

**IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL
CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA**

CASE NO: 2021-005183-CA-01

SECTION: CA32

JUDGE: Ariana Fajardo Orshan

Majorca Isles I Condominium Association Inc

Plaintiff(s)

vs.

American Coastal Insurance Company

Defendant(s)

_____ /

ORDER DENYING DEFENDANT'S MOTIONS FOR PARTIAL SUMMARY JUDGMENT

THIS CAUSE, having come before the Court on Defendant, AMERICAN COASTAL INSURANCE COMPANY (*hereinafter* “American Coastal”), two separate Motions for Partial Summary Judgment, and the Court having considered the written submissions and arguments of counsel, and being otherwise duly advised in the premises the court finds as follows:

I. PROCEDURAL HISTORY

This action involves a first party claim for insurance proceeds due to damage associated with Hurricane Irma on September 10, 2017. On March 3, 2021, Plaintiff, MAJORCA ISLES I CONDOMINIUM ASSOCIATION, INC. (*hereinafter* “Majorca”) filed this breach of contract lawsuit against American Coastal. In its Complaint, Majorca alleged that American Coastal breached the insurance policy by failing to provide insurance coverage under the Policy and by specifically denying that the Property was damaged by Hurricane Irma. Majorca is pursuing “all damages recoverable due to Defendant’s material breach of its contract for insurance,” which damages could include, but were not limited to, Actual Cash Value (*hereinafter* “ACV”) (in the amount of \$3,665,119.83) and RCV Replacement Cost Value (*hereinafter* “RCV”) (in the amount of \$4,232,254.65).

On June 30, 2022, American Coastal filed two motions for partial summary judgment. The first motion claimed that Majorca was not entitled to increased-cost-of-construction damages because Majorca did not repair or replace the Property within two years of the loss. The second motion claimed that Majorca was not entitled to ACV damages because it never requested those damages prior to filing suit, and Majorca was not entitled to RCV damages because it did not repair or replace the Property within two years after Hurricane Irma.

Majorca opposed both motions. It argued that, because American Coastal denied the claim outright within 90 days, the Policy did not require Majorca to demand ACV, RCV, or repair or replace the Property within two years of the loss. Majorca also claimed that whether American

Coastal committed a prior material breach of the insurance policy by denying its claim outright was a fact issue for the jury. According to Majorca, if the jury finds in its favor on that issue, then Majorca is discharged of the very contractual obligations (ACV, RCV, time to repair) upon which American Coastal relied. Finally, Majorca contended that assuming it had post-denial contract obligations, there remained a fact issue as to whether Majorca's alleged non-compliance with those post-denial conditions were legally justified or excused. As part of their oppositions, Majorca explained that it did not repair and/or replace the damaged Majorca I Property because American Coastal denied its claim outright on February 26, 2018.

On September 11, 2022, the Honorable Mark Blumstein consolidated American Coastal's two summary judgment motions and set them for argument on October 7, 2022. The parties argued their respective positions on October 7, 2022. On the record, Judge Blumstein denied both motions but never entered a written order.

On November 7, 2022, American Coastal filed a motion for reconsideration. In January 2023, this case was transferred to the Honorable Jennifer D. Bailey and thereafter to the undersigned. On January 31, 2023, this Court granted American Coastal's motion for reconsideration on the basis that Judge Blumstein did not issue a written order stating his reasons for denying summary judgment motions. On February 1, 2023, the Court held a hearing in which the parties re-argued their respective summary judgment positions.

II. STIPULATED FACTS

A. Majorca is a Florida not-for-profit homeowners' association whose Board of Directors (*hereinafter* "Board") is responsible for managing "Phase I" of the condominiums (*hereinafter* "Majorca I"). There are fourteen buildings in the Majorca I condominium complex located in Miami County, Florida (*hereinafter* "Property").

B. American Coastal sold Majorca an "all risk," replacement-cost-value insurance policy covering the roofs and certain exterior components of the Property. Majorca paid a significantly increased annual insurance premium for the "replacement cost policy" or "RCV" policy, which allows Majorca, as the insured, to recover the replacement cost value caused by the loss, without deduction for depreciation.

C. Hurricane Irma made landfall in South Florida on September 10, 2017. Shortly thereafter, on November 16, 2017, Majorca retained the services of a public adjuster, Phill Wright (*hereinafter* "Mr. Wright"), to assist with Majorca's potential insurance claim.

D. On December 1, 2017, after a preliminary inspection of the Property by Mr. Wright, Majorca filed a claim with American Coastal alleging that Hurricane Irma caused significant damage to all of the buildings in the Majorca I complex. Majorca also retained the services of Robin Roberts (*hereinafter* "Mr. Roberts"), a licensed architect, who performed an inspection of the property and likewise concluded that the Majorca I buildings suffered significant damage caused by Hurricane Irma.

E. American Coastal's expert, Michael Cahill (*hereinafter* "Mr. Cahill"), also inspected the Property after Majorca made its insurance claim. American Coastal's causation expert

concluded that Hurricane Irma caused no damage to the Majorca I buildings.

F. On February 26, 2018, based on Mr. Cahill's inspection and report, American Coastal denied Majorca's insurance claim outright. In its denial letter, American Coastal stated the following:

We have concluded our investigation and determined that the damage to roof tiles are not due to a covered cause of loss. It was also determined that the majority of exposed and broken roof tiles exhibited long-term environmental exposure that existed prior to Hurricane Irma and that the remainder of damage to roof tiles are a result of footfall and/or was mechanical in nature.

Also, in its denial letter, American Coastal advised Majorca that it should consider the claim "closed" based on its conclusion that there was no causal connection between Hurricane Irma and the damage to the Majorca I buildings.

