IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

COCANOUGHER ASSET NO. 3, LLC	§	
	§	
Plaintiff,	§	
	§	
v.	§	**Civil Action No. 4:20-CV-00784-O**
	§	
TWIN CITY FIRE INSURANCE COMPANY	§	
	§	
	§	
Defendant.	§	

ORDER

Before the Court are Defendant's Motion for Summary Judgment (ECF No. 24), filed May 17, 2021; and Plaintiff's Response (ECF No. 31), filed June 18, 2021. After reviewing the briefing, relevant facts, and applicable law, the Court finds that Defendant's Motion should be **DENIED.**

I. BACKGROUND[1]

This case is an insurance coverage dispute arising from hail damage at a commercial building in Colleyville, Texas. Twin City issued Policy number 46 SBA VU4670 to Cocanougher Asset No. 3, LLC for the building located at 5005 Colleyville Blvd, Colleyville, Texas 76034 for the policy period March 1, 2018 to March 1, 2019 (the "Policy"). *See* Appendix ("Appx.") 4-176, ECF No. 26. The Policy provides coverage for "direct physical loss of or direct physical damage" "caused by or resulting from a Covered Cause of Loss," which includes hail. It excludes damage caused by other conditions such as faulty workmanship, repair, or

[1] The parties do not meaningfully dispute the facts of this case, but rather dispute the legal implications of the facts. Therefore, the Court adopts Defendant's statement of undisputed facts that Plaintiff does not contest in its response as the statement of facts. Def.'s Br., ECF No. 25. On motion for summary judgment, the Court views the facts in the light most favorable to the non-movant. *See Walker v. Sears, Roebuck & Co.*, 853 F.2d 355, 358 (5th Cir. 1988).

maintenance, neglect, rust, deterioration and other wear and tear, and further limits coverage for interior water damage unless such damage results from a covered cause of loss to the roof or walls through which the water enters. *See id*. at 46, 47, 62-63, ECF No. 26.

Plaintiff reported a claim on August 29, 2018 for roof damage allegedly caused by hail on April 6, 2018. *See* Letter from David Matheson dated May 27, 2020, Appx. 1-3, ECF No. 26. Defendant timely acknowledged the claim and claims professional Phillip Stubblefield inspected the building on September 13, 2018. *See id*. Based on Mr. Stubblefield's determination that hail had not damaged the roof, Defendant issued a declination letter dated September 24, 2018. Appx. 177-79, ECF No. 26. Plaintiff subsequently retained a public adjuster, Premier Claims, which submitted an estimate over a year after Defendant's declination. *See* Premier Claims estimate dated September 12, 2019, Appx. 187-204.1, ECF No. 26. Premier Claims simultaneously made a "demand for payment" of $172,980.94 and included a Sworn Proof of Loss in the amount of 171,980.94 ($172,980 less $1,000 deductible) signed by Jaque Burris on behalf of Plaintiff. *See id*.

Defendant retained an engineer and conducted a second inspection in response to the PA's demand. Engineer Jim Flint with Donan Engineering performed a site inspection and concluded that the 1-inch hail that fell at the location was insufficient to damage the roof. *See* October 29, 2019 report, Appx. 205-218, ECF No. 26. Defendant also asked Donan Engineering to review photos and a letter provided by Premier Claims. Mr. Flint issued a supplemental opinion as follows:

> Photographs provided by Premier Claims show dented metal roof appurtenances, unadhered and missing silicone roof coating, and two roof blemishes. The roof blemishes have no photographic context, and their locations are unknown. No determination can be made about the cause of the blemishes.

See Supplemental report dated December 30, 2019, Appx. 453-438, ECF No. 26.

