IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Christine M. Arguello

Civil Action No. 16-cv-02687-CMA-KHR

CHERRY GROVE EAST II CONDOMINIUM ASSOCIATION, INC.,

Plaintiff,

v.

PHILADELPHIA INDEMNITY INSURANCE COMPANY, and
AMERICAN ALTERNATIVE INSURANCE COMPANY,

Defendants.

ORDER GRANTING DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT AND DENYING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

This matter is before the Court on three competing motions for summary judgment:

1. Defendant Philadelphia Indemnity Insurance Company's ("PIIC") Motion for Summary Judgment (Doc. # 54);
2. Plaintiff Cherry Grove East II Condominium Association, Inc.'s (the "Association") Motion for Partial Summary Judgment (Doc. # 55); and
3. Defendant American Alternative Insurance Company's ("AAIC") Motion for Summary Judgment (Doc. # 56).

For the reasons described below, the Court grants the Defendants' Motions for Summary Judgments (Doc. ## 54, 56) and denies the Association's Motion for Partial Summary Judgment (Doc. # 55).

I. BACKGROUND

This case arises from insurance disputes over coverage for hail damage between the Association and two of its insurers, PIIC and AAIC (together, the "Defendants"). The Association manages the Cherry Grove East II community in Aurora, Colorado (Doc. # 40 at 2), and is a non-profit corporation governed by volunteers (Doc. # 60 at 6).

A. FACTUAL BACKGROUND

1. PIIC's Policy

Between March 15, 2014, and March 15, 2015, the Association had an insurance policy with PIIC. (Doc. # 25 at 2.) PIIC's policy, No. PHPK1136864 (Doc. # 54-1 at 21–117), covered "loss or damage commencing . . . [d]uring the policy period . . . ; and [w]ithin the coverage territory," subject to enumerated exceptions (*id.* at 40). PIIC's policy covered damage from hail, subject to a one percent deductible. (*Id.* at 78–92.) It also contained the following relevant provision:

> E. Loss Conditions
>
> 3. Duties in the Event of Loss
>
> a. You must see that the following are done in the event of "loss" to Covered Property: . . .
>
> (2) Given us **prompt notice** of the "loss". Include a description of the property involved.
>
> (3) As soon as possible, give us a description of how, when, and where the "loss" occurred.

(*Id.* at 58) (emphasis added).

The Association's claim against PIIC arises from a hail loss allegedly incurred on September 29, 2014 (the "2014 loss"), within PIIC's policy period. (Doc. # 25 at 3.) On May 28, 2015, when the Association no longer was insured by PIIC, the Association

incurred another hail loss.[1] (Doc. # 40 at 13.) The Association did not report the 2014 loss to PIIC until June 1, 2016, approximately 21 months after the hail loss. (Doc. # 40 at 13.)

2. AAIC's Policy

From May 15, 2015, to May 15, 2016, the Association had an insurance policy with AAIC, Policy No. 6DA2CP0000194-00. (Doc. # 25 at 2.) AAIC's policy, *see generally* (Doc. ## 56-1–56-4), covered "direct physical loss to covered property at a 'covered location' caused by a covered peril" during the policy period (Doc. # 56-2 at 29; Doc. # 56-3 at 14) and included a two percent deductible (Doc. # 32 at 7). Damage from "weather conditions" was covered by AAIC's policy. (Doc. # 56-3 at 7.) The policy contained the following relevant provision:

> WHAT MUST BE DONE IN CASE OF LOSS
>
> 1. Notice – In case of a loss, "you" must:
>
> a. Give "us" or "our" agent **prompt notice** including a description of the property involved ("we" may request written notice); . . .

(*Id.* at 9) (emphasis added).

The Association's claim against AAIC arises from hail loss allegedly incurred on May 28, 2015 (the "2015 loss"), within AAIC's coverage period. (Doc. # 25 at 3.) The Association did not report the 2015 loss to AAIC until July 28, 2016, approximately 14 months after the hail loss. (Doc. # 40 at 13.)

[1] The hail loss on May 28, 2015 is the subject of the Association's claim against AAIC, as the Court details blow.

B. PROCEDURAL HISTORY

The Association filed its Second Amended Complaint on February 6, 2017, asserting one claim of breach of contract against the Defendants. (Doc. # 25.) The Association argues that the Defendants both breached their respective policies by failing to cover the Association's hail damage claims. (*Id.* at 3–4.) It requests that the Court award it compensatory damages, as well as fees and costs. (*Id.* at 4.) PIIC and AAIC both timely answered the Association's Complaint. (Doc. ## 27, 32.)

