

**IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL  
CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA**

CASE NO: 2014-012381-CA-01

SECTION: CA32

JUDGE: Mark Blumstein

**Rose, John**

Plaintiff(s)

vs.

**Florida Peninsula Ins Co**

Defendant(s)

**ORDER ON DEFENDANT'S AMENDED MOTION FOR FINAL SUMMARY  
JUDGMENT, FILED ON AUGUST 13, 2020**

THIS CAUSE, having come to be heard on December 01, 2020 on Defendant's Amended Motion for Final Summary Judgment, dated August 13, 2020, and the Court having heard arguments of Counsel, and being otherwise advised in the premises, it is hereupon

**ORDERED AND ADJUDGED** as follows:

1. Defendant's Amended Motion for Final Summary Judgment is **GRANTED** for the following reasons.
2. There are no material issues of fact in dispute between the parties and Florida Peninsula is entitled to Judgment as a matter of law. As a result of Plaintiffs' actions, inactions and lack of cooperation, Florida Peninsula was unable to restore the property to its pre-loss condition, although Florida Peninsula was ready, willing, and able to do so. Thus, Plaintiffs' failure to comply with the option to repair bars any recovery under the Policy.
3. These undisputed material facts include the following:
  - a. This lawsuit involves a claim for damages arising out of a water loss occurring on March 15, 2013. At the time of the loss, the Plaintiffs' property was insured by a

Policy issued by Florida Peninsula bearing policy number FPH1110699-00. The Policy includes the following provisions in relevant part:

**SECTION I – CONDITIONS**

**9. Our Option.**

If we give you written notice within 30 days after we receive your signed, sworn proof of loss:

- a. For losses settled on an actual cash value basis, we may repair or replace any part of the damaged property with material or property of like kind and quality;
- b. For losses covered under Coverage A - Dwelling, insured for Replacement Cost Loss Settlement as outlined in Section I - Conditions, Loss Settlement, we may repair the damaged property with material of like kind and quality without deduction for depreciation.

\* \* \*

**SECTION I – CONDITIONS**

**8. Suit Against Us**

No action can be brought against us; unless:

- a. There has been full compliance with all of the terms of the policy; and
- b. The action is started within 5 years after the date of loss.

- b. The Plaintiffs reported their loss to Florida Peninsula on March 15, 2013, which was on the same date that their property was inspected. Less than two weeks later on March 29, 2013, Florida Peninsula forwarded its letter to the Plaintiffs which advised that it was exercising its option to repair their property consistent with the Policy's option to repair provision. Importantly, this letter attached a proof of loss but specifically noted that Florida Peninsula was not requiring the Plaintiffs to complete it.

- c. Between the date of Florida Peninsula's invocation of the option to repair and present, Florida Peninsula was never allowed to repair the Plaintiffs' property. This is despite its requests and a stay issued by the prior Judge in this case.
- d. For example, on October 18, 2013, Florida Peninsula sent the Plaintiffs a correspondence indicating that their claim would be denied if the managed repair did not begin within fourteen (14) days. This letter specifically referenced the Plaintiffs' lack of cooperation which has prevented the repairs from beginning, and noted that their claim would be denied if they failed to cooperate. Despite this letter, the Plaintiffs refused to allow the repairs to commence, and instead their counsel via e-mail alleged that the invocation was improper for reasons left unstated and that Florida Peninsula was not entitled to begin the repairs, again for unstated reasons. Paradoxically, despite these unexplained reasons for objecting to the repairs, he then noted that Florida Peninsula could send its contractor at its own risk but also threatened a lawsuit under many different bases. He also requested a copy of all estimates, communications, e-mails, invoices and receipts exchanged between Florida Peninsula and its contractor.
- e. Consistent with Florida Peninsula's Corporate Representative affidavit, the Plaintiffs failed to allow Florida Peninsula to exercise its option to repair. The Plaintiffs' counsel failed to provide record evidence showing that despite his position on the validity of the repairs, threat of lawsuit, and conditions, as well as the aforementioned affidavit, the repairs were allowed to commence. The record is also uncontested that on December 6, 2013, due to the Plaintiffs' failure to allow the repairs to commence.
- f. This lawsuit was subsequently filed on May 30, 2014. Importantly, despite Plaintiffs' counsel's argument to the contrary, at no time did Florida Peninsula ever waive its right to repair the Plaintiffs' property. The uncontested facts show that from the start of this litigation, Florida Peninsula, through its counsel, moved to

