UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 24-81400-CIV-DIMITROULEAS

GEORGE BOTELHO and
INNA BOTELHO,

Plaintiff,

vs.

INDIAN HARBOR INSURANCE COMPANY,

Defendant.
_____/

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

THIS CAUSE is before the Court upon Defendant's Motion for Summary Judgment [DE 81]. The Court has carefully considered the Motion, Response, Reply, the statements of facts and opposition thereto, and is otherwise fully advised in the premises.

1. BACKGROUND[1]

Plaintiffs, George Botelho ("George") and Inna Botelho ("Inna") (collectively, "the Botelhos"), are husband and wife and reside at 2880 Banyan Boulevard Circle, NW, Boca Raton, Florida, 33431 (the "Property"). Plaintiffs purchased the Property in 2017.

The Property's Roof

At the time they purchased the Property in 2017, Plaintiffs were aware the Property's roof was in need of a replacement. Plaintiffs engaged DMA Roofing ("DMA") on November 17, 2017 to completely replace the roof. DMA subcontracted with Custom Architectural Roofing

[1] All statements in the Background section are derived from uncontested portions of the statements of material facts and supporting materials, unless otherwise noted.

("CAR") and S&M Fam ("S&M"). The roof replacement was performed defectively and was not completed. The roof project was abandoned by the contractors in August of 2018, over one year prior to the inception date of Indian Harbor's first policy. The roof remained incomplete from March of 2018 until 2025. Water began entering the home as the result of the defective roof replacement in March of 2018 and continued for years thereafter.[2] Water continually entered the property each time it rained.[3] Plaintiffs recently signed a contract for a new roof replacement with iRoof, LLC on February 28, 2025. The new roof replacement is currently underway but is not yet complete.

Plaintiffs' Application for Insurance and the Indian Harbor Policies

Prior to obtaining insurance from Indian Harbor, Plaintiffs completed an application for coverage (the "application") dated September 20, 2019.[4] On September 17, 2019, three days prior to the date of the application, Atlas Roofing prepared a re-roofing proposal for Plaintiffs.[5] On September 23, 2019, three days after the date of the application, Gomez Roofing Co. prepared a re-roofing proposal for Plaintiffs.[6]

The application specifically asked: "Are you carrying out/do you plan to undergo

[2] Plaintiffs attempt to dispute this asserted fact by citing to deposition testimony by George regarding when he first noticed the leaking, which does not dispute the fact asserted by Defendant. *Compare* [DE 80] at D SOF ¶ 19 with [DE 91] at P response SOF ¶ 19.
[3] Plaintiffs attempt to dispute this asserted fact by responding "This is another gross misrepresentation of Dr. Botelho's Testimony" and then citing to deposition testimony by George which does not dispute the fact asserted by Defendant but rather supports the asserted fact. *Compare* [DE 80] at D SOF ¶ 20 with [DE 91] at P response SOF ¶ 20.
[4] Plaintiffs attempt to dispute this asserted fact by citing to deposition testimony by George that he originally answered the questions honestly but that he could not recall if he changed the answer himself to question 9 after his insurance broker advised him to or if the insurance broker changed it for him after this discussion. This distinction does not dispute the asserted fact. Plaintiffs are not taking the position that they did not know what the completed application stated when they submitted it. *Compare* [DE 80] at D SOF ¶ 24 with [DE 91] at P response SOF ¶ 24.
[5] Plaintiffs attempt to dispute this asserted fact is nonresponsive and nonsensical. *Compare* [DE 80] at D SOF ¶ 25 with [DE 91] at P response SOF ¶ 25. The date on the proposal is evidence of when it was prepared and therefore was properly cited by Defendant in support of its asserted fact that it was prepared on that date. If Plaintiff wished to dispute Defendant's asserted fact, Plaintiff was required to cite to record evidence contradicting the asserted fact.
[6] *See* footnote above.

construction, renovation or reconstruction at any of your properties in the next year?" To this question, Plaintiffs responded with: "No." George was advised by his insurance broker to answer "no" to avoid a denial of the application.[7]

The application also asked: "Have you suffered any loss or damage to your property in the last 5 years, whether or not covered by insurance? If yes, please provide the date of loss, a description and the amount of the loss." Plaintiffs responded to this question affirmatively but failed to describe any of the ongoing issues with the defective roof replacement. George was trying to keep the ongoing issues with the subject property's roof "separate" from his insurance.[8]

On October 24, 2019, George signed a "Statement of No Loss" certifying that he was "not aware of any losses, accidents, or circumstances that might give rise to a claim" at that time.