Plaintiff subsequently retained attorneys to pursue the claim. Plaintiff's statutory pre-suit notice letter and, subsequently, Initial Disclosures served in this suit, claimed damages in the amount of $414,497, which may have been based on the estimate prepared by the public adjuster, albeit $100,000 less. *See* Plaintiff's Initial Disclosures, (iii) (disclosing $414,497.33 in estimated actual damages (less the applicable deductible and/or prior payments, if any), but producing Premier Claims estimate totaling $514,497.332), Appx. 221-25, ECF No. 26. In response to the notice letter, Defendant retained a third opinion by Nelson Forensics architect Matthew Smith. Mr. Smith performed a site inspection and obtained roof core samples which were laboratory tested for hail impact damage. The findings included the following:

> Roof cores C1 through C3 were submitted to Nelson Discovery Laboratory (NDL) with a request to perform delamination testing (for evaluation of the interply moppings for impact distress). A separate laboratory report describing the testing procedures and results was prepared by NDL, a copy of which is included in the Appendix section of this report.
>
> NDL performed membrane delamination testing on the roof core samples. According to the NDL report, membrane delamination was performed in general accordance with Section 6.8 of ASTM D2829-07(2019), Standard Practice for Sampling and Analysis of Existing Built-Up Roof Systems. NDL reported that Cores C1 through C3 did not exhibit interply bitumen disturbances consistent with a discrete impact force.

See Nelson Report dated May 8, 2020, Appx. 240, ECF No. 26.

Based on his observation of ponding, roof repairs, and Google Earth imagery indicating installation of the elastomeric coating in 2016 or early 2017, Mr. Smith determined that there had been long-term drainage/water intrusion issues at the roof prior to the recently reported hail events. Specifically, M. Smith concluded as follows regarding hail damage to the roof:

> The areas of coating loss, peeling, and/or deterioration of the elastomeric surface coating are consistent with long-term conditions that are unrelated to a recent hail event(s). While it is undeterminable if the areas of coating loss were exacerbated by hail, it is Nelson's opinion that the origin of the coating distress is not the result of the recent hail events.

The mod-bit membranes at Roofs 1 through 3 have not been damaged by the recent hail events on April 6, 2018 (reported date of loss), or March 24, 2019. *See* Nelson Report dated May 8, 2020, Appx. at 240, ECF No. 26.

Defendant provided an updated response to Plaintiff's counsel dated May 27, 2020, in reliance on the Donan and Nelson reports. *See* Appx. 1-3, ECF No. 26. This suit was filed on June 24, 2020 and subsequently removed to federal court. *See* ECF. Nos. 1, 1-5. During discovery, Defendant has re-inspected the building through engineer Brian Sattler with EFI Global. Mr. Sattlers's opinions and report were disclosed to Plaintiff via a Supplemental Expert Designation on April 30, 2021. *See* ECF No. 23. They are consistent with all prior reports on which Defendant claims to have relied upon. *See* Report of Brian Sattler dated April 19, 2021, Appx. 312, ECF No. 26.

Defendant moved for summary judgment on the grounds that (1) a bona-fide coverage dispute exists, therefore, Plaintiff's bad faith insurance claims must be dismissed, and (2) if Plaintiff is able to prove that Defendant should cover the claim, Plaintiff should be limited to the amount in damages that Plaintiff stated pre-suit in demand letters and sworn proof of loss statements. Def.'s MSJ, ECF No. 25. The Motion is now ripe for the Court's review.

II. LEGAL STANDARD

The Court may grant summary judgment where the pleadings and evidence show "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). Summary judgment is not "a disfavored procedural shortcut," but rather an "integral part of the Federal Rules as a whole, which are designed to secure the just, speedy and inexpensive determination of every action." *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986).

"[T]he substantive law will identify which facts are material." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A genuine dispute as to any material fact exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* The movant must inform the court of the basis of its motion and demonstrate from the record that no genuine dispute as to any material fact exists. *See Celotex*, 477 U.S. at 323. "The party opposing summary judgment is required to identify specific evidence in the record and to articulate the precise manner in which that evidence supports his or her claim." *Ragas v. Tenn. Gas Pipeline Co.*, 136 F.3d 455, 458 (5th Cir. 1998).

When reviewing the evidence on a motion for summary judgment, courts must resolve all reasonable doubts and draw all reasonable inferences in the light most favorable to the non-movant. *See Walker v. Sears, Roebuck & Co.*, 853 F.2d 355, 358 (5th Cir. 1988). If there appears to be some support for disputed allegations, such that "reasonable minds could differ as to the import of the evidence," the court must deny the motion. *Anderson*, 477 U.S. at 250.

