

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

TOUCHMARK HOTEL GROUP, LLC, d/b/a
HOLIDAY INN EXPRESS, a Florida limited
liability company,

Plaintiff,

Case No.: 1:24-CV-06744-PKC

vs.

MT. HAWLEY INSURANCE COMPANY, a
foreign insurance corporation,

Defendant.

**PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION
TO DEFENDANT'S MOTION FOR SUMMARY JUDGEMENT**

COMES NOW the Plaintiff, **TOUCHMARK HOTEL GROUP, LLC,**
d/b/a HOLIDAY INN EXPRESS, a Florida limited liability company, by
and through the undersigned counsel, and respectfully submits its Memorandum
of Law, and therefore, Plaintiff states as follows:

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INTRODUCTION

Defendants Mt. Hawley Insurance Company (“Defendant”) filed their Motion for Summary Judgement (“Motion”) as to the issue of whether Plaintiff materially breached its policy by violating the policy conditions of prompt notice and concealment, misrepresentation, or fraud, thereby voiding coverage.

Ultimately, Defendant seeks judgement on its 12th and 18th Affirmative Defenses. Defendant’s Motion should be denied because 1) Plaintiff provided prompt notice of the claim to Defendant after Plaintiff reasonably became aware of circumstances suggesting they may have a claim; and 2) Plaintiff did not, at any point from the inception of the claim, conceal, misrepresent, or provide fraudulent information to Defendant as to any material fact. Accordingly, Defendants are not entitled to judgment in their favor.

STATEMENT OF FACTS

1. Defendant issued Commercial Property Insurance Policy No. MPCo604887 (hereinafter, the “Policy”) to Plaintiff which insured the property located at 10148 New Berlin Road Jacksonville, Florida 32226 (hereinafter, the “Property”) from December 22, 2022, to January 22, 2024.

2. Plaintiff’s property suffered damage from a windstorm on or about January 4, 2023.

3. The following day the general manager told Plaintiff’s corporate representative, Mr. Rick Patel, that there were shingles in the parking lot.

4. Neither Mr. Patel nor the general manager observed water intrusion at the time the shingles were discovered, and no storm-created openings were visible from the ground.

5. The physical damage to the roof was not visible from the parking lot.

6. Mr. Patel assessed the circumstances and given the lack of water intrusion damage, the size of the roof, and the small amount of shingles, the circumstances did not suggest to him the possibility of an insurance claim.

7. On or about May 23, 2023, Plaintiff received notification that the phone system was not working. Plaintiff's employees observed significant water intrusion and Plaintiff promptly reported the claim to Defendant on June 22, 2023.

8. Defendant assigned claim #526755 and provided its coverage decision in a letter dated September 6, 2023.

9. Plaintiff subsequently hired a public adjuster, River City Claims, to assist them with the claim.

10. Plaintiff executed a sworn proof of loss quantifying the claimed damage to the hotel as \$805,258.91 which was based on the River City Claims estimate and a PuroClean restoration estimate.

11. The RCC estimate included a roof replacement cost of \$266,761.62 to replace the hotel's roofs. The scope of the roof replacement in the RCC estimate included all roof surfaces, the tear off, haul, and disposal of the existing shingles, decking replacement, a complete replacement of the existing shingles, roofing

labor, and materials, among other roof related repairs such as replacement of roof vents.

12. Prior to executing the sworn proof of loss, Plaintiff paid \$40,000 as a deposit on a roof bid it received from Coastal Roofing, the scope of which was significantly less than the River City Claims estimate.

13. On November 29, 2023, Plaintiff received another estimate from Coastal Roofing for the installation of a metal roof for \$120,000.

14. On August 20, 2024, Plaintiff signed a third bid from Coastal Georgia Roofing which estimated the roof replacement of the main hotel, pool shed, and front carport to be \$110,000.00. The estimate made clear, costs would increase if structural components needed to be replaced due to rot.

15. As of August 20, 2024, the final cost of the roof was still unascertainable.

16. The roof work commenced in mid-2024 and was not completed until late 2024.

17. Plaintiff was forthcoming with all documentation in the discovery process and did not attempt to commit fraud, misrepresentation, or concealment. Plaintiff did not know the final cost of the roof replacement until almost a year after executing the sworn proof of loss. The final cost of the roof replacement was \$106,692.47.

18. The facts show Plaintiff provided prompt notice of the claim to Defendant promptly after the circumstances suggested they may have a claim.

Further, Plaintiff did not, at any point from the inception of the claim, conceal, misrepresent, or provide fraudulent information to Defendant as to any material fact.

