UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

Case Number: 20-24099-CIV-MARTINEZ/BECERRA

LMP HOLDINGS, INC.,

Plaintiff,

v.

SCOTTSDALE INSURANCE COMPANY,

Defendant.
_____/

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

THIS CAUSE comes before the Court upon Defendant's Motion for Final Summary Judgment ("Motion"). (ECF No. 20). The Court has reviewed the Motion and the pertinent portions of the record. After careful consideration, the Motion is **GRANTED**.

I. BACKGROUND

The following facts are undisputed unless stated otherwise. Plaintiff, LMP Holdings, Inc., filed suit against its insurer, Scottsdale Insurance Company, for breach of contract and declaratory judgment. Plaintiff's two officers, Adrian Perez and Laura Perez, operate an architectural firm out of the property located at 2401 NW 7th Street, Miami, Florida (the "Property"). (Def.'s Statement of Material Facts ("Def.'s SOMF") ¶ 2, ECF No. 21). Plaintiff also leases additional space in the Property to an adult daycare center. (*Id.*). Defendant issued Plaintiff an all-risk commercial property insurance policy, No. CPS2511886 (the "Policy") for the Property. (Def.'s SOMF ¶¶ 1, 9; *see* Policy, ECF No. 20-3). The Policy contains the following relevant conditions in the event of loss or damage:

> **3. Duties In The Event Of Loss Or Damage**
>
> a. You must see that the following are done in event of loss or damage to Covered Property: . . .
>
> (2) Give us prompt notice of the loss or damage. Include a description of the property involved
>
> (3) As soon as possible, give us a description of how, when and where the loss or damage occurred.
>
> (4) Take all reasonable steps to protect the Covered Property from further damage . . .
>
> (6) As often as may be reasonably required, permit us to inspect the property proving the loss or damage . . .

(Def.'s SOMF ¶ 10; Policy, at 71–72[1] (emphasis in original)).

On September 10, 2017, Hurricane Irma struck South Florida. Plaintiff alleges that the Property sustained damages caused by the hurricane on that date. Plaintiff's handyman, Angel Del Oro, was the first person to visit the Property after the hurricane, though the record is unclear as to whether he visited the Property on the day of the hurricane or the day after. (*Id.* ¶ 4; A. Perez Dep., at 29:14–15, ECF No. 20-1). Mr. Perez, however, visited the Property on September 11, 2017, the day after Hurricane Irma. (Def.'s SOMF ¶ 4). At that time, Mr. Del Oro pointed out "some punctures" on the roof, which he patched up the next day or so. (*Id.* ¶ 5). A panel from one of the AC units on the roof had also come off, and Mr. Del Oro put it back on. (*Id.*). Inside the Property, Mr. Perez saw "extensive water damage in the storage room," and "some water damage" in the office reception area. (*Id.* ¶ 6).

In 2018, Plaintiff noticed other "issues" with the AC unit whose panel had blown off and decided to replace the compressor. (*Id.* ¶ 7). Approximately six months after Hurricane Irma, a

[1] For ease of reference, when citing to the Policy, the Court will cite to the page numbers automatically generated by the CM/ECF filing system.

water stain began to appear on the ceiling tile. (*Id.*). Around this time, Mr. Perez also noticed that the lower portion of an exterior sign had come off. (*Id.*). Finally, sometime in 2019, a header on the top part of a bank of windows on the east side of the Property began showing rod and deterioration damage, and water stains became visible. (*Id.*). Plaintiff reported a claim for damage to Defendant on December 10, 2019. (*Id.* ¶ 8).

On December 18, 2019, Defendant's independent public adjuster inspected the property. (Letter, at 1, ECF No. 20-5). On January 10, 2020, Defendant sent Plaintiff a reservation of rights letter, reserving its rights and defenses under the Policy due to Plaintiff's failure to report the claim promptly. (Def.'s SOMF ¶ 11). Several months later, Defendant had its engineer inspect the Property. (*Id.* ¶ 13). The engineer confirmed that there was an absence of wind damage to the roof or exterior walls and noted areas of interior water damage to the ceiling in areas of previous repairs. (*Id.* ¶ 14). On July 10, 2020, Defendant sent a letter to Plaintiff denying coverage to repair or replace the roof or leaking windows, and for interior water damage. (*Id.*). This lawsuit ensued.

II. LEGAL STANDARD

Summary judgment is appropriate only 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). An issue is genuine if there is sufficient evidence such that a reasonable jury could return a verdict for either party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Similarly, an issue is material if it may affect the outcome of the suit under governing law. *Id.* The moving party bears the burden of showing the absence of any genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). At the summary judgment stage, courts must view the evidence in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Chapman v. Am. Cyanamid Co.*, 861

F.2d 1515, 1518 (11th Cir. 1988). That said, if the evidence advanced by the nonmoving party "is merely colorable, or is not significantly probative, then summary judgment may be granted." *Anderson*, 477 U.S. at 249–50 (citations omitted).

