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IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR MIAMI DADE COUNTY, FLORIDA

CASE NO.: 2022-021372-CA-01

GERARDO FRAGA & ANA ALVA,

Plaintiffs,

v.

CITIZENS PROPERTY INSURANCE CORPORATION,

Defendant,
____/

PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AND ENTRY OF DECLARATORY DECREE

Plaintiffs GERARDO FRAGA & ANA ALVA ("Plaintiffs"), by and through undersigned counsel and pursuant to the applicable Florida Rules of Civil Procedure, hereby file this Motion for Partial Summary Judgment and Entry of Declaratory Decree, and in support thereof state the following:

Summary of the Argument

Plaintiffs' property sustained a covered loss during the effective period of an insurance policy that was issued by Defendant. Defendant offered to repair Plaintiffs' property through its managed repair program, which provided Defendant with the option of repairing the property in lieu of a monetary payment. To participate in the program, Plaintiffs were required to "provide written consent." The "written consent" was also to be "provided… by completing and returning… the Program Consent Form provided to [Plaintiffs] by [Defendant]." Accordingly, the sole purpose of the Program Consent Form was to obtain Plaintiffs' written consent to participate in the program and nothing else.

Defendant provided Plaintiffs with and demanded that they sign and return a Program Consent Form that went far beyond obtaining Plaintiffs' written consent. The Program Consent Form provided by Defendant required Plaintiffs to, *inter alia*, legally acknowledge and agree that they understood a laundry list of various policy terms and conditions, some of which were not even found in the policy. Accordingly, Plaintiffs redlined the language that was unrelated to written consent, signed the redlined version, and returned it to Defendant. Upon receipt, Defendant rejected the Program Consent Form and refused to accept anything other than an unaltered version of the form. Defendant then proceeded to disallow Plaintiffs from participating in the program and refused to assign a contractor to repair their property.

Pursuant to Florida law, Plaintiffs are entitled to partial summary judgment and issuance of declaratory decree finding, in sum, that (1) under the clear and unambiguous terms of the Policy, the sole purpose of the Program Consent Form was to obtain Plaintiffs written consent to participate in the managed repair program; (2) the Program Consent Form Defendant provided to Plaintiffs violated this clear and unambiguous purpose; (3) Defendant therefore had no right to demand Plaintiffs sign and return the Program Consent Form it provided, nor were Plaintiffs required to sign it; (4) Plaintiffs fully complied with their obligations under the policy by signing and returning a version of Defendant's Program Consent Form that was limited to written consent; (5) Defendant was required to accept that redlined version of the form; (6) Defendant's rejection of the Program Consent Form provided by Plaintiffs and subsequent refusal to allow Plaintiffs to participate in the Managed Repair Program was improper.

Supporting Factual Position

1. Plaintiffs and Defendant entered into a written contract, insurance policy number 08096450-1 (the "Policy"), which had effective dates of August 12, 2022 to August 12, 2023, and provided all-risk insurance coverage to the property owned by Plaintiffs located at 8051 SW 138th

Court, Miami, FL 33183 (the "Property") (the "Property"). See Joint Stipulation of Fact and Admissibility of Evidence, D.E. 28, at Exhibit A. See also ¶1-3.

2. During the Policy period, Plaintiffs' Property sustained a loss caused by water damage due to a plumbing leak (the "Loss"). Id. at ¶4.

3. Plaintiffs reported the Loss to Defendant. Id. at ¶5. Defendant received notice of the Loss, assigned claim number 001-00-321414, and conducted its investigation. Id. at ¶6.

4. Plaintiffs also retained licensed public adjuster George Quintero ("Quintero") of Vanguard Public Adjusters, Inc. to assist them with handling their claim. Id. at ¶13 and Ex. F.

5. After completing its investigation, on or about September 7, 2022, Defendant determined that the Loss was covered under the Policy, and stated to Plaintiffs - "We have now confirmed that there is coverage for the water ensuring water damage [sic] from the 1st floor bathroom due to drain obstruction." Id. at ¶7 and Ex. B.

