

Third District Court of Appeal

State of Florida

Opinion filed October 21, 2020.
Not final until disposition of timely filed motion for rehearing.

No. 3D19-646
Lower Tribunal No. 18-7894

Walter Gonzalez and Yasmin Gonzalez,
Appellants,

vs.

People's Trust Insurance Company,
Appellee.

An Appeal from the Circuit Court for Miami-Dade County, Mavel Ruiz,
Judge.

Mintz Truppman, P.A., and Timothy H. Crutchfield, for appellants.

Cole, Scott & Kissane, P.A., and Mark D. Tinker (Tampa), for appellee.

Before LOGUE, HENDON, and LOBREE, JJ.

HENDON, J.

Appellants, Walter Gonzalez and Yasmin Gonzalez (hereinafter “the Gonzalezes”), appeal from a final summary judgment entered in favor of People’s Trust Insurance Company (“People’s Trust”). We reverse.

Facts

The Gonzalezes are the owners of a home insured by a homeowner’s insurance policy issued by People’s Trust. People’s Trust’s homeowner’s policy comes with a Preferred Contractor Endorsement that, for a reduced premium and in lieu of paying cash to the insured, allows the insurer to send its own contractors to assess and repair the insured property. On September 10, 2017, the Gonzalezes’ property sustained damage from Hurricane Irma when a tree fell on the house. Mr. Gonzalez reported the loss to People’s Trust on September 13, 2017, and on September 15, it sent its preferred contractor, Rapid Response Team, LLC (“Rapid Response”), to perform emergency mitigation prior to sending out a claims adjuster to estimate the cost of repairing the damage.¹ People’s Trust sent its claims adjuster to perform an inspection on November 10, 2017. On December 10, 2017, People’s Trust sent a letter to the Gonzalezes notifying them that it had completed its investigation of the claim and determined that there was coverage for the loss under

¹ Mr. Gonzalez signed the “Emergency Services Work Authorization” form, but only after adding a handwritten qualification that his authorization was restricted to removing the tree from his roof. Otherwise, Rapid Response’s “24 Hour Mitigation Report” identifies the roof damage and interior water damage, and notes that “owner do [sic] not authorize us to do any work.”

the policy. The letter explained that, pursuant to the Preferred Contractor Endorsement, People's Trust elected to use its preferred contractor, Rapid Response, to repair the property to its pre-loss condition. The letter further advised the Gonzalezes that People's Trust had not yet completed its own estimate of the loss by stating, "[o]nce we finalize our inspection with our field adjuster, a list of what we believe needs to be repaired will be provided to you." In that notification letter, People's Trust also requested the Gonzalezes provide an executed sworn proof of loss within sixty days.

On January 24, 2018, Mr. Gonzalez provided the signed sworn proof of loss and executed a work authorization to People's Trust, modifying the forms People's Trust provided to him by deleting the "agreement as to scope of repairs" clause, and stating instead that Rapid Response must—with time being of the essence—commence repairs to "put the Insured back to their pre-loss condition." Mr. Gonzalez testified that because he had not received any estimate from People's Trust, he indicated on the proof of loss form that the "Whole Loss and Damage" was "pending," and "the Amount Claimed" was "pending." People's Trust subsequently accepted Mr. Gonzalez's work authorization form but rejected Mr. Gonzalez's proof of loss form as deficient and notified the Gonzalezes that People's Trust's contractor could not begin repairs without knowing what was damaged and the cost estimate to

repair the damage.² Further, the appraisal provision contained in the policy's Preferred Contractor Endorsement stated that where People's Trust elected to repair the property, "[i]f [the Gonzalezes] and [People's Trust] fail to agree on the amount of loss, which includes the scope of repairs, either may demand an appraisal as to the amount of loss and the scope of repairs." Under the appraisal provision, once the appraisers set the amount of loss and the scope of repairs, "[t]he scope of repairs shall establish the work to be performed and completed by Rapid Response Team, LLC™."