III. ANALYSIS

A. Extra-Contractual Claims

Defendant argues that it has established as a matter of law that a bona-fide coverage dispute exists in this case, therefore, Plaintiff's extra-contractual bad faith claims should be dismissed. Def.'s MSJ 3, ECF No. 25. Plaintiff argues that there is a fact issue regarding Defendant's investigation, and whether such investigation was done in good faith. Pl.'s Resp., ECF No. 32. The question here is narrow – if a fact issue exists as to the reasonableness of Defendant's investigation of the claim, then summary judgment must be denied. The Court is not deciding today whether Defendant breached the contract, whether Defendant acted in bad faith, or even whether Defendant acted unreasonably in its investigation. The Court is merely deciding

whether Plaintiff produced sufficient evidence to raise a fact issue on whether Defendant's investigation was reasonable.

Under Texas law, an insurance carrier owes the insured a duty of good faith and fair dealing. *Wells v. Minnesota Life Ins. Co*., 885 F.3d 885, 889 (5th Cir. 2018). The duty of good faith and Section 541.060 of the Texas Insurance Code require that a carrier reasonably investigate a claim and "attempt in good faith to effectuate a prompt, fair, and equitable settlement of a claim with respect to which the insurer's liability has become reasonably clear." *See id*.; Tex. Ins. Code § 541.060(a)(2)(A)), § 541.060(a)(7); *Universe Life Ins. Co. v. Giles*, 950 S.W.2d 48, 56 (Tex. 1997) (unifying breach of the duty of common law good faith and fair dealing by adopting "reasonably clear" standard, under which "an insurer will be liable if the insurer knew or should have known that it was reasonably clear that the claim was covered.").

Whether the insurer's liability was reasonably clear when it denied the claim and whether the insurer denied the claim without conducting a reasonable investigation, i.e., whether the insurer knew or should have known the claim was covered, are questions for the fact-finder." *See State Farm Mut. Auto. Ass'n v. Cook*, 591 S.W.3d 677, 680 (Tex. App.—San Antonio 2019, no pet.) (*citing Universe Life Ins. Co. v. Giles*, 950 S.W.2d 48, 56 (Tex. 1997)); *see also AFS/IBEX Fin. Servs*., 2011 WL 3163605, at *3 ("whether an insurer's liability is 'reasonably clear' is a question of fact to be decided by a jury unless there is no conflict in the evidence"). In making this determination, the jury must consider only the facts that were before the insurer at the time it denied the claim. *See Aleman v. Zenith Ins. Co*., 343 S.W.3d 817, 823 (Tex. App.—El Paso 2011, no pet.) (*citing Viles v. Security Nat'l Ins. Co*., 788 S.W.2d 566, 567 (Tex. 1990)).

An insurance carrier does not commit bad faith as a matter of law if it denies coverage following a ***reasonable*** investigation of the claim where it relies on experts retained to assist in

assessing the claim. *See Wells*, 885 F.3d at 897 (doctor's opinion with additional information reviewed by insurer provided reasonable basis for rejection of accidental death claim, despite court's reversal of summary judgment for insurer on contractual claim for benefits). Even if a coverage determination is proven incorrect, a carrier does not commit bad faith simply by denying coverage. *See U.S. Fire Ins. Co. v. Williams*, 955 S.W.2d 267, 268 (Tex. 1997) ("A carrier cannot be liable for bad faith simply because it misinterprets a rule.").

Further, conflicting opinions or expert reports as to coverage issues are insufficient to show bad faith and at most present a bona fide dispute as to coverage. *Transportation Ins. Co. v. Moriel*, 879 S.W.2d 10, 17 (Tex. 1994). Absent evidence that the insurer was unreasonable in relying on an expert's report or that the report was not objectively prepared, a court may issue summary judgment on an insured's extra-contractual claims. *See Thompson v. Zurich Am. Ins. Co.*, 664 F.3d 62, 67 (5th Cir. 2011) ("In addition to the conflicting expert opinion, the party alleging bad faith must also bring direct or circumstantial evidence showing that the carrier's expert's opinion was questionable and that the carrier knew or should have known that the opinion was questionable.").

