IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

343 WEST SUNSET, LLC, *Plaintiff*, vs. SENECA INSURANCE COMPANY, INC., *Defendant*.	§ § § § § § § § § § §	5-19-CV-01375-FB-RBF

REPORT AND RECOMMENDATION
OF UNITED STATES MAGISTRATE JUDGE

To the Honorable United States District Judge Fred Biery:

This Report and Recommendation concerns the Motion for Summary Judgment filed by Defendant Seneca Insurance Company. *See* Dkt. No. 17. Pursuant to Rules CV-72 and 1 of Appendix C to the Local Rules for the United States District Court for the Western District of Texas, the District Court referred all pretrial matters for resolution. *See* Dkt. No. 25. Authority to enter this recommendation stems from 28 U.S.C. § 636(b)(1)(B). For the reasons set forth below, Seneca's Motion, Dkt. No. 17, should be **GRANTED**.

Factual and Procedural Background

This case involves alleged hail damage to two adjacent San Antonio commercial buildings owned by Plaintiff 343 West Sunset, LLC and insured by Defendant Seneca. West Sunset purchased the property in 2017. *See* Markwardt Dep. 7:4-6 (Dkt. No. 17-1 at 286). Shortly thereafter, it applied for insurance coverage with Seneca. *See* Dkt. No. 17-1 at 128 (Commercial Insurance Application). As part of its underwriting process, Seneca retained roof

inspector Steven Smallwood to document the condition of the buildings. *See id.* at 139-88. According to Smallwood's inspection report, the roof was generally in "good overall condition" but the following notable features: (1) several areas of "ponding on the gravel roof from HVAC drainage" indicating some "longterm and ongoing drainage issues"; (2) some loose and unsecured electrical lines; (3) instances of clogged roof drains; (4) damage to several exhaust vent caps; and (4) a few areas with uneven gravel distribution. *See id.* Thereafter, Seneca issued a commercial insurance policy to West Sunset for the policy period June 15, 2018, through June 15, 2019. *See id.* at 1-125. The policy covered wind and hail damage, but excluded damage from wear and tear, continuous or repeated seepage or leakage of water, and cosmetic damage to roof surfacing caused by wind or hail. *Id.* at 57, 62, 70.

On October 5, 2018, West Sunset reported to Seneca a claim for hail damage. *See id.* 189-90. According to the "Subject" line of the email transmitting the document entitled "Property Loss Notice," West Seneca listed a date of loss ("DOL") of "06/15/2018 (Unk)" which reflects an unknown date of loss or notes the date of loss as the last day of the policy period. But in a field labeled "Date of Loss and Time," the Property Loss Notice provides a response of "Unknown." *Id.* The form explains—in response to a field entitled "DESCRIPTION OF LOSS & DAMAGE,"—that "[i]nsured inspected roof and noticed Hail Damage, not sure of date of loss." *Id.* Four days later, Seneca acknowledged West Sunset's claim and assigned independent adjustor Gerald Cosgrove with Sedgwick to investigate. *See id.* 193.

Cosgrove issued his first report on October 25, 2018, although at that time he hadn't yet received permission to inspect the roof in question. *Id.* 219-222. In this initial report, Cosgrove explained that the photographs provided by West Sunset's roofer "show a breaker panel with spatter which matches spatter seen on the inspection photos completed by Seneca on 7/28/17 at the inception of the policy." *Id.* Cosgrove further observed that the hail report for June 15, 2018,

revealed that hail didn't exceed a size of 3/4 inches (presumably, in diameter) on that date. *Id.* Finally, Cosgrove noted that both buildings were the subject of a prior hail-damage claim submitted by the property's prior owners to their insurer Travelers. *See id.* That prior claim listed a date of loss of April 12, 2016, and identified hail damage to the roofs, flashings, hvac units, and expansion joint damage. *See id.* Ultimately, Travelers reimbursed the prior owners for repairs to the HVAC units (less depreciation costs), although the roof itself, its vents, and expansion joint apparently weren't repaired. *See id.*

Cosgrove's initial findings led Seneca to retain the services of engineer Rodolfo Serrano, Jr., who inspected the property on November 16, 2018, and issued a report of his findings on December 5, 2018. *See id.* 196-98, 224-26. During his inspection, Serrano observed: (1) discoloration indicative of water intrusion in the interior of the property; (2) deterioration of roofing materials and the sealant between concrete panels; and (3) evidence of ponding water. These were all conditions that Serrano opined would've resulted from a long-term process as opposed to a recent one-time event. *See id.* 198. Although Serrano did observe hail exposure to either one or both of the building's roofs, he noted that this same evidence was previously documented by Smallwood during his July 29, 2017, inspection. *See id.* Moreover, Serrano didn't observe any storm-created openings. *See id.* Based on Serrano's and Cosgrove's findings, Seneca denied coverage on December 14, 2018. *See id.* 227. In denying the claim, Seneca explained:

