

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

URNETTE CENE, ELICIEN LAMANDIER
and ROSILIA ALEXIS,

Plaintiffs,

v.

CASE NO. 1:21-cv-23819

AMERICAN STRATEGIC INSURANCE
CORP.,

Defendant.

**DEFENDANT’S MOTION FOR SUMMARY JUDGMENT AND
INCORPORATED MEMORANDUM IN SUPPORT OF MOTION**

NOW INTO COURT, through undersigned counsel, comes Defendant, American Strategic Insurance Corp. (“ASI”), a Write-Your-Own (“WYO”) Program insurance carrier participating in the National Flood Insurance Program (“NFIP”)¹ appearing herein in its “fiduciary”² capacity as the “fiscal agent of the United States,”³ and at the expense of the U.S. Treasury.⁴ ASI respectfully files this Motion for Summary Judgment and Incorporated Memorandum and submits that there are no genuine issues of any material facts, and ASI entitled to judgment as a matter of law.

I. NATURE AND STAGE OF THE PROCEEDINGS

Plaintiffs improperly filed their Complaint in state court on June 30, 2021, alleging breach of contract seeking additional funds for damages arising under Plaintiff’s NFIP Standard Flood Insurance Policy (“SFIP”) Number 0FLD51112 as a result of flooding that occurred on May 26,

¹ 42 U.S.C. § 4001, *et seq.*; *see also*, *Shuford v. Fidelity Natl Prop. Ins. Co.*, 508 F.3d 1337, 1339 (11th Cir. 2007).

² 44 C.F.R. § 62.23(f).

³ 42 U.S.C. § 4071(a)(1); *Shuford*, 508 F.3d. at 1339; *Gowland v. Aetna*, 143 F.3d 951, 953 (5th Cir.1998).

⁴ *Grissom v. Liberty Mut. Fire Ins. Co.*, 678 F.3d. 397, 402 (5th Cir. 2012).

2020, and state-law-based extra-contractual claims under 627.428 Fla. Stat., for attorneys' fees costs and legal interest. [ECF 1-2].⁵On October 29, 2021, ASI removed the matter to this Court as this court has original exclusive jurisdiction over this matter pursuant to 42 U.S.C. § 4072 and federal question jurisdiction pursuant to 28 U.S.C. §§ 1331. [ECF 1]. A Scheduling Order was issued on November 1, 2021, setting the Dispositive Motions Deadline for July 18, 2022 [ECF 5]. This dispositive motion is being filed in compliance with the Court's November 1, 2021, Order. [Id.]

II. SUMMARY OF THE ARGUMENTS

Summary judgment is appropriate in this case dismissing all of Plaintiffs' claims against ASI as there are no issues of material fact or law. It is undisputed that on August 5, 2020, September 8, 2020, October 13, 2020, and December 15, 2020, ASI mailed letters to Plaintiffs denying coverage under their SFIP for all or part of their claim. [ECF 22-1 Exh. A, Sworn Declaration of Francois Jean Baptiste, ¶¶ 13, 14 and 16; ECF 22-7, 22-8, 22-10, and 22-11 Exhs. G, H, J and K - Partial denial letters dated August 5, 2020, September 8, 2020, October 13, 2020, and December 15, 2020.] It is further undisputed that Plaintiffs received ASI's letters dated August 5, 2020, September 8, 2020, October 13, 2020, and December 15, 2020, before filing the lawsuit in state court on June 30, 2021. [ECF 1-2; ECF 22-12, Exh. L - Deposition of Urnette Cene, p. 17, lines.18-25; p. 18, lines. 12-15; p. 18, lines 16-22; p. 20, lines 2-8; p. 20, lines 10-16.]

Pursuant to 42 U.S.C. §4072 and Article VII(R) of Plaintiffs' SFIP, Plaintiffs had one year from August 5, 2020, to file their lawsuit in the United States District Court for the district wherein the subject property is located.

