

2022 WL 22873389

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United States District Court, S.D. Florida.

Sonya Johnson BAIN, Plaintiff,

v.

HARTFORD INSURANCE COMPANY

OF THE MIDWEST, Defendant.

Case No. 19-cv-25038-COOKE/GOODMAN

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Signed September 7, 2022

Attorneys and Law Firms

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ORDER ON MOTIONS IN LIMINE

ROBIN L. ROSENBERG, UNITED STATES DISTRICT JUDGE for Marcia G. Cooke, United States District Judge

*1 THIS MATTER is before the Court on two of the parties' four renewed motions *in limine*. ECF No. 85. On August 31, 2022, the Court held a hearing on this matter, and granted in part and denied in part two of the parties' motions *in limine*. ECF No. 88. The Court deferred judgment on the other two motions, and ordered additional briefing on whether certain tear-out costs¹ were recoverable under the insurance policy at the heart of this dispute. *See id.* The parties filed supplemental briefs, ECF Nos. 90 and 91, which the Court has reviewed. For the reasons stated below, the Court finds that tear-out costs associated with undamaged property are not recoverable under the policy, prior to an insured carrying out repairs. Accordingly, the Court **GRANTS** Defendant's motion *in limine* to exclude mention of tear-out costs, ECF No. 85 at 2, as explained below. The Court further **DENIES without prejudice** Plaintiff's motion *in limine* to exclude information concerning the sale of the property, ECF No. 85 at 9.

**FACTUAL BACKGROUND
AND PROCEDURAL HISTORY**

This case concerns an insurance dispute between Plaintiff Sonya Johnson Bain ("Plaintiff" or "Ms. Bain") and Defendant Hartford Insurance Company of the Midwest ("Defendant" or "Hartford"). The parties entered into an insurance contract ("the policy") whereby Hartford would cover to repair certain damages to Ms. Bain's property. In August 2019, Ms. Bain filed two separate claims with Hartford for damages to her property resulting from overflows or discharges of her plumbing system. Ms. Bain subsequently filed this case in state court, which Hartford later removed to federal court. Ms. Bain did not repair the damages to her property resulting from these incidents, but nevertheless sought to recover certain damages under the policy. *See* ECF No. 51 at 5.²

The parties dispute the scope of damages Ms. Bain may recover under the insurance policy. *See generally* ECF No. 51 (order on motion for partial summary judgment, summarizing the dispute in this matter). At summary judgment, the Court found that Plaintiff could only recover for the actual cash value of the repairs at issue, which excluded certain matching costs. *Id.* at 8; *see also infra* at 5 (explaining matching costs), 6 n.4 (explaining actual cash value). The Court denied Defendant's motion without prejudice as to a finding that certain tear-out costs and mold damage were not recoverable under the policy. ECF No. 51 at 8. The Court explicitly noted that it would not address Defendant's argument concerning tear-out costs at summary judgment, since that argument was raised on reply. *Id.* at 7.

*2 The parties subsequently filed four renewed motions *in limine*. ECF No. 85. The Court held a hearing on August 31, 2022, and granted in part and denied in part two of the parties' motions *in limine*. ECF No. 88. Based on the parties' arguments at the hearing, the Court deferred judgment on the other two motions, and ordered additional briefing on whether Plaintiff could introduce evidence of tear-out costs at trial. *Id.* at 1–2. The parties submitted additional briefs, ECF Nos. 90 and 91, and these issues are now ripe for adjudication.