> Enclosed you will find a copy of the report from Mr. Serrano for your review which indicates there was no hail or wind damage found to the property resulting from the reported occurrence. Furthermore, the interior water damage was the result of deterioration of roofing materials and sealant. There was no damage by a covered cause of loss which would have allowed the water to enter the building. At this time, Seneca must deny coverage to the insured for the reported damages to the roof and interior based on the terms and conditions of the insured's policy.

Seneca then cited to the policy's exclusions for (1) wear and tear; (2) deterioration; (3) continuous or repeated seepage or leakage of water; and (4) damages caused by faulty, inadequate or defective maintenance. *See id.*

On June 14, 2019, West Sunset provided Seneca with a pre-suit notice pursuant to Chapter 542 of the Texas Insurance Code. *See id.* 230. Seneca denied the demand. Accordingly, West Sunset sued Seneca on September 11, 2019, in Bexar County state court raising claims for (1) negligence in failing to properly adjust all losses associated with the property; (2) breach of contract; (3) various violations of the Texas Deceptive Trade Practices Act and Chapters 541 and 542 of the Texas Insurance Code; and (4) breach of the common law duty of good faith and fair dealing. *See* Dkt. No. 1-2 at 4-22. With respect to West Sunset's extracontractual claims, West Sunset alleges—without any supporting factual allegations—that Seneca: (1) made various misrepresentations regarding its adjusting and investigative services, the terms of its policy, and that Seneca would pay for the damages at issue; (2) failed to attempt in good faith to effectuate a prompt, fair, and equitable settlement when liability had become reasonably clear; (3) failed to promptly provide a reasonable explanation of the basis in the policy for the claim denial; (4) failed to conduct a reasonable investigation; (5) failed to timely acknowledge receipt of the claim; (6) failed to timely reject the claim; and (7) failed to state the reasons for rejection. *See id.*

Seneca removed the case to this Court on November 22, 2019, on the basis of diversity jurisdiction. *See* 28 U.S.C. § 1332.[1] Seneca now moves for summary judgment on all claims asserted by West Sunset. *See* Dkt. No. 17.

[1] Seneca filed an amended notice of removal on July 27, 2021 properly asserting the citizenship of all parties. *See* Dkt. No. 27.

Analysis

Seneca's motion should be granted in its entirety. There's no evidence in the record reflecting a genuine issue of material fact concerning whether West Sunset suffered a covered loss and, regardless, West Sunset hasn't introduced any evidence allocating between covered and non-covered damages. West Sunset's extracontractual claims, which are also premised on the lost policy benefits, as opposed to some other independent injury, similarly fail. There's also no triable issue with respect to whether Seneca engaged in any bad faith or misrepresentations that could potentially lead to liability under the Texas Insurance Code, Deceptive Trade Practices Act, or common law. Finally, because in Texas there is no independent cause of action against an insurer for negligent handling of claims, that claim warrants dismissal as well.

A. No Viable Claim for Breach of the Insurance Policy Is Presented.

1. *There's no triable issue presented on the policy coverage.* "In Texas, insurance policies are contracts subject to the rules of contract construction." *Certain Underwriters at Lloyd's of London v. Lowen Valley View, LLC*, 892 F.3d 167, 170 (5th Cir. 2018). And to prevail on a claim for breach of the policy, West Sunset bears the burden of establishing the claim is covered by the policy. *See id.* To prove coverage, West Sunset must establish that the injury or damage alleged is a type (1) covered by the policy and (2) was incurred at a time covered by the policy. *See Seger v. Yorkshire Ins. Co.*, 503 S.W.3d 388, 400 (Tex. 2016).

Here, there's no genuine issue of material fact concerning whether West Sunset suffered a covered loss during the policy period. To start, Seneca provides ample evidence that there was no covered loss during the policy period. According to Seneca's expert Mark Kubena, there's no evidence of any hail-related damage to the surface of the buildings' roof. *See* Kubena Aff. (Dkt. No. 17-1 at 293-95). According to Kubena, hail didn't fall at the property on June 15, 2018—the

only date provided as a possible date of loss—or at any time in 2017. *See id.* Even though Kubena conceded that the exposed A/C coil fins have small indentations, he also clarified that those indentions are visible in the 2017 inspection photographs, which indicates they would've predated any 2018 weather event. Kubena's opinion is consistent with that of Seneca's engineer Serrano, who opined that the damage at issue would've resulted from a long-term process as opposed to a recent weather-related event. *See id.* 198.