People's Trust notified Mr. Gonzalez that until he agreed to a scope of loss (i.e., what specifically needed to be repaired) and provided a compliant proof of loss (i.e., the specific dollar estimate of the repairs), People's Trust's contractor could not move forward with repairs. In March 2018, the Gonzalezes filed a complaint against People's Trust that included one count for declaratory judgment, one count for breach of the Preferred Contractor repair contract, and one count for breach of the insuring policy for failing to begin the covered repairs. The Gonzalezes' complaint and subsequent amended complaint sought a declaratory judgment determining that People's Trust "must begin the repair process immediately." In

² The record indicates that People's Trust's contractor, Rapid Response, took many photographs of the damage to the exterior and interior of the Gonzalezes' property when it performed the initial emergency mitigation visit, which calls into question People's Trust's claimed lack of knowledge of the scope of repairs.

response, People’s Trust filed a counterclaim with one count for declaratory relief, and one count in the alternative for material breach of the insurance policy and the Preferred Contractor repair contract, alleging the Gonzalezes’ failure to substantially comply with their post-loss obligations relieves People’s Trust of any further coverage obligation related to this claim. People’s Trust subsequently filed a motion for summary judgment arguing that the Gonzalezes failed to substantially comply with People’s Trust’s request for a policy-compliant sworn proof of loss, and that the Gonzalezes failed to acknowledge that People’s Trust’s estimated scope of repair was sufficient in scope for the purpose of restoring the insured dwelling to its pre-loss condition. After hearing argument at the summary judgment hearing, the trial court entered final summary judgment in People’s Trust’s favor. The Gonzalezes appeal.

Standard of Review

This Court reviews a trial court’s ruling on a motion for summary judgment de novo. Volusia Cty. v. Aberdeen at Ormond Beach, L.P., 760 So. 2d 126, 130 (Fla. 2000). “Summary judgment is proper if there is no genuine issue of material fact and if the moving party is entitled to a judgment as a matter of law.” Id. Summary judgment “is designed to test the sufficiency of the evidence to determine if there is sufficient evidence at issue to justify a trial or formal hearing on the issues raised in the pleadings.” Fla. Bar v. Greene, 926 So. 2d 1195, 1200 (Fla. 2006). Because

summary judgment tests the sufficiency of the evidence to justify a trial, it “is proper only if, taking the evidence and inferences in the light most favorable to the non-moving party, and assuming the jury would resolve all such factual disputes and inferences favorably to the non-moving party, the non-moving party still could not prevail at trial as a matter of law.” Moradiellos v. Gerelco Traffic Controls, Inc., 176 So. 3d 329, 334–35 (Fla. 3d DCA 2015).

Discussion

There is no dispute that the Gonzalezes’ property incurred damage from Hurricane Irma, and there is no dispute that People’s Trust conceded coverage for those as-yet unspecified losses under the homeowner’s policy. People’s Trust’s policy indicates that the Gonzalezes must continue to comply with their post-loss obligations even after People’s Trust invokes its right to repair their property.³

³ The policy sets forth the insured’s post-loss obligations under SECTION I – CONDITIONS, as follows:

C. Duties After Loss

In case of a loss to covered property, we have no duty to provide coverage under this policy if the failure to comply with the following duties is prejudicial to us. These duties must be performed either by you, an “insured” seeking coverage, or a representative of either:

....

5. Cooperate with us in the investigation of the claim;
6. Prepare an inventory of damaged personal property showing the quantity, description, actual cash value and amount of loss. Attach all bills, receipts and related documents that justify the figures in the inventory;
7. As often as we reasonably require:
 - a. Show the damaged property;

Without the insureds' compliance, insurance companies have no formal notice of disagreement with the amount or scope of repairs. People's Tr. Ins. Co. v. Ortega, 45 Fla. L. Weekly D1523 (Fla. 3d DCA June 24, 2020). On this record however, whether the Gonzalezes substantially complied with their post-loss obligations once People's Trust acknowledged coverage, or whether they totally failed to comply, is a disputed issue of fact and therefore summary judgment was improvidently granted. See Solano v. State Farm Fla. Ins. Co., 155 So. 3d 367, 370 (Fla. 4th DCA 2014) ("Although '[a] total failure to comply' with a condition precedent can preclude an

b. Provide us with records and documents we request and permit us to make copies; and

c. Submit to examination under oath, while not in the presence of another "insured" and sign the same.

8. Send to us, within sixty (60) days after our request, your signed, sworn proof of loss which sets forth, to the best of your knowledge and belief:

a. The time and cause of loss;

b. The interests of all "insureds" and all others in the property involved and all liens on the property;

c. Other insurance which may cover the loss;

d. Changes in title or occupancy of the property during the term of the policy;

e. **Specifications of damaged buildings and detailed repair estimates;**

f. The inventory of damaged personal property described in C.6. above;

g. Receipts for additional living expenses incurred and records that support the fair rental value loss. . . .