LEGAL STANDARD

On a motion *in limine* "[t]he movant has the burden of demonstrating that the evidence is inadmissible on any

relevant ground.” *Rodriguez v. GeoVera Specialty Ins. Co.*, 426 F. Supp. 3d 1334, 1339–40 (S.D. Fla. 2019) (quoting *United States v. Gonzalez*, 718 F. Supp. 2d 1341, 1345 (S.D. Fla. 2010)). “In order to exclude evidence *in limine* it must be inadmissible on all potential grounds.” *Id.* (citation and quotation omitted). “Evidence is admissible if relevant, and evidence is relevant if it has any tendency to prove or disprove a fact of consequence.” *Vaughn v. Carnival Corp.*, 571 F. Supp. 3d 1318, 1321 (S.D. Fla. 2021) (citing *Fed. R. Evid.* 401, 402; Advisory Comm. Notes, *Fed. R. Evid.* 401).

DISCUSSION

The outstanding motions *in limine* concern the actual cash value of the repairs underlying this dispute, and the relevance of certain tear-out costs at trial. *See* ECF No. 85 at 2, 9. The parties do not dispute that Plaintiff has not carried out any repairs to her property, or that pursuant to the policy that she is entitled to the actual cash value of the damages to the property. ECF No. 51 at 5. The parties dispute, however, whether the recoverable actual cash value includes certain tear-out costs.

The Court's analysis proceeds in three parts. First, the Court summarizes the portions of the policy concerning tear-out costs. Second, the Court reviews the applicable Florida law. Third, applying the relevant law to the policy provisions at issue here, the Court finds that Defendant has met its burden to show that where Plaintiff has not carried out repairs, she may not recover tear-out costs as part of the recoverable actual cash value. Thus, the Court finds that Defendant has met its burden to show that mention of tear-out costs at trial is irrelevant to Plaintiff's case.

I. The parts of the policy concerning damage, actual cash value, and tear-out costs

The following provisions of the policy are relevant to the instant motions:

Section I – Perils Insured Against states that the policy insures “against risk of direct physical loss to property[.]” ECF No. 4-1 at 40. This same section states that “[u]nless the loss is otherwise excluded” the policy also covers:

[L]oss to property covered ... resulting from an accidental discharge or overflow of water or steam from within a:

...

(ii) Plumbing, heating, air conditioning or automatic fire protective sprinkler system or household appliance on the “residence premises”. This includes the cost to tear out and replace any part of a building, or other structure, on the “residence premises”, but only when necessary to repair the system or appliance. However, such tear out and replacement coverage only applies to other structures if the water or steam causes actual damage to the building on the “residence premises”.

Id. at 41.

Additionally, Section I – Conditions, under the subsection “C. Loss Settlement,” describes how covered property losses are settled. Under part C.2 the policy explains that:

*3 d. [Insurer] will pay no more than the actual cash value of the damage until actual repair or replacement is complete[.]

...

e. [Insured] may ... make [a] claim under this policy for loss to buildings on an actual cash value basis. [Insured] may then make [a] claim for any additional liability according to the provisions of this Condition C. Loss Settlement, provided [insured] notif[ies] [insurer] of [insured's] intent to do so within 180 days after the date of loss.

ECF No. 4-1 at 46. The policy does not define actual cash value, nor does it define tear-out costs. *See id.* at 33–34 (providing definitions for certain terms in the policy).

II. Relevant Florida insurance law

Because this is a diversity action, the Court applies Florida law. *See Winn-Dixie Stores, Inc. v. Dolgencorp, LLC*, 746 F.3d 1008, 1026 (11th Cir. 2014). “In interpreting Florida law, [the Court looks] first to precedent from the Florida Supreme Court. If there is no such precedent, [the Court] adhere[s] to decisions of Florida's intermediate appellate courts absent some persuasive indication that the Florida Supreme Court would decide the issue otherwise.” *Carlson v. FedEx Ground Package Sys., Inc.*, 787 F.3d 1313, 1318 (11th Cir. 2015) (quotation and citation omitted). Where Florida's appellate courts are split on an issue, the Florida Supreme Court has instructed trial courts to follow the law of the appellate district “in which the trial court is located.” *Pardo v. State*, 596 So. 2d 665, 667 (Fla. 1992); *see also United States v. Montague*, 437 F. App'x 833, 836 (11th Cir. 2011) (citing to the rule in *Pardo*).