Defendant Indian Harbor Insurance Company ("Indian Harbor") issued Policy No. HS221258200 to the Botelhos providing coverage for the Property with effective dates October 23, 2019 to October 23, 2020, in exchange for policy premiums paid by the Botelhos ("2019 Policy"). Indian Harbor also issued Policy No. HS221258201 to the Botelhos providing coverage for the Property with effective dates October 23, 2020 to October 23, 2021, in exchange for policy premiums paid by the Botelhos ("2020 Policy"). (The 2019 Policy and 2020 Policy are collectively, "the Policies").

The Policies provide coverage for instances of "sudden or accidental" physical loss or damage that occurs within the policy periods unless an exclusion applies:

> We insure against all risks of sudden and accidental direct physical loss or damage to your dwelling, contents and other structures unless an exclusion

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[7] Plaintiffs' response, "Disputed as an incomplete summary of Dr. Botelho's testimony," does not "clearly challenge" Defendant's asserted fact. *See* S.D. Fla. L.R. 56.1(a)(2). *Compare* [DE 80] at D SOF ¶ 29 with [DE 91] at P response SOF ¶ 29.

[8] Plaintiffs' response, "Disputed. Incomplete summary of Dr. Botelho's testimony," does not "clearly challenge" Defendant's asserted fact. *See* S.D. Fla. L.R. 56.1(a)(2). *Compare* [DE 80] at D SOF ¶ 32 with [DE 91] at P response SOF ¶ 32.

applies.

The Policies exclude damage caused by defective workmanship:

6. Faulty, Inadequate or Defective Planning

We do not cover any loss caused by faulty, inadequate or defective:

a. Planning, zoning, development, surveying, siting;

b. Design, specifications, workmanship, repair, construction, renovation, remodeling, grading, compaction;

c. Materials used in repair, construction, renovation or remodeling; or

d. Maintenance;

of part or all of any property whether on or off the residence premises.

However, we do insure ensuing covered loss to your dwelling and other structures unless another exclusion applies.

The Policies contain the following provision regarding "Concealment or Fraud" on the part of an insured either before or after a loss:

G. Concealment or Fraud

We do not provide coverage to an insured who, whether before or after a loss, has:

a. Intentionally concealed or misrepresented any material fact or circumstance;

b. Engaged in fraudulent conduct; or

c. Made false material statements;

relating to this insurance.

Plaintiffs' Insurance Claim

On December 7, 2020, the Botelhos submitted a claim to Indian Harbor and/or Pure Insurance Company ("Pure"). The claim that was submitted on December 7, 2020 to Pure and/or

Indian Harbor was for water entering the Property. Pure and/or Indian Harbor retained a company called ARC Solutions in December of 2020 to remediate or address the damages at the subject property, and a representative of ARC Solutions went to the property in December of 2020 to perform content manipulation, water extraction from a hard surface floor, installation of air movers and dehumidifiers, applying of plant based antimicrobial agents to the ceiling, and cleaning the floor.

Mr. Errington ("Errington") of Axiom Engineering, Inc. ("Axiom") was retained by Pure "to assist with the reinspection and brought in as an expert to opine on maybe causation" and/or to "determine why there's water entering the premises." Errington inspected the subject property on October 28, 2021. Pure and/or Indian Harbor paid for a contractor to remove and reset a tarp on the roof at the subject property in order for Errington to perform his inspection. Bob Kester ("Kester), a general adjuster working for Pure, inspected the Property on October 8, 2021 in response to the Botelhos submitting a claim for damages to Pure and/or Indian Harbor. During Kester's inspection of the subject property on October 8, 2021, Kester walked around the perimeter of the home, took numerous photographs, entered the home, and took photographs of all rooms within the home where the Botelhos were pointing out issues with the house. The purpose of Kester's inspection was to gather information on damages being claimed by the Botelhos. On October 11, 2021, Kester requested an engineer employed by Axiom named Sean Bunch "inspect the home and opine as to how the various rooms are being damaged (roof leak or some other leak). On October 11, 2021, when requesting Axiom's assistance to "inspect the home and opine as to how the various rooms are being damaged (roof leak or some other leak)", Kester explained to Julie Lourim of Axiom that the living room, sitting room, kitchen, master bathroom, and guest wing were being claimed as damaged. Errington of Axiom issued a Report