ARGUMENTS AND AUTHORITY

I. Standard of Review

“It is a bedrock rule of civil procedure that ‘a district court generally cannot grant summary judgment based on its assessment of the credibility of the evidence presented.’” *Frost v. New York City Police Dep't*, 980 F.3d 231, 245 (2d Cir. 2020)(quoting *Agosto v. INS*, 436 U.S. 748, 756 (1978)). A grant of summary judgment is proper' where a nonmovant's supporting evidence ‘is so slight that no rational jury could' find in [their] favor. *AMVS, Inc. v. Mt. Hawley Ins. Co.*, 22-cv-10782 (ER) (S.D. N.Y. Jan 23, 2025), 10

In deciding a motion for summary judgment, a court must consider the evidence “in the light most favorable to the non-moving party and draw all reasonable inferences in its favor.” *Allen v. Coughlin*, 64 F.3d 77, 79 (2d Cir. 1995).

II. Plaintiff Promptly Notified Defendant of the Loss

An insured's failure to give timely notice to its insurer may be excused by proof that the insured either lacked knowledge of the occurrence or had a reasonable belief of nonliability. *Sparacino v. Pawtucket Mut. Ins. Co.*, 50 F.3d 141 (2d Cir. 1995). The standard for evaluating prompt notice is whether the circumstances known to the insured at that time would have suggested to a

reasonable person the possibility of a claim. *AMVS, Inc. v. Mt. Hawley Ins. Co.*, 22-cv-10782 (ER) (S.D. N.Y. Jan 23, 2025).

In the present case, the circumstances would not have suggested to a reasonable person the possibility of an insurance claim. Plaintiff's corporate representative, Mr. Rick Patel, testified that on January 5, 2023, his general manager told him of some shingles in the parking lot. Mr. Patel testified that he did not report the claim because he did not know if the shingles in the parking lot observed after the storm by his general manager would result in an insurance claim. Furthermore, the Policy had a \$25,000 deductible. Given the scarce number of shingles compared to the size of the hotel's roof, a reasonable person would not believe the presence of a few missing shingles would exceed, or even come close to exceeding, the deductible. On or about May 23, 2023, Plaintiff received notification that the phone system was not working. Defendant's Exhibit 2-A, Patel depo at 24:1-8. Upon inspection, water intrusion damage was found above the phone system. Upon noticing the water intrusion, Plaintiff promptly notified Defendant of the claim on June 22, 2023.

The cases cited by Defendant in its motion are distinguishable from the facts in the present case. For example, in *AMVS, Inc. v. Mt. Hawley Ins. Co.*, 22-cv-10782 (ER) (S.D. N.Y. Jan 23, 2025) the court granted Mt. Hawley's Motion for summary judgement due to a two-month delay in reporting. However, the plaintiff in that case testified he was present during the storm and saw water intruding into the structure, including his own suite. *Id.*

Here, the Plaintiff's corporate representative was not present at the time of the storm and interior water damage was not observable until months later. Once the water intrusion was observed, Plaintiff promptly submitted a claim on June 22, 2023. Prior to the water intrusion damage, the circumstances would not have suggested to a reasonable person the possibility of a claim.

Moreover, in *American Home Assur. Co. v. Republic Ins. Co.*, 984 F.2d 76, 78 (2d Cir. 1993), the court granted summary judgement when, the primary insurer, American Home Assurance Company ("American") delayed 36 days in reporting an accident in which five people were killed to the excess insurer Republic Insurance Company. The Court concurred with the District court's holding that American's notice of loss was not timely. *Id.* The district court stated that the insured must have realized within a few days after the accident in which five people were killed that there was a serious likelihood that a recovery would exceed the \$5,300,000 of primary coverage. *Id.* Additionally, American had been notified by counsel of the probability of a "huge recovery by plaintiffs." *Id.*

Here, unlike in *American* where it was clear damages would exceed the primary coverage, the damages did not suggest to Plaintiff that they would exceed the \$25,000 deductible and, therefore, rise to the level of a claim. It should be noted that, Defendant investigated the claim, had experts inspect the property, and was able to make a coverage decision based on their findings after receiving the sworn proof of loss indicating the date of loss to be January of 2023.

The damages sustained by Plaintiff in January of 2023 would not have suggested to a reasonable person the possibility of a claim, therefore, Defendant's Motion must be denied.

III. Plaintiff did not violate the "Concealment, Misrepresentation or Fraud" Provision of the Policy

Plaintiff does not dispute the Policy contains a "Concealment, Misrepresentation, or Fraud" provision. However, Plaintiff did not, at any point from the inception of the claim, conceal, misrepresent, or provide fraudulent information to Defendant as to any material fact.