⁵ Notably, ASI filed Motions to Dismiss the State-Law-Based Extra-contractual claims on January 19, 2022. [ECF 13] and a Motion to Withdraw the Plaintiffs' Jury Demand. [ECF 14] the Court granted the motions on May 17, 2022 [ECF 21].

As Plaintiffs did not file suit within one year in compliance with the law, their claims are time barred and due to be dismissed. *See, Hairston v. Travelers Cas. & Sur. Co.*, 232 F.3d 1348, 1352-53 (11th Cir. 2000). The Southern District of Florida has similarly held. *See, Smith-Pierre v. Fidelity National Indemnity Ins. Co.*, 2011 WL 3924178 (S.D. Fla. Sept. 7, 2011); *Castro v. Fidelity Nat'l Ins. Co.*, 2007 WL 1173072 (S.D. Fla. April 18, 2007); *Sanchez v. Selective Ins. Co. of the Southeast*, 2015 WL 4768258 (S.D. Fla Aug. 12, 2015); and *Miller v. American Bankers Ins. Co.*, 85 F.Supp.2d 1287 (S.D. Fla April 30, 1999).

Based upon these undisputed facts, ASI submits that summary judgment is warranted and that Plaintiffs' claims for damages should be dismissed with prejudice.

III. STATEMENT OF UNDISPUTED MATERIAL FACTS

In accordance with the Federal Rules of Civil Procedure, the Local Rules of Southern District of Florida and the this Court's Trial Order, ASI has contemporaneously filed and served a Statement of Undisputed Material Facts supported by the Sworn Declaration of Francois Jean-Baptiste, the Corporate Representative of ASI, which sets out the indisputable material facts supported by reference to the relevant exhibits attached to his Sworn Declaration and maintained by ASI in its normal course of business. The Defendant hereby adopts and incorporates by reference the Sworn Declaration and exhibits to which the Court is referred for the indisputable material facts necessary to decide this Motion for Summary Judgment. ASI submits the following synopsis of undisputed material facts:

1. Urnette Cene, Elicien Lamandier and Rosilia Alexis, are the holders of a NFIP SFIP issued by ASI, bearing number 0FLD511122, for the dwelling located at 1260 NW 100th Terrance, Miami, FL 33147, with policy limits of \$250,000 for building damages, subject to a \$10,000 deductible. Plaintiffs did not purchase contents coverage. The policy period at issue for SFIP No. 0FLD511122 was February 25, 2020 to February 25, 2021. [ECF 22-1 Ex. A, ¶3, ECF 22-2 Ex.

B, Declarations Page; ECF 22-3 Exh. C, SFIP]

2. On or about May 26, 2020, Plaintiffs' property sustained some damages associated with the flood, for which Plaintiffs submitted a claim seeking payment for flood damages. Plaintiffs reported the loss and initiated the claim on May 26, 2020. ASI acknowledged the flood claim and referred the loss to an independent adjuster as a courtesy pursuant to Article VII(J)(7) of the SFIP. [ECF 22-1 Exh. A, ¶9] The independent adjuster is not authorized to approve or disapprove claims. SFIP Art. VII(J)(8). [ECF 22-3 Exh. C, SFIP]

3. On June 2, 2020, the independent adjusting firm, FKS Services, LLC, retained by ASI, inspected the property, through its adjuster, Jason Stallings, and determined that the dwelling was flooded with 2 inches of water on the interior and 19 inches on the exterior for 24 hours. [ECF 22-1 Exh. A, ¶ 10; ECF 22-4 Exh. D, Adjuster's Preliminary Report]

4. On June 8, 2020, the independent adjuster prepared an estimate of covered damages, the net total for covered building was \$46,560.63 (RCV: \$56,560.63 minus \$10,000 deductible). ASI reviewed the independent adjuster report, estimate, and supporting documentation and verified that Plaintiff was entitled to this amount, but Plaintiffs did not execute the independent adjuster's Proofs of Loss for these amounts. [ECF 22-1 Exh. A, ¶11; ECF 22-5 Exh. E, Estimate totaling \$46,560.63]