6. On September 13, 2022, Plaintiffs, through Quintero, informed Defendant that "[t]he cast iron sanitary drain line under the slab needs to be replaced per [their] plumber. The costs to gain access and restore the home to pre-loss condition will exceed $10,000.00. **At his** [sic]**time [Plaintiffs are] requesting… participation in the Citizens Managed Repair Program**." Id. at Ex. C.

7. Plaintiffs reiterated the request on September 14, 2022, stating – "The costs to gain access and restore the home to pre-loss condition will exceed $10,000.00" and noting that Plaintiffs had already "**requested participation in the Citizens Managed Repair Program.**" Id.

8. The Policy in this matter provides:

> **MANAGED REPAIR CONTRACTOR NETWORK PROGRAM**
>
> At our option, we may offer you the Program described in this "Endorsement". If the offer is made by us, a "Contractor" that is participating in the Program will contact you. We or the "Contractor(s)" will provide a scope of repairs for covered damages… To participate in the Program and accept our offer, you must sign and return the Program Consent Form provided by us…
>
> …
>
> **CONSENT**

You must provide written consent to participate in this Program.

Your written consent to participate in this Program can only be provided to us by completing and returning to us, on or after reporting a claim of loss or damage, the Program Consent Form provided to you by Citizens.

Id at Ex. A, Form CIT 04 86 02 21 Page 1 of 5.

9. Finally, on September 20, 2022, Defendant offered the Managed Repair Contractor Network Program (the "Managed Repair Program") and provided Plaintiffs with a Program Consent Form Id. at ¶8-9, and Ex. D. Defendant nevertheless immediately threatened to terminate Plaintiffs from the Managed Repair Program if Plaintiffs failed to sign and return "the form within 10 calendar days." Id. at Ex. D.

10. In addition to the Policy containing no time limitation on when the Program Consent Form must be signed and returned to Defendant, the Program Consent Form provided by Defendant also contained a multitude of language that exceeded the bargained for terms of the Policy and had nothing to do with Defendant obtaining Plaintiffs' "written consent." Id.

11. The language that was not bargained for and unrelated to "written consent" included, but is not limited, to the following:

i. I understand I must separately contract with a Program "Contractor" for repairs of covered damage within 10 business days from the date the contract is delivered to me. I understand if I do not sign a contract with the Program "Contractor", my consent is terminated and if the loss is subject to the $10,000 limit on coverage described in my Policy, **the $10,000 limit on coverage applies and is the most Citizens will pay for my covered loss**.

ii. Only this Program Consent Form may be used to acknowledge your consent to participate in the Program. In consenting to participate in the Program, **you acknowledge that Citizens is not a party to the contract between you and the Program "Contractor".**

iii. SUMMARY OF PROGRAM PARTICIPATION AND TERMINATION OF CONSENT

Participation in the Program is terminated if you or your representative:
- Request that the Program "Contractor" stop providing or completing repairs.
- Prevent the Program "Contractor" from providing or completing repairs.

• Fail to execute the contract provided by the Program "Contractor" within 10 business days from the date the contract is delivered to you.

You are not eligible to participate in the Program if you or your representative:

- Request participation after you have incurred any costs for repairs or start any repairs, replacement or rebuilding of property covered under Coverage **A** or **B**.
- Incur any costs for repairs or start any repairs, replacement or rebuilding of property covered under Coverage **A** or **B** prior to our receipt of your written consent and the execution of the contract between you and the Program "Contractor".

Participation in the Program is contingent upon the property, prior to or at the time of the loss, being in a condition that does not impair or prevent the Program "Contractor's" ability to repair the covered loss. Participation in the Program is terminated if we or the Program "Contractor" determine:

- The property is in a condition that impairs or prevents the Program "Contractor's" ability to repair the covered loss.
- Conditions are present that prevent repair, replacement or rebuilding of the property from starting or being completed.

iv. When participation in the Program is terminated, the Program "Contractor" will stop repairs, replacement and rebuilding of the property. If the loss is subject to the $10,000 limit on coverage as described in your Policy, **the $10,000 limit on coverage applies to the loss.**

v. If you modify any condition or term in this offer or add terms or conditions to this offer, you will be deemed to have rejected the Program and if the loss is subject to the $10,000 limit on coverage as described in your Policy, your policy limit applicable to the referenced loss shall be $10,000.

vi. INSURED'S AGREEMENT

I HAVE REVIEWED THIS DOCUMENT, AND AFFIRM I UNDERSTAND THE CONTENTS AND TERMS OF THIS PROGRAM CONSENT FORM AND THE CONTENTS AND TERMS OF CITIZENS MANAGED REPAIR CONTRACTOR NETWORK PROGRAM ENDORSEMENT. I AM EXECUTING THIS FORM ON BEHALF OF ALL INSUREDS UNDER MY POLICY."

