UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 2:23-cv-14362-KMM

ST.JOE HOMES & INVESTMENTS, LLC;
SEBRING ONE, LLC,

Plaintiffs

vs.

WESTCHESTER SURPLUS LINES
INSURANCE COMPANY,

Defendant.

DEFENDANT, WESTCHESTER SURPLUS LINES INSURANCE COMPANY'S MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM OF LAW

Defendant, WESTCHESTER SURPLUS LINES INSURANCE COMPANY ("Westchester"), pursuant to Federal Rule of Civil Procedure 56 and Southern District of Florida Local Rule 56.1, files this Motion for Summary Judgment[1] and Memorandum of law in its favor and against Plaintiffs, ST. JOE HOMES & INVESTMENTS, LLC; SEBRING ONE, LLC, and states as follows:

I. Legal Standard

"The 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). "[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Scott v. Harris*, 550 U.S. 372, 380 (2007) (quoting

[1] In compliance with Southern District of Florida Local Rules 56.1(a) and 56.1(b), the Statement of Material Facts has been filed separate and contemporaneous from this Motion for Summary Judgment and Memorandum of Law

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986)). When the moving party has carried its burden of demonstrating the absence of a genuine issue of material fact, the burden of production shifts, and the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

"The moving party may meet its burden to show that there are no genuine issues of material fact by demonstrating that there is a lack of evidence to support the essential elements that the non-moving party must prove at trial." *Moton v. Cowart*, 631 F.3d 1337, 1341 (11th Cir. 2011) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23)). "When the *nonmoving* party has the burden of proof at trial, the moving party is not required to 'support its motion with affidavits or other similar material *negating* the opponent's claim ….'" *U.S. v. Four Parcels of Real Prop. In Greene & Tuscaloosa Cntys. in State of Ala.*, 941 F.2d 1428, 1437 (11th Cir. 1991) (quoting *Celotex Corp.*, 477 U.S. at 323) (emphasis in original). "If the nonmoving party fails to 'make a sufficient showing on an essential element of her case with respect to which she has the burden of proof,' the moving party is entitled to summary judgment." *Id.* at 1438 (quoting *Celotex*, 477 U.S. at 323) (internal citation omitted).

"All the evidence and factual inferences reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party." *Phila. Indem. Ins. Co. v. Fla. Mem'l Univ.*, 307 F. Supp. 3d 1343, 1346 (S.D. Fla. 2018). But, "[a]n issue 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 Se.*, 492 F. App'x 16, 27 (11th Cir. 2012) (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.* (quoting *Anderson*, 477 U.S. at 252).

"For a breach of contract claim, Florida law requires the plaintiff to plead and establish: (1) the existence of a contract; (2) a material breach of that contract; and (3) damages resulting from the breach." *Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256, 1272 (11th Cir. 2009). The most basic element of the Plaintiff's claim against Westchester is that the Plaintiff claims it was owed money under the Policy that Westchester failed to pay. *Appalachian Ins. Co. v. United Postal Sav. Ass'n*, 422 So. 2d 332 (Fla. 3d DCA 1982) (holding that it was the insured's burden to establish that any claim exceeding the deductible was attributable to a single loss occurrence).

II. Westchester is Entitled to Summary Judgment because the 2805 Property is Not Listed on the Policy.

"Under Florida law, "contracts of insurance must be construed by resorting to the plain language of the policies as freely bargained for by the parties." *Prudential Prop. & Cas. Ins. Co. v. Swindal*, 622 So. 2d 467, 472 (Fla. 1993); "Courts are to give effect to the intent of the parties as expressed in the policy language, and if the policy is ambiguous, the ambiguity must be resolved liberally in favor of the insured and strictly against the insurer who prepared the policy." *Id*. In *United Specialty Ins. Co. v. Tzadik Acquisitions, LLC*, 859 Fed. Appx. 426 (11th Cir. 2021), the insured/plaintiff had a commercial general liability (CGL) insurance policy with United which identified 45 properties owned or operated by [the insured] but did not identify Kings Trail Apartments (KTA)—the premise from which the premises liability case arose. *Id*. The policy in that case provided a "classification and premium" table that classified each of the 45 premises by property type (e.g., apartment building, swimming pool, or vacant land), and assigned each a policy premium. *Id*. at 427 However, the table did not include the unlisted KTA property. *Id*. The Eleventh Circuit affirmed the district court's summary judgment for the insurer holding that

