IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION

PHOUTHASITH AMPHAY

Plaintiff,

v.

ALLSTATE VEHICLE AND PROPERTY INSURANCE COMPANY,

Defendant.

2:21-CV-219-Z-BR

ORDER

Before the Court is Defendant's Motion for Partial Summary Judgment ("Motion") (ECF No. 28), filed on January 31, 2023. Having considered the Motion, briefing, and relevant law, the Court **GRANTS** the Motion.

BACKGROUND

This case concerns damage to Plaintiff's dwelling from a storm that occurred on August 29, 2020. ECF No. 29 at 5. Plaintiff alleges Defendant underpaid his claim and engaged in bad faith in handling the claim. *Id.* The primary dispute is whether Defendant was incorrect to write an estimate that did not include the replacement of Plaintiff's metal roofs. Defendant seeks partial summary judgment because "Plaintiff's alleged damage to the metal roofs is cosmetic damage and not covered by the express terms of his Homeowner's Policy." *Id.* Defendant "also seeks summary judgment on Plaintiff's extra-contractual claims because Plaintiff cannot raise a fact issue" that Defendant acted in bad faith. *Id.* at 6.

LEGAL STANDARD

Summary judgment is proper if the movant shows that there is no genuine dispute of material fact, and the movant is entitled to judgment as a matter of law. *Sanders v. Christwood*,

970 F.3d 558, 561 (5th Cir. 2020) (citing FED. R. CIV. P. 56(a)). A fact is "material" if resolving it one way or another would change the outcome of the lawsuit. *Sossamon v. Lone Star State of Tex.*, 560 F.3d 316, 325 (5th Cir. 2009). A genuine dispute over that fact exists if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *McCarty v. Hillstone Rest. Grp., Inc.*, 864 F.3d 354, 357–58 (5th Cir. 2017) (internal marks omitted). Courts must view the evidence in the light most favorable to the non-movant and resolve factual controversies in the nonmovant's favor. *Id.* (internal marks omitted).

ANALYSIS

A. The Damage to Plaintiff's Roof is Not Covered by the Policy

"The interpretation of an insurance policy is a question of law for the court to decide based on the language in the policy itself, not a question of fact to be determined by the jury." *Davis v. Nat'l Lloyds Ins. Co.*, 484 S.W.3d 459, 470 (Tex. App.—Houston [1st Dist.] Oct. 13, 2015, pet. denied). "[I]nsurance contracts are subject to the same rules of construction as other contracts." *Balandran v. Safeco Ins. Co. of Am.*, 972 S.W.2d 738, 740–41 (Tex. 1998). "The language in an agreement is to be given its plain grammatical meaning unless to do so would defeat the parties' intent." *DeWitt Cnty. Elec. Co-op., Inc. v. Parks*, 1 S.W.3d 96, 101 (Tex. 1999). Here, Plaintiff's policy includes the following exclusion of coverage:

> Cosmetic damage caused by hail to the surface of a metal roof, including but not limited to, indentations, dents, distortions, scratches, or makes, that change the appearance of the surface of a metal roof.
>
> This exclusion applies to all of the components of the surface of a metal roof, including but not limited to, panels, shingles, flashing, caps, vents, drip edges, finials, eave and gable trim and snow guards, coatings and other finishing materials.
>
> **We** will not apply this exclusion to **sudden and accidental** direct physical damage to the surface of a metal roof caused by hail that results in water leaking through the surface of a metal roof.

ECF No. 29 at 11 (emphasis in original). Therefore, cosmetic damage to Plaintiff's roof caused by hail is not covered unless it results in water leaking through the surface. Both of Defendant's experts confirmed that the damage to Plaintiff's metal roof is cosmetic and does not allow water to enter through the roof. *Id.* at 10. And Plaintiff's own expert admits he did not observe any areas where water entered the interior of the home. *Id.* at 12. Plaintiff's expert speculated that the roof *could* leak sometime in the future. *Id.* at 13. But he could not quantify the amount of time — days, months, or even years — that it would take for sediment to eventually cause roof failure. *Id.* Instead, he argued damage is not cosmetic if a roof's lifespan is "100 years and you take away 5 days," because "it's still 5 days." *Id.* This type of speculation is insufficient to create a fact issue. *See, e.g.*, *Tri Invs., Inc. v. United Fire & Cas. Co.*, No. 5:18-CV-116, 2019 WL 13114345, at *7 (S.D. Tex. Nov. 15, 2019) (excluding expert testimony as unreliable and unhelpful to a trier of fact because "the experts provide[d] no timeline or rate for the corrosion and whether it would ultimately result in failure of the roof at any particular indentation.").

