemental claim' or 'reopened claim' means any additional claim for recovery from the insurer for losses from the same hurricane or windstorm which the insurer has previously adjusted pursuant to the initial claim." Fla. Stat. § 627.70132. Based on that language, the multimillion-dollar claim presented after the initial adjustment is a "supplemental claim." Even if this were not a supplemental claim, however, the Court must resolve the issue of whether Plaintiff breached the post-loss obligations before appraisal could be compelled.



*(5) At our request, give us complete inventories of the damaged and undamaged property, including quantities, costs, values and amount of loss claimed.*

*(6) As often as may be reasonably required, permit us to inspect the property proving the loss or damage and examine your books and records.*

*Also permit us to take samples of damaged and undamaged property for inspection, testing and analysis, and permit us to make copies from your books and records.*

*b. We may examine any insured under oath, while not in the presence of any other insured and at such times as may be reasonably required, about any matter relating to this Insurance or the claim, including an insured's books and records. In the event of an examination, an insured's answers must be signed.*

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***H. The following provisions are added to the Duties In The Event Of Loss Or Damage Loss Condition:***

*(1) A claim, supplemental claim or reopened claim for loss or damage caused by hurricane or other windstorm is barred unless notice of claim is given to us in accordance with the terms of this policy within three years after the hurricane first made landfall or a windstorm other than hurricane cause the covered damage. (Supplemental claim or reopened claim means an additional claim for recovery from us for losses from the same hurricane or other windstorm which we have previously adjusted pursuant to the initial claim.)*

*This provision concerning time for submission of claim, supplemental claim or reopened claim does not affect any limitation for legal action against us as provided in this policy under the Legal Action Against Us Condition, including any amendment to that condition.*

*(2) Any inspection or survey by us, or on our behalf of property that it the subject of a claim, will be conducted with at least 48 hours notice to you. The 48 hours notice may be waived by you.*

***D. LEGAL ACTION AGAINST US***

*No one may bring a legal action against us under this Coverage Part unless:*

*(1) There has been full compliance with all of the terms of this Coverage Part; and \*\*\*\**

(See Policy Forms CP 00 17 06 07 pp. 9-10 of 14, CP 00 90 07 88, p. 1 of 2.

“Conditions in policies of insurance are part of the consideration for assuming the risk, and the insured, by accepting the policy, becomes bound by these conditions.” *Goldman v. State Farm Fire Gen. Ins. Co.*, 660 So. 2d 300, 304 (Fla. 4th DCA 1995). An insured’s compliance with all post-loss obligations allows for an orderly claims handling process without burdening either the parties or the court system with unnecessary litigation.

Here, Defendant invoked the post-loss obligation to sit for an examination under oath, inspect the property, and allow inspection of its books and records. There is no dispute between the parties that those duties are contained within the policy, along with a legal action clause. There is also no dispute that Plaintiff refused to comply with its post-loss obligations after it submitted its \$3 million supplemental claim.

Among the relief requested in its Amended Complaint, Plaintiff sought a judicial declaration that it did not have to comply with its post-loss obligations prior to compelling appraisal and sought an order-compelling appraisal of the supplemental claim. Among its defenses, Defendant argued that the insured materially breached the insurance contract by refusing to sit for an EUO, produce documents or allow inspection; thus, Defendant was relieved of any obligation to provide further coverage or participate in appraisal on the denied supplemental claim.

Plaintiff categorized its duties as “punitive” but Florida law holds that “these obligations are not unduly burdensome or arbitrary and constitute assurance that the



insurer will be provided with adequate information on which to base its conclusions.” *United States Fidelity & Guar. Co. v. Romy*, 744 So. 2d 467, 471 (Fla. 3d DCA 1999). Indeed, the Third DCA has found the type of documentation and information requested by Defendant relevant and appropriate in the investigation of an insurance claim. See, *Citizens. Prop. Ins. Corp. v. Galeria Villas Condo. Ass’n*, 48 So. 3d 188, 191 (Fla. 3d DCA 2010). Thus, the Court finds no merit in Plaintiff’s characterization of the Defendant’s invocation of those duties as vindictive or punitive. To the contrary, the Court finds it quite fair and reasonable for the Defendant to seek to investigate the Plaintiff’s \$3,000,000.00 claim brought to the Defendant’s attention about 2 years after the hurricane.

