IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

ALEXANDRA LOPEZ,

Appellant,

v. Case No. 5D20-64

AVATAR PROPERTY & CASUALTY INSURANCE COMPANY,

Appellee.

_____/

Opinion filed March 12, 2021

Appeal from the Circuit Court for Osceola County, Michael Murphy, Judge.

William D. Mueller, Elliot B. Kula, and W. Aaron Daniel, of Kula & Associates, P.A., Miami, for Appellant.

Carol M. Rooney and Adam Topel, of Butler Weihmuller Katz Craig LLP, Tampa, for Appellee.

EDWARDS, J.

Appellant, Alexandra Lopez, argues that the summary judgments entered against her and in favor of Appellee, Avatar Property & Casualty Insurance Company, on her water damage claims should be reversed. Avatar and its trial counsel[1] made material misrepresentations to the trial court by asserting that Lopez failed to provide any repair estimates when she submitted her sworn proof of loss forms to Avatar. As Lopez demonstrated in her motion for rehearing, she had indeed attached detailed repair estimates to her proofs of loss. In response to the motion for rehearing and on appeal, Avatar's counsel admitted that Lopez was correct about providing estimates and apologized for unintentionally misstating the facts.[2] However, rather than agree to a rehearing on the correct facts, Avatar successfully argued to the trial court and now argues on appeal that the original summary judgments should stand. We find the trial court erred in granting summary judgment and in denying Lopez's motion for rehearing. We reverse for further proceedings.

Background Facts

[1] Avatar's trial counsel was Curt Allen of Butler, Weihmuller, Katz, Craig, LLP.

[2] Whether the misrepresentation was intentional, as Lopez claims, or the result of a mistake or negligence, as Avatar claims, is of course important; however, it is not material to our decision.

Lopez insured her home through Avatar's homeowners' insurance policy (the "Policy"). The Policy insured Lopez's residence against certain types of property damage, including water damage. The Policy stated that Avatar would provide insurance in return for a premium and compliance with all applicable Policy provisions. It also stated that no legal action could be brought against Avatar unless the Policy provisions had been complied with.

Lopez's home allegedly sustained water damage on two occasions. The first occurrence was on August 6, 2015, and the second occurrence was on March 15, 2016.[3] Through her counsel, Lopez reported both water damage claims for the first time on April 5, 2016. Avatar responded to the claims with separate letters to Lopez, dated April 5, 2016, which Avatar sent directly to her counsel. In each letter, Avatar assigned a separate claim number to each loss. Each of Avatar's letters provided Lopez with a sworn proof of loss form and instructed her "to send to us, within 60 days, your signed sworn proof of loss . . ."

Through her counsel, Lopez provided Avatar with two separate, notarized sworn proof of loss statements, dated June 7, 2016, using slightly different forms instead of those provided by her insurer. Avatar claimed it

[3] The August 6, 2015, damage allegedly was caused by Lopez's dishwasher, while the March 15, 2016, water damage was related to some problem in a bathroom.

received the proof of loss forms on June 14, 2016, which was 69 days after the date of its letters to Lopez.[4]

In July 2016, Avatar denied both of Lopez's claims, stating that the loss was not covered by the policy.

Summary Judgment Papers and Hearing

Thereafter, in October 2016, Lopez filed twin lawsuits against Avatar, one for each water damage claim. In response to each suit, Avatar did not file an answer. Instead, in each case, Avatar filed a motion for summary judgment which it subtitled as "Undisputed Failure to Submit Required Valid Sworn Proof of Loss."

In each summary judgment motion, filed in December 2017, Avatar argued that the sworn proofs of loss were submitted untimely and were not signed by Lopez's husband.[5] Avatar's motions incorrectly asserted that Lopez's proofs of loss contained information for "some other company, made by some other insured, under some other policy, for who knows what kind of

[4] No evidence was submitted to the trial court regarding the date on which Avatar received Lopez's sworn proofs of loss forms with attached repair estimates.

