IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

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| MARINA CLUB CONDOMINIUM ASSOCIATION,<br><br>Plaintiff,<br><br>vs.<br><br>PHILADELPHIA INDEMNITY INSURANCE COMPANY,<br><br>Defendant. | §<br>§<br>§<br>§<br>§<br>§<br>§<br>§<br>§<br>§<br>§ | No. 1:21-CV-429-DAE |

ORDER: (1) GRANTING IN PART AND DENYING IN PART MOTION FOR SUMMARY JUDGMENT; AND (2) OVERRULING AS MOOT OBJECTIONS TO EVIDENCE AND MOTION TO STRIKE

The matters before the Court are: (1) Defendant Philadelphia Indemnity Insurance Company's ("Philadelphia") Motion for Summary Judgment (Dkt. # 19); and (2) Plaintiff Marina Club Condominium Association's ("Marina Club") Objections to Philadelphia's Summary Judgment Evidence and Motion to Strike (Dkt. # 21). The Court finds these matters suitable for disposition without a hearing. Upon careful consideration of the arguments raised by the parties in the motions, the Court—for reasons that follow—**GRANTS IN PART** and **DENIES IN PART** Philadelphia's motion for summary judgment, and **OVERRULES AS MOOT** Marina Club's objections and motion to strike.

## BACKGROUND

This removed action arises from an insurance coverage dispute over wind and hail damage to a roof. (Dkt. # 1-1.) Marina Club is a thirty-five-unit condo community located in twenty-three different buildings near Lake Austin. (Dkt. # 23-1.) Philadelphia insured Marina Club under Commercial Lines Policy No. PHPK1632644 effective for the coverage period of April 1, 2017, to April 1, 2018 (the "Policy"). (Dkt. # 19-2.) The Policy excluded from coverage ordinary wear and tear, decay, deterioration, and other similar causes of harm. (Id. at 135.) The Policy also limited coverage for faulty, inadequate, or defective maintenance. (Id. at 137.)

On July 14, 2017, after a storm on May 11, 2017, Marina Club made a claim under the Policy for hail damage. (Dkt. # 19-3.) Philadelphia responded on July 18, 2017, with a Loss Acknowledgement Letter. (Id.) The claim was assigned to Christian Morales at Engle Martin for handling, and Robert Konz from Envista Forensics was retained as the engineer. (Dkt. # 19-1.) On July 27, 2017, Konz inspected four building at the Marina Club complex via visual inspection from "locations at ground level" and "from the eaves of some lower roofs," but did not go on the roofs to inspect the damage. (Id.) After his inspection, Konz prepared a report which concluded that the observable areas of the fiber-cement roofing on the buildings he inspected were not damaged as a result of hail impacts. (Dkt. # 19-4.)

Instead, he found that the "fiber-cement tiles exhibited varying degrees of weathering," due to surface peeling, pitting, and erosion of exposed edges, among others. (Id.) On October 16, 2017, Philadelphia issued a denial letter, explaining that no covered hail damage had been found on the roofs of the inspected buildings. (Dkt. # 19-5.)

Dissatisfied with Philadelphia's handling of the claim, Marina Club retained public adjuster Michael Fried. (Dkt. # 1-1.) In May 2019, Fried contacted Philadelphia and provided pictures of alleged hail damage to the condos' roofs. (Dkt. # 19-8 at 2.) Thereafter, Philadelphia reopened the claim, assigning a new adjuster, Craig Landry. (Dkt. # 19-7.) On September 20, 2019, the condo roofs were reinspected by drones. (Dkt. # 23-18.) On February 24, 2020, Philadelphia received a second report of findings, indicating that in addition to varying degrees of weathering, deterioration, and mechanical damage from proximity to tree branches, there was also hail damage to the roofs of three different units. (Dkt. # 19-7.) However, the report concluded that the hail damage was historical and most likely occurred after a March 25, 2005 hailstorm, or many years' prior to the 2017 hailstorm. (Id. at 8.) On April 17, 2020, Philadelphia closed the claim for a second time. (Dkt. # 19-8.)

On April 7, 2021, Marina Club filed suit against Philadelphia in the 201st Judicial District Court of Travis County, Texas. (Dkt. # 1-1.) Marina Club's

petition alleges claims for breach of contract, violations of the Texas Prompt Payment Act, and other violations of the Texas Insurance Code. (Id.) On May 14, 2021, Philadelphia removed the case to this Court on the basis of diversity jurisdiction. (Dkt. # 1.) On June 17, 2022, Philadelphia moved for summary judgment on all of Marina Club's claims. (Dkt. # 19.) On July 8, 2022, Marina Club filed objections to Philadelphia's summary judgment evidence and a motion to strike. (Dkt. # 21.) On July 13, 2022, Marina Club filed a response in opposition to the summary judgment motion (Dkt. # 23); on July 20, 2022, Philadelphia filed a reply (Dkt. # 24).

