UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 17-61237-CIV-DIMITROULEAS

BETTY JOSEPH,

Plaintiff,

v.

PRAETORIAN INSURANCE COMPANY,

Defendant.
_____/

ORDER GRANTING IN PART DEFENDANT'S MOTION TO DISMISS

THIS CAUSE is before the Court upon Defendant's Motion to Dismiss Plaintiff's Amended Complaint or, Alternatively, Motion to Strike Plaintiff's Demand for Attorney's Fees as to Plaintiff's Complaint [DE 23], filed herein on December 21, 2017. The Court has carefully considered the Motion [DE 23], Response [DE 27], Reply [DE 28], and is otherwise fully advised in the premises.

I. BACKGROUND

Plaintiff Betty Joseph ("Plaintiff") filed a Complaint against Defendant Praetorian Insurance Company ("Defendant") on May 4, 2017 in state court. [DE 5-3]. On June 22, 2017, the action was removed to this Court. [DE 1].

According to the allegations of the Complaint, Plaintiff is a homeowner with a home located in Broward County. Defendant is an insurance company that issued a lender-placed homeowners insurance policy on Plaintiff's home.[DE 1-3](Insurance Policy);[1] The Named

1 "In analyzing the sufficiency of the complaint, [the Court] limit[s] [its] consideration to the well-pleaded factual allegations, documents central to or referenced in the complaint, and matters judicially noticed." *La Grasta v. First Union Sec., Inc.*, 358 F.3d 840, 845 (11th Cir.2004). The Court may also consult documents that are attached to the

Insured is identified as Bank of America, N.A. ("BOA") and Plaintiff as "Borrower." [DE 1-3]. In December 2014, Plaintiff reported damage to her home due to a leak in her kitchen (the "Kitchen Leak Claim") and a leak in her bathroom (the "Bathroom Leak Claim"). [DE 1-6]. Defendant denied both claims. [DEs 1-4, 1-5]. The instant action followed.

On October 4, 2017, the Court issued an Order granting in part Defendant's Motion to Dismiss and allowing Plaintiff to amend the Complaint. *See* [DE 13]. The Amended Complaint ("AC") alleges two counts against Defendant: (1) Breach of Contract related to the Kitchen Leak Claim; (2) Breach of Contract related to the Bathroom Leak Claim. Defendant has moved to dismiss both counts. [DE 22].

II. STANDARD OF REVIEW

To adequately plead a claim for relief, Rule 8(a)(2) requires "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Under Rule 12(b)(6), a motion to dismiss should be granted only if the plaintiff is unable to articulate "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (citing *Twombly*, 550 U.S. at 556). When determining whether a claim has facial plausibility, "a court must view a complaint in the light most favorable to the plaintiff and accept all of the plaintiff's well-pleaded facts as true." *Am. United Life Ins. Co. v.*

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motion to dismiss under the "incorporation by reference" doctrine. The Eleventh Circuit has defined the incorporation by reference doctrine to mean:

[A] document attached to a motion to dismiss may be considered by the court without converting the motion into one for summary judgment only if the attached document is: (1) central to the plaintiffs claim; and (2) undisputed.... "Undisputed" in this context means that the authenticity of the document is not challenged.

Horsley v. Feldt, 304 F.3d 1125, 1134 (11th Cir.2002) (internal citations omitted); *see also Day v. Taylor*, 400 F.3d 1272, 1276 (11th Cir.2005). The insurance policy itself is central to Plaintiff's claim and undisputed, so the Court includes the policy under the incorporation by reference doctrine.

Martinez, 480 F.3d 1043, 1066 (11th Cir. 2007).