Id.

12. Plaintiffs placed redlines through the language identified above (except for vi. Insured's agreement), signed the Program Consent Form, and on September 27, 2022, returned the signed version to Defendant. Id. at ¶10 and Ex. E.

13. On September 28, 2022, Defendant informed Plaintiff that it was rejecting the signed Program Consent Form, stating:

> **We specifically reject the altered MRP Consent Form** that your office submitted to Citizens. The policy requires that the insured provide in writing the Consent Form provided to your client from Citizens. Someone has placed red lines through numerous sentences on the consent form deeming it altered and void. As such, we specifically reject this altered consent form and deem that the insured is still NOT in the program.
>
> Id. at ¶11 and Ex. E. (**emphasis added**)

14. Defendant once again exerted its totalitarian power by threatening Plaintiffs to do things the way it wanted them done or else all it was going to pay for the Loss was $10,000. Id. at Ex. E.

15. Because Defendant refused to accept the Program Consent Form signed and returned by Plaintiffs, Plaintiffs were rejected from participating in the Managed Repair Program, Defendant refused to assign a contractor to perform the repairs, and Plaintiffs' Property remains unrepaired to date.

MEMORANDUM OF LAW

I. Summary Judgment and Declaratory Decrees

Rule 1.510, Florida Rules of Civil Procedure requires that "[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." Fla. R. Civ. P. 1.510(a).

Florida's Declaratory Judgment Act provides in pertinent part that "[a]ny person claiming to be interested or who may be in doubt about his rights... may have determined any question of construction or validity arising"). Fla. Stat. §86.021; see also Fla. Stat. §86.011; *Lambert v. Justus*, 335 So. 2d 818, 820 (Fla. 1976), receded from on other grounds in *Higgins v. State Farm Fire and Casualty*

Co., 894 So. 2d 5 (Fla. 2004). "[I]ssues involving the rights and obligations under an insurance policy come within the purpose of the declaratory judgment statutes" *Higgins* 894 So. 2d at 15.

Declaratory relief is not contingent on the existence of purportedly ambiguous policy language. The supreme court made clear in *Higgins* that although declaratory relief is available to resolve such ambiguity, it is not available only to resolve such ambiguity. *Id.* at 12. ("[A]lthough section 86.021 ... grants to the courts the power to determine any question of 'construction or validity' arising under a contract, section 86.051 states that the enumeration of powers in section 86.021 'does not limit or restrict the exercise of the general powers conferred in section 86.011.'"). Rather, declaratory relief is available to resolve questions concerning the application of unambiguous policy provisions to a disputed set of facts. "Put another way, 'the courts have the general power to issue declaratory judgments ... in suits solely seeking a determination of any fact affecting the applicability of an "immunity, power, privilege, or right."' *Heritage Prop. & Cas. Ins. Co. v. Romanach*, 224 So. 3d 262, 265 (Fla. 3d DCA 2017) (quoting *Higgins*, 894 So. 2d at 12).

"Where the determination of the issues of a lawsuit depends upon the construction of a written instrument and the legal effect to be drawn therefrom, the question at issue is essentially one of law only and determinable by entry of summary judgment." *Angell v. Don Jones Ins. Agency*, 620 So. 2d 1012, 1014 (Fla. 2d DCA 1993) (citing *Kochan v. Am. Fire & Cas. Co.*, 200 So. 2d 213, 220 (Fla. 2d DCA 1967)). Here, by virtue of the parties' stipulation, there are no remaining disputed issues of fact, and the sole remaining questions are ones in law, which only may be determined by the Court and are proper for summary judgment.