LEGAL STANDARD

"Summary judgment is appropriate only if 'there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.'" Vann v. City of Southaven, 884 F.3d 307, 309 (5th Cir. 2018) (citations omitted); see also Fed. R. Civ. P. 56(a). "A genuine dispute of material fact exists when the 'evidence is such that a reasonable jury could return a verdict for the nonmoving party.'" Bennett v. Hartford Ins. Co. of Midwest, 890 F.3d 597, 604 (5th Cir. 2018) (quoting Anderson v. Liberty Lobby, 477 U.S. 242, 248 (1986)). "The moving party 'bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact.'" Nola Spice Designs,

LLC v. Haydel Enter., Inc., 783 F.3d 527, 536 (5th Cir. 2015) (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986)).

"Where the non-movant bears the burden of proof at trial, 'the movant may merely point to the absence of evidence and thereby shift to the non-movant the burden of demonstrating . . . that there is an issue of material fact warranting trial.'" Kim v. Hospira, Inc., 709 F. App'x 287, 288 (5th Cir. 2018) (quoting Nola Spice Designs, 783 F.3d at 536). While the movant must demonstrate the absence of a genuine issue of material fact, it does not need to negate the elements of the nonmovant's case. Austin v. Kroger Tex., L.P., 864 F.3d 326, 335 (5th Cir. 2017) (quoting Little v. Liquid Air Corp., 37 F.3d 1069, 1076 n.16 (5th Cir. 1994)). A fact is material if it "might affect the outcome of the suit." Thomas v. Tregre, 913 F.3d 458, 462 (5th Cir. 2019) (citing Anderson, 477 U.S. at 248).

"When the moving party has met its Rule 56(c) burden, the nonmoving party cannot survive a summary judgment motion by resting on the mere allegations of its pleadings." Jones v. Anderson, 721 F. App'x 333, 335 (5th Cir. 2018) (quoting Duffie v. United States, 600 F.3d 362, 371 (5th Cir. 2010)). The nonmovant must identify specific evidence in the record and articulate how that evidence supports that party's claim. Infante v. Law Office of Joseph Onwuteaka, P.C., 735 F. App'x 839, 843 (5th Cir. 2018) (quoting Willis v. Cleco Corp., 749 F.3d 314, 317 (5th Cir. 2014)). "This burden will not be satisfied by

'some metaphysical doubt as to the material facts, by conclusory allegations, by unsubstantiated assertions, or by only a scintilla of evidence.'" McCarty v. Hillstone Rest. Grp., Inc., 864 F.3d 354, 357 (5th Cir. 2017) (quoting Boudreaux v. Swift Transp. Co., 402 F.3d 536, 540 (5th Cir. 2005)). In deciding a summary judgment motion, the court draws all reasonable inferences in the light most favorable to the nonmoving party. Wease v. Ocwen Loan Servicing, LLC, 915 F.3d 987, 992 (5th Cir. 2019).

Additionally, at the summary judgment stage, evidence need not be authenticated or otherwise presented in an admissible form. See Fed. R. Civ. P. 56(c); Lee v. Offshore Logistical & Transp., LLC, 859 F.3d 353, 355 (5th Cir. 2017). However, "[u]nsubstantiated assertions, improbable inferences, and unsupported speculation are not sufficient to defeat a motion for summary judgment." United States v. Renda Marine, Inc., 667 F.3d 651, 655 (5th Cir. 2012) (quoting Brown v. City of Houston, 337 F.3d 539, 541 (5th Cir. 2003)).

## DISCUSSION

Philadelphia moves for summary judgment on the basis that Marina Club has failed to present any evidence segregating hail damage from the May 2017 storm and prior damage, including damage due to excluded causes of wear and tear, deterioration, overhanging tree branches, and historical hail damage. (Dkt. # 19.) Thus, according to Philadelphia, Marina Club's failure to allocate the

loss allegedly attributable to May 2017 hailstorm precludes coverage and the breach of contract claim. (Id. at 8.) Additionally, Philadelphia argues that it is entitled to summary judgment on Marina Club's claims for violations of the Texas Insurance Code because coverage is excluded. (Id. at 10.)

A. Breach of Contract

In a claim for breach of an insurance contract, Texas law requires the insured to prove: "(1) the existence of a valid contract; (2) performance or tendered performance by the plaintiff; (3) breach of the contract by the defendant; and (4) damages sustained by the plaintiff as a result of the breach." Certain Underwriters at Lloyd's of London v. Lowen Valley View, L.L.C., 892 F.3d 167, 170 (5th Cir. 2018) (quoting Smith Int'l., Inc. v. Egle Grp., LLC, 490 F.3d 380, 387 (5th Cir. 2007)) (internal quotation marks omitted).