However, the Court need not take allegations as true if they are merely "threadbare recitals of a cause of action's elements, supported by mere conclusory statements." *Iqbal*, 129 S. Ct. at 1949. "Mere labels and conclusions or a formulaic recitation of the elements of a cause of action will not do, and a plaintiff cannot rely on naked assertions devoid of further factual enhancement." *Franklin v. Curry*, 738 F.3d 1246, 1251 (11th Cir. 2013). "[I]f allegations are indeed more conclusory than factual, then the court does not have to assume their truth." *Chaparro v. Carnival Corp*., 693 F.3d 1333, 1337 (11th Cir. 2012). In sum, "[t]he plausibility standard 'calls for enough fact to raise a reasonable expectation that discovery will reveal evidence' of the defendant's liability." *Miyahira v. Vitacost.com, Inc.*, 715 F.3d 1257, 1265 (11th Cir. 2013) (quoting *Twombly*, 550 U.S. at 556).

III. DISCUSSION

The policy at issue as a lender-placed homeowners insurance policy. The Named Insured identified in the Policy is Bank of America ("BOA"). Plaintiff is identified in the Policy as "Borrower." The Declarations page of the Policy is clear that

> The contract of insurance is only between the NAMED INSURED and Praetorian Insurance Company. There is no contract of insurance between the BORROWER and Praetorian Insurance Company. The insurance purchased is intended for the benefit and protection of the NAMED INSURED, insures against LOSS only to the dwelling and OTHER STRUCTURES on the DESCRIBED LOCATION, and may not sufficiently protect the BORROWER'S interest in the property. No coverage is provided for contents, personal effects, additional living expense, fair rental value or liability. *Id.*

[DE 1-3].

The Policy does not provide for Plaintiff to recover directly from the insurance company. The only

time Plaintiff/Borrower is addressed in the Policy is as a potential "loss payee" for a residual payment under the "Loss Payment" provision:

> 13. LOSS Payment. WE will adjust each LOSS with YOU and will pay YOU. If the amount of LOSS exceeds YOUR insurable interest, the BORROWER may be entitled, as a simple LOSS payee only, to receive payment for any residual amount due for the LOSS, not exceeding the lesser of the applicable Limit of Liability indicated on the NOTICE OF INSURANCE and the BORROWER'S insurable interest in the damaged or destroyed property on the DATE OF LOSS. Other than the potential right to receive such payment, the BORROWER has no rights under this RESIDENTIAL PROPERTY FORM.

Id. at Conditions, ¶ 13.

Defendant filed the instant motion to dismiss arguing that Plaintiff has no standing to sue under the Policy and Plaintiff is seeking a money judgment in direct derogation of the rights of the Named Insured under the Policy. Defendant also argues that Plaintiff's demand for attorney's fees, contents and loss of use must be stricken as improperly plead. The Court finds that Plaintiff does not have the right to the relief sought under the Policy, so the Motion to Dismiss is granted in part.

In order to have standing, Plaintiff must have an "injury in fact, causation and redressability." *Elend v. Basham*, 471 F.3d 1199, 1205 (11th Cir.2006). To establish an injury in fact, Plaintiff has to demonstrate that Defendant invaded one of Plaintiff's "legally protected interest[s]." *AT&T Mobility, LLC v. Nat'l Ass'n for Stock Car Auto Racing, Inc.*, 494 F.3d 1356, 1360 (11th Cir. 2007).

While standing may be available to third-party beneficiaries of a contract, this designation is usually limited or precluded by the contract at issue, subject to applicable law. A federal court in a diversity action "must apply the controlling substantive law of the state." *Provau v. State Farm Mut. Auto. Ins. Co.*, 772 F.2d 817, 819 (11th Cir.1985). "The construction of insurance contracts is

governed by substantive state law." *Id.* at 819–20. Thus, whether a petitioner who is a third-party beneficiary has standing to sue is a question of state law. *AT & T Mobility, LLC*, 494 F.3d at 1360 (citing *Miree v. DeKalb County, Ga.*, 433 U.S. 25, 29–33 (1977)).

Section 627.405, Florida Statutes, provides the basis for defining an "insurable interest" under an insurance contract, to wit:

> (1) No contract of insurance of property or of any interest in property or arising from property shall be enforceable as to the insurance except for the benefit of *persons having an insurable interest in the things insured as at the time of the loss*.
>
> (2) "Insurable interest" as used in this section means *any actual, lawful, and substantial economic interest in the safety or preservation of the subject of the insurance free from loss, destruction, or pecuniary damage or impairment*.
>
> (3) The measure of an insurable interest in property is the extent to which the insured might be damnified by loss, injury, or impairment thereof.

