UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA

ORLANDO DIVISION

SHILOH CHRISTIAN CENTER,

Plaintiff,

v.

ASPEN SPECIALTY INSURANCE COMPANY,

Defendant.
_____/

CIVIL ACTION: 6:20-cv-01774-CEM-LRH

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND INCORPORATED MEMORANDUM OF LAW

COMES NOW, Defendant, Aspen Specialty Insurance Company, ("Aspen"), by and through their undersigned counsel, and moves for summary judgment pursuant to Fed. R. Civ. P. 56, dismissing all claims asserted against Defendant by Plaintiff, Shiloh Christian Center, ("Shiloh"), and states as follows:

I. INTRODUCTION

Shiloh is a church operating in Brevard County. In 2014, Plaintiff purchased a policy of insurance issued by Aspen providing coverage to two locations in Brevard County. Plaintiff operated a church and daycare at one location, the "University Boulevard" location, and had previously purchased a second location, the "Sarno Road" location, to which Plaintiff intended to relocate its operations

after completing renovations. In July 2015, Plaintiff asked Aspen to remove named windstorm coverage from the policy in exchange for a reduction of over $20,000 in annual premiums. Aspen complied with this request by issuing an endorsement removing named windstorm coverage from the policy, paying a return premium to Plaintiff, and reducing future premiums to reflect the change in coverage. Plaintiff never requested named windstorm coverage be reinstated and continued to pay lower premiums reflecting the removal of the coverage. This is reflected in the insurance applications presented to Aspen for subsequent policy periods. In October 2016, Plaintiff filed a claim with Aspen for damages allegedly associated with Hurricane Matthew. Plaintiff also filed a claim in October 2018 for damages allegedly caused by Hurricane Irma, which it contends occurred in September 2017. Aspen denied both claims due to the lack of coverage for named windstorm coverage in the policy, the lack of any identifiable wind damage to the roof, and other applicable terms.

Plaintiff filed this lawsuit seeking a declaratory judgment that Aspen's policy covers damage caused by named windstorm. Plaintiff also asserts a breach of contract claim for Aspen's failure to pay benefits on the both the Hurricane Matthew and Irma claims.[1] Aspen seeks a ruling from this Honorable Court that

[1] Shortly after filing suit, Plaintiff submitted a $5,177,331.36 Sworn Statement in Proof of Loss and Public Adjuster estimate asserting Hurricane Irma as the date of loss. However, in its expert

there is no coverage for loss due to Hurricanes Matthew or Irma under the applicable policies.

II. STATEMENT OF UNDISPUTED MATERIAL FACTS

1. Aspen issued Policy Number PRADXWL14 to Shiloh Christian Center providing coverage to properties located at 155 E. University Boulevard and 3900 Sarno Road in Melbourne, Florida, beginning on February 21, 2014.[2]
2. In 2015, during the next policy period, Plaintiff began exploring options to lower its insurance premiums. Jacquelyn Gordon, Shiloh's founder, Senior Pastor, and Board President, also stated she decided to remove named windstorm coverage for the Sarno Road location because she believed it was not necessary due to its tilt-wall construction.[3]
3. On May 29, 2015, Shiloh's insurance agent contacted Burns & Wilcox, the policy's broker, regarding removing named windstorm coverage, stating, "[T]he insured has contacted me regarding this policy. They would like to know what the premium would be without hurricane coverage . . . please help me with this."[4]

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disclosures, Plaintiff recently produced a $1,907,644.84 Hurricane Irma estimate and a $364,304.96.96 Hurricane Matthew estimate from its expert loss consultant.

[2] *See* Exhibit A - Aspen Policy No. PRADXWL14.

[3] Exhibit. B, Deposition of Jacquelyn Gordon, pp. 75:12-14, 97:19-98:21.

[4] *See* Exhibit C, p. 3, (B&W 04338).