(emphasis added).

insured from recovering; *in a case like this where an insured cooperates to some extent*, a fact question remains as to whether the condition is breached to the extent of denying the insured any recovery under the policy.”) (emphasis added); Himmel v. Avatar Prop. & Cas. Ins. Co., 257 So. 3d 488, 493 (Fla. 4th DCA 2018) (“When an insured does submit a sworn proof of loss, however, the issue of whether the submitted document ‘substantially complie[s] with policy obligations is a question of fact’ which precludes the entry of summary judgment.”) (quoting State Farm Fla. Ins. Co. v. Figueroa, 218 So. 3d 886, 888 (Fla. 4th DCA 2017)). It remains to be determined whether the Gonzalezes’ submitted sworn proof of loss constitutes a breach of the policy to the extent of justifying forfeiture of coverage when coverage has been conceded by People’s Trust. See Am. Integrity Ins. Co. v. Estrada, 276 So. 3d 905, 916 (Fla. 3d DCA 2019) (“[W]hen an insurer has alleged, as an affirmative defense to coverage, and thereafter has subsequently established, that an insured has failed to substantially comply with a contractually mandated post-loss obligation, prejudice to the insurer from the insured’s material breach is presumed, and the burden then shifts to the insured to show that any breach of post-loss obligations did not prejudice the insurer.”).

People’s Trust determined that coverage existed and invoked the proof of loss requirement in order to establish the parties’ obligations under the Preferred

Contractor repair contract.⁴ The Gonzalezes assert that People’s Trust’s admission of coverage created an automatic waiver of formal proof of loss, arguing that once the insurer determines that coverage exists, the proof of loss is assumed. The purpose of a proof of loss provision is to inform the insurer of facts surrounding the

⁴ The “Our Option” provision contained in “SECTION I – CONDITIONS” of the policy lays out the various rights and obligations should People’s Trust choose to repair or replace any part of the damaged property, as occurred in this case:

J. Our Option

At our option:

...

2. For losses covered under Coverage A – Dwelling, insured for Replacement Cost Loss Settlement as outlined in SECTION I – CONDITIONS, Loss Settlement, **we may repair the damaged property** with material of like kind and quality without deduction for depreciation.

3. We will provide written notice to you no later than thirty (30) days after our inspection of the reported loss.

4. **You must comply with the duties described in SECTION I – CONDITIONS, C. 6. and 7.**

5. You must provide access to the property and execute any necessary municipal, county or other governmental documentation or permits for repairs to be undertaken.

6. You must execute all work authorizations to allow contractors and related parties entry to the property.

7. You must otherwise cooperate with repairs to the property.

8. You are responsible for payment of the deductible stated in your declaration page.

9. **Our right to repair or replace, and our decision to do so, is a material part of this contract and under no circumstances relieves you or us of our mutual duties and obligations under this contract.**

(emphasis added).

loss, and to afford the insurer an adequate opportunity to investigate, prevent fraud, and form an intelligent estimate of its rights and liabilities before it is obliged to pay. See Estrada, 276 So. 3d at 916; Allstate Floridian Ins. Co. v. Farmer, 104 So. 3d 1242, 1246 (Fla. 5th DCA 2012) (citing 13 Lee R. Russ & Thomas F. Segalla, Couch on Insurance § 186.22 (3d ed. 2011)); Citizens Prop. Ins. Corp. v. Mango Hill Condo. Ass'n 12 Inc., 54 So. 3d 578, 581 (Fla. 3d DCA 2011) (“No disagreement . . . exists unless ‘some meaningful exchange of information sufficient for each party to arrive at a conclusion’ has taken place.” (quoting U.S. Fid. & Guar. Co. v. Romay, 744 So. 2d 467, 470 (Fla. 3d DCA 1990))). In other words, until the subject homeowner’s insurance policy’s post-loss obligations are met, there can be no disagreement as to the amount of the loss. Id.; United Prop. & Cas. Ins. Co. v. Concepcion, 83 So. 3d 908, 910 (Fla. 3d DCA 2012) (“In order to make a preliminary determination that there is a disagreement between the insurer and the insured regarding the amount of loss, the trial court must be satisfied of the insured’s compliance with the policy’s post-loss conditions.”); Citizens Prop. Ins. Co. v. Galeria Villas Condo. Ass’n, Inc., 48 So. 3d 188, 191 (Fla. 3d DCA 2010) (“Until these conditions are met . . . , there is no ‘disagreement’ (for purposes of the appraisal provision in the policy) regarding the value of the property or the amount of the loss.”).

For the foregoing reasons, we reverse the final summary judgment and remand for further proceedings.

Reversed and remanded.