reading the insurance policy as a whole, the meaning is not ambiguous and giving effect to every provision, including the list of 45 properties in the application and policy, as well as the "classification and premium" table, the parties' clear intent was to limit coverage to the scheduled properties." *Id*.; *see also RLI Ins. Co. v. Caliente Oil, Inc*., 469 F. Supp. 3d 729, 741 (W.D. Tex. 2020) (holding that provisions in inland marine insurance policy extending coverage to contractors' equipment and tools owned by insured parent corporation did not apply under Texas or New Mexico law to light tower that was not listed on schedule on file with insurer).

Additionally, in *Ormond Country Club v. James River Ins. Co*., 2008 WL 859482, at *1-2 (E.D. La. 2008), a dispute arose under a commercial property policy from property damage arising out of wind and wind driven rain. *Id*. The plaintiff in Ormond was seeking coverage for a golf course but James River denied coverage asserting the golf course was not covered under the policy. *Id*. According to the Declarations Page of the Ormond policy, certain building coverage was provided to the club house, a storage building, a poolside cabana, a pumphouse and two course shelters. *Id*. at *1. The *Ormond* policy contained a coverage form—identical to the one issued by Westchester in this case—which provided that "We will pay for direct physical loss of or damage to Covered Property at the premises described in the Declarations caused by or resulting from any Covered Cause of Loss." *Id*. The *Ormond* court granted summary judgment to the insurer holding that "the golf course is not listed in the policy declarations. Thus, damages to the golf course are not covered." *Id*. at *2; *see also Halpern v. Lexington Ins. Co.,* 558 F.Supp. 1280 (E.D.La.), aff'd, 715 F.2d 191 (5th Cir.1983)(building not listed in the declarations not covered); *In re McDermott*, 875 So.2d 863 (La.App.4th Cir.2004)(personal property not shown on declarations page not covered); *Soundview Associates v. New Hampshire Ins. Co*., 215 A.D.2d 370, 625 N.Y.S.2d 659 (1995) (golf course not listed in the declarations pages of policy not covered).

Here, the Plaintiffs have only filed one count for breach of contract; the Plaintiffs did not file counts for reformation of the Policy or declaratory judgment.[2] Thus, the Policy cannot be reformed and the court must rule based on the plain and unambiguous language of the Policy. Specifically, the Building coverage section for the commercial property coverage states that Westchester "will pay for direct physical loss of or damage **to Covered Property at the premises described in the Declarations** caused by or resulting from any Covered Cause of Loss."[3] Accordingly, the Commercial Property Declarations only lists the two buildings at the 2803 Property.[4] The Commercial Property Declarations does not list, schedule, or include the 2805 Property.[5] Thus, the language of the Policy unambiguously demonstrates that the commercial property insurance only lists the 2803 Policy. Additionally, the Plaintiffs do not have any evidence to prove that the 2805 Property was listed on the Property or a breach of contract by Westchester relating to the 2805 Property. Therefore, Plaintiffs are not entitled to any damages or payments for the 2805 Property, including any payment for the alleged cost of $123,993.52 and $127,310.72, to replace the roofs of the two buildings at the 2805 Property, as alleged by Plaintiffs' engineer.

III. The Plaintiffs are not entitled to payment for the Stucco, Windows, Door, and Air Conditioning Repairs because they seek payment on a Replacement Cost basis for repairs they have not performed and/or Are Unable to Prove.