4. Plaintiff had also previously inquired about exclusion of all wind coverage and a sprinkler discount as options to decrease the policy premium.[5]

5. On June 22, 2015, Plaintiff's agent informed Burns & Wilcox that she had "just spoke with the insured and they are refinancing and the bank need to see the price is with out hurricane coverage so they can close by the end of the week."[6]

6. Burns & Wilcox informed Plaintiff's agent Aspen could provide coverage "excluding Named Storm for $32k. (This will exclude coverage on all Named hurricanes and Tropical storms, but allow coverage for tornadoes and heavy wind/rain storms that are not named)" and asked Plaintiff's agent if she wanted Burns & Wilcox to get a formal quote for this coverage option.[7]

7. Plaintiff's agent asked that Burns & Wilcox provide a formal quote from Aspen, stating "that quote with [A]spen would be good it is a good selling point."[8]

[5] Id.
[6] *See* Exhibit C, p. 4, (B&W 02988)
[7] Exhibit C, p. 5, (B&W 03973).
[8] Id.

8. On July 22, 2015, Aspen notified Burns & Wilcox it would issue a return premium to Plaintiff if named windstorm coverage was removed from the policy.[9]

9. Burns & Wilcox informed Plaintiff's agent that Aspen was doing this "as an accommodation" and "they would not normally do this in the middle of hurricane season."[10]

10. On July 30, 2015, Plaintiff's agent instructed Burns & Wilcox to "proceed as per the insured" with removing named windstorm coverage retroactive to July 16, 2015, and to issue the return premium "at your earliest."[11]

11. On August 14, 2015, the return premium and endorsement excluding named windstorm coverage was forwarded to Plaintiff's agent.[12] The endorsement issued by Aspen states:

> It is understood and agreed effective 7/16/2015, the following change is made to this policy:
>
> **Named Windstorm** coverage is removed from this policy.
>
> All Other Windstorm and / or Hail coverage remains subject to a $25,000 minimum each and every occurrence.[13]

[9] Exhibit C, p. 6-7, (B&W 01318-01319).
[10] Exhibit C, p. 8, (B&W 01387).
[11] Exhibit C, p. 9, (B&W 01393).
[12] Exhibit C, p. 10-11, (B&W 01472-01473).
[13] Exhibit D, Named Windstorm Endorsement.

12. The original premium charged for the 2015-2016 policy was $48,545.00.[14]

13. Aspen issued Plaintiff a return premium of $15,912.15 when it issued the endorsement in 2015 to remove named windstorm coverage.[15]

14. The 2016-2017 and 2017-2018 premiums dropped to $22,500 which is significantly less than the premium charged prior to the removal of named windstorm coverage.[16]

15. For the 2016-2017 policy period encompassing Hurricane Matthew, Plaintiff submitted an application which stated the "Ex Wind" "form and condition" would apply.[17]

16. Aspen provided a quote for the 2016-2017 policy which indicated, "All Risk of Direct Physical Loss or Damage **excluding** Flood, Earthquake and **Named Windstorm**" as the covered perils.[18, 19]

[14] Exhibit E, 2015-2016 Quote.
[15] Exhibit C, p. 10-11, (B&W 01472-01473).
[16] Exhibit F, 2016-2017 Revised Quote; Exhibit G, 2017-2018 Quote.
[17] Exhibit G, 2016-2017 Application (B&W 00152 - 00158).
[18] Exhibit F, 2016-2017 Revised Property Quote (emphasis added).
[19] Originally, Aspen inadvertently submitted a quote that did not exclude windstorm coverage, but Aspen was asked to revise the quote because Plaintiff was "trying to save money as they can and have actually asked us to obtain an option without wind so they can present to the insured." Burns & Wilcox notified Plaintiff the revised quote and lower premium did not include named windstorm coverage. The Original 2016-2017 Quote is found at Exhibit H. Correspondence regarding the change is found at Exhibit C, pp. 12-15, (B&W 03095, 03979, 03099, 03155).

17. Aspen issued a binder providing coverage for the perils stated in its quote.[20] Aspen subsequently issued Policy No. PRADXWL16 effective from February 21, 2016 to February 21, 2017.[21]

18. The application, quote, and binder for the 2017-2018 Hurricane Irma policy period included the same language regarding the named the covered perils and exclusion of named windstorm coverage.[22]

19. Aspen subsequently issued Policy No. PRADXWL17 effective from February 21, 2017 to February 21, 2018.[23]

20. After Hurricane Matthew, Aspen received notice of a claim from Shiloh for "Water Damage from Roof hurricane Matthew" with an October 7, 2016, date of loss.[24]