Philadelphia moves for summary judgment on Marina's Club's breach of contract claim on the basis that even if some of the damage to the condos' roofs are attributable to covered causes, Marina Club has failed to meet its burden to separate covered and non-covered damages under the doctrine of concurrent causation. (Dkt. # 19 at 8–9.) In response, Marina Club argues that the concurrent causation doctrine does not apply in this case. (Dkt. # 23 at 18.) Instead, according to Marina Club, the doctrine only applies in cases where damage is caused by covered and non-covered *perils*, as opposed to *conditions* of the roof due

to normal aging and wear and tear. (Id. at 19–20 (emphasis added).) In other words, Marina Club argues that the concurrent cause doctrine does not apply in cases like this one "where the insurer contends that the non-covered peril giving rise to the doctrine is a property condition such as wear and tear, lack of maintenance, and/or historical hail damage that did not affect the functionality of the roof or directly cause the insured's loss." (Id. at 20–21.) Additionally, Marina Club contends that even if the property conditions can be considered perils, the doctrine does not apply because it applies to perils that occur concurrently. (Id. at 21.)

Under the concurrent causation doctrine, "when covered and non-covered perils combine to create a loss, the insured is entitled to recover that portion of the damage caused solely by the covered peril." Advanced Indicator and Mfg., Inc. v. Acadia Ins. Co., 50 F. 4th 469, 476–77 (5th Cir. 2022) (quoting Dallas Nat'l Ins. Co. v. Calitex Corp., 458 S.W.3d 210, 222 (Tex. App. 2015)). "Failure to segregate covered and noncovered perils is fatal to recovery." Id. at 477. "An insured may carry its burden by putting forth evidence demonstrating that the loss came solely from a covered cause or by putting forth evidence by which a jury may reasonably segregate covered and non-covered losses." Id.

Here, Marina Club does not necessarily dispute Philadelphia's evidence that the condos' roofs were between thirteen and seventeen years old at the time of the May 17, 2017 storm, and that the roofs were not in same condition as when they were first installed. (Dkt. # 23 at 23–24.) Instead, Marina Club's position is that, at the time of the storm, the roofs were in good working order and fully functional and did not need to be replaced prior to the May 11, 2017 storm. (Id. at 24.) Additionally, Marina Club argues that, because the roofs' tiles were later in their service life, they were more susceptible to damage when they were struck by hail on that date. (Id.) Given this, Marina Club appears to argue that the loss that is the subject of the insurance claim in this case was caused solely (100%) by the hail produced during the May 11, 2017 storm. (Id.)

Whether the concurrent cause doctrine applies in cases like has troubled district courts and the Fifth Circuit. Recognizing the substantial gaps in the doctrine, the Fifth Circuit has twice certified the following questions to the Supreme Court of Texas:

1. Whether the concurrent cause doctrine applies where there is any non-covered damage, including "wear and tear" to an insured property, but such damage does not directly cause the particular loss eventually experienced by plaintiffs;

2. If so, whether plaintiffs alleging that their loss was entirely caused by a single, covered peril bear the burden of attributing losses between that peril and other, non-covered or excluded perils that plaintiffs contend did not cause the particular loss; and

> 3. If so, whether plaintiffs can meet that burden with evidence indicating that the covered peril caused the entirety of the loss (that is, by implicitly attributing one hundred percent of the loss to that peril).

See Overstreet v. Allstate Vehicle & Property Insurance Co., 34 F.4th 496, 499 (5th Cir. 2022), certified question accepted (May 27, 2022), certified question dismissed (Sept. 16, 2022); Frymire Home Servs., Inc. v. Ohio Sec. Ins. Co., 12 F.4th 467, 472 (5th Cir. 2021), certified question accepted (Sept. 10, 2021), certified question dismissed (Dec. 3, 2021). In certifying the questions to the Texas Supreme Court, the Overstreet panel noted:

> We are . . . unsure whether the doctrine [of concurrent causation] applies if, examining the record in the light most favorable to the plaintiff, the covered peril caused the entire loss. Similarly, we are unsure whether, even assuming a plaintiff must attribute losses in this situation, attributing 100% of the damage to a covered peril satisfies an insured's burden.

Id. at 499. Because both Overstreet and Frymire settled after certification, the Fifth Circuit's questions regarding when the doctrine applies, and a plaintiff's burden of proof remain unanswered.