"Replacement cost insurance is designed to cover the difference between what property is actually worth and what it would cost to rebuild or repair that property." *Trinidad v. Fla. Peninsula Ins. Co.*, 121 So. 3d 433, 438 (Fla. 2013). "Replacement cost is measured by what it would cost to replace the damaged structure on the same premises." *Id.* (quotation marks omitted). "In contrast to a replacement cost policy, actual cash value is generally defined as 'fair market value' or

[2] Compl. [DE 1, at pgs. 11-15].
[3] Policy, at 24.
[4] Policy, at 6.
[5] Policy, at 6.

'[r]eplacement cost minus normal depreciation,' where depreciation is defined as a 'decline in an asset's value because of use, wear, obsolescence or age.'" *Id.* (quoting Black's Law Dictionary 506, 1690 (9th ed. 2009)).

In an analogous case, the Eleventh Circuit concluded that an identical Replacement Cost provision "unambiguously required the insured to repair its property before receiving [Replacement Cost Value] damages…. The insurance contract contains no allowances for advance payments to fund repairs." *Buckley Tower Condo., Inc. v. QBE Ins. Corp.*, 395 F. App'x 659, 662 (11th Cir. 2010). An insured is "barred from recovering [Replacement Cost Value] damages under the plain terms of the contract" when the insured does not complete the proposed repairs. *Id.* "Courts have almost uniformly held that an insurance company's liability for replacement cost does not arise until the repair or replacement has been completed." *State Farm Fire & Cas. Co. v. Patrick*, 647 So. 2d 983, 983 (Fla. 3d DCA 1994). An insurer does not breach a policy by not paying the actual cash value of a loss where the insured seeks payment on a replacement cost basis only. *CMR Constr. & Roofing, LLC v. Empire Indemnity Ins. Co.*, 843 F. App'x 189, 192-93 (11th Cir. 2021) ("Nor could Empire have breached the insurance policy based on the actual cash value because CMR did not and does not seek actual cash value.").

Here, the Plaintiffs are seeking damages to repair/replace the sign, billboard, windows, doors, air conditioning units, and for exterior stucco cracks. However, the Plaintiffs have not repaired or replaced the sign or the billboard.[6] In fact, the Plaintiffs have only paid between $400 to $600 to remove the old billboard.[7] Additionally, the Plaintiffs have not performed any repairs to the stucco cracks.[8] Lastly, the Plaintiffs allege they performed repairs to the doors and air

[6] Weinstein Dep. 63;15-25 and 64;1-11.
[7] Weinstein Dep. Weinstein Dep. 45;1-3.
[8] Weinstein Dep. 45;1-3 : 48;2-24 : 50;4-10 :

conditioning units but did not have any invoices, receipts, or photos to prove the repairs were performed.[9]

Q. And are the doors at the 2803 property operational? Do they work as of today?

A. We repaired the ones that we needed to fix and they are operational at this stage. They're ugly. They were painted, they still look ugly.

Q. And, other than painting them, did you do anything else to the doors at the 2803 property?

A. Yes.

Q. What else did you do?

A. Well, some of the frames were gone and damaged, they had to be repaired. We had to replace all the locks on the doors because the doors wouldn't work. This is after the hurricane.

Q. Right. And so you said you painted them and replaced the locks?

A. We repaired any of the doors that didn't work properly, I put new locks on them, all of them, all 25, and we painted them to make them look better, but they all have damage which is evident on them. Just take a look at -- I don't like them. It's the first thing the customer sees.

Q. And how much have you spent for the 2803 property for the repairs to the doors?

A. I'm not specific on those. Thousands. Tens of thousands probably.

Q. Do you have receipts and/or invoices for those repairs?

A. No. We did them ourselves.

[9] Weinstein Dep. pg. 45;18-25 and pg. 46;1-13 and pg. 46; 14-20 and pg. 48;2-24 and pg. 50;4-10.

