

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

SEVERIN HEGEL and
STEPHANIE HEGEL,

Plaintiffs,

CASE NO: 8:12-cv-01161-EAK-MAP

v.

THE FIRST LIBERTY INSURANCE
CORPORATION,

Defendant.

STATEMENT OF UNDISPUTED FACTS

1. This case involves a breach of an insurance policy (“the Policy”), which covers Mr. and Mrs. Hegel’s property located at 8257 Tranquil Drive, Spring Hill, FL 34606, (the “Residence”), for damages caused by sinkhole activity. (Doc. 25.)

2. The parties executed the Policy for the effective period of October 5, 2010 to October 5, 2011. (Hernando Aff., Ex. A.)

3. Mr. and Mrs. Hegel made an application for benefits under the Policy. (Hernando Aff., Ex. B.)

4. In response, The First Liberty Insurance Corporation (“First Liberty”) retained Structural Engineering & Inspections, Inc. (“SEI”) to conduct a limited inspection at the Residence, “to determine, based on visual, non-destructive structural inspection of the readily accessible areas, if the home has been structurally damaged as defined in the current Fla. Stat. § 627.706 (SB 408).” (Hernando Aff., Exs. C & D.)

5. In its report, dated September 23, 2011, SEI concluded that the Residence

is not structurally damaged as defined by section 627.706, Florida Statutes (2011) (“SB 408”). (Hernando Aff., Ex. D.)

6. SEI’s conclusions are based entirely on the definition of “structural damage” that was added to Florida’s sinkhole statutes *after* the Policy was issued. *See* (Hernando Aff., Exs. A & D.)

7. On or about October 3, 2011, First Liberty notified Mr. and Mrs. Hegel that their claim was being denied because, “your policy does not afford coverage for the shrinkage of concrete or settlement (as stated in 2.e.6. of the stated exclusions below). It is also being denied for improper embedment of your foundation (as stated in 2.c.2. of the stated exclusions below). In addition, your policy only provides coverage for sinkhole losses when there is structural damage to the home. As outlined in the engineers report, there is no indication of any structural damage to your home.” (Hernando Aff., Ex. E.)

8. Mr. and Mrs. Hegel subsequently requested that their claim be submitted to Neutral Evaluation, on or about November 14, 2011. (Hernando Aff., Ex. F.)

9. On or about April 24, 2012, Mr. and Mrs. Hegel initiated the underlying lawsuit, alleging that they are suffering direct physical damage to their home and property, and further alleging that Defendant has breached the Policy by failing to pay all benefits due thereunder. (Doc. 25 ¶¶ 9-10); *See also* (Doc. 2 ¶¶ 9-10).

10. First Liberty removed this matter to Federal Court, on or about May 21, 2012. (Doc. 1.)

11. On May 21, 2012, First Liberty also requested this matter be stayed

pending the completion of Neutral Evaluation, which had not yet occurred. (Doc. 4.)

12. On May 25, 2012, this Court entered its Order staying this matter until the completion of Neutral Evaluation. (Doc. 6.)

13. In his July 23, 2012 report, Neutral Evaluator, Kevin H. Scott, P.E. of Tierra, Inc. (“Mr. Scott”), confirmed that the settlement related distress occurring at the Residence is in part attributable to sinkhole activity, and verified that a sinkhole loss has occurred at the Residence. (Hernando Aff., Ex. G, pp. 3-4, 10.)

14. Mr. Scott based his determination that a sinkhole loss has occurred at the Residence following the guidelines provided for the Neutral Evaluation process as detailed in the directive from the Florida Department of Financial Services, dated September 13, 2011, which states, “if the sinkhole claim being subjected to the neutral evaluation process is made under a policy with an effective date before May 17, 2011, then the pre-May 17, 2011 definitions under 627.706 (pre-SB 408) should be applied in the neutral evaluator’s report.” (Hernando Aff., Ex. G, pp. 3-5.)