West Sunset doesn't point to evidence sufficient to indicate a triable issue on this point. *See New Hampshire Co. v. Martech USA, Inc.*, 993 F.2d 1195, 1200 (5th Cir. 1993) (proof of covered loss that occurred during the policy period is plaintiff's burden, and evidence that loss didn't occur within policy limits requires rebuttal evidence to defeat summary judgment). West Sunset's corporate representative and its testifying expert concede they made no attempt to determine the cause or timing of the alleged loss. West Sunset's corporate representative testified that he couldn't recall any particular storm but rather had reported the date provided based on the recommendation of his roofer. *See id.* 288 (P. Markwardt Dep. 15:8-16:6). Similarly, West Sunset's expert testified that he wasn't retained to talk about causation; June 15, 2018, was simply the date "passed on to [him] from counsel." *Id.* 277 (F. Lupfer Dep. 18:7-19:4). West Sunset's expert even conceded that some of the dents he observed could've been caused by a different storm. *See id.* 279 (Lupfer Dep. 27:2-5). At most, all that is presented here are "unconfirmed rumors of loss" that do not raise a triable issue concerning whether any losses occurred during the coverage period. *New Hampshire Co.*, 993 F.2d at 1195 ("Proof that the claimed losses occurred during the policy period is an essential element of Martech's coverage claim on which it bears the burden of proof. Unconfirmed rumors of loss are insufficient to satisfy that burden. Accordingly, summary judgment in favor of the insurance companies was proper.").

Nor does the December 17, 2020, affidavit of adjuster Michael Shipp, *see* Dkt. No. 21-1, change matters. Shipp offers no more than his credentials followed by his subjective, unsupported opinion that "[a]lthough the roof showed signs of older damage, a recent hail and/or wind event caused substantial damage to the roof." *Id.* This conclusory affidavit is insufficient to reflect a genuine dispute of material fact as to the cause or timing of damage. *See, e.g.*, *Orthopedic & Sports Injury Clinic v. Wang Lab., Inc.*, 922 F.2d 220, 224 (5th Cir.1991) (noting, "unsupported affidavits setting forth ultimate or conclusory facts and conclusions of law are insufficient to either support or defeat a motion for summary judgment").

Indeed, even if Shipp's affidavit were sufficient to suggest that a hailstorm caused the claimed damage, Shipp's vague assertion that the storm was "recent" fails to raise a genuine issue of material fact that the claimed loss occurred during the policy period. This is particularly true given that the policy period terminated over a year and a half before Shipp executed his affidavit. Because proof that the claimed loss occurred during the policy period is an essential element on which West Sunset bears the burden of proof, summary judgment on West Sunset's breach of contract claim is warranted. *See New Hampshire Co*., 993 F.2d at 1200.

2. *The failure to provide evidence on segregation between covered and uncovered losses defeats the claim.* "An insurer is liable only for losses covered by the policy." *Lowen*, 892 F.3d at 170. Accordingly, "when covered and excluded perils combine to cause an injury, the insured must present some evidence affording the jury a reasonable basis on which to allocate the damage." *Id.* (brackets and quotations omitted). "If the insured falls short of meeting this burden, the insurer is entitled to summary judgment." *Id.* Here, summary judgment is also appropriate on West Sunset's breach-of-contract claim because West Sunset hasn't provided any evidence to segregate damages between covered and uncovered losses.

Seneca provides unrebutted evidence that at least some of the claimed damage was caused by normal wear-and-tear, continuous leakage, and/or a prior hail storm—all events excluded from coverage. Shipp conceded that the roof "showed signs of older damage." Shipp Aff. at 2. Nevertheless, Shipp made no effort to allocate between the covered and uncovered damage. West Sunset hasn't introduced any other evidence on the issue. West Sunset's unsupported arguments regarding what Shipp *may* testify to at trial, *see* Dkt. No. 21 at 9, don't create a genuine issue of material fact on the matter. Accordingly, West Sunset's failure to provide any evidence on this point is fatal to its breach of contract claim.[2]