21. After investigating the claim, on October 25, 2016, Aspen issued a denial due to coverage issues regarding deferred maintenance, the lack of wind damage to the roof, and the lack of coverage for damage resulting from named windstorms.[25]

[20] Exhibit I, 2016-2017 Property Binder (emphasis added).
[21] Exhibit J, 2016 – 2017 Policy.
[22] Exhibit K, 2017-2018 Application; Exhibit L, 2017-2018 Quote; Exhibit M, 2017-2018 Binder.
[23] Exhibit N, 2017 – 2018 Policy.
[24] Exhibit O, Property Loss Notice.
[25] Exhibit P, October 25, 2016, Claim Denial Letter.

22. At no point between the initial removal of named windstorm coverage from the policy and Hurricane Matthew did Plaintiff request the coverage be reinstated.[26]

23. On September 12, 2018, Aspen received an emailed Assignment of Benefits contract from Five Star Claims Adjusting regarding an alleged Hurricane Irma loss allegedly occurring one year earlier, on September 11, 2017.[27]

24. Aspen investigated the claim and issued a denial letter on February 28, 2019, citing the same deterioration and wear and tear observed after Hurricane Matthew, the re-presentation of damage from prior losses, and the policy's lack of coverage for named windstorm.[28]

25. Plaintiff made no attempt to have named windstorm coverage reinstated between the denial of its Hurricane Matthew claim due to the coverage exclusion and Hurricane Irma.[29]

III. LEGAL STANDARD

Summary judgment "shall be granted, 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if

[26] Affidavit of Linda Noonan; Exhibit Q; and Exhibit B, pp. 98:22-99:5.
[27] Exhibit R, 9/12/18 Email and AOB Contract.
[28] Exhibit S, February 28, 2019, Claim Denial Letter.
[29] Exhibit O, Affidavit of Linda Noonan; Exhibit B, pp. 98:22-99:5.

any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" *Allen v. Tyson Foods, Inc.*, 121 F.3d 642, 646 (11th Cir. 1997) (quoting Fed. R. Civ. P. 56(c)). "By its very terms, this standard provides that the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986) (emphasis added). A fact is material when, under the substantive governing law, it affects the outcome of the case. Id. at 248.

The party moving for summary judgment bears the initial burden of establishing the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); see also Clark v. Coats & Clark, Inc., 929 F.2d 604, 608 (11th Cir. 1991). The burden then shifts to the nonmoving party, who "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986); *Legg v. Voice Media Grp., Inc., 20 F. Supp.* 3d 1370, 1373 (S.D. Fla. 2014). The nonmoving party "may not rest upon the mere allegations or denials in its pleadings" but instead must present "specific facts showing that there is a genuine issue for trial." *Walker v. Darby*, 911 F.2d 1573, 1576–77 (11th Cir. 1990). "Rule 56(c) mandates the entry of summary judgment . . . against a party who fails to make a showing

sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322–23 ("In such a situation, there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.").

IV. ASPEN IS ENTITLED TO SUMMARY JUDGMENT AS A MATTER OF LAW

In Florida, "[s]ummary judgment is appropriate in declaratory judgment actions seeking a declaration of coverage when the insurer's duty, if any, rests solely on the applicability of the insurance policy, the construction and effect of which is a matter of law." *Northland Cas. Co. v. HBE Corp.*, 160 F.Supp.2d 1348, 1358 (M.D. Fla. 2001); see also *Gas Kwick, Inc. v. United Pac. Ins. Co.*, 58 F.3d 1536, 1538–39 (11th Cir. 1995) ("Under Florida law, interpretation of an insurance contract is a matter of law to be decided by the court."). "Florida law provides that insurance contracts are construed in accordance with the plain language of the policies as bargained for by the parties." *Westport Ins. Corp. v. VN Hotel Grp., LLC*, No. 6:10-cv-222-ORL-28KRS, 2011 WL 4804896, at *2 (M.D. Fla. Oct. 11, 2011), aff'd, 513 F. App'x 927 (11th Cir. 2013) (quotation omitted).