Further, the Court finds no merit in Plaintiff’s position, that compliance with post-loss duties cease after appraisal is demanded. It is universal that an insured’s complete failure to comply with its post-loss obligations is a material breach of the policy that can void coverage for a loss. See *State Farm Fla. Ins. Co. v. Xirinachs*, 251 So. 3d 221, 223 (Fla. 3d DCA 2018) (“...the insured’s failure to comply with their post-loss obligations relieved State Farm of any duties under the policy as to the supplemental claims sought by the insured.”).

There is nothing improper about requesting documents and examination under oath in response to an appraisal demand. As the Third DCA stated in its *en banc* decision in *Romy*, “no reasonable and thoughtful interpretation of the policy could support compelling appraisal without first complying with the post loss obligation.” *Romy*, 744 So. 2d at 471. If that were so, a policyholder, after incurring a loss, could immediately invoke appraisal and secure a binding determination as to the amount of

loss. *Id.* That determination, in turn, could be enforced in the courts. *Id.* Under that framework, expressed and agreed-upon terms of the contract, i.e., the post-loss obligation, would be struck from the contract by way of judicial fiat and the bargained-for contractual terms would be rendered surplusage.” *Id.* See also *Am. Coastal Ins. Co. v Ironside Inc.*, 330 So.2d 570 (Fla. 2d DCA 2021).

There is no dispute that Plaintiff failed to comply with the policy’s post loss conditions. Once it is shown the insured did not comply with a post-loss obligation, “prejudice to the insurer from the insured’s material breach is presumed, and the burden shifts to show that any breach of post-loss obligations did not prejudice the insurer.” *Am. Integrity Ins. Co. v. Estrada*, 276 So. 3d 905, 916 (Fla. 3d DCA 2019).

Plaintiff now has to present admissible evidence that its refusal to sit for an EUO, timely produce documents and refuse to allow inspection did not prejudice Defendant. See *Estrada*, supra. As *Estrada* noted, when an insurer alleges a failure to substantially comply with a post-loss obligation – as Defendant has done here – and establishes the insured failed to do so (as with Plaintiff’s refusal to sit for EUO, produce documents and allow inspection prior to the suit), the burden then shifts to the insured to show that its failures did not prejudice the insurer. *Id.*

Without submitting to the Examination Under Oath, providing documents requested, or allow re-inspection of the property, Plaintiff deprived Defendant of its valuable right to investigate both the damages claimed here, the foundation for the claim, its right to learn about the historical “health” of the building, and its right to monitor the condition of the claimed damages over time. That effectively thwarted Defendant’s adjustment, forcing it to rely on only cherry-picked information selected by



the Plaintiff and its counsel. Therein lies the prejudice. As stated above, Plaintiff's documents were particularly important because the windows and doors were new, had the blue installation film still on them, they were under warranty, and Plaintiff was in the midst of an ongoing restoration project when the hurricane hit the property.

Illustrating the prejudice, Defendant was unable to inspect the damaged property as part of Plaintiff's \$3 million supplemental claim, have Plaintiff sit for an EUO, and inspect its books and records as provided in the policy. Instead, Plaintiff is now forcing Defendant to complete its adjustment of the loss in litigation and under the threat of statutory attorneys' fees under Fla. Stat. § 627.428.

Simply stated, prejudice is presumed where prejudice to the insurer is required following a breach of a post-loss obligation. An insured *must* present summary judgment evidence that shows the insurer suffered *no* prejudice from the breach of a post-loss obligation. If after reviewing the summary judgment record Plaintiff has not met this high burden as it failed to produce any evidence to rebut the presumption of prejudice to Defendant.

Ultimately, the Court finds that Plaintiff materially breached the insurance policy by refusing to comply with the post-loss conditions. As a result of the breach, the Defendant suffered prejudice and is entitled to summary judgment in its favor as a matter of law on both Counts of Plaintiff's Amended Complaint.

Plaintiff shall recover nothing from this action and Defendant shall go henceforth without day. The Court reserves ruling on Defendant's entitlement to fees and costs, if any, should a timely filed motion for same be filed.

DONE AND ORDERED in Chambers, Key West, Florida on this 7<sup>th</sup> day of ~~May~~<sup>June</sup>, 2024.

  
MARK H. JONES  
CIRCUIT COURT JUDGE

- cc. Stephen A. Marino, Jr. ([smarino@vpm-legal.com](mailto:smarino@vpm-legal.com); [jpacheco@vpm-legal.com](mailto:jpacheco@vpm-legal.com))  
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