Under the Policy, Westchester "will pay for direct physical loss of or damage to Covered Property at the premises described in the Declarations caused by or resulting from any Covered Cause of Loss."[10] The Policy provides coverage on a Replacement Cost basis. The Replacement Cost provision in the Policy states:

> **3. Replacement Cost**
> **a.** Replacement Cost (without deduction for depreciation) replaces Actual Cash Value in the Valuation Loss Condition of this Coverage Form.
> * * *
> **d.** We will not pay on a replacement cost basis for any loss or damage:
> **(1)** Until the lost or damaged property is actually repaired or replaced; and
> **(2)** Unless the repair or replacement is made as soon as reasonably possible after the loss or damage.
> * * *
> **e.** We will not pay more for loss or damage on a replacement cost basis than the least of **(1), (2)** or **(3),** subject to **f.** below:
> **(1)** The Limit of Insurance applicable to the lost or damaged property;
> **(2)** The cost to replace the lost or damaged property with other property:
> **(a)** Of comparable material and quality; and
> **(b)** Used for the same purpose; or
> **(3)** The amount actually spent that is necessary to repair or replace the lost or damaged property. [11]

As discussed in this motion, the Policy provides for replacement cost coverage for all items and property except the roof.[12] Thus, for property other than the roof, Westchester is not required to pay "[u]ntil the lost or damaged property is actually repaired or replaced" and the amount does cannot exceed the "amount actually spent that is necessary to repair or replace the lost or damaged property." The cost of the repairs made by the Plaintiffs do not exceed the applicable deductible. Based on Mr. Weinstein's testimony, the Plaintiffs are only able to prove repairs of $400.00 to $600.00 for the billboard and $7,000 for repairs to the roof of the Property that is not listed on the

[10] Policy, at 24.
[11] Policy, at 34.
[12] Policy, at 23 and 38.

Policy as these are the only items that the Plaintiffs have invoices for.[13] The Plaintiffs are not entitled to payment for any repairs that have not actually been made, and are not entitled to payment in excess of what it actually spent. Because the Plaintiffs have not made repairs to the property in excess of the $27,000 deductible, the Plaintiffs cannot establish entitlement to the damages they seeks under the Policy's replacement cost provision. Therefore, summary judgment should be entered in favor of Westchester.

IV. Based on the Plain Language of Policy, Plaintiffs are only Entitled to $2,500 per sign and Fences are not Covered.

As acknowledged by both the federal district court and the Eleventh Circuit, Florida law provides that insurance contracts are construed in accordance with the plain language of the policies as bargained for by the parties. *Auto Owners Ins. Co. v. Anderson*, 756 So. 2d 29, 34 (Fla. 2000). *Travelers Indem. Co. of Conn. v. Richard Mckenzie & Sons, Inc*., 10 F. 4th 1255, 1264 (11th Cir. 2021). "When contractual language is clear and unambiguous, [courts] cannot indulge in construction or interpretation of its plain meaning." *Id*. An ambiguity does not exist based on "fanciful, inconsistent, and absurd interpretations of plain language" and "[i]t is the duty of the trial court to prevent such interpretations." *Am. Med. Int'l, Inc. v. Scheller*, 462 So. 2d 1, 7 (Fla. Dist. Ct. App. 1984).

a. The Policy only Covers $2,500 Per Sign.

The Plaintiffs seek $50,000 to repair a billboard at the 2803 Property.[14] The Plaintiffs are also seeking either $31,668.83 to repair a Budget Inn sign at the 2803 Property or $95,506.87 to

[13] Weinstein Dep. pg. 63;15-25 and pg. 64;1-11 and pg. 54;1-3 and Exhibits 5 to Weinstein Dep.
[14] Weinstein Dep. pg. 63:5-25 and pg. 64;1-3

replace the Budget Inn sign at the 2803 Property.[15] However, the Policy contains a clear and unambiguous provision that provides as follows:

> **C. Limits Of Insurance**
>
> The most we will pay for loss or damage in any one occurrence is the applicable Limit Of Insurance shown in the Declarations.
>
> The most we will pay for loss or damage to outdoor signs, whether or not the sign is attached to a building, is $2,500 per sign in any one occurrence.[16]

Thus, under the plain and unambiguous language of the Policy, the Plaintiffs are only entitled to $2,500 for the billboard and $2,500 for the Budget Inn sign at the 2803 Property.

b. <u>Fences Damaged by Hurricane Winds are Not Covered Under the Policy</u>.