5. Rather than sign the adjuster's Proofs of Loss, on July 24, 2020, Plaintiffs, through their public adjuster submitted a signed Proof of Loss for \$242,708.19 to ASI, which was supported by an estimate prepared by Fraser Property and Adjusting with a Replacement Cost Value of \$252,708.19 prior to the deduction of the \$10,000 deductible. [ECF 22-1 Exh. A, ¶12, ECF 22-6 Exh F – Plaintiffs' Proof of Loss Submission dated July 24, 2020]

6. After reviewing the Proof of Loss and documentation submitted on July 24, 2020,

on August 5, 2020, ASI mailed a letter to Plaintiffs, in the normal course of its business, with proper postage affixed, at the address identified on the declarations page, rejecting the Proof of Loss because included a \$90,000 line-entry for Loss of Use which is not covered under the SFIP; and included over \$17,000 for non-recoverable content manipulation charges, as Plaintiffs did not purchase contents coverage. [ECF 22-1 Exh. A, ¶13, ECF 22-7 Exh. G – Correspondence dated August 5, 2020]

7. On September 8, 2020, ASI mailed another letter to Plaintiffs, in the normal course of its business, with proper postage affixed, at the address identified on the declarations page, detailing the approved claim payment of \$46,560.63 under Coverage A (building damages) based upon independent adjuster's report, subject to receipt of the executed Proof of Loss forms for that amount. The September 8, 2020 correspondence also issued a detailed partial denial of the claim based upon its review of the public adjuster estimate which included items that were either not covered under the policy or not sufficiently supported. These items include, but are not limited to, the \$90,000 allowance for loss of use, which is not covered As per SFIP Art. V(A)(3); denial of claim for contents manipulation, which is not allowed when the insured has not purchased contents coverage; and denials for other items which were indirect or direct overhead costs already addressed as overhead and profit, such as temporary toilet, personal protective mask, packing tape, personal gloves, on-site evaluation and or supervisor/administrative hours. [ECF 22-1 Exh. A, ¶14, ECF 22-9 Exh. I – Correspondence dated September 8, 2020; ECF 22-3 Exh. C SFIP Art. V(A)(3 and [ECF 22-13 Exh. M – Excerpts from FEMA Claim Manual, pp. 231-232, 264-265]

8. On October 7, 2020, Plaintiffs submitted the undisputed executed Proofs of Loss which totaled \$46,560.63 and ASI issued payment to Plaintiffs in that amount on October 14, 2020. [ECF 22-1 Exh. A, ¶15, ECF 22-9 Exh. I – Proofs of Loss totaling \$46,560.63]

9. On October 13, 2020, ASI mailed a letter to Plaintiffs, in the normal course of its business, with proper postage affixed, at the address identified on the declarations page, regarding the payment and reaffirming the partial denial of items outlined in its September 8, 2020 correspondence. The partial denial was reaffirmed on December 15, 2020. [ECF 22-1 Exh. A, ¶16, ECF 22-10 Exh. J – Correspondence dated October 13, 2020; ECF 22-11 Exh. K – Correspondence dated December 15, 2020]

10. Ms. Cene testified that she received the letter dated August 5, 2020, and understood the letter was denying the claim. [ECF 22-12 Exh. L – Deposition of Urnette Cene, p. 17, lines.18-25; p. 18, lines. 12-15] She also testified that she received the letters dated September 8, 2020, October 13, 2020, and December 15, 2020. [ECF 22-12 Exh. L, p. 18, lines 16-22; p. 20, lines 2-8; p. 20, lines 10-16.]

