IN THE CIRCUIT COURT OF THE 20TH
JUDICIAL CIRCUIT IN AND FOR
COLLIER COUNTY, FLORIDA

Case No.: 11-2019-CA-005022-0001-XX

MAURICE O'CONNOR & CORAL-
JEANNE O'CONNOR,

Plaintiffs,

v.

FIRST PROTECTIVE INSURANCE
COMPANY D/B/A FRONTLINE
INSURANCE COMPANY,

Defendant.
_____/

ORDER ON DEFENDANT'S MOTION FOR SUMMARY FINAL JUDGMENT

THIS CAUSE having come before the Court upon the Defendant's Motion for Summary Final Judgment and the Court having considered the record, pleadings, motions, summary judgment evidence including the insurance policy, legal authority, as well as the argument of counsel at the March 25, 2022 hearing as to said Motion, and being otherwise advised in the Premises it is hereby:

ORDERED AND ADJUDGED that Defendant's Motion for Summary Final Judgment is **GRANTED**. The Court makes this ruling based on the following:

UNDISPUTED FACTS

1. First Protective Insurance Company D/B/A Frontline Insurance Company ("Frontline") issued Policy No. FFH3-66085 ("the Policy"), to Maurice and Coral-Jeanne O'Connor, for the property located at 7615 Palmer Court, Naples, FL 34113 ("Property"), with effective dates of December 12, 2016 through December 12, 2017 ("Policy").

2. On September 14, 2017, Maurice O'Connor reported a claim for damage due to Hurricane Irma, reportedly having occurred on September 10, 2017.

3. Frontline immediately sent the Insureds a claim acknowledgment letter and notice of right to mediate letter, advising that the claim will be assigned to a field adjuster for inspection.

4. Frontline's field adjuster was scheduled to inspect the Property for this loss on October 8, 2017. However, Frontline's field adjuster reported back to Frontline that the "Insured withdrew claim".

5. On October 23, 2017, Frontline mailed the Insureds a letter confirming they wish to withdraw the claim. The letter requested the Insureds to contact Frontline should they wish to re-open the claim at a later date. As a result, no further investigation occurred at that time, nor was any evidence or documentation submitted to Frontline to assist in the investigation of the claim.

6. There was no correspondence or communication from the Insureds or their representatives for almost two years. Approximately two years later on September 18, 2019, Frontline received documentation from CMR Construction and Roofing ("CMR").

7. Due to the late notice provided to investigate the claim and inspect the Property, Frontline inspected the Property for the first time with a field adjuster and engineer on December 6, 2019.

8. Frontline's engineer observed repairs throughout the roof of the Property.

9. Plaintiff, Maurice O'Connor, confirmed during his deposition that repairs were completed to the roof of the Property shortly after Hurricane Irma.

10. No photographs of the roof prior to repairs being completed, and no damaged or repaired building materials were provided to Frontline to assist in the investigation of the claim.

11. In correspondence dated January 8, 2020, Frontline advised the Insureds the claim was being denied.

12. The Policy insures the Property against the risk of direct physical loss and outlines certain "duties" that must be performed in the event of loss. The Duties After Loss provision of the Policy states:

> **SPECIAL PROVISIONS—FLORIDA**
>
> ***
>
> **SECTION I – CONDITIONS**
>
> ***
>
> 2. **Your Duties After Loss.** In case of a loss to covered property, you must see that the following are done:
> a. Give prompt notice to us or our agent;
>
> ***
>
> d. Protect the property from further damage. If repairs to the property are required, you must:
> (1) Make reasonable and necessary repairs to protect the property; and
> (2) Keep an accurate record of repair expenses;
>
> ***
>
> f. As often as we reasonably require:
> (1) Show the damaged property;
>
> ***

10. The Policy further provides that a lawsuit shall not be brought until there has been full compliance with Policy conditions.

> **SPECIAL PROVISIONS—FLORIDA**
>
> ***
>
> **SECTION I – CONDITIONS**
>
> ***
>
> 2. **Your Duties After Loss.** In case of a loss to covered property, you must see that the following are done:
>
> ***
>
> **8. Suit Against Us**. No action can be brought against us unless there has been full compliance with all of the terms under Section I of this policy and the action is started within 5 years after the dates of loss.
>
> ***

11. Plaintiffs did not allow an inspection or investigation of this claim until CMR Construction and Roofing opened the claim in September 2019. Thus, Plaintiffs did not provide timely notice to Frontline and prejudice to the Defendant is presumed.

12. Further, Plaintiffs failed to show the damaged property, failed to provide Defendant with photographs of the roof prior to repairs being completed, and failed to provide damaged and/or repaired building materials, thus, prejudice to the Defendant is further presumed.

13. As Plaintiffs breached the notice provision of the Policy, prejudice to the Defendant is presumed, and Plaintiffs' are unable to rebut the presumption of prejudice to Defendant in determining both causation and extent of the claimed damage. Further, Plaintiffs failed to submit competent summary judgment evidence to rebut the presumption of prejudice to Frontline.