The Plaintiffs also seek $12,000 for replacement of the fence at the 2803 Property.[17] However, the Policy provides that *Covered Property does not include*:

> **q.** The following property while outside of buildings: (2) Fences, radio or television antennas (including satellite dishes) and their lead-in wiring, masts or towers, trees, shrubs or plants (other than trees, shrubs or plants which are "stock" or are part of a vegetated roof), all except as provided in the Coverage Extensions.[18]

The Policy also provides that You may extend the insurance provided by this Coverage Form to apply to your outdoor fences…caused by or resulting from any of the following causes of loss if they are Covered Causes of Loss: (1) Fire; (2) Lightning; (3) Explosion; (4) Riot or Civil Commotion; or (5) Aircraft.[19] However, the Plaintiffs' corporate representative testified that the

[15] Weinstein Dep. pg. 60;2-14 and pg. 61;17-24, and pg. 62;1-22, and see Exhibits 8(a) and 8(b) to Weinstein's Dep.
[16] Policy, at 32
[17] Weinstein Dep. pg. 88;1-13.
[18] Policy, at 25-26.
[19] Policy, at 31.

fence was damaged by Hurricane Ian winds.[20] Because wind is not a Covered Cause of Loss that provides provide coverage for fences, the fence is not covered under the Policy.

CONCLUSION

The Plaintiffs' claim fails as a matter of law because (a) the Policy, on its face, does not cover the 2805 Property and the Plaintiffs are not entitled to any damages for the 2805 Property; (b) Pursuant to the Policy's replacement cost provision, Westchester is not liable because Plaintiffs cannot demonstrate that they have repaired or replaced lost or damaged property or that they have spent money in excess of the $27,000 deductible in making necessary repair; (c) Further, the Policy clearly and unambiguously limits payments for signs to $2,500 per sign; and (d) fences damaged by wind/hurricanes are not covered under the Policy. Therefore, the Plaintiffs cannot establish entitlement to the damages they seek. For these reasons, summary judgment should be entered in favor of Westchester.

WHEREFORE, Defendant, Westchester Surplus Lines Insurance Company, respectfully requests the Court enter summary judgment in its favor and against Plaintiffs, ST. JOE HOMES & INVESTMENTS, LLC; SEBRING ONE, LLC, and grant any other relief this Court deem just and proper.

Respectfully submitted,

COZEN O'CONNOR

By: /s/ *Juan P. Garrido*
John David Dickenson
Florida Bar No. 575801
jdickenson@cozen.com
1801 N. Military Trail, Suite 200
Boca Raton, FL 33431
Telephone: (561) 515-5250

[20] Weinstein Dep. pg. 51;10-12.

Juan P. Garrido, Esq.
Florida Bar No. 118678
jgarrido@cozen.com
200 South Biscayne Blvd., Ste. 3000
Miami, Florida 33131
Telephone: (305) 397-0826
Counsel for Defendant, Westchester Surplus Lines Insurance Company

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on July 19th, 2024, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF, which will provide a copy to all counsel of record identified on the attached Service List via transmission of Notices of Electronic Filing generated by CM/ECF.

/s/ *Juan P. Garrido*
Juan P. Garrido, Esq.

SERVICE LIST

Luis F. Robayo, Esq.
Daniel Ilani, Esq.
THE PROPERTY PEOPLE FL, P.A.
80 SW 8th Street, Suite 2590
Miami, FL 33130
Telephone: (844) 776-7364
Luis@propertypeoplelaw.com
Danny@propertypeoplelaw.com
service@propertypeoplelaw.com
Attorneys Plaintiffs