A. The Parties Entered into a Contract of Insurance Excluding Coverage for Named Windstorms.

The terms of an insurance policy "should be taken and understood in their ordinary sense, and the policy should receive a reasonable, practical and sensible interpretation consistent with the intent of the parties – not a strained, forced or unrealistic construction." *Siegle v. Progressive Consumers Ins.*, 819 So. 2d 732, 736 (Fla. 2002). "Every insurance contract shall be construed according to the entirety of its terms and conditions as set forth in the policy and amplified, extended, or ***modified by any application therefor*** or any rider or endorsement thereto." Fla. Stat. Ann. § 627.419 (emphasis added). "The application thus becomes a part of the agreement between the parties and the policy together with the application form the contract of insurance." *Mathews v. Ranger Ins. Co.*, 281 So. 2d 345, 348 (Fla. 1973); *Zenith Ins. Co. v. Com. Forming Corp.*, 850 So. 2d 568, 570 (Fla. Dist. Ct. App. 2003). "[W]hen the terms of the contract are ambiguous, susceptible to different interpretations, parol evidence is admissible to "explain, clarify or elucidate" the ambiguous term." *Strama v. Union Fid. Life Ins. Co.*, 793 So. 2d 1129, 1132 (Fla. Dist. Ct. App. 2001), quoting *Friedman v. Va. Metal Prods. Corp.*, 56 So.2d 515, 517 (Fla.1952).

Plaintiff will argue there is named windstorm coverage under the policy because the endorsement originally issued in 2015 was not attached to the 2016-2017 and 2017-2018 policy forms. However, the parties bargained for coverage to

remove coverage for named windstorms, and Plaintiff paid a reduced premium for such coverage. The intent of the parties is clearly illustrated by the negotiations and correspondence described above. Further, the applications for the applicable policy periods are part of the insurance contract. The applications signed by Plaintiff's representatives for the two policy periods involved in this lawsuit reflect the exclusion of named windstorm coverage. Under Florida law, these applications form a part of the contract of insurance between the parties.

In *Zenith*, the Court found a venue provision included in the policy application but not referenced in the policy form was enforceable as part of the insurance agreement. 850 So. 2d 568, 569-570. In *Gen. Star Indem. Co. v. W. Fla. Vill. Inn, Inc.*, 874 So. 2d 26 (Fla. Dist. Ct. App. 2004), the Court applied a deductible that was included only in the policy application over ambiguous deductible terms in the policy form. In *Certain Underwriters at Lloyds of London v. Pero Fam. Farm Co.*, the Southern District of Florida relied on parol evidence including the application and policy underwriting to limit coverage pursuant to a Marine Cargo Insurance Policy. No. 18-CV-81680, 2020 WL 3268274 (S.D. Fla. Apr. 9, 2020), report and recommendation adopted sub nom. *Certain Underwriters at Lloyds of London v. Pero Fam. Farm Food Co.*, No. 18-CIV-81680, 2020 WL 4464676 (S.D. Fla. June 26, 2020). In *Nugget Oil, Inc. v. Universal Sec. Ins. Co.*, an insurance agent drew lines through some of an insured's locations on the schedule attached to the policy application.

584 So. 2d 1068 (Fla. Dist. Ct. App. 1991). The Court found that, despite the policy's declaration stating "all premises" "owned, rented, or occupied" were insured, the marked-through locations were not covered under the policy. *Id*. at 1069-1070. Here, the policy applications state windstorm is excluded from coverage. Furthermore, the correspondence described above indicates the parties intended for the exclusion to apply to the policies, and knew they were not obtaining coverage for named windstorm in exchange for a significantly reduced premium.

The August 14, 2015, endorsement issued by Aspen removed named windstorm coverage from Plaintiff's policy. The exclusion of named windstorm coverage was reflected in the policy applications for the 2016-2017 and 2017-2018 policy periods. Correspondence and documents exchanged between Plaintiff's agent, the underwriter, and Aspen show Plaintiff bargained for -- and received the consideration of lower premiums for -- the removal of named windstorm coverage. Aspen also issued quotes and binders reflecting the lack of named windstorm coverage. Accordingly, the contract of insurance provides no coverage for the damages alleged by Plaintiff.

B. Alternatively, the Policy Should be Reformed to Reflect the Agreement of the Parties Regarding Named Windstorm Coverage.