abate this action in order for the repairs to commence. The result was an Order of Abatement entered by the prior Judge in this case on March 23, 2015.

- g. However, even a Court Order could not get the Plaintiffs to allow the repairs to commence. Instead, the record shows that on June 8, 2015, the Plaintiffs filed a Motion for Clarification of the Court's Order, which the Court notably denied.
- h. Additionally, during the abatement the record evidence shows that Florida Peninsula attempted to have the repairs commence. Instead of allowing the repairs, Plaintiffs' counsel forwarded e-mails requesting for Florida Peninsula to pay for a plumber of the Plaintiffs' choosing to repair the pipe instead. This is despite the fact that the plumbing from which the water escaped is not covered under Florida Peninsula's Policy.
- i. Although Florida Peninsula was under no obligation to pay Plaintiffs for repairs to the plumbing which caused the subject loss, Florida Peninsula attempted to satisfy Plaintiffs' request, and agreed to issue payment in the amount of Plaintiffs' plumber's invoice for repairs. In fact, it paid two separate invoices and yet still was not allowed to have its contractor access the Plaintiffs' property in order to complete the repairs which the Court previously ordered to occur, and which the Policy allows to complete.
- j. This Court finds the Plaintiffs' argument that Florida Peninsula waived its option to repair particularly dubious considering that the record evidence shows that several e-mails were forwarded by the Plaintiffs' counsels noting that the plumbing repairs which Florida Peninsula paid for were in process of being completed, which the record evidence shows was not the case. Instead, the Plaintiffs began issuing new conditions on the repairs, asking for Florida Peninsula to warranty the work of their own plumber.
- k. The deposition testimonies in this case support this Court's finding that the Plaintiffs have failed to permit the repairs as required by the Policy and Court

Order, and have failed to comply with the Policy's post-loss obligations and mitigate their loss.

l. For example, during her deposition, Plaintiff Ludie Rose testified that she never cashed the checks issued by Florida Peninsula for plumbing repairs based upon the advice of her lawyer. She also testified that her attorney advised her not to make repairs and had no answer as to whether anything was preventing her from repairing her plumbing. See Plaintiff's deposition, pg. 42 lines 13-25 and pg. 43 lines 1-2.

m. Additionally, during his deposition, the Plaintiffs' plumber, Mervin Gordon – the same one whose invoices were paid in full by Florida Peninsula so that it could complete its repairs to the Plaintiffs' property – testified that he did not complete the repairs to the Plaintiffs' property since he was never given the go-ahead. See Gordon deposition, pg. 18 lines 5-15. He also testified that he prepared a new proposal in December since the Plaintiffs later stated that they wanted repairs in the kitchen which was not included in his initial proposal. He assumed that this was not brought up when he prepared his first estimate as "I think if I remember correctly, all we talked about was the leak coming into the bathroom." After he provided the estimate they requested, he never heard from them again. Id. pg. 18 lines 20-25, page 19 lines 1-22, pg. 21 lines 3-22.

n. During argument, Plaintiffs' position was that their plumber would not warranty his plumbing work and as such repairs could not commence. However, in regard to warranty, Mr. Gordon testified as follows:

Q: Did you speak to Mr. and Mrs. Rose and/or Mr. or Mrs. Rose about your warranty on any plumbing work that you would be doing to their property?

A: No.