to Kester of Pure on November 11, 2021 ("Axiom Report"). Errington was an engineering intern, not a professional engineer, at the time he performed his inspection and the Axiom Report was issued. The Axiom Report finds observed water damage by Errington during his inspection on or about October 28, 2021 in the sitting room and laundry room, kitchen, and guest suite, which, according to Errington, were "consistent with leakage through the roof above due to deficiencies in the installation." For the living room and theater room, the Botelhos reported signs of water damage to Errington, who then concluded that these areas of reported damages were also "consistent with leakage through the roof above due to deficiencies in the installation." The leakage Errington refers to in his report is rain coming into the interior of the residence during a storm or rain event. The water damage Errington either reported or observed in the home during his inspection was spread across the home. It was not an isolated event of water intrusion. The damage to the interior of the house could have happened on December 7, 2020, when the Botelhos reported a claim to Indian Harbor and/or Pure.

II. STANDARD OF REVIEW

Under Rule 50(a), "[t]he court shall grant summary judgment if the movant shows that there is no 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). The movant bears "the stringent burden of establishing the absence of a genuine issue of material fact." *Suave v. Lamberti*, 597 F. Supp. 2d 1312, 1315 (S.D. Fla. 2008)(citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)).

"A fact is material for the purposes of summary judgment only if it might affect the outcome of the suit under the governing law." *Kerr v. McDonald's Corp.*, 427 F. 3d 947, 951 (11th Cir. 2005)(internal quotations omitted). Furthermore, "[a]n issue [of material fact] is not 'genuine' if it is unsupported by the evidence or is created by evidence that is 'merely colorable'

or 'not significantly probative.'" *Flamingo S. Beach I Condo. Ass'n Inc. v. Selective Ins. Co. of Southeast,* 492 F. Appx 16, 26 (11th Cir. 2013)(quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986)). "A mere scintilla of evidence in support of the nonmoving party's position is insufficient to defeat a motion for summary judgment; there must be evidence from which a jury could reasonably find for the non-moving party." *Id.* at 26-27 (citing *Anderson*, 477 U.S. at 252). Accordingly if the moving party shows "that, on all the essential elements of its case on which it bears the burden of proof at trial, no reasonable jury could find for the nonmoving party" then "it is entitled to summary judgment unless the nonmoving party, in response comes forward with significant, probative evidence demonstrating the existence of a triable issue of fact." *Rich v. Sec'y*, *Fla. Dept. of Corr.*, 716 F. 3d 525, 530 (11th Cir. 2013) (citation omitted).

III. DISCUSSION

The Botelhos have brought the instant action for breach of contract against Indian Harbor, contending that the substantial damages suffered at the Property are covered under the Policies and that Indian Harbor has failed and refused to pay the Botelhos under the Policies. *See* [DE 1].

To establish a claim for breach of contract under Florida law, a plaintiff must establish that: (1) a contract existed; (2) there was a breach of contract; and (3) damages occurred. *See J.J. Gumberg Co. v. Janis Servs.,* 847 So. 2d 1048, 1049 (Fla. 4th DCA 2003).

Defendant argues it is entitled to summary judgment, asserting that Plaintiffs' breach of contract claim is precluded on the following grounds: (1) due to material misrepresentations made on their insurance application; (2) because Plaintiffs failed to identify a fortuitous loss within the relevant coverage period; (3) because Plaintiffs never presented a claim at actual cash

value; (4) because Plaintiffs have not incurred loss of use damages; and (5) because the policy excludes damage caused by faulty construction. *See* [DE 81]. For the reasons set forth below, Defendant's motion shall granted.

1. Plaintiffs' claim fails due to material misrepresentations made on their application for insurance with Indian Harbor

Defendant Indian Harbor argues it is entitled to summary judgment because there is no coverage for Plaintiffs' claim due to the material misrepresentations made on their application for insurance with Indian Harbor. The Court agrees with Defendant.

As set forth *supra*, the Policies contain the following provision regarding "Concealment or Fraud" on the part of an insured either before or after a loss:

> G. **Concealment or Fraud**
>
> **We do not provide coverage to an insured who**, whether before or after a loss, has:
>
> a. **Intentionally concealed or misrepresented any material fact or circumstance**;
>
> b. Engaged in fraudulent conduct; or
>
> **c. Made false material statements;**
>
> relating to this insurance.

(emphasis added).