On May 5, 2017, the Association filed its Motion to Compel Appraisal and to Stay Litigation. (Doc. # 40.) According to the Association, the parties disputed "the extent of damages caused by the respective hail storms [the 2014 loss versus the 2015 loss], and how these damages are to be rectified and apportioned to each insurer." (*Id.* at 6.) The Defendants both opposed appraisal, characterizing the dispute between the parties as concerning coverage. *See, e.g.*, (Doc. # 43 at 7.) Coverage determinations are "within the specific province of the courts," the Defendants explained, and thus, appraisal was neither contractually required nor appropriate. *E.g.*, (*id.*) On July 20, 2017, United States Magistrate Judge Craig B. Shaffer conducted a telephone conference with the parties to discuss the Association's Motion to Compel Appraisal and, more generally, how to proceed with the case. (Doc. # 49.) According to the parties, Magistrate Judge Shaffer "invited or directed the parties to file dispositive motions on the issue of insurance coverage" because he determined that coverage for each hail loss should be determined as a matter of law prior to ruling on the Association's Motion to Compel Arbitration. *E.g.*, (Doc. # 55 at 3.)

On September 5, 2017, all three parties filed motions for full or partial summary judgment that focus on the disputed issue of coverage. (Doc. ## 54–56.) The primary point of disagreement is whether the Association's 21- and 14-month delays in reporting the hail losses relieve the Defendants of their coverage obligations. *See* (*id.*) All parties timely responded and replied to the motions. *See* (Doc. ## 58–61, 68–71.) The three motions for full or partial summary judgment are ripe for the Court's review.

II. SUMMARY JUDGMENT STANDARD

Summary judgment is warranted when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A fact is "material" if it is essential to the proper disposition of the claim under the relevant substantive law. *Wright v. Abbott Labs., Inc.*, 259 F.3d 1226, 1231–32 (10th Cir. 2001). A dispute is "genuine" if the evidence is such that it might lead a reasonable jury to return a verdict for the nonmoving party. *Allen v. Muskogee, Okl.*, 119 F.3d 837, 839 (10th Cir. 1997). When reviewing motions for summary judgment, a court must view the evidence in the light most favorable to the non-moving party. *Id*. However, conclusory statements based merely on conjecture, speculation, or subjective belief do not constitute competent summary judgment evidence. *Bones v. Honeywell Int'l, Inc.*, 366 F.3d 869, 875 (10th Cir. 2004).

The moving party bears the initial burden of demonstrating the absence of a genuine dispute of material fact and entitlement to judgment as a matter of law. *Id.* In attempting to meet this standard, a movant who does not bear the ultimate burden of persuasion at trial does not need to disprove the other party's claim; rather, the movant

need simply point out to the Court a lack of evidence for the other party on an essential element of that party's claim. *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 671 (10th Cir. 1998) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986)).

Once the movant has met its initial burden, the burden then shifts to the nonmoving party to "set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). The nonmoving party may not simply rest upon its pleadings to satisfy its burden. *Id.* Rather, the nonmoving party must "set forth specific facts that would be admissible in evidence in the event of trial from which a rational trier of fact could find for the nonmovant." *Adler*, 144 F.3d at 671. Stated differently, the party must provide "significantly probative evidence" that would support a verdict in her favor. *Jaramillo v. Adams Cty. Sch. Dist. 14*, 680 F.3d 1267, 1269 (10th Cir. 2012). "To accomplish this, the facts must be identified by reference to affidavits, deposition transcripts, or specific exhibits incorporated therein." *Id.*

III. DISCUSSION

A. CONTROLLING LAW

The Court first considers whether the Association's failure to promptly notify the Defendants of its hail losses bars recovery. As the Court previously described, both Defendants' insurance policies required the insured to give the insurer "prompt notice" of any loss. It is indisputable that the Association gave neither PIIC nor AAIC prompt notice of the hail losses. The Defendants argue that the Association's failure to comply with their prompt notice provision precludes the Association's recovery. (Doc. # 54 at 5;

Doc. # 59 at 9 n.4.) The Association asserts that the Notice-Prejudice Rule applies and that the Defendants therefore must show that they were prejudiced by its delayed notifications. (Doc. # 60 at 2–3.) The interpretation of relevant case law is at the core of the parties' competing motions for summary judgment. The Court concludes that, pursuant to Colorado law, an insured's failure to comply with his or her first-party insurance policy's prompt notice provision prevents his or her recovery.