[5] Lopez's husband was not an insured.

loss, under who knows what type of coverage."[6] Contrary to Avatar's arguments, each sworn proof of loss statement submitted by Lopez correctly identified the applicable claim number, policy number and coverage dates, insurer, insured, and date for each water loss. Each one set forth a different amount of damage or loss claimed and attached to each was a separate, detailed, itemized repair estimate for the appropriate water damage event.

Avatar attached a copy of the relevant proof of loss form to each of its summary judgment motions. However, Avatar did not attach or make any reference to the repair estimates that Lopez had provided, nor did either motion mention anything about a lack of repair estimates. In support of each motion, Avatar submitted an affidavit signed by Ronald Barcena, Jr., who was identified only as "a duly authorized representative of Avatar." These affidavits were nothing more than a repetition of the conclusory and argumentative statements set forth in Avatar's motions and provided no information as to Barcena's source of knowledge.[7]

[6] Avatar has never offered any explanation for this melodramatic mischaracterization of the information provided in Lopez's proofs of loss.

[7] Apparently, Avatar has used this "copy and paste" approach of transforming a motion into an "affidavit" for other vaguely identified representatives of Avatar to swear to. *See Everett v. Avatar Prop. & Cas. Ins. Co.*, 46 Fla. L. Weekly D259 (Fla. 2d DCA Jan., 29, 2021); *Rodriguez v. Avatar Prop. & Cas. Ins. Co.*, 290 So. 3d 560, 562 (Fla. 2d DCA 2020).

Nearly two years later, Lopez filed her responses in opposition to Avatar's motions in which she asserted that Avatar had offered no evidence that the proofs of loss were submitted untimely nor had it shown that it was prejudiced in any fashion. Lopez further argued that Avatar's letters had not asked for her husband's signature on the proof of loss forms. Finally, she argued that although she did not use the proof of loss forms provided by Avatar, the ones she did fill out and submit contained the identical information requested by Avatar's forms and what was called for in the policy. Lopez did not provide any counter affidavits.

At the hearing held on Avatar's motions for summary judgment, the parties argued the points set forth in the written motions and written responses. Additionally, Lopez asserted that Avatar never informed her of any deficiencies in either proof of loss. For the first time, Avatar orally argued during the summary judgment hearing that Lopez's proofs of loss were insufficient because they did not provide specific information about the water damage nor, Avatar claimed, did they provide a detailed estimate for the necessary repairs. Nine times during the hearing, Avatar's counsel represented to the trial court that Lopez failed to provide repair estimates, asserting repeatedly that there were absolutely no attachments. Avatar argued that because Lopez did not timely provide sufficient proofs signed by

Lopez and her husband, she had breached the policy and should not be allowed to continue her lawsuits.

The trial court was convinced by Avatar's assertion that no estimates were attached and noted that one could not tell how the damage figures were calculated by simply looking at the proof of loss forms. The court noted that an insured obviously could not be required to file estimates if none had been prepared. The trial court pointed out that there was a reference to an attachment, but that nothing was attached. During the hearing, Lopez did not directly respond to the argument that she had not provided estimates as attachments to her proofs of loss.

Ultimately, the trial court denied summary judgment regarding whether the proofs of loss had been submitted untimely and did not rule on whether the husband's signature was required on the proofs of loss. However, the court stated that, as a matter of law, the insured's sworn statements and proofs of loss did not provide the information required by the Policy. Simple form final summary judgments which contained no detailed explanations were then entered in favor of Avatar and against Lopez.