An insurance contract may be reformed when a "mutual mistake or a unilateral mistake by one party coupled with the inequitable conduct of the other party . . . fails to express the agreement of the parties." *Romo v. Amedex Ins. Co.*, 930

So. 2d 643, 649 (Fla. Dist. Ct. App. 2006), *citing Kolski v. Kolski,* 731 So.2d 169 (Fla. 3d DCA 1999). "A mistake is mutual when the parties agree to one thing and then, due to either a scrivener's error or *inadvertence,* express something different in the written instrument." *Fed. Ins. Co. v. Donovan Indus., Inc.,* 75 So. 3d 812, 815 (Fla. Dist. Ct. App. 2011), quoting *Circle Mortg. Corp. v. Kline,* 645 So.2d 75, 77–78 (Fla. 4th DCA 1994) (emphasis in original).

A party seeking reformation must show that that the parties "agreed on one thing before they put their agreement in writing and that their written agreement said something different." *Essex Ins. Co. v. Tina Marie Ent., LLC,* 602 F. App'x 471, 473–74 (11th Cir. 2015). "The rationale for reformation is that a court sitting in equity does not alter the parties' agreement, but allows the defective instrument to be corrected to reflect the true terms of the agreement the parties actually reached. Although ordinarily a writing will be looked to as the only expression of the parties' intent, in a reformation action in equity, parol evidence is admissible to demonstrate that the true intent was other than as expressed in the writing." *Fed. Ins. Co. v. Donovan Indus., Inc.,* 75 So. 3d 812, 815 (Fla. Dist. Ct. App. 2011).

In *Donovan Indus., Inc.,* an insurer inadvertently left blank the schedule of excluded products. The insurer was entitled to reformation where it was able to show that this exclusion was previously agreed between insurer and insured's agent. The insurer was concerned about issuing a policy to Donovan when there

were pending lawsuits concerning one of its products, "exercise balls." Donovan indicated it no longer sold the product and agreed coverage for that product could be excluded. The court also noted that "Federal would have factored into the premium it charged Donovan the absence of any risk from the outstanding claims regarding the exercise balls causing injury." *Donovan Indus., Inc.*, 75 So. 3d at 815. Likewise, in *Bos. Old Colony Ins. Co. v. Popple*, the court looked to the difference in premium in finding in favor of reformation when the parties made a mutual mistake regarding the inadvertent deletion of an operable vehicle instead of an inoperable vehicle from a fleet policy. 305 So. 2d 877 (Fla. App. 1st Dist. 1974).

In the present case, Plaintiff and Aspen mutually agreed to exclude named windstorm coverage from the Policy. The failure to attach the endorsement to the 2016-2017 and 2017-2018 policy forms was inadvertent. Correspondence between Plaintiff's agent, Aspen, and the insurance broker illustrate the parties' intent to exclude named windstorm coverage from the policy. The policy applications, quotes, and binders all reflect the exclusion of named windstorm coverage. In both the 2016-2017 and 2017-2018 policy periods, Plaintiff paid premiums over 50 percent less than those paid before named windstorm coverage was excluded from the policy. There is overwhelming evidence the parties intended for named windstorm coverage to be removed from the policies in effect when Hurricanes Matthew and Irma allegedly damaged Plaintiff's property to warrant reformation

of the insurance contract. Aspen maintains the 2016-2017 and 2017-2018 policies, when considering the policy forms, applications, binders, endorsements, and premiums, did not provide named windstorm coverage when issued. However, alternatively, if the Court finds the written terms of the policies as issued provide such coverage, the policies should be reformed to reflect the intent of the parties: that there is no coverage for named windstorms.

V. CONCLUSION

WHEREFORE, the defendant, Aspen Specialty Insurance Company, respectfully requests the Court grant summary judgment in its favor dismissing Plaintiff's claims, and such other relief as this Court deems proper.

Date: November 1, 2021.

Respectfully submitted,

LOBMAN, CARNAHAN, BATT, ANGELLE & NADER

/s/ Charles R. Rumbley

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Certificate of Service

I hereby certify that a true and correct copy of the foregoing document has been furnished to Matthew G. Strubel, counsel for Plaintiff, via the Court's ECF filing system, on this 1st day of November, to the designated addresses: mstruble@strublelawfirm.com.

/s/ Charles R. Rumbley