II. Policy Interpretation

"When interpreting a contract, the court must first examine the plain language of the contract for evidence of the parties' intent." *Perez-Gurri Corp. v. McLeod*, 238 So. 3d 347, 350 (Fla. 3d DCA 2017) (citation omitted). An insurance contract must be construed in accordance with the plain

language of the policy. *Swire Pac. Holdings, Inc. v. Zurich Ins. Co.*, 845 So. 2d 161, 165 (Fla. 2003). "[I]n construing insurance policies, courts should read each policy as a whole, endeavoring to give every provision its full meaning and operative effect." *Auto-Owners Ins. Co. v. Anderson*, 756 So. 2d 29, 34 (Fla. 2000). If the terms of a contract are clear and unambiguous, the court is bound by the plain meaning of those terms. *Emerald Pointe Prop. Owners' Ass'n v. Commercial Constr. Indus., Inc.,* 978 So. 2d 873, 877 (Fla. 4th DCA 2008). Thus, where a contract is unambiguous, the parties' intent must be gleaned from "the four corners of the document." *Dows v. Nike, Inc.,* 846 So. 2d 595, 601 (Fla. 4th DCA 2003).

III. ANALYSIS AND ARGUMENT

a. Defendant had no right to demand that Plaintiffs sign a Program Consent Form which exceeded the limited purpose of obtaining Plaintiffs' written consent.

The explicitly limited and unambiguous purpose of the Program Consent Form was to obtain Plaintiffs' "written consent" to participate in the Managed Repair Program. The totality of the language related to the purpose of the Program Consent Form, as stated in the Policy, is as follows:

> **CONSENT**
> You must provide written consent to participate in this Program.
>
> Your written consent to participate in this Program can only be provided to us by completing and returning to us, on or after reporting a claim of loss or damage, the Program Consent Form provided to you by Citizens.

Id at Ex. A, Form CIT 04 86 02 21 Page 1 of 5. There is no other language anywhere in the Policy which even remotely suggests that there is any other purpose, implied or explicit, for the Program Consent Form. There is nothing ambiguous about either "[y]ou must provide written consent to participate" or that the "written consent to participate… can only be provided… by completing and returning… the Program Consent Form provided to you by [Defendant]." Because the Policy is clear and unambiguous, the court is bound by its plain meaning. Here, that means Defendant was not entitled to use the Program Consent for anything other than obtaining Plaintiffs' "written consent" to participate in the Managed Repair Program. Permitting Defendant to use the Program Consent for

more than obtaining Plaintiffs' written consent is plainly inconsistent with the terms of the Policy, and would require the Court to write-in language that is simply not there.

Despite having no right to use the Program Consent Form for any purpose except for obtaining Plaintiffs' "written consent," Defendant provided to Plaintiffs and demand that they sign a Program Consent Form that required them to:

(i) legally acknowledge and understand that its Loss was subject to a $10,000 limit on coverage should he not sign a contract with a contractor within 10 days;

(ii) legally acknowledge and understand that the most Defendant would pay is $10,000 if Defendant unilaterally determined that the limit applied;

(iii) legally acknowledge and agree that Defendant was not a party to the contract between Plaintiffs and the contractor;

(iv) legally acknowledge a summary of Policy terms related to participation and termination of consent;

(v) legally acknowledge and agree that if Defendant unilaterally terminated Plaintiffs' participation in the Managed Repair Program, then the contractor would stop all work irrespective of the condition of the Property and Defendant would pay no more than $10,000;

(vi) legally acknowledge and agree it was precluded from modifying or adding any term to the Program Consent Form or otherwise its Loss was subject to a maximum payment by Defendant of $10,000; or,

(vii) legally acknowledge and agree that it understood the terms of the Program Consent form, as well as the Managed Repair Program Endorsement.

Under Florida's policy interpretation principles, there are absolutely no circumstances in which Defendant would have the right to demand Plaintiffs sign and return such a Program Consent Form.

Similarly, no circumstances exist in which Plaintiffs would ever be required to sign such a form. Quite frankly, Defendant's demand that such Program Consent Form be signed and returned is a gross violation of the clear and unambiguous terms of the Policy.