III. ANALYSIS

The purpose of a notice provision in an insurance policy is to allow the insurer to "evaluate its rights and liabilities, [and] to afford it an opportunity to make a timely investigation." *Gemini II Ltd. v. Mesa Underwriters Specialty Ins. Co.*, 592 Fed. App'x 803, 806 (11th Cir. 2014) (quoting *Laster v. U.S. Fid. & Guar.*, 293 So.2d 83, 86 (Fla. 3d DCA 1974)). "Under Florida law, a failure to provide timely notice of loss in contravention of a policy provision is a legal basis for the denial of recovery under the policy." *Mid-Content Cas. Co. v. Basdeo*, 742 F. Supp. 2d 1293, 1335 (S.D. Fla. 2010); *Ideal Mut. Ins. Co. v. Waldrep*, 400 So.2d 782, 785 (Fla. 3d DCA 1981). Late notice creates a rebuttable presumption of prejudice to the insurer. *Basdeo*, 742 F. Supp. 2d at 1336. Thus, the insured has the burden of rebutting this presumption by presenting competent evidence that the insurer has not been prejudiced by the late notice. *Bankers Ins. Co. v. Marcias*, 475 So.2d 1216, 1217–18 (Fla. 1985); *Clena Invs., Inc. v. XL Specialty Ins. Co.*, Case No. 10-62028-CIV-RNS, 2012 WL 1004851, at *4 (S.D. Fla. Mar. 26, 2012) (citations omitted); *see also Bankers Ins. Co. v. Macias*, 475 So.2d 1216, 1218 (Fla. 1985). The insured must prove that the insurer has not been deprived of the opportunity to investigate the facts. *Macias*, 475 So.2d at 1218.

A. Notice to Defendant Was Not "Prompt" as a Matter of Law

The Court first turns to whether notice of the loss was timely. Generally, the question of whether notice is timely is a question of fact for the jury. However, "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." *Clena*, 2012 WL 1004851, at *4; *see PDQ Coolidge*

Formad, LLC v. Landmark Am. Ins. Co., 566 Fed. App'x 845, 848 (11th Cir. 2014) ("Florida courts have ruled *on summary judgment* that an insured's delayed notice to an insurer did not constitute prompt notice under the policy when the factual record did not support an argument that the delay was reasonable." (emphasis in original)); *Kendall Lake Towers Condominium Ass'n, Inc. v. Pacific Ins. Co., Ltd.*, Case No. 10-24310-CIV-JG, 2012 WL 266438, at *2 (S.D. Fla. Jan. 30, 2012) (internal citations omitted); *Kroener v. Fla. Ins. Guar. Ass'n*, 63 So.3d 914, 916 (Fla. 4th DCA 2011). Where, as here, the Policy does not define the contours of "prompt" notice, it shall be construed to mean that notice should be given "with reasonable dispatch and within a reasonable time in view of all the facts and circumstances of the particular case." *Yacht Club on the Intracoastal Condo. Ass'n, Inc. v. Lexington Ins. Co.*, 599 Fed. App'x 875, 879 (11th Cir. 2015). "[W]hen facts are undisputed and different inferences cannot reasonably be drawn therefrom," the question of whether notice is prompt is a question for the court. *Id.*

Plaintiff's claim involves damages caused by Hurricane Irma on September 10, 2017. It is undisputed that the day after Hurricane Irma struck, Plaintiff's officer, Mr. Perez, and its handyman, Mr. Del Oro, "went up to the roof of the Property" where Mr. Del Oro "pointed out 'some punctures,' which [Mr.] Del Oro patched up the next day or so." (Def.'s SOMF ¶ 5). That same day, Mr. Del Oro noticed that "a panel from one of the AC units on the roof had come off, and he had to put it back on." (*Id.*). Mr. Del Oro also saw "extensive water damage in the storage room" and some damage in the office reception area. (*Id.* ¶ 6). Approximately six months after the hurricane, a water stain appeared on one of the ceiling tiles. (Def.'s SOMF ¶ 7; A. Perez Dep., at 44:22–45:6). Mr. Perez also noticed around the same time that the lower portion of an exterior sign had come off. Yet, Mr. Perez failed to report these damages to Defendant at the time because he believed it was not "enough to be over the [deductible]." (A. Perez Dep., at 47:6–9). Later in

2018, the AC unit started to have "some issues" with the compressor, and Plaintiff decided to replace it. (Def.'s SOMF ¶ 7). Plaintiff again failed to report these issues. It was not until December 10, 2019, more than two years after the sustained loss, that Plaintiff reported the issues to Defendant. (*Id.* ¶ 9).