11. On June 30, 2021, Plaintiffs filed their lawsuit in the state court of the Eleventh Judicial Circuit in and for Miami-Dade County Florida, in violation of SFIP Art. VII(R) which required Plaintiffs to file their lawsuit in the United States District Court where the insured property is located, within one year after the date of the written denial of all or part of their claim. [ECF 1-2]

12. ASI removed the matter to this Honorable Court on October 29, 2021. [ECF 1]

IV. STATEMENT OF THE ISSUES:

The only issue before this court, which is dispositive of the entire lawsuit, is whether Plaintiffs' lawsuit is time barred because they did not file the lawsuit in the United States District Court where the property is located within one year of receiving the correspondence which denied all or part of the claim?

The short answer to this question is “Yes”. Therefore, ASI submits that there are no genuine issues of material fact and summary judgment should be granted on these issues.

V. LAW AND ARGUMENT

A. Summary Judgment Standard

Summary Judgment is appropriate when there is no genuine issue as to any material facts, and the moving party is entitled to judgment as a matter of law. In this case, an examination of the pleadings and evidence presented shall demonstrate that there are no genuine issues as to any material facts, and ASI is entitled to judgment as a matter of law.

B. The NFIP

In *Sanz* and *Shuford*, the Eleventh Circuit explained in detail the legal structure of the NFIP; the relationship between the federal government and the WYO Program carriers; and finally, the constitutional impediments to court orders requiring payments under flood policies where plaintiffs have not established full and complete compliance with the conditions precedent to the making of a claim under the policy. These cases detail the statutory and regulatory scheme of the NFIP. ASI submits that a review of these cases would be of assistance to this Honorable Court on the instant Motion. However, briefly, ASI points out the following:

The NFIP is a creature of the U.S. Congress, administered by the Federal Emergency Management Agency (“FEMA”) and the Federal Insurance Administration (“FIA”), and underwritten by the U.S. Treasury. *Sanz v. U. S. Security Ins. Co.*, 328 F.3d 1314, FN1 (11th Cir. 2003). *See also, Gowland*, 143 F.3d at 955 (All flood loss claims presented under the NFIP are paid directly with U.S. Treasury funds. *See, The Arrangement* at Art. III(D)(1).⁶ *See also, Gowland*, 143 F.3d at 955. The SFIP is written by the federal government and is a codified federal regulation. *See*, 44 C.F.R. Pt. 61, App. A(1) ASI is a WYO Program carrier authorized to issue the SFIP under its logo pursuant to the “Arrangement” between itself and FEMA. However, ASI may

⁶ The *Arrangement* is also published at https://www.fema.gov/sites/default/files/2020-10/fema_fy-21-wyo-financial-subsidy-arrangement_october-2020.pdf. *See also*, ECF 22-14 Exh. N.

not alter, amend, or waive any provision or condition of the SFIP. The sole authority is the Federal Insurance Administrator, and the waiver must be expressed and in writing. *See*, 44 C.F.R. Pt. 61, App. A(1), Art. VII(D); and 44 C.F.R. §61.13(d). Due to the statutory scheme of the NFIP and the fact that U.S. Treasury funds are at stake, strict adherence to the conditions precedent for payment of a claim is required. *Sanz*, 328 F.3d at 1317-18; *Gowland*, 143 F.3d at 953. To make payments not in strict compliance with the SFIP would be contrary to Congress' mandate and would violate the Appropriations Clause of the Constitution. *Sanz*, 328 F.3d at 1317-18; *Gowland*, 143 F.3d at 955; and *Flick v. Liberty Mut. Fire Ins. Co.*, 205 F.3d 386, 391 (9th Cir. 2000), *cert denied*, 531 U.S. 927 (2000).