Accordingly, Plaintiffs are, as a matter of law, entitled to entry of summary judgment and declaratory decree finding that:

(1) Under the clear and unambiguous terms of the Policy, the sole purpose of the Program Consent Form was to obtain Plaintiffs written consent to participate in Defendant's Managed Repair Program.

(2) The Program Consent Form provided to Plaintiffs by Defendant well-exceeded this singular purpose.

(3) Defendant had no right under the Policy to demand that Plaintiffs sign and return the Program Consent Form that it provided to Plaintiffs.

(4) Plaintiffs were not required by the terms of the Policy to sign the Program Consent Form that Defendant provided to them.

b. Plaintiffs complied with their obligations by signing and returning a version of Defendant's Program Consent Form that was limited to obtaining written consent.

After receiving Program Consent Form, which as set forth above went beyond obtaining Plaintiffs' written consent, Plaintiffs redlined the language that was unrelated to written consent, signed the redlined version, and returned it Defendant. Plaintiff did not alter, revise, modify or delete any language that was related to written consent. Accordingly, Plaintiffs fully complied with their policy obligations by signing and returning Defendant's Program Consent Form in a manner that was consistent with the bargained for terms of the Policy. Upon receiving the redlined Program Consent Form, Defendant immediately notified Plaintiffs that it "specifically reject[ed]" it and deemed it "void." Defendant also terminated Plaintiffs' participation in the Managed Repair Program and refused to assign a contractor to repair Plaintiffs' Property. Defendant's refusal to accept the redlined

Program Consent Form and its termination and/or refusal to allow Plaintiffs to participate in the Managed Repair Program is not supported by the Policy.

To begin with, nowhere in the Policy are Plaintiffs precluded from modifying the Program Consent Form, particularly when the modifications are strictly limited to achieving a purpose of the form that is consistent with the terms of the Policy. Further, Plaintiffs did not alter the Program Consent Form to frustrate its purpose. Rather, Plaintiffs corrected Defendant's attempted wrongdoings by making revisions to give Defendant exactly what it bargained for – Program Consent Form that was dedicated to obtaining Plaintiffs' written consent to participate in the Managed Repair Program and nothing else.

Accordingly, Plaintiffs are, as a matter of law, entitled to entry of summary judgment and declaratory decree finding that:

(5) Plaintiffs complied with their obligations under the Policy by signing and returning Defendant's Program Consent Form in a manner that consistent with obtaining Plaintiffs' written consent to participate in the Managed Repair Program;

(6) Defendant had no right to reject Plaintiffs' redlined consent form as it was limited to written consent as the bargained for Policy required;

(7) Defendant was obligated under the Policy to accept the Program Consent Form that was signed and returned by Defendant;

(8) Defendant's rejection of the Program Consent Form and refusal to permit Plaintiffs to participate in the Managed Repair Program was not supported by the clear and unambiguous terms and Policy.

(9) The Program Consent Form provided to Plaintiffs by Defendant well-exceeded this singular purpose.

IV. CONCLUSION

Pursuant to Florida law, the Program Consent Form that Defendant provided to Plaintiffs and demanded be signed and returned violated the clear and unambiguous terms of the Policy, which expressly required it to be limited to obtaining Plaintiffs' "written consent" to participate in the Managed Repair Program. Plaintiffs were not required to sign the Program Consent Form that Defendant provided as it exceeded the limited purpose expressed in the Policy. Plaintiffs complied with their obligations under the Policy by signing and returning a version of Defendant's Program Consent Form that was limited to written consent. Defendant was required to accept that version of the form and its rejection and subsequent refusal to allow Plaintiffs to participate in the Managed Repair Program was improper.

WHEREFORE, Plaintiffs respectfully request that this honorable court enter an order granting partial summary judgment in favor of Plaintiff and issuing a declaratory decree that is consistent with the relief requested herein, together with awarding Plaintiffs with any further relief deemed just and proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on January 29, 2024, a true and correct copy of the foregoing was filed and served upon Allison McNeill, Esq. using the E-Filing Portal.

By: **/s/ Matthew A. Barket**
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