14. Therefore, there are no genuine issues of material facts that a reasonable jury could return a verdict for the Plaintiffs.

LEGAL STANDARD

Pursuant to the recent amendment to Florida Rule of Civil Procedure 1.510, the standard for summary judgment now aligns with the federal summary judgment standard. In re Amends. To Fla. Rule. Of Civ. Pro. 1.510, No. SC20-1490 (Fla. Dec. 31, 2020). "The Florida and federal rules of civil procedure share the same overarching purpose: to secure the just, speedy and inexpensive determination of every action." *Id.* "We are persuaded that the federal summary judgment standard better comports with the text and purpose of rule 1.510 and that adopting that standard is in the best interest of our state." *Id.* at Pg. 6.

Accordingly, the new summary judgment standard is as follows: "whether the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* at Pg. 4. Under the new standard, "[a] party opposing summary judgment 'must do more than simply show that there is some metaphysical doubt as to the material facts." (emphasis added) Id. at Pg. 4. The new standard "mirrors the standard for a directed verdict." *Id.* at Pg. 2. The inquiry under both standards (i.e. a motion for summary judgment and directed verdict) are the same: "whether the evidence

presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Id.* at Pg. 3. In practical terms, this means that this Court can consider the validity and efficacy of the evidence offered by the non-movant. "When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of facts for purposes of ruling on a motion for summary judgment." *Id.* at Pg. 5. "If the evidence [offered by the nonmoving party] is merely colorable, or is not significantly probative, summary judgment may be granted." (emphasis added) *Id.* at Pg. 4.

CONCLUSIONS OF LAW

When an insured materially breaches a condition precedent, the insurer is not obligated to pay any damages. See *Amica Mut. Ins. Co. v. Drummond*, 970 So. 2d 456, 459-460 (Fla. 2d DCA 2007). Florida law holds that where an insured has breached the conditions of an insurance policy, prejudice to the insurer is presumed. *Bankers Ins. Co. v. Macias*, 475 So. 2d 1216, 1218 (Fla. 1985). The presumption can only be avoided by the insured presenting evidence that the insurer was not in fact prejudiced by noncompliance with the condition. *Id.*; see *Hunt v. State Farm Fla. Ins. Co.*, 145 So. 3d 210, 211 (Fla. 4th DCA 2014) (where insureds did not come forward with any evidence rebutting the presumed prejudice State Farm suffered as a result of their tardily submitted proof of loss, trial court properly entered summary favor in State Farm's favor).

A. Prompt Notice

"The question of whether an insured's untimely reporting of loss is sufficient to result in the denial of recovery under the policy implicates a two-step analysis." *LoBello v. State Farm Florida Ins. Co.*, 152 So.3d 595, 599 (Fla. 2d DCA 2014). If late notice is established, prejudice to the insurance company is presumed. *Macias*, 475 So. 2d at 1218. A plaintiff can only avoid the

legal presumption of prejudice (and thus summary judgment) by presenting evidence of no prejudice. *Id.*

"Notice [to the carrier] is necessary when there has been an occurrence that should lead a reasonable and prudent [person] to believe that a claim for damages would arise." *Ideal Mut. Ins. Co. v. Waldrep*, 400 So. 2d 782, 785 (Fla. 3d DCA 1981). Notice is said to be prompt when it is provided "with reasonable dispatch and within a reasonable time in view of all of the facts and circumstances of the particular case." *Laquer v. Citizens Prop. Ins. Corp.*, 167 So0.3d 470, 474 (Fla. 3d DCA 2015) (quoting *Yacht Club on the Intracoastal Condo. Ass'n v. Lexington Ins. Co.*, 599 Fed. Appx. 875, 879 (11th Cir. 2015)). "When the undisputed factual record establishes notice is so late that no reasonable juror could find it timely, Florida courts will deem the notice untimely as a matter of law." *Ramirez v. Scottsdale Ins. Co.*, 2021 WL 5050184, at *4 (S.D. Fla. Oct. 29, 2021); *Kroener v. Fla. Ins. Guar. Ass'n*, 63 So. 3d 914, 916 (Fla. 4th DCA 2011).

The factual record in this case supports summary judgment as no reasonable juror could conclude that Plaintiffs' notice to Defendant was given with reasonable dispatch and within a reasonable time in view of all of the facts and circumstances of this case. Although the claim was initially reported on September 14, 2017, the Plaintiffs actions shortly after reporting, and totality of the facts and circumstances, negate compliance with the notice provision. The Plaintiffs prevented an inspection and investigation from occurring, thus, the Plaintiffs did not provide timely notice of this claim.

Further, as Plaintiff Maurice O'Connor testified to, Plaintiffs completed repairs to the roof shortly after Hurricane Irma. Plaintiffs did not allow Frontline an opportunity to inspect the Property prior to repairs being completed. Plaintiffs also failed to show the damaged property,

failed to photographs of the roof prior to repairs being completed, failed to provide damaged and/or repaired building materials, and failed to cooperate with the investigation of the claim.