Notably, ASI has absolutely no reason to avoid paying Plaintiffs' flood insurance claim, because ASI's profits are based upon the amount of money it pays out in claims. *See*, 44 C.F.R. §62.23(i)(3) and *the Arrangement* at Art. III(C)(1). [ECF 22-14 Exh. N] The more money ASI pays out in claims, the higher the fee it receives under the Program. *Eddins v. Omega Ins. Co.*, 825 F.Supp. 752, 753 (N.D. Miss. 1993). Accordingly, ASI's only motive for not paying benefits to an NFIP participant is its belief that such a claim cannot legally be paid under the rules of the Program.

Finally, it is well settled that participants in federal insurance programs are charged with knowledge of the laws governing those programs. *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 384-85 (1947). The Supreme Court went further in *Heckler v. Community Health Services of Crawford County, Inc.*, 467 U.S. 51, 64 (1984) and held that participants in federal benefit programs do so under a further legal duty to "familiarize" themselves with the requirements of those programs. Thus, based on *Merrill* and *Heckler*, Plaintiffs at bar are legally required to make certain that they fully understand the federal insurance program under which they seek recovery.

C. Plaintiffs Breached the Requirement of SFIP Article VII(R)

In enacting the NFIP, Congress imposed a one-year statute of limitations for a policy holder to bring a lawsuit after the denial/disallowance or partial denial/disallowance of the policyholder's claim. *See*, 42 U.S.C. §4072. This one-year statute of limitation was incorporated into the SFIP by FEMA, and the same is found at SFIP Art. VII(R), which is itself a published codified federal law found at 44 C.F.R. Pt. 61, App. A(1). Article VII(R) of the SFIP states:

You may not sue us to recover money under this policy unless you have complied with all the requirements of the policy. If you do sue, you must start the suit **within one year after the date of written denial of all or part of the claim, and you must file the suit in the United States District Court of the district in which the covered property is located at the time of loss.** This requirement applies to any claim that you may have under this policy and to any dispute that you may have arising out of the handling of any claim under this policy.

Id. (emphasis added).

This provision of the SFIP is contained within the same section of the SFIP under which the courts have fully applied a strict construction standard, namely, SFIP Article VII. *See Sanz*, 143 F.3d at 117-18 (11th Cir. 2003). Further, the statutory grant of "original exclusive" jurisdiction over lawsuits arising from the operation of the NFIP found at 42 U.S.C. § 4072 provides the same one-year time limitation. *See, Hairston*, 232 F.3d at 1350; *Flick*, 205 F.3d at 391; *Van Holt v. Liberty Mut. Fire Ins. Co.*, 163 F.3d 161, 163 (3rd Cir. 1998).

Accordingly, whether the Court looks to the NFIA or the codified SFIP, Plaintiffs' claims may only be heard if a lawsuit is filed in the United States District Court of the district where the property is located and within the one-year time limitation. Moreover, ASI cannot extend the time limit for policyholders to bring a lawsuit, as the applicable time to file a lawsuit is set by statute. FEMA explained:

[U]nlike the SFIP Proof of Loss deadline, which is a regulation created by FEMA, FEMA cannot extend the time limit for NFIP policy holders to bring a lawsuit. The applicable time limit to file a lawsuit was set by statute, not FEMA. Although

FEMA has the administrative authority to extend the Proof of Loss deadline it established by regulation, FEMA lacks the authority to extend the time limit to file a lawsuit established by statute. This statute of limitations has never been extended.⁷

In addition to being charged with knowledge of the terms of the SFIP, Ms. Cene expressly testified that she received the letter dated August 5, 2020, and understood the letter was denying the claim. [ECF 22-12 Exh. L – Deposition of Urnette Cene, p. 17, lines.18-25; p. 18, lines. 12-15] Ms. Cene also testified that she received the letters dated September 8, 2020, October 13, 2020, and December 15, 2020. [ECF 22-12 Exh. L, p. 18, lines 16-22; p. 20, lines 2-8; p. 20, lines 10-16.] However, Plaintiffs did not file their lawsuit in federal court within the required time period.