1. The Traditional Rule

In *Barclay v. London Guarantee and Accident, Co.*, 105 P. 865, 866 (Colo. 1909), the Colorado Supreme Court articulated the fundamental concept that the rights and duties flowing from an accident insurance policy are contractual in nature and are measured by the terms and conditions of the policy. The Court held that by the "plain and unequivocal" requirement of the notice provision in the policy at issue, "an immediate notice of the accident and also notice of claim for damages . . . are **conditions precedent** to the liability of the [insurer], and without such notice or notices, or a legal excuse to give the same, the [insurer] cannot be held [liable]." *Barclay*, 105 P. 865 at 867 (emphasis added.) The Colorado Supreme Court reaffirmed this rule decades later in *Certified Indemnity Co. v. Thun*, 439 P.2d 28 (Colo. 1968) (en banc). Where there is a notice requirement in an insurance policy:

> Failure to notify the insurer within a reasonable time constitutes a breach of that contract requiring a justifiable excuse or extenuating circumstances explaining the delay. Unless the delay is so explained, the insurer cannot be held liable under the insurance contract to defend the insured and pay any judgments recovered against him.

Id. at 30.

Thirteen years later, in *Marez v. Dairyland Insurance Company*, the Colorado Supreme Court held that where an insured does not satisfy the policy's notice provision, the insurer is relieved of its duty to the insured—regardless of whether the insurer was actually prejudiced by the untimely notification. *Marez v. Dairyland Ins. Co.*, 638 P.2d 286, 289–90 (Colo. 1981), *overruled as to late-notice liability insurance cases by Friedland v. Travelers Indem. Co.*, 105 P.3d 639, 647 (Colo. 2005). The Court squarely rejected the plaintiff's argument that an insurer should escape liability only upon showing that it suffered prejudice as a result of the insured's failure to provide notice. *Id*. at 290. To require a showing of prejudice "would negate the purpose of the contract conditions and render them meaningless and would in effect rewrite the insurance policy contrary to the intent of the parties," the Court explained. *Id*. at 291. It stated, "It is universally acknowledged . . . that the notice of accident and claim provisions provide substantial benefits and protections to both the insurance company and the insured." *Id.* This rule—that an unexcused delay in giving notice relieves the insurer of its obligations under an insurance policy, regardless of whether the insurer was prejudiced by the delay—which is generally referred to as the Traditional Rule, has not been disturbed in the context of a first-party insurance claim.

2. The Notice-Prejudice Rule and Third-Party Liability Coverage

However, in *Clementi v. Nationwide Mutual Fire Insurance Company*, 16 P.3d 223, 227 (Colo. 2001), the Colorado Supreme Court found that there was a critical distinction between uninsured motorist liability coverage and first-party insurance coverage, and held that the Traditional Rule does not apply if the policy at issue is for

uninsured motorist liability coverage. *Id.* at 225 n.2 (citing *Burns v. Int'l Ins. Co.*, 929 F.2d 1422, 1424 (9th Cir. 1991)). In support of its decision, it identified three public policy justifications for departing from the Traditional Rule: "(1) the adhesive nature of insurance contracts, (2) the public policy objective of compensating tort victims, and (3) the inequity of the insurer receiving a windfall due to a technicality." *Id.* at 229–30. The Court in *Clementi* adopted a Notice-Prejudice Rule for an uninsured motorist (liability) policy. However, the Court expressly limited its adoption of the Notice-Prejudice Rule to the uninsured motorist context. *Id*. at 330.

Four years later, in *Friedland v. Travelers Indemnity Company*, 105 P.3d 639, 647 (Colo. 2005), the Colorado Supreme Court expanded application of the Notice-Prejudice Rule to a liability policy and overruled *Marez* to the extent it applied to late-notice liability cases. In so doing, the Court explained that the three concerns it identified in *Clementi*—"the adhesive nature of insurance contracts, the public's interest in compensating tort victims, and the inequity of an insurer receiving a windfall from a technicality—also apply to liability policies." *Id.* at 646. It focused on the similarities between liability coverage and uninsured motorist coverage:

> [L]iability coverage is for the protection of the insured against liability to a third party and for the protection of the innocent tort victim who suffers personal injury or property damage for which the insured is liable. A UIM policy protects the insured who invokes it for injuries caused by another, but the underlying principle of such coverage is that the tort victim (the insured) should be made whole within the limits of the coverage due to non-payment by the liable party.

Id. The Colorado Supreme Court also observed that "in Colorado, there is a strong public policy in favor of protecting tort victims." *Id.* However, the Court explicitly tailored

its holding: it overruled *Marez* only "to the extent it applies to a late-notice liability case." *Id.* at 647; *see also Craft v. Phila. Indem. Ins. Co.*, 343 P.3d 951, 656 (Colo. 2015).

3. Rules in the Context of a First-Party Insurance Policy

Having carefully analyzed the Colorado Supreme Court cases related to both rules, the Court concludes that an insured's failure to comply with his or her first-party insurance policy's prompt notice provision prevents the insured's recovery. No showing of prejudice to the insurer is necessary for the insurer to be relieved of its contractual duties. In short, the Traditional Rule identified in *Marez* continues to apply to first-party insurance claims.