The Court notes that the trial court where this case was filed prior to removal is located in Florida's Third District. *See* ECF No. 1-2 at 1–2 (state court complaint filed in the Eleventh Judicial Circuit in and for Miami-Dade County, which is part of the Third District). Similarly, the Miami Division of the Southern District of Florida, where this case is pending, is also located in the Third District.

Two cases from Florida's Third District Court of Appeal are especially relevant here,³ where an insured seeks to recover actual cash value under a policy, without making repairs. First is *Homeowners Choice Prop. & Cas. v. Miguel Maspons*, 211 So. 3d 1067 (Fla. 3d DCA 2017). There, insureds sought to recover for the cost of tearing through an undamaged slab of concrete, in order to repair a broken pipe underneath the concrete. The Third District reversed the trial court on summary judgment, holding the lower court had prematurely entered summary judgment in favor of the insureds by awarding them the cost of tearing through the concrete before they carried out repairs. Reading a similar insurance policy, the Third District reasoned that such costs could not be recovered until after repairs were carried out because the policy only covered “direct” and “physical” loss. *Id.* at 1069 (“‘Direct’ and ‘physical’ modify loss and impose the requirement that the damage be actual.”).

*4 Second is *Vazquez v. Citizens Prop. Ins. Corp.*, 304 So. 3d 1280 (Fla. 3d DCA 2020). *Vazquez* concerned in part an appeal of a motion *in limine* where an insurer sought to exclude evidence of certain so-called “matching costs” from the actual cash value recoverable prior to carrying out repairs. The Third District addressed whether “actual cash value included costs to replace undamaged items in order to match [plaintiffs’] continuous floor[.]” *Id.* at 1285. Relying on *Maspons*, the Third District held the trial court had properly excluded such costs from the actual cash value calculation of the loss. *Id.* at 1284–85. The *Vazquez* court reiterated that because the policy at issue only covered direct and physical loss, if the insureds could not show the repairs had been carried out, then these losses had not been incurred within the meaning of the policy, and could therefore not be recovered as part of the actual cash value calculation. *See id.* The Third District Court of Appeal recently cited to *Maspons* and *Vazquez* as controlling authority in interpreting similar insurance policies. *See Commodore, Inc. v. Certain Underwriters at Lloyd's London*, 342 So. 3d 697, 702 (Fla. 3d DCA 2022).

III. Whether tear-out costs are recoverable here, where Plaintiff has not carried out repairs

Here, it is undisputed that Plaintiff has not carried out repairs on her property, and that Plaintiff seeks only to recover for the actual cash value of her loss. Accordingly, Defendant argues that *Maspons* and *Vazquez* preclude Plaintiff from recovering for the cost of tearing out and replacing undamaged property. The Court agrees, and for the reasons stated below, finds Defendant has met its burden to show that—prior to carrying out repairs—any evidence of the costs of tearing out undamaged property would be irrelevant at trial.

As an initial matter, the Court notes that pursuant to the plain language of the policy, Plaintiff is covered “against risk of direct physical loss to property[.]” ECF No. 4-1 at 40. The policy covers property loss “resulting from an accidental discharge or overflow of water.” *Id.* at 41. The policy further covers the “cost to tear out and replace any part of a building, or other structure ... but only when necessary to repair the system or appliance [from which the water escaped].” *Id.* Under the policy, insureds may recover the actual cash value of damages, without carrying out repairs to their property. *Id.* at 46.⁴