In cases involving notice provisions similar to the one in this case, Florida courts have held that a period of even six-month or less is not considered prompt notice as a matter of law. *See e.g.*, *Morton v. Indem. Ins. Co. of North America*, 137 So.2d 618, 620 (Fla. 2d DCA 1962) (six-and-a-half-month delay); *Ideal Mut. Ins. Co. v. Waldrep*, 400 So.2d 782, 785 (Fla. 3d DCA 1981) (two-month delay in reporting after airplane accident); *Deese v. Hartford Acc. & Indem. Co.*, 205 So.2d 328, 329 (Fla. 1st DCA 1967) (four-week delay); *see also PDQ Coolidge Formad*, 566 Fed. App'x at 849 (upholding district court's finding that six-month delay in reporting property damage is late as a matter of law); *Soronson v. State Farm Fla. Ins. Co.*, 96 So.3d 949 (Fla. 4th DCA 2012) (three-year delay in reporting damage caused by Hurricane Irma).

Here, Plaintiff's notice to Defendant came *twenty-seven* months after the damage to the Property. The undisputed record shows that Plaintiff became aware of punctured holes on the roof and other water damage the day after the hurricane struck, and instead of reporting it, decided to patch it up. Even assuming that the loss at the time was not readily apparent to Plaintiff, as it asserts, Plaintiff's officer admitted that more "issues" began surfacing in 2018, and he nevertheless failed to report it. Regardless of whether Mr. Perez believed that the damages would not exceed the deductible, "[p]rompt notice is not excused because an insured might not be aware of the full extent of damage or that the damage would exceed the deductible." The undisputed facts in this case are sufficient to "lead a reasonable and prudent man to believe that a claim for damages would

arise." *See Yacht Club*, 599 Fed. App'x at 879. The Court thus finds that as a matter of law, Plaintiff's notice to Defendant was untimely.

B. Defendant Suffered Prejudice as a Result of Plaintiff's Late Notice

A breach of duty of notice results in a rebuttable presumption of prejudice to the insurer. *Bankers Ins. Co. v. Macias*, 475 So.2d 1216, 1218 (Fla. 1985). Plaintiff avers that, even if it failed to provide prompt notice, there is a genuine dispute of material fact as to whether it has rebutted the presumption of prejudice. Plaintiff argues that "Defendant has failed to set forth any evidence that it was prejudiced by Plaintiff's alleged late reporting of the claim." As the Eleventh Circuit has emphasized, however, "[s]uch a requirement [] would flip the burden from the insured to the insurer, which is contrary to Florida law." *Yacht Club*, 599 Fed. App'x at 881. It is Plaintiff who must put forth evidence to rebut the presumption of prejudice that arises when it has failed to provide prompt notice, not the other way around.

The only evidence Plaintiff proffers to rebut the presumption of prejudice is that both parties' experts gave different opinions as to the causation of the damages sustained. As in *Yacht Club*, where the only evidence Plaintiff proffered was varying opinions from experts, this evidence is not enough to create a genuine issue of material fact. 599 Fed. App'x at 881. Here, too, Plaintiff's late notice frustrated the purpose of the notice requirement, which goes beyond mere causation and is meant to "enable the insurer to evaluate its rights and liabilities, to afford it an opportunity to make a timely investigation, and to prevent fraud and imposition upon it." *Id.* (quoting *Laster v. U.S. Fid. & Guar. Co.*, 293 So.2d 83, 86 (Fla. 3d DCA 1974)).

Further, it is undisputed that Plaintiff undertook several repairs prior to filing his claim with Defendant. While Defendant's engineer had an opportunity to inspect the property after the claim was filed, this nevertheless prejudiced Defendant by not being able to inspect the Property

prior to those repairs and by not participating in the repair of those damages. *See PDQ Coolidge Formad*, 566 Fed. App'x at 850. Even Defendant's engineer, Hunt, acknowledged that any attempt to "patch" the damaged areas caused on the roof "would further exacerbate the roof's already degenerating condition." (Synergyn Report, at 8, ECF No. 26-12). Plaintiff fails to proffer any evidence that an earlier inspection, and in particular, one conducted before the repairs were made, would not have impacted the investigation. *See PDQ Coolidge Formad*, 566 Fed. App'x at 850. Defendant was therefore "deprived of the opportunity to investigate the facts[,]" *Macias*, 475 So.2d at 1218, and Plaintiff has failed to present any evidence to the contrary. Accordingly, the Court finds that Defendant has been prejudiced by Plaintiff's delay.

IV. CONCLUSION

For the foregoing reasons, it is **ORDERED AND ADJUDGED** that:

1. Defendant's Motion for Final Summary Judgment, (ECF No. 20), is **GRANTED**. Final Judgment shall issue by separate order.

2. This case is **CLOSED** and all pending motions are **DENIED as moot**.

DONE AND ORDERED in Chambers at Miami, Florida, this 27th day of September, 2021.

JOSE E. MARTINEZ
UNITED STATES DISTRICT JUDGE

Copies provided to:
Magistrate Judge Becerra
All Counsel of Record