The Court agrees with PIIC's argument that the cases in which Colorado courts have applied the Notice-Prejudice Rule (in lieu of the Traditional Rule articulated in *Marez*) are easily distinguished from the case presently before the Court. *See* (Doc. # 54 at 6–7.) The Notice-Prejudice Rule cases—*Clementi* and *Friedland*—were third-party liability cases, in which the Colorado Supreme Court was particularly focused on the public policy interest in protecting innocent tort victims. Here, the Association is not a third-party innocent tort victim. Rather, the Association is a first-party insured seeking benefits under its commercial property policy. As PIIC explains, "[u]nlike the insured in a third-party liability case who does not know whether an injured party will bring a claim, the insured here [the Association] has penultimate knowledge and control over the history and condition of its property and benefits that it would like to receive." (Doc. # 54 at 6–7.) In short, the public policy concern that justified applying the Notice-Prejudice Rule to liability policies in *Friedland* is absent here. Without that motivating

rationale, the Court sees no reason that justifies judicial modification of the insured's contractual obligation to provide prompt notice of an insured event. In short, the Traditional Rule should be applied to this contractual agreement. *See Craft*, 343 P.3d at 961 (holding that the Notice-Prejudice Rule does not apply to a date-certain notice requirement in claims-made liability policy because "the public policy concerns that counseled in favor of extending the notice-prejudice rule to liability policies in *Friedland* . . . do not support applying the rule to date-certain notice requirements").

B. APPLICATION

Under the Traditional Rule, "[f]ailure to notify the insurer within a reasonable time constitutes a breach of that contract requiring a justifiable excuse or extenuating circumstances explaining the delay." *Thun*, 439 P.2d at 30.

In this case, the Association did not report to PIIC any losses from the September 29, 2014 hail event until 21 months after the hail storm. (Doc. # 55 at 3.) The Association did not report to AAIC any losses from the May 28, 2015 hail event until 14 months after the hail storm. (*Id.* at 4.) Ordinarily, what constitutes a reasonable time for the giving of the notice as provided in insurance policies is a question for the jury. *Thun*, 439 P.2d at 30. However, where, as here, "facts are undisputed and only one inference can be drawn therefrom, it is a question of law for the court." *Id*. The Court finds that it is indisputable as a matter of law that the Association did not notify either defendant within a reasonable time.

The Association asserts that, to the extent its notices were unreasonable, it had a justifiable excuse: "The Association is a nonprofit corporation governed by volunteers,

many of whom are unsophisticated with respect to insurance, claims and legal matters. The Association has always acted in good faith and has never consciously acted in a dilatory manner with respect to this dispute." (Doc. # 60 at 6.) Such "conclusory statements based merely on conjecture, speculation, or subjective belief do not constitute competent summary judgment evidence." *Bones*, 366 F.3d at 875. As PIIC argues, the Association "has presented no actual facts that would constitute justifiable excuse or extenuating circumstances." (Doc. # 71 at 5.)

Applying the Traditional Rule articulated in *Marez*,[2] the Court concludes that the Defendants have satisfactorily shown the absence of genuine issues of material fact. It is indisputable that the Association's delays in notifying the Defendants of its losses were unreasonable and that it has not made factual allegations sufficient to constitute justifiable excuse. The Defendants are therefore entitled to judgment as a matter of law.

IV. CONCLUSION

For the foregoing reasons, the Court concludes that the Defendants have adequately demonstrated the absence of a genuine dispute of material fact with respect to the unreasonableness of the Association's untimely notices and with respect to the absence of justifiable excuses or extenuating circumstances to explain these delays. The Association has not set forth specific facts from which a rational trier of fact could

[2] Because the Court applies the Traditional Rule, it need not reach the Defendants' alternate arguments that they were in fact prejudiced by the Association's delayed reporting. *See* (Doc. # 54 at 7–9); (Doc # 56 at 15–16.)

find otherwise, and summary judgment is therefore warranted on its claim against both Defendants. The Association is barred from recovery as a matter of law.

Accordingly, it is ORDERED that PIIC's Motion for Summary Judgment (Doc. # 54) and AAIC's Motion for Summary Judgment (Doc. # 56) are GRANTED as to the Association's sole claim. It is

FURTHER ORDERED that the Association's Motion for Partial Summary Judgment (Doc. # 55) is DENIED. It is

FURTHER ORDERED that the Association's Motion to Compel Appraisal and to Stay Litigation (Doc. # 40) is DENIED AS MOOT. Finally, it is

FURTHER ORDERED that this case is DISMISSED WITH PREJUDICE. It is

FURTHER ORDERED that the Defendants shall have their costs by filing a Bill of Costs with the Clerk of the Court within fourteen days of the entry of judgment.

DATED: December 20, 2017

BY THE COURT:

Christine M. Arguello

CHRISTINE M. ARGUELLO
United States District Judge