15. Section 627.706(2), Florida Statutes (2010) states in relevant part:

(j) “Sinkhole loss” means structural damage to the covered building, including the foundation, caused by sinkhole activity.

16. The Policy states in relevant part:

a. Sinkhole Loss means structural damage to the building, including the foundation caused by sinkhole activity. Contents coverage shall apply only if there is structural damage to the building caused by sinkhole activity.

17. Mr. Scott also prepared a recommendation and estimate for remediation of

the sinkhole conditions at the Residence, which are included in his July 23, 2012 report. (Hernando Aff., Ex. G, pp. 3-5.) Mr. Scott estimates that \$105,075.00 will be necessary to implement repairs. *Id.* at 5.

18. On September 14, 2012, First Liberty filed a counterclaim against Mr. and Mrs. Hegel requesting declaratory relief from the Court on the basis that because of differing interpretations of the undefined term “structural damage” found within the Policy, a declaration of judgment as to the coverage available under the Policy, and the rights and responsibilities of the parties thereto, is warranted. (Doc. 13 ¶¶ 29, 32.)

19. Meanwhile, Mr. and Mrs. Hegel engaged the services of Triad Consulting Group (“Triad”) to prepare an estimate for repair of the cosmetic damages. (James Aff. ¶ 3.) The Triad estimate is dated November 20, 2012, and states that a total of \$20,743.17 will be necessary to complete above-ground repairs. (James Aff. ¶ 5.)

20. On November 29, 2012, First Liberty filed its Motion for Summary Judgment seeking a ruling as a matter of law that the Policy does not provide coverage for Mr. and Mrs. Hegel’s damages because the Policy does not provide coverage absent a finding of “structural damage.” (Doc. 29.) First Liberty believes that the May 17, 2011 amendment to section 627.706, Florida Statutes, to include a technical definition for “structural damage” should apply retrospectively to the Policy in this matter. *Id.* In the alternative, First Liberty believes that the undefined Policy term “structural damage” should at the very least be interpreted as requiring damage which impairs the structural integrity of the home. *Id.*

21. On December 10, 2012, Mr. and Mrs. Hegel responded to First Liberty’s

Motion for Summary Judgment on the basis that the May 17, 2011 amendment to section 627.706, Florida Statutes cannot apply retrospectively to the Policy in this matter which pre-dates the 2011 statutory changes, and that based on a large breadth of Florida Law the undefined Policy term “structural damage” means “damage to the structure.” (Doc. 31.)

22. This Court has not yet issued a ruling on Defendant’s summary judgment motion.

23. On or about February 19, 2013, Mr. and Mrs. Hegel engaged Central Florida Testing Laboratories, Inc. (“CFTL”), to conduct additional site specific and non-destructive testing at the Residence, review the SEI and Neutral Evaluation reports, and provide an opinion as to the proper method of repair. (Hernando Aff., Ex. H.) The opinions of George C. Sinn, Jr., P.E. of CFTL (“Mr. Sinn”) are memorialized in the CFTL report dated March 16, 2013. (Sinn Aff., Ex. B.)

24. Based upon the independent investigation performed by CFTL, in addition to his review of the SEI and Neutral Evaluation reports, Mr. Sinn concluded that the total cost of remediation is approximately \$145,775.00. (Sinn Aff. ¶¶ 8, 12.)

25. Champion Foundation Repairs (“Champion”) subsequently prepared a proposal for the implementation of the remediation protocol recommended by Mr. Sinn, which totals \$141,180.00. (Wester Aff. ¶¶ 5-6.)

26. Discovery in this matter concluded on July 1, 2013. (Doc. 28.)

27. The only expert report prepared and produced on behalf of First Liberty is the SEI report.¹

¹ GeoView, Inc. was retained by SEI to conduct a floor elevation survey at the Residence and prepare a report representing its findings and conclusions. The GeoView, Inc. report is incorporated in the SEI report.