There is no genuine factual dispute that Plaintiffs failed to give timely notice as required by the subject policy, and this Court finds that no reasonable juror could find otherwise. Therefore, because Plaintiffs breached the notice provision of the policy, prejudice to Defendant is presumed.

B. Failure to Show Damaged Property

Plaintiffs breached the policy condition requiring that they show the damaged property. Plaintiffs completed roof repairs prior to allowing Frontline an opportunity to complete an inspection and investigation of the loss and claimed damage. Specifically, Frank Foster Construction Company completed repairs to the roof. See Exhibit "B" to Defendant's Motion for Summary Final Judgment, 47:22-55:8. In all, Plaintiffs paid $3,400.00 for repairs to the property. Defendant was not afforded the opportunity to inspect the damaged property prior to repairs being completed. Plaintiffs also provided no photographs of the damaged property before repairs were completed. As a result, Plaintiffs failed to comply with the policy condition requiring Plaintiffs to show the damaged property and prejudice to the insurer is presumed. Bankers, 475 So.2d at 1218.

C. Prejudice to Defendant

This Court finds that Plaintiffs presented no evidence to overcome the legal presumption of prejudice to Defendant. Further, the Court finds that Defendant has been clearly prejudiced by Plaintiffs' violations of their contractual obligations to comply with the policy conditions. Plaintiffs' only reference to summary judgment evidence was in the form of an affidavit and report by "certified roof inspector" Steven M. Thomas, CTS, CIT, which was attached as Exhibit A to Plaintiffs' Response to Defendant's Motion for Summary Judgment. The affidavit was less than two pages, is conclusory, and mischaracterizes facts of this case and claim. Neither the affidavit nor report mentions the total amount of damage present, what type of damage was present, or

where it was located. Further, neither the affidavit nor report mentions repairs, amount of tiles repaired, when the repairs were completed, or what relation if any the repairs have to do with the cause of loss. Neither the affidavit nor report explain how he came to his conclusion, other than to summarily decide the damage was caused by Hurricane Irma, and as such the roof must be replaced.

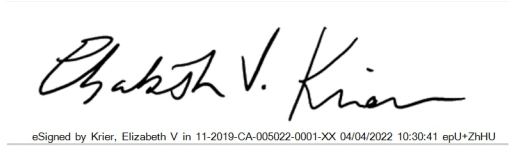
Mr. Thomas' affidavit and report also lack credibility. The affidavit misstates facts and damage claimed in the case. Further, the affidavit and report used to attempt to rebut prejudice to the Defendant fails to provide any sufficient counterevidence as to why the Defendant was not prejudiced by the multi-year delay in allowing an inspection and investigation.

As a result of the above, Plaintiffs' affidavit was merely conclusory, and this Court rules it is not competent summary judgment evidence. "[C]onclusory self-serving statements which are framed in terms only of conclusions of law are not sufficient to either raise a genuine issue of material fact or prove the non-existence of a genuine issue of material fact." *Abu-Khadier v. City of Fort Myers*, 312 So. 3d 975, 976 (Fla. 2d DCA 2020) (citing *Progressive Express Ins. Co. v. Camillo*, 80 So. 3d 394, 399 (Fla. 4th DCA 2012)); *Archer v. Tower Hill Signature Ins. Co.*, 313 So. 3d 645, 649 (Fla. 4th DCA 2021) (same). Additionally, nothing in the affidavit refutes Defendant's allegations that Plaintiffs' notice was late and that they failed to show the damaged property. More importantly, nothing in the affidavit refutes the presumption of prejudice to Defendant in this case.

CONCLUSION

For the forgoing reasons, it is **ORDERED AND ADJUDGED** that the Defendant's Motion for Final Summary Judgment is **GRANTED**. Final Judgment is entered in favor of Frontline Insurance Company against Maurice O'Connor & Coral-Jeanne O'Connor ("Plaintiffs").

The Plaintiffs shall recover nothing from Frontline Insurance Company in this action, and Frontline Insurance Company shall go hence without day. The Court retains jurisdiction for any motions for entitlement for attorney's fees and costs from Defendant, and to enter such other orders as may be necessary to enforce this Final Judgment.



Electronic Service List
Gerald Thomas Albrecht <galbrecht@albrechtmediation.com>
Jordan H. Lande <jlande@kelleykronenberg.com>
Jordan H. Lande <vgomez@kelleykronenberg.com>
Derek Oliver Goldsmith <dgoldsmith@kelleykronenberg.com>
Derek Oliver Goldsmith <mferrer@kelleykronenberg.com>
Luis Pimentel <lpimentel@kpattorney.com>
Luis Pimentel <Alsilva@kpattorney.com>
Luis Pimentel <FirstPartyEService@kpattorney.com>
Rose Hansen <rhansen@ca.cjis20.org>