Florida law enforces and upholds "concealment or fraud" provisions in insurance contracts. *See Anchor Prop. & Cas. Ins. Co. v. Trif, No.* 4D20-814, 2021 WL 2217265 (Fla. 4th DCA June 2, 2021) ("[A] policy provision that voids coverage for fraud or concealment relating to the insurance is fully enforceable in Florida."). Moreover, "traditional requirements of a fraud claim do not necessarily apply by the same measure to such a contractual fraud claim" such that an insurer need not demonstrate that relied on an insured's misrepresentations when asserting

this policy defense. *Nova Hills Villas Condo. Ass'n, Inc. v. Aspen Specialty Ins. Co.*, No. 07-60939CIV, 2008 WL 179878, at *4 (S.D. Fla. Jan. 21, 2008).

Under Florida law, "[a]n intentional, material misrepresentation relating to a claim voids the coverage under a policy containing such provision. A misrepresentation is material if a reasonable insurance company, in determining its course of action, would attach importance to the fact misrepresented." *In re Sandell*, No. 8:00BL6417KRM, 2005 WL 1429746, at *2 (Bankr. M.D. Fla. June 9, 2005).

Here, Defendant contends that, based upon the undisputed facts, Plaintiffs made material false statements and misrepresentations to Indian Harbor while they were applying for insurance in September of 2019, as follows:

> First, Plaintiffs failed to disclose the defective roof replacement from 2018 or the resulting interior water intrusion that was ongoing at that time. Second, Plaintiffs falsely represented that they were not planning to undergo any more construction at the subject property while they were actively obtaining new roof bids to correct the defective construction. Third, Plaintiffs signed a "Statement of No Loss" wherein they erroneously certified they were unaware of any circumstances that might give rise to a claim under Indian Harbor's policies. The "Statement of No Loss" was signed by Dr. Botelho on October 24, 2019.

See [DE 81] at p. 8. Defendant further argues that these misrepresentations were material, as a reasonable insurance company would attach importance in the underwriting process as to whether that there was a defective roof replacement to the Property in 2018 and as to whether Plaintiffs were actively obtaining bids to correct the defective roof at the time they were applying for insurance with Indian Harbor. Accordingly, Defendant argues that, pursuant to the terms of Indian Harbor's policy, there is no coverage for Plaintiffs' claim due to these material misrepresentations.

Plaintiffs, on the other hand, maintain that the "Concealment or fraud" provision of the Policies does not apply based on their argument that there is substantial evidence that Indian

Harbor knew about the issues with the roof and voluntarily decided to issue the Policies. Plaintiffs cite to a Risk Management Report prepared in November 2019 by Pure and/or Indian Harbor after an employee of Pure, Janae Kanjian, inspected the Property on November 15, 2019 for the purpose "to report on the condition of the home or condition of the risk that – that – that Pure had underwritten" and/or to "document the condition or state of the property that was being insured." Plaintiffs therefore argue that in November of 2019, Pure and/or Indian Harbor made the decision to continue to insure the Property, thereby voluntarily assuming the risk that the roof was in an incomplete state.

The Court finds Plaintiffs' argument to be foreclosed under the facts of this case and under Florida law. First, the November 2019 inspection occurred approximately two months after Plaintiffs submitted the application containing the material misrepresentations and approximately one month after coverage was already bound. Furthermore, Florida law does not support Plaintiffs' contention that Plaintiffs can make material misrepresentations on an insurance application and then avoid the contractual consequence therefrom because Defendant conducted an investigation. *See, e.g., Besett v. Basnett,* 389 So. 2d 995, 997 (Fla. 1980) ("A person guilty of fraudulent misrepresentation should not be permitted to hide behind the doctrine of caveat emptor."). Moreover, "if there is no consequence when a policyholder makes a false representation to his or her insurance company even if not relied upon, the policy provision would be rendered meaningless, which would be inconsistent with the principle that every provision in a contract is to be given meaning and effect." *Nova Hills*, 2008 WL 179878, at *4.

Here, based upon the undisputed facts, *see supra*, Plaintiffs made material misrepresentations on their application and Defendant is entitled to judgment as a matter of law

of no coverage due to Plaintiffs' violation of the Policies' "Concealment or Fraud" provision. [9]

IV. CONCLUSION

Based upon the foregoing, it is **ORDERED AND ADJUDGED** as follows:

1. Defendant's Motion for Summary Judgment [DE 81] is **GRANTED**;

2. Pursuant to Fed. R. Civ. P. 58(a), the Court will enter a separate final judgment.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 8th day of January, 2026.

WILLIAM P. DIMITROULEAS
United States District Judge

Copies furnished to:
Counsel of record

[9] As this issue is dispositive, the Court need not reach the additional independent grounds asserted by Defendant in its motion for summary judgment.