At the time Defendant denied the claim, Defendant's adjuster, Phil Stubblefield, inspected the property[2] on or about September 13, 2018, and found damage in the amount of $7,624.25, which fell below Plaintiff's deductible. Pl.'s Resp. 12, ECF No. 32. Defendant sent its denial letter to Plaintiff based on Stubblefield's findings and closed the claim on September 24, 2018. Defendant did not retain any experts until over a year later. It is undisputed that Defendant did not rely on an expert report at the time it denied Plaintiff's claim, but rather Defendant relied

[2] Plaintiff suggests that a fact issue exists as to whether Stubblefield's inspection was adequate, in-part, based on its expert's testimony that Stubblefield outright ignored clear damage to the property. *See* Pl.'s Resp. 12-14. Since Defendant did not consider anything other than Stubblefield's inspection before denying the claim, Plaintiff's contradictory expert testimony alleging that Stubblefield's inspection was inadequate raises a fact issue.

on its own adjuster's investigation. Therefore, the cases supporting dismissal of bad faith claims due to an insurer's reliance on an expert report are irrelevant under these circumstances.

Plaintiff argues that based on these facts, a jury could conclude that Defendant did not reasonably investigate the claim because Defendant only hired experts *after* its unequivocal denial and in anticipation of litigation. Therefore, Defendant cannot prove as a matter of law, based on reliance on expert opinion, that its denial of the coverage was reasonable at the time Defendant denied it.

Further, Plaintiff argues that the jury could conclude from the testimony, report, and photographs of Plaintiff's expert, Kerry Freeman, that Defendant either knew or should have known that its liability was reasonably clear when it denied the claim. Pl.'s Resp. 13, ECF No. 32. Whether the insurer knew or should have known the claim was covered, at the time of the coverage decision, is a question for the factfinder. *Cook*, 591 S.W.3d at 680. In viewing the facts in the light most favorable to the non-movant, Defendant has failed to show that it is entitled to summary judgment on Plaintiff's extra-contractual claims. Therefore, Defendant's Motion for Summary Judgment must be **DENIED.**

B. Damages

Defendant argues that if Plaintiff can prove that the claim should be covered, which Defendant disputes, then Plaintiff's damages should be capped at the sworn proof of loss submitted to Defendant pre-suit. Def.'s MSJ 11, ECF No. 25. Plaintiff argues that Defendant did not rely on the sworn proof of loss in making its claim determination, therefore it cannot be used against Plaintiff at trial. Pl.'s Resp. 12, ECF No. 32. Further, Plaintiff argues that even if the sworn proof of loss can be properly considered, it may be treated as an admission against interest at trial, but the proof of loss is not an automatic cap on damages as Defendant claims. *Id.*

The purpose of a proof of loss is to provide the insurer with information it needs in order to investigate the loss, prevent fraud, and evaluate its rights and liabilities. *See General Am. Life Ins. Co. v. Rodriguez*, 641 S.W.2d 264, 269 (Tex. App.—Houston [14th Dist.] 1982, no writ). It is a condition precedent to suit that may be waived. Here, Defendant did not request a sworn proof of loss, but Plaintiff still submitted the sworn proof of loss more than a year after Defendant denied its claim. As a matter of law, Defendant could not have relied on the sworn proof of loss at the time it made the claim decision. *See Benefit Ass'n of Ry. Employees v. O'Gorman*, 195 S.W.2d 215, 217 (Tex. App.—Fort Worth 1946, writ ref'd n.r.e.) (holding that an insured is not estopped from suing for more than the amount claimed in a proof of loss where the insurer did not accept and pay the claim as set forth in the proof of loss or otherwise acted to its detriment based on the statements in the proof of loss). The Court concludes that the jury could properly consider the proof of loss as an admission against interest, but that the proof of loss statement does not serve as a conclusive cap on damages Plaintiff may recover. Therefore, Defendant's Motion for Summary Judgment on this ground must be **DENIED.**

IV. CONCLUSION

For the reasons stated above, Defendant's Motion for Summary Judgment (ECF No. 24) must be **DENIED.**

SO ORDERED on this **6th day of August, 2021.**

Reed O'Connor
UNITED STATES DISTRICT JUDGE