....

Q: Did they tell you at any point that they were not happy with the warranty that you were offering them for the work at their property?

A: No, because we didn't discuss it, so no.

Id. pg. 20 lines 6-10 and lines 18-21.

4. Plaintiffs' counsel also argued during the hearing on this Motion that the Policy's option to repair was improperly invoked since Florida Peninsula did not request a proof of loss. However, the first sentence of the option to repair provision states as follows: "If we give you written notice within 30 days after we receive your signed, sworn proof of loss:" Not only did Florida Peninsula in its invocation letter specifically and unequivocally note that a proof of loss is not required, but this provision only sets the time limit after which invocation would not be allowed, rather than start the time limit for the invocation. The use of the word "within 30 days" rather than "before 30 days" means that the intent was to stop invocations occurring beyond 30 days pass the receipt of a proof of loss, rather than before that period. Ordinary rules of construction include the premise that "[t]he lack of a definition of an operative term in a policy does not necessarily render the term ambiguous and in need of interpretation by the courts." *State Farm Fire & Cas. Co. v. CTC Dev. Corp.*, 720 So.2d 1072, 1076 (Fla. 1998). Rather, the Court must give undefined words their everyday meaning and not create ambiguity in otherwise clear contract provisions. *Westmoreland v. Lumbermens Mut. Cas. Co.*, 704 So. 2d 176, 179 (Fla. 4<sup>th</sup> Dist. Ct. App. 1997).

5. In sum, the uncontested facts show that Florida Peninsula exercised the option to repair the damages at the Plaintiffs' property consistent with the Policy's option to repair provision. Despite Florida Peninsula's request and a Court Order, the Plaintiffs failed and/or refused to allow the repairs to commence. Instead, they used threats and unsupported conditions to prevent the repairs from commencing. This was in violation of Florida law and the Policy.

6. Fla. Stat. 627.7011 permits an insurer to invoke the option to repair. Additionally,

the validity of option to repair provisions is well established under Florida law. *Travelers Indemn. Co. v. Parkman*, 300 So.2d 284 (Fla. 4th DCA 1974); *Siegle v. Progressive Consumers Ins. Co.*, 819 So.2d 732, 735 (Fla. 2002); *Drew v. Mobile USA Ins. Co.*, 920 So.2d 832 (Fla. 4th DCA 2006); *see also Walker v. Republic Underwriters*, 574 F. Supp. 686 (D. Minn. 1983).

7. A new binding contract to repair is created where the carrier elects the option to repair, selects the repair company and directs the insured to use the service of the repair company. There are no policy limits in place once the Option is invoked. *Drew v. Mobile USA Ins. Co.*, 920So.2d 832 (Fla. 4th DCA 2006); *Bray & Gillespie Mgmt. LLC v. Lexington Ins. Co.*, 527 F.Supp. 2d 1355 (M.D. Fla. 2007); *see also Travelers Indemnity Co. v. Parkman*, 300 So.2d 284 (Fla. 4th DCA 1974). Additionally, Florida law is clear that once an insurer properly exercises an option to repair, an insured cannot by his or her unilateral action impair or affect the insurer's right to proceed in accordance with the election to repair under the policy of insurance. *Stucker v. The Travelers Indem. Co.*, 84 N.W. 2d 566, 568 (S.D. 1957); *Arch Roberts & Co. v. Auto-Owners Ins. Co.*, 305 So. 2d 882, 882 (Fla. 1st DCA 1975); *Coleman v. American Bankers Ins. Co. of Florida*, 228 So. 2d 410, 411 (Fla. 3d DCA 1969); *Auto-Owners Ins. Co. v. Green*, 220 So. 2d 29, 30 (Fla. 1st DCA 1969); *Couch On Insurance* §176:18 (West 2012); *See Fernandez-Andrew v. Florida Pen. Ins. Co.*, 208 So. 3d 835, 837 (Fla. 3d DCA 2017) (non-final order abating an action to allow repairs to commence would not irreparably harm the insured as he could maintain suit after the repairs were completed); *see Hernandez v. Florida Pen. Ins. Co.*, 211 So. 3d 1126 (Fla. 3d DCA 2017) (order abating an action to allow repairs to commence did not harm the insured. As argued by the insurer, the action was premature since it did not get an opportunity to repair the damage and they can later seek to lift an abatement if they contend their property was not returned to pre-loss condition.)