The language in the policy here is nearly identical to that in *Maspons* and *Vazquez*. Compare ECF No. 4-1 at 40 (the instant policy, covering “direct physical loss to property”), with *Maspons*, 211 So. 3d at 1069 (covering “direct loss to property ... only if that loss is a physical loss”), and *Vazquez*, 304 So. 3d at 1283–85 (same, and repeatedly referring to the covered loss as “direct physical loss” in the opinion); see also *Commodore*, 342 So. 3d at 701 (applying the same interpretation in *Maspons* and *Vazquez* to a policy which covered “direct physical loss of or damage to property”). And as the Third District held in *Maspons* and reiterated *Vazquez*, pursuant to the plain language of such policies covering direct physical loss, an insured cannot recover for the cost of tearing out and replacing undamaged property as part of the actual cash value calculation, prior to making repairs. So too here, the Court finds that the plain language of the policy precludes Plaintiff from recovering the cost of tearing out and replacing undamaged property if Plaintiff has not carried out those repairs.

Plaintiff's arguments to the contrary are unpersuasive.

First, Plaintiff argues that *Maspons* is distinguishable because there it was unclear whether water had caused *any* damage

that would trigger coverage under the policy. ECF No. 90 at 3. Even if that were the case, *Vazquez* subsequently held that even where there has been some damage to property, the plain language of a nearly identical insurance policy precluded the interpretation that Plaintiff advances here. See 304 So. 3d at 1284. Thus, the Court finds that even if *Maspons* were distinguishable, *Vazquez* controls the outcome here, and Plaintiff presents no argument to the contrary.

*5 Second, relying on *Security First Insurance Co. v. Vazquez*, 336 So.3d 350 (Fla. 5th DCA 2022), Plaintiff argues that the language of the policy here is ambiguous and the policy should therefore be read in favor of coverage. ECF No. 90 at 2, 4. The Court disagrees. *Security First Insurance* concerned a different set of insurance provisions, and did not address the issue of whether damage need be a direct physical loss to be considered as part of the actual cash value recoverable prior to making repairs. 336 So.3d at 351–352 (discussing the policy's Limited Water Damage Endorsement). Moreover, even if *Security First Insurance* supported Plaintiff's position, because the instant case was filed in a trial court in the Third District and is pending in a federal court in the Third District, the Court would still be bound to follow the Third District's holdings in *Maspons* and *Vazquez*, and not the Fifth District's holding in *Security First Insurance*. See *Pardo*, 596 So. 2d at 667. In *Maspons*

and *Vazquez* the Third District held that the plain language of nearly identical policies was not ambiguous, and Plaintiff has not persuaded the Court otherwise here. Thus, the Court finds Plaintiff's second argument also fails.

CONCLUSION

Based on the foregoing it is hereby **ORDRED AND ADJUDGED** that Defendant's motion *in limine* to exclude the costs of tearing out undamaged property from the actual cash value calculation at trial, ECF No. 85 at 2, is **GRANTED**. Furthermore, the Court **DENIES without prejudice** Plaintiff's motion to exclude mention of the sale of the property, ECF No. 85 at 9. Although it appears that, given the exclusion of evidence of tear-out costs, the mention of the sale may not be relevant, Plaintiff may renew this motion at trial, outside the jury's presence, if needed.

DONE and ORDERED in Chambers in West Palm Beach, Florida, this 7th day of September 2022.

All Citations

Not Reported in Fed. Supp., 2022 WL 22873389

Footnotes

- 1 By tear-out costs the parties refer to the costs of tearing out certain undamaged property to carry out repairs. See ECF No. 85 at 2 (Defendant's motion, referring to trenching through flooring to carry out repairs); ECF No. 90 at 3 (Plaintiff's supplemental response, referring to a "situation where undamaged property has to be torn-out to effectuate the repairs").
- 2 The Court uses the pagination generated by the CM/ECF system.
- 3 The Florida Supreme Court does not appear to have issued a decision controlling the outcome in this case. Neither party has pointed the Court to such a case, and the Court has found no such case.
- 4 While the policy does not define actual cash value, the parties do not dispute that under Florida law actual cash value is defined as "replacement cost minus depreciation." *Trinidad v. Fla. Peninsula Ins. Co.*, 121 So. 3d 433, 443 (Fla. 2013).