It is well settled that filing suit in state court does not toll the statute of limitations. *See, Hairston v. Travelers Cas. & Surety Co.*, 232 F.3d 1348. In *Hairston*, plaintiffs' property was damaged by flood in 1995 for which they received payment. Almost two years later, they noticed additional damage which they attributed to the 1995 flood. The carrier denied the claim for additional damages on November 13, 1997, and plaintiffs filed suit in state court on November 11, 1998. Defendants removed the lawsuit to federal court on December 15, 1998, more than a year after the denial of the claim. Defendant moved to dismiss the lawsuit based on the twelve-month limitations period, and the district court granted the motion finding that filing in state court did not toll the statute of limitations. The Eleventh Circuit agreed holding that the statutory language of 42 U.S.C. §4072 expressively provides that the jurisdiction of the district court is exclusive, [*Id.*, p. 1350-1351] and, that because 4072 does not permit concurrent jurisdiction, filing in a court without competent jurisdiction did not toll the statute of limitations. [*Id.* p. 1353]

⁷ *See*, FEMA's Claim Manual, which can be found at https://www.fema.gov/sites/default/files/documents/fema_nfip_claims-manual_2021.pdf. *See also*, ECF 22-13 Exh. M - Excerpts from the Claims Manual regarding Statute of Limitations, pp 289-291.

In *James v. Auto Owners*, 1998 WL 914241 (S.D. Ga. Dec. 10, 1998), plaintiff filed her claim for flood damages in state court within one year of the denial and Auto Owners removed it following that period. Plaintiff moved, over Auto Owners objection, to voluntarily dismiss the state court suit without prejudice and then re-file in federal court, which according to plaintiff, would “relate” back to the state court within the one-year filing period. The district court dismissed the case holding that state law saving provisions are inapplicable where the federal statutory limitations period governs, such as 4072. The district court analogized:

Suppose she filed her case in her kitchen drawer, rather than in State court, within the policy’s one-year period. Yet filing it in State court is analytically no different. The policy (and 4072) said federal, not State court, so it does not matter where James filed her lawsuit once she concedes she did not file it in federal court within the one-year period.

Id., at *1.

Furthermore, courts within the Southern District of Florida have similarly held. *See, Smith-Pierre v. Fidelity Nat’l Indemnity Ins. Co.*, 2011, at *4 WL 3924178 (S.D. Fla. Sept. 7, 2011); *Castro v. Fidelity Nat’l Ins. Co.*, 2007 WL 1173072, at*4 (S.D. Fla. April 18, 2007); *Phillips v. American Strategic Ins. Corp.*, 2020 WL 1692365 (S.D. Fla. Jan. 10, 2020); *Sanchez v. Selective Ins. Co.*, 2015 WL 4768258 (S.D. Fa. Aug. 12, 2015).

In the present matter, ASI issued correspondence which denied all or part of the claim on August 5, 2020, September 8, 2020, October 13, 2020, and December 15, 2020. [ECF 22-7, 22-8, 22-10, 22-11 Exh. G, H, J, K] The lawsuit was removed to federal court on October 29, 2021. [ECF 1] Based upon *Hairston*, the removal occurred more than one year from the denial letters dated August 5, 2020, and September 8, 2020. As such, as per 42 U.S.C. § 4072 and Article VII(R) of the SFIP, Plaintiffs’ lawsuit is time barred and dismissal is warranted.

VII. CONCLUSION

Based on federal law and established jurisprudence interpreting same discussed in this Memorandum, ASI submits there are no genuine issues as to any material facts. As such, ASI is entitled to judgment as a matter of law and Plaintiffs' claims must be dismissed with prejudice and at Plaintiffs' costs.

Date: June 20, 2022

Respectfully Submitted:

/s/ John Michael Pennekamp

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CERTIFICATE OF SERVICE

I hereby certify that on June 20, 2022, the foregoing document was electronically filed with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

s/ John Michael Pennekamp
John Michael Pennekamp

SERVICE LIST

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