To support its argument Defendant cites cases in which coverage was voided because the insured submitted falsified invoices and records and/or knew of the replacement or repair cost of the property lost. *See Fernandez v. Philadelphia Indem. Ins. Co.*, No. 16 CIV. 2533 (JCM), 2018 WL 502709, at *7 (S.D.N.Y. Jan. 19, 2018); *Cimato v. State Farm Fire & Cas. Co.*, No. 16-CV- 94A(SR), 2020 WL 5260295, at *4 (W.D.N.Y. June 29, 2020); *Clerical Apparel of New York v. Valley Forge Ins. Co.*, 209 F.R.D. 316 (E.D.N.Y. 2002).

Here, Plaintiff did not provide any falsified records and did not know the final cost of the roof replacement until almost a year after signing its sworn proof of loss. Plaintiff submitted its sworn proof of loss based, in part, on the estimate provided by its public adjuster, RCC. The RCC estimate contained an estimate for a roof replacement totaling \$266,761.62. A copy of the RCC estimate has been attached hereto as Plaintiff's **Exhibit "A"**. The scope of the roof replacement in

the RCC estimate included all roof surfaces, the tear off, haul, and disposal of the existing shingles, decking replacement, a complete replacement of the existing shingles, roofing labor, and materials, among other roof related repairs such as replacement of roof vents. On September 27, 2023, Plaintiff paid \$40,000 as a deposit on a roof bid it received from Coastal Roofing. The amount of the bid was \$75,000. Plaintiff was to pay \$40,000 for the initial downpayment and \$35,000 upon completion of the job. There was no signed contract. The bid stated “[e]stimate for the installation of new Timberland HDZ shingles, plumbing roof vents, and lower-level flat roof Gecko roofing sealant comes to a total of \$70,000.” A copy of the Coastal Roofing bid has been attached hereto as Plaintiff’s **Exhibit “B”**. Plaintiff testified in his deposition that the roofer told him this bid did not include the tearing off of existing shingles, therefore, the Coastal Roofing estimate does not reflect the cost of a roof replacement, but merely temporary repairs. Defendant’s Exhibit 2-A, Patel depo at 112: 14-16. The scope of the Coastal Roofing estimate and RCC estimate is not the same. The Coastal Roofing estimate does not provide an estimated cost for a full roof replacement on all roof surfaces, including the tear off, haul, and disposal of existing shingles. Therefore, the Coastal Roofing bid did not include the total roof damages Plaintiff was claiming.

On November 29, 2023, Plaintiff received another estimate from Coastal Roofing for the installation of a metal roof for \$120,000. A copy of the Coastal Roofing bid for the metal roof has been attached hereto as Plaintiff’s **Exhibit “C”**. Plaintiff’s roof at the time of the loss was composed of shingles, making an estimate

for a metal roof inappropriate and inadequate to assess the cost of replacement of Plaintiff's shingle roof. On January 12, 2024, Plaintiff signed the sworn proof of loss based on the public adjuster's estimate which included a full shingle roof replacement of all roof surfaces. Roof work had not yet commenced.

On March 8, 2024, Plaintiff filed its Notice of Intent to Initiate Litigation attaching the sworn proof of loss. Roof work had not yet commenced. On August 20, 2024, Plaintiff signed a third bid from Coastal Georgia Roofing which estimated the roof replacement of the main hotel, pool shed, and front carport to be \$110,000.00. A copy of the Coastal Georgia Roofing bid has been attached hereto as Plaintiff's **Exhibit "D"**. The estimate made clear, costs would increase if structural components needed to be replaced due to rot. As of August 20, 2024, the final cost of the roof was unascertainable.

In its response to Defendant's Request for Production, Plaintiff produced all repair records, estimates, and bids, including those from Coastal Roofing and Coastal Georgia Roofing, as well as supplemented its responses with further documentation as it became available. Additionally, Plaintiff detailed the repairs and costs associated with them in its answers to Defendant's Interrogatories.

At the time Plaintiff signed the sworn proof of loss based on the River City Claims estimate, Plaintiff represented to Defendant its understanding of the scope of damage to the roof and the cost to repair the damage it was claiming. The sworn proof of loss was not a false statement of how much a roof replacement would cost given the scope of the River City Claims estimate. Plaintiff was forthcoming with

all documentation in the discovery process and did not attempt to commit fraud, misrepresentation, or concealment. Plaintiff did not know the final cost of the roof replacement until almost a year after executing the sworn proof of loss. Therefore, Defendant's Motion must be denied.

Conclusion

Defendant's Motion should be denied because 1) Plaintiff provided prompt notice of the claim to Defendant after Plaintiff reasonably became aware of circumstances suggesting they may have a claim; and 2) Plaintiff did not, at any point from the inception of the claim, conceal, misrepresent, or provide fraudulent information to Defendant as to any material fact. Accordingly, Defendant is not entitled to judgment in their favor.

Respectfully submitted this 20th day of August 2025.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 20th day of August 2025, a true and correct copy of the foregoing was sent by email to all counsel or parties of record listed below:

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