Here, the same issues that troubled these courts are before this Court. Recognizing that the concurrent causation doctrine's questions certified to the Fifth Circuit remain unanswered, the Fifth Circuit's most recent opinion on the issue, Advanced Indicator, 50 F. 4th at 476–77, found that the concurrent causation doctrine does not bar recovery where the same evidence supporting an insured's

argument that a storm caused *some* damage also supports its argument that the storm caused *all* the damage.[1] Id. at 477.

Here, Marina Club has presented evidence by Brandon Allen, a licensed insurance adjustor and Marina Club's testifying expert, that the May 11, 2017 storm caused the damage to Marina Club's property for which it submitted a claim, and that 100% of the repair estimate in his report was caused by the hail damage on that date and not by any non-covered peril. (Dkt. # 23-2.) Given this evidence, as the Fifth Circuit found in Advanced Indicator, a jury could reasonably find that all of Marina Club's loss comes from a covered cause, and therefore the concurrent cause doctrine does not bar recovery. See Advanced Indicator, 50 F.4th at 477; see also Hahn v. United Fire and Casualty Company, No. 6:15–CV–00218 RP, 2017 WL 1289024, at *8 (W.D. Tex. Apr. 6, 2017) (denying summary judgment where plaintiff presented evidence that all claimed loss was covered); Labourdette v. State Farm Lloyds, No. 4:19-CV-2551, 2021 WL 2042974, at *5 (denying summary judgment where plaintiff's evidence that all the claimed lost was attributed to hail event raised a genuine dispute as to the extent of covered versus non-covered damage). Philadelphia of course disputes this evidence,

[1] The Court determined that its unanswered questions to the Texas Supreme Court were not important because its conclusion in the case did not rest exclusively on the application of the concurrent cause doctrine. Advanced Indicator, 50 F.4th at 477 n4.

presenting its own evidence that the roof had significant wear and tear, and that any hail damage was caused by a 2005 storm and not the May 11, 2017 storm. However, because Marina Club has presented evidence which creates a factual dispute regarding whether the May 11, 2017 storm caused 100% of the damage, the Court will deny summary judgment to Philadelphia on Marina Club's breach of contract claim.

B. Extra-contractual Claims

Philadelphia also argues that it is entitled to summary judgment on Marina Club's claim under the Texas Prompt Payment Act, and its other claims under the Texas Insurance Code. In order to prevail on a Prompt Payment Act claim, the insured must show "(1) a claim under an insurance policy (2) for which the insurer is liable and (3) that the insurer has not followed one or more sections" of the Act. Wellisch v. United Servs. Auto. Ass'n, 75 S.W.3d 53, 57 n.2 (Tex. App.—San Antonio 2002, pet. denied) (citing Allstate Ins. Co. v. Bonner, 51 S.W.3d 289, 291 (Tex. 2001)). An insurer may be liable under the Prompt Payment Act if it is found liable for breach of contract. Tremago, L.P. v. Euler-Hermes Am. Credit Indem. Co., 602 F. App'x 981, 983 (5th Cir. 2015). This Court has already denied summary judgment on Marina Club's breach of contract claim, so summary judgment on the Prompt Payment Act claim is also inappropriate and is denied.

Next, a statutory bad faith claim under Chapter 541 of the Texas Insurance Code requires a showing of some unfair or deceptive act or practice by the insurer—in other words, bad faith. See Tex. Ins. Code. § 541.151. Marina Club has not offered any evidence that Philadelphia acted in bad faith in denying the claim. Instead, the parties have offered "evidence showing only a bona fide coverage dispute," which "does not, standing alone, demonstrate bad faith." State Farm Lloyds v. Nicolau, 951 S.W.2d 444, 448 (Tex. 1997). Consequently, summary judgment as to this claim is warranted and is granted.

C. Marina Club's Objections to Evidence and Motion to Strike

Marina Club objects to several exhibits Philadelphia offered in support of its summary judgment motion. (Dkt. # 21.) Because the Court did not rely on these exhibits when considering the motion, the objections and motion to strike will be overruled as moot.

CONCLUSION

Based on the foregoing, the Court **GRANTS IN PART** and **DENIES IN PART** Philadelphia's Motion for Summary Judgment (Dkt. # 19). The motion is **GRANTED** only as to Marina Club's Chapter 541 bad faith claim. The motion is **DENIED** in all other respects. Additionally, the Court **OVERRULES AS MOOT** Plaintiff Marina Club's Objections to Philadelphia's Summary Judgment

Evidence and Motion to Strike (Dkt. # 21). The Court will set trial in this case by separate order.

**IT IS SO ORDERED.**

**DATED:** Austin, Texas, November 7, 2022.

David Alan Ezra
Senior United States District Judge