Motion for Rehearing Based on Misrepresentation

Lopez timely filed a written motion for rehearing in each case, asserting that Avatar's counsel intentionally misled the trial court by stating that the

sworn proofs of loss did not have any attachments and specifically Avatar's repeated misstatement that Lopez had not provided repair estimates. Lopez noted that she had submitted a request for production to Avatar, who responded by producing copies of Lopez's proofs of loss with repair estimates attached, along with a copy of the original transmission letter from Lopez's counsel which listed the proofs of loss and the repair estimates. In support of her motions for rehearing, Lopez attached copies of the proofs of loss as originally submitted with estimates as well as copies of the just-referenced discovery responses from Avatar.[8]

As noted during oral argument before this Court, Avatar's counsel at some point apologized and ultimately admitted on page twenty-two of his response to Lopez's motion for rehearing that he was mistaken when he had repeatedly represented to the trial court, during the hearing, that no repair estimates had been submitted by Lopez. Rather than simply stipulating that the court should rehear the matter based on the correct facts, Avatar's counsel filed a lengthy response giving numerous reasons, including allegations of fraud against Lopez, as to why the trial court should not

[8] Avatar's appellate counsel conceded that those discovery responses were filed with the trial court prior to the summary judgment hearing.

consider the originally submitted repair estimates and should not grant rehearing. The trial court denied rehearing, and Lopez timely appealed.

Analysis

Because Avatar did not file a cross-appeal, we will not consider the trial court's ruling against Avatar on the timeliness of Lopez's submission of the proofs of loss. Furthermore, because Avatar did not plead that it was prejudiced by Lopez's supposed tardiness in returning her proofs of loss, we will not address which party had the burden of proving prejudice or lack or prejudice. We also find it unnecessary to address the issue of the absence of Lopez's husband's signature on the proofs of loss, as the trial court did not rule on that.[9]

Appellate courts conduct a de novo review of summary judgments. *ARR Invs., Inc. v. Baustista REO US, LLC.*, 278 So. 3d 931, 933 (Fla. 5th DCA 2019). "[S]ummary judgment is proper [only] if there is no genuine issue of material fact and if the moving party is entitled to a judgment as a matter of law." *Baxter v. Northrup*, 128 So. 3d 908, 909 (Fla. 5th DCA 2013) (citation omitted). "An appellate court must consider the evidence contained

[9] We decline Avatar's invitation to affirm on grounds not asserted in its original motions, as "[t]he Tipsy Coachman doctrine does not apply to grounds not raised in a motion for summary judgment." *Mitchell v. Higgs*, 61 So. 3d 1152, 1155 n.3 (Fla. 3d DCA 2011).

in the record, including any supporting affidavits, in the light most favorable to the non-moving party; if the slightest doubt exists, summary judgment must be reversed." *Id.* (citing *Delta Fire Sprinklers, Inc. v. OneBeacon Ins. Co.*, 937 So. 2d 695, 698 (Fla. 5th DCA 2006)).

"A policy provision requiring an insured to submit a sworn proof of loss is a condition precedent to a suit against an insurer." *Bryant v. GeoVera Specialty Ins. Co.*, 271 So. 3d 1013, 1021 (Fla. 4th DCA 2019) (citing *Soronson v. State Farm Fla. Ins. Co.*, 96 So. 3d 949, 952 (Fla. 4th DCA 2012)). Conditions precedent must be substantially complied with in order to authorize performance of a contract. *Allstate Floridian Ins. Co. v. Farmer*, 104 So. 3d 1242, 1246 (Fla. 5th DCA 2012) (citing *Seaside Cmty. Dev. Corp. v. Edwards*, 573 So. 2d 142, 145 (Fla. 1st DCA 1991)). Substantial compliance is "the opposite of a material breach of contract." *Green Tree Servicing, LLC v. Milam*, 177 So. 3d 7, 14 (Fla. 2d DCA 2015) (citing *Legacy Place Apartment Homes, LLC v. PGA Gateway, Ltd.*, 65 So. 3d 644, 644 (Fla. 4th DCA 2011)). "[F]or there to be a total forfeiture of coverage under a homeowner's insurance policy for failure to comply with [conditions precedent to suit], the insured's breach must be *material*." *Am. Integrity Ins. Co. v. Estrada*, 276 So. 3d 905, 914 (Fla. 3d DCA 2019) (citing *Amica Mut. Ins. Co. v. Drummond*, 970 So. 2d 456, 460 (Fla. 2d DCA 2007)). *See Hunt*