Based on the above, Defendant, Florida Peninsula Insurance Company's, Amended Motion for Final Summary Judgment is hereby **GRANTED**.

The Clerk is directed to close this case.

**DONE** and **ORDERED** in Chambers at Miami-Dade County, Florida on this 31st day of December, 2020.

~~2014-012381-CA-01 12-31-2020 10:54 AM~~

2014-012381-CA-01 12-31-2020 10:54 AM

Hon. Mark Blumstein

**CIRCUIT COURT JUDGE**

Electronically Signed

Final Order as to All Parties SRS #: 12 (Other)

THE COURT DISMISSES THIS CASE AGAINST ANY PARTY NOT LISTED IN THIS FINAL ORDER OR PREVIOUS ORDER(S). THIS CASE IS CLOSED AS TO ALL PARTIES.

**Electronically Served:**

Amy E. Ruiz, ARuiz@tevtlaw.com  
Amy E. Ruiz, ARedondo@tevtlaw.com  
Amy E. Ruiz, tevtservice@gmail.com  
Brian C Costa, BCosta@afdc.legal  
Brian C Costa, aarbide@afdc.legal  
Brian C Costa, czabalo@afdc.legal  
Christopher A Martinez, CMartinez@afdc.legal  
Christopher A Martinez, DCastellanos@afdc.legal  
Christopher A Martinez, Leo@afdc.legal  
Francie Gutierrez, fgutierrez.pleadings@qpwbllaw.com  
Francie Gutierrez, jbosch.pleadings@qpwbllaw.com  
Iniv Gabay, iniv.gabay@qpwbllaw.com  
Iniv Gabay, igabay.pleadings@qpwbllaw.com



Iniv Gabay, marie.cesar@qpwbllaw.com  
John W. Salmon, MARTHA@SD-ADR.COM  
Jose E Bosch, jbosch@qpwbllaw.com  
Jose E Bosch, jbosch.pleadings@qpwbllaw.com  
Jose E. Bosch, jbosch@qpwbllaw.com  
Jose E. Bosch, nrosenfeld@qpwbllaw.com  
Jose E. Bosch, nrosenfeld.pleadings@qpwbllaw.com  
Leonardo DaSilva, Esq., LDaSilva@acfdllaw.com  
Leonardo DaSilva, Esq., Service@acfdllaw.com  
Leonardo H DaSilva, leo@afdc.legal  
Leonardo H DaSilva, DEstevez@afdc.legal  
Leonardo H DaSilva, Xgrande@afdc.legal  
Marialys Rodriguez, marialys.rodriguez@qpwbllaw.com  
Nicholas Grandal, Ngrandal@capotegrandal.com  
Nicholas Grandal, service@capotegrandal.com  
Nicholas Grandal, scapote@capotegrandal.com  
Rafael Lorenzo Mas, rmas@afdlegal.com  
Rafael Lorenzo Mas, destevez@afdlegal.com  
Rafael Lorenzo Mas, xgrande@afdlegal.com  
Sara Garcia Garcia Esq., sgarcia@pdmplaw.com  
Sara Garcia Garcia Esq., dbonjour@pdmplaw.com  
Sara Garcia Garcia Esq., rbouey@pdmplaw.com  
Veronica M. Garcia Veliz, vveliz@qpwbllaw.com  
Veronica M. Garcia Veliz, vveliz.pleadings@qpwbllaw.com

**Physically Served:**