Plaintiff avers that Defendant's denial letter acknowledged "interior leak damage" to Plaintiff's ceiling. ECF No. 36 at 16. However, Defendant's investigation revealed the interior leak damage was "not the result of an opening created to the roof or exterior walls by wind or hail." ECF No. 30 at 62. The reason was that the leakage "was related to the sewer vent stack penetration of the roof and not the condition of the roof panels, storm caused or otherwise." *Id.* at 213. Similarly, the other leakage "was related to the louver fixture and/or siding interface" and the extent of staining "indicated repetitive leakage over a long period of time." *Id.* Plaintiff admits his family "never looked at" the ceiling until after the storm. ECF No. 36 at 127. And the mere existence of a leak unrelated to the storm is insufficient to show any covered damage exists. Thus, Plaintiff can only cite the declaration of a general contractor who stated he "witnessed water

leaking into the attic through the metal roofing system." ECF No. 36 at 155. But Plaintiff cannot raise a fact issue by citing this one statement from a witness not qualified as an expert to opine on causation. This is especially the case where three experts — including Plaintiff's expert — concluded the roof does not allow water to enter.

Plaintiff's reliance on *Allstate Vehicle & Prop. Ins. Co. v. Reininger* is also unavailing. No. 04-19-00443-CV, 2021 WL 2445622, at *4 (Tex. App.—San Antonio June 16, 2021, pet. denied). There, the court interpreted the same policy provision cited above. The court did reject the insurer's argument that the policy only covers hail damage "that creates a hole in the roof on impact." *Id.* But Defendant has not made any such argument here. Defendant concedes the damage could be covered where it results in water leaking through the surface — even if the leakage is not from an opening created *immediately* by the hail. However, Defendant maintains *there is no leakage* created by hail damage — whether the leakage was caused immediately by the storm or sometime later. Again, three experts agree with this assessment. *Reininger* is also distinguishable because the plaintiff's expert identified "several roof seams that had been compromised by hail and were no longer watertight." *Id.* That is not the case here. Accordingly, Defendant is entitled to summary judgment on this claim.

B. Defendant Did Not Act in Bad Faith

Under Texas law, "an insurer will be liable if the insurer knew or should have known that it was reasonably clear that the claim was covered." *Universe Life Ins. Co. v. Giles*, 950 S.W.2d 48, 56 (Tex. 1997); *see also State Farm Fire & Cas. Co. v. Simmons*, 963 S.W.2d 42, 44 (Tex. 1998) ("[A]n insurer breaches its duty of good faith and fair dealing by denying a claim when the insurer's liability has become reasonably clear."). Here, Plaintiff's bad faith argument relies in part on the notion that Defendant's interpretation of the policy was flawed. *See* ECF No. 35 at 20.

But because the Court has rejected that argument, Defendant's interpretation of the policy cannot support an inference of bad faith. *See Bible Baptist Church v. Church Mut. Ins. Co.*, No. 2:21-CV-93-Z-BR, 2023 WL 1931912, at *9 (N.D. Tex. Jan. 18, 2023), *report and recommendation adopted*, No. 2:21-CV-0093-Z-BR, 2023 WL 1931350 (N.D. Tex. Feb. 10, 2023) ("[W]here no breach of contract claim is sustained, no bad faith claim can survive.").

Switching gears, Plaintiff asserts Defendant's investigation was unreasonable — any dispute over coverage notwithstanding. *See Simmons*, 963 S.W.2d at 44 ("[A]n insurer cannot insulate itself from bad faith liability by investigating a claim in a manner calculated to construct a pretextual basis for denial."). The Court finds no evidence to support this claim. An adjuster was assigned to the case and a representative was sent to conduct an in-person inspection. ECF No. 29 at 16. Defendant then retained an engineer to conduct an inspection and provide his opinions. *Id.* Defendant called Plaintiff to discuss the engineer's findings and its decision on the claim. *Id.* at 17. Plaintiff was provided a copy of the engineer's report and a denial letter with respect to the metal roof. *Id.* And Defendant prepared an estimate for the covered damages totaling $5,209.33 and issued payment for the damages that exceeded the deductible. *Id.* Defendant reasonably relied on an expert for its decision regarding the claim.

Plaintiff's argument that Defendant's investigation was unreasonable boils down to his assertion that the adjuster "never even went into the primary bedroom or the garage to view the damage," and the engineer "did not inspect the interior of the home *at all* until long after the claim decision was made." ECF No. 35 at 19. The record shows Plaintiff was sick during the adjuster's inspection and was secluded in the master bedroom. ECF No. 30 at 29. The adjuster advised Plaintiff's spouse that he could not inspect the master bedroom because of Plaintiff's condition. *Id.* Plaintiff's spouse stated she understood. *Id.* Considering the inspection occurred in October

2020 — the first year of COVID — the Court cannot attribute the adjuster's caution as bad faith on the part of Defendant. And the engineer listed the damage to the overhead garage doors as "storm related damage in which the policy affords coverage." *Id.* at 20. In any event, the initial assessments were confirmed by the relevant experts in this case. Thus, there is no evidence of any "unfair or deceptive acts" committed by Defendant. *Certain Underwriters at Lloyd's, London v. Prime Nat. Res., Inc.*, 634 S.W.3d 54, 60 (Tex. App.—Houston [1st Dist.] Nov. 26, 2019, no pet.). Accordingly, Defendant is entitled to summary judgment on Plaintiff's bad faith claims.

CONCLUSION

For the foregoing reasons, the Court **GRANTS** the Motion.

SO ORDERED.

March 13, 2023

MATTHEW J. KACSMARYK
UNITED STATES DISTRICT JUDGE