v. State Farm Fla. Ins. Co., 145 So. 3d 210, 212 (Fla. 4th DCA 2014). "[A] material breach mean[s] 'a breach causing prejudice.'" *Farmer*, 104 So. 3d at 1249 (quoting *State Farm Mut. Auto Ins. Co. v. Curran*, 83 So. 3d 793, 803 (Fla. 5th DCA 2011)).

Substantial compliance does not require full performance of a contract, rather performance "'so nearly equivalent to what was bargained for that it would be unreasonable to deny' the other party the benefit of the bargain." *Milam*, 177 So. 3d at 14 (quoting *Casa Linda Tile & Marble Installers*, *Inc. v. Highlands Place 1981 Ltd.*, 642 So. 2d 766, 768 (Fla. 4th DCA 1994)).

Avatar admitted that Lopez was not required to utilize Avatar's proof of loss forms, as they had only been provided as a "convenience" to Lopez. Engaging in our de novo review of the record, it would appear that by utilizing different sworn proof of loss forms, Lopez provided most, if not all, the information regarding each claim that was requested in Avatar's own forms and as further specified in the Policy, especially when one considers that each proof of loss was accompanied by an attached detailed, itemized repair estimate. The proofs of loss Lopez submitted were not the gobbledygook that Avatar represented them to be, nor were they lacking sufficient explanation of how she arrived at the amount of her damages as the trial

court found. On the record before this Court, we find that there are genuine disputed issues of material fact.

Our de novo review and application of controlling law leads us to conclude that Avatar did not carry its burden of establishing that there were no genuine issues of material fact or that it was entitled to judgment in its favor as a matter of law. The trial court erred in granting the summary judgments in Avatar's favor.

"A trial court's denial of a motion for rehearing is usually subject to an abuse of discretion standard of review; however when the motion only addresses issues of law the standard of review is de novo." *Bank of Am. N.A. v. Eastridge*, 253 So. 3d 722, 728 (Fla. 5th DCA 2018) (citations omitted).

In her motion for rehearing, Lopez correctly pointed out that Avatar had not pled or set forth in the written motions for summary judgment its claim that Lopez had failed to provide repair estimates. Lopez claimed in her motion for rehearing that she was not prepared to respond during the hearing to this previously unasserted issue. Florida Rule of Civil Procedure 1.120(c) requires that any denial of compliance with a condition precedent must be specific and rule 1.510(c) requires a party moving for summary judgment to state the grounds upon which it relies with particularity. Avatar did not

comply with either of those rules, to the extent that it only raised the repair estimate issue orally, during the summary judgment hearing. Under these circumstances, rehearing should have been granted.

Furthermore, the parties agreed through Lopez's motion for rehearing and its attachments and through Avatar's response to that motion, that Lopez had submitted detailed repair estimates with each proof of loss and actually received by Avatar. Under the circumstances, that evidence was properly before the trial court and clearly established that Avatar was not entitled to summary judgment. Accordingly, the trial court erred as a matter of law in denying Lopez's motion for rehearing.[10]

Conclusion

We reverse the summary final judgments and the orders denying rehearing, and remand this matter for further proceedings in accordance with this opinion.[11]

REVERSED and REMANDED.

EVANDER, C.J. and HARRIS, JJ., concur.

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[10] The same result would be reached by applying the abuse of discretion standard of review. *Canakaris v. Canakaris*, 382 So. 2d 1197, 1203 (Fla. 1980).

[11] By separate order, we conditionally grant Lopez's motion for attorney's fees, which the trial court shall consider and determine *if* Lopez ultimately prevails on her claims against Avatar and timely files a motion for fees with the trial court.