B. The Extracontractual Claims Also Fail to Present a Triable Issue.

1. There is no evidence of bad faith and no evidence of an independent injury. West Sunset's extracontractual claims resting on Seneca's alleged bad-faith conduct similarly fail. To start, West Sunset hasn't identified—let alone pointed to any evidence concerning—a single misrepresentation, non-disclosure, or other bad-faith act that could give rise to liability under the Texas Insurance Code, the Deceptive Trade Practices Act, or common law. And West Sunset argues merely that its extracontractual claims survive summary judgment for the same reason its breach of contract claim ought to survive. *See* Dkt. No. 21. In other words, West Sunset's extracontractual claims rest on Seneca's non-payment of policy benefits. Further, West Sunset's corporate representative conceded that the company's only complaints here concern Seneca's denial of its claim. *See* Markwardt Dep. 21:18-23; 26:15-25 (Dkt. No. 17-1 at 289). An insurer's extra-contractual liability, however, is "distinct" from its liability for benefits under the insurance policy. *USAA Texas Lloyds Co. v. Menchaca*, 545 S.W.3d 479, 499

[2] *See, e.g., Lowen*, 892 F.3d at 170-71 (affirming grant of summary judgment where the record lacked reliable evidence permitting a jury to determine which of several storms—alone or in combination—damaged plaintiff's property); *Frymire Home Servs., Inc. v. Ohio Sec. Ins. Co.*, No. 3:19-CV-1938-B, 2020 WL 7259335, at *3 (N.D. Tex. Dec. 10, 2020) (granting summary judgment on similar grounds).

(Tex. 2018). And, regardless, West Sunset's breach of contract claim fails. Because West Sunset's claims don't rely on Seneca having committed some act that caused an injury independent of the policy claim, which West Sunset denies occurred here, *see* Markwardt Dep. 26:15-25, summary judgment must be granted on West Sunset's statutory and common law bad-faith claims. *See Menchaca*, 545 S.W.3d at 500; *see also Lowen*, 892 F.3d at 171; *Progressive Cty. Mut. Ins. Co. v. Boyd*, 177 S.W.3d 919, 922 (Tex. 2005).

2. There's no cause of action in Texas for negligent claims handling. West Sunset's negligence claim must also fail. In Texas, there is no independent cause of action against an insurer for negligent handling of claims. *See Northwinds Abatement, Inc. v. Employers Ins. of Wausau*, 258 F.3d 345, 352 (5th Cir. 2001) (noting Texas law does not recognize a cause of action for negligent claims handling); *see also Zimmerman v. Travelers Lloyds of Tex. Ins. Co.*, No. 5:15-CV-325, 2015 WL 3971415, at *5 (W.D. Tex. Jun. 30, 2015). Furthermore, West Sunset's briefing fails to meaningfully respond to Seneca's arguments on this issue. Therefore, summary judgment in favor of Seneca on West Sunset's negligence claim should be granted.

Conclusion and Recommendation

For the reasons discussed above, it is recommended that Seneca's Motion, Dkt. No. 17, be **GRANTED**.

Having considered and acted upon all matters for which the above-entitled and numbered case was referred, it is **ORDERED** that the above-entitled and numbered case is **RETURNED** to the District Court for all purposes.

Instructions for Service and Notice of Right to Object/Appeal

The United States District Clerk shall serve a copy of this report and recommendation on all parties by either (1) electronic transmittal to all parties represented by attorneys registered as a "filing user" with the clerk of court, or (2) by mailing a copy by certified mail, return receipt

requested, to those not registered. Written objections to this report and recommendation must be filed **within fourteen (14) days** after being served with a copy of same, unless this time period is modified by the district court. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b). The objecting party shall file the objections with the clerk of the court, and serve the objections on all other parties. A party filing objections must specifically identify those findings, conclusions, or recommendations to which objections are being made and the basis for such objections; the district court need not consider frivolous, conclusory, or general objections. A party's failure to file written objections to the proposed findings, conclusions, and recommendations contained in this report shall bar the party from a *de novo* determination by the district court. *Thomas v. Arn*, 474 U.S. 140, 149-52 (1985); *Acuña v. Brown & Root, Inc.*, 200 F.3d 335, 340 (5th Cir. 2000). Additionally, failure to timely file written objections to the proposed findings, conclusions, and recommendations contained in this report and recommendation shall bar the aggrieved party, except upon grounds of plain error, from attacking on appeal the unobjected-to proposed factual findings and legal conclusions accepted by the district court. *Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1428-29 (5th Cir. 1996) (en banc).

IT IS SO ORDERED.

SIGNED this 27th day of July, 2021.

RICHARD B. FARRER
UNITED STATES MAGISTRATE JUDGE