Fla. Stat. § 627.405 (emphasis added).

The Court found that Plaintiff had an insurable interest, and, for some Courts, that is enough to confer standing to sue under the insurance contract. *See* [DE 13]; *Conyers v. Balboa Ins. Co.*, 935 F. Supp. 2d 1312, 1316–17 (M.D. Fla. 2013) (citing *Schlehuber v. Norfolk & Dedham Mut. Fire Ins. Co.*, 281 So.2d 373, 375 (Fla. 3d DCA 1973)); *see also Fawkes v. Balboa Ins. Co.*, No. 8:10–cv2844–T–30TGW, 2012 WL 527168, at *3 (M.D.Fla. Feb. 17, 2012); *Kelly v. Balboa Insurance Co.*, 897 F.Supp.2d 1262, 1266–67 (M.D.Fla.2012). However, under the unambiguous language of the Policy, Plaintiff is not a third-party beneficiary or omnibus beneficiary.

There is no *per se* rule in Florida that a party with an insurable interest is automatically vested with standing to enforce a policy of property insurance. In *Catatonic Investments Corp. v. Great Am. Assurance Co.*, the Court dismissed the case because policy was clear that the plaintiff

was not a beneficiary. No. 14-CV-21621, 2014 WL 11997839, at *3 (S.D. Fla. Nov. 25, 2014)

> (The "Policy contains the clear or manifest intent not to primarily and directly benefit the third party. Florida courts apply the principle that insurance contracts are interpreted and construed in accordance with the plain language of the policy. . . . Plaintiff is not listed as a named insured in the Policy, nor is Plaintiff referred to or designated as a third-party beneficiary under the Policy. On the other hand, the Policy clearly states that the mortgagor is not an insured or additional insured under the policy. As Plaintiff is specifically excluded from coverage pursuant to the terms of the policy, this Court cannot find an intent by Defendant to make Plaintiff a third-party beneficiary to the Policy. Therefore, Plaintiff's claim must be dismissed for failure to state a claim for which relief can be granted.").

Similarly, in *Se. Fid. Ins. Co. v. Suwannee Lumber Mfg. Co.*, the Court found that a lienholder could not recover policy proceeds from a loss to the property because the lienholder was not the Named Insured and the Policy did not provide for direct payment to the lienholder in the event of loss. 411 So. 2d 950, 951 (Fla. Dist. Ct. App. 1982) (The "courts of Florida have consistently held that the term 'named insured' has a restricted meaning and does not apply to persons not specifically named in the policy. . . . Here, the named insureds [the Rhodes] and no one else. There is no ambiguity on the face of the policy.").

This Court finds that a homeowner's insurable interest in their home does not automatically confer standing to sue on a lender-placed homeowner's insurance policy. The unambiguous language of the Policy governs. In this instance, the Policy clearly does not confer standing to sue as a third-party beneficiary or omnibus beneficiary. Even if Plaintiff did have standing, Plaintiff does not have the right to recover directly from the insurance company in this instance. The "loss payment" provision is clear; this is not one of the limited circumstances in which the Borrower could recover because the loss exceeds the lender's insurable interest in the

property. Since Plaintiff does not have the right to sue under the Policy, this case is dismissed.

III. CONCLUSION

Based upon the foregoing, it is **ORDERED AND ADJUDGED** as follows:

1. Defendant's Motion to Dismiss [DE 23] is **GRANTED IN PART** as set forth above;
2. This case is **DISMISSED**; and
3. The Clerk is directed to **CLOSE** this case and **DENY** any pending motions as moot.

DONE AND ORDERED in Chambers, Fort Lauderdale, Broward County, Florida, this 16th day of February, 2018.

WILLIAM P. DIMITROULEAS
United States District Judge

Copies furnished to:

Counsel of record