G. American Coastal's coverage denial was based on the lack of causation and the corresponding, pre-existing-damage exclusions in the Policy. Between the time that Majorca filed its insurance claim on December 1, 2017 and the time that it denied the claim on February 26, 2018, American Coastal never demanded from Majorca an ACV or RCV damages calculation. Nor did American Coastal advise Majorca that it must repair and/or replace the damaged Property within two years of the loss. Nowhere in American Coastal's denial letter does the carrier refer to those provisions of the insurance policy.

H. After American Coastal denied the claim in February 2018, Majorca and American Coastal engaged in additional unsuccessful attempts to settle Majorca's claim until March 2021. During that three-year period, American Coastal never demanded from Majorca an ACV or RCV damages calculation or invoked any of those Policy terms. Through its public adjuster Mr. Wright, Majorca provided American Coastal an RCV damages calculation in the amount of \$4,232,254.65 in May 2018, but American Coastal never responded to it or otherwise claimed that the RCV calculation was somehow barred by the Policy. Nor did American Coastal during that three-year, post-denial period ever advise Majorca that it must repair and/or replace the damaged Property within two years after Hurricane Irma, or by September 10, 2019.

III. THE POLICY TERMS AT ISSUE

Because the Parties' respective summary judgment positions depend, at least in part, on the terms of the underlying insurance contract between Majorca and American Coastal, the Court will next set forth the contract terms at issue.

A. DUTIES IN THE EVENT OF LOSS OR DAMAGE

The Policy sets forth numerous post-loss duties with which Majorca must comply to obtain coverage under the Policy. Those duties are set forth in two separate sections of the Policy (Florida Changes, AC 01 25 06 16, at pages 2-3, §G.3) and on the Coverage Form (CP 00 17 06 07, at pages 9-10, under "Loss Conditions," §E.3(1)-(8)). Majorca has many duties under the Policy including, providing "prompt notice" of a claim and cooperating with American Coastal in its investigation.

Notably, however, the Policy does not require Majorca to provide American Coastal an ACV or RCV calculation of its losses or to repair/replace the Property within two years of the loss. Instead, the Policy merely states that, if American Coastal makes the “request,” Majorca would be required to provide “inventories of the damaged . . . property,” which would include “costs, values and amount of loss claimed.” Coverage Form (CP 00 17 06 07), at page 10 of 14, Loss Conditions §E.3(5); Florida Changes (AC 01 25 06 16), at page 2 of 4, §G.3(6). There is no evidence that American Coastal ever made the request referenced in these policy provisions before it denied the claim on February 26, 2018.

B. LOSS PAYMENT CONDITION

The Policy contains a “Loss Payment Condition” that sets forth the time within which American Coastal would pay for a loss covered by the Policy. See Florida Changes (AC 01 25 06 16), at page 3 of 4, §H. That provision states that, as long as Majorca complied with its post-loss duties (set forth above), American Coastal “will pay for covered loss or damage upon the earliest of the following: ...(3) Within 90 days of receiving notice of an initial ...claim, unless we deny the claim during that time...” *Id.*, §H(3).

Nothing in the Loss Payment Condition of the Policy states that American Coastal would pay ACV or RCV damages within 90 days if it found that Majorca’s loss was covered. Nor does the Loss Payment Condition premise payment on repair and/or replacement of the damaged Property. The provision simply states that American Coastal “will pay for covered loss or damage,” without qualification or exception.

C. INCREASED COST OF CONSTRUCTION/LAW AND ORDINANCE

In the Coverage Form of the Policy (CP 00 17 06 07), American Coastal sets forth various provisions that govern if, and only if, American Coastal decides there is coverage under the Policy. Section A, Coverage, states this plainly: “We will pay for direct physical loss of or damage to Covered Property . . . caused by or resulting from any Covered Cause of Loss.” Coverage Form (CP 00 17 06 07), at page 1 of 14, §A.

One provision governs what is called increased costs of construction, or law and ordinance. Under the Policy, American Coastal is required to pay Majorca increased costs of construction if it determines that there is coverage—that is, if it concludes that Hurricane Irma caused damage to the Property. The provision provides in relevant part:

(2) In the event of damage by a Covered Cause of Loss to a building that is Covered Property, we will pay the increased costs incurred to comply with enforcement of an ordinance or law in the course of repair, rebuilding or replacement of damaged parts of that property subject to the limitations stated in e.(3) through e.(9).

.....

(7) With respect to this Additional Coverage:

(a) We will not pay for the Increased Cost of Construction:

(i) Until the property is actually repaired or replaced, at the same or another premises; and

(ii) Unless the repairs or replacement are made as soon as reasonably possible after the loss or damage, not to exceed two years. We may extend that period in writing during the two years.

Coverage Form (CP 00 17 06 17), at page 4 of 14 – page 5 of 14, Additional Coverages §4(e)(2), 4(e)(7)(a)(i)-(ii).

Because there is no dispute that American Coastal denied Majorca's claim outright within 90 days, this two-year repair/replace Policy term was rendered moot, does not apply to the Parties' pre-lawsuit dealings and, therefore, compliance was not required. Enforcing this provision prior to providing coverage is like putting the cart before the horse.

D. ACTUAL CASH VALUE (ACV) AND REPLACEMENT COST VALUE (RCV)

In the Policy's Coverage Form, American Coastal sets forth additional terms that may apply if, and only if, American Coastal determines that Hurricane Irma caused damage to the Majorca I Property. Those additional terms, ACV and RCV, provide the following:

c. You may make a claim for loss or damage covered by this insurance on actual cash value basis instead of on a replacement cost basis. In the event you elect to have loss or damage settled on an actual cash value basis, you may still make a claim for the additional coverage this Optional Coverage provides if you notify us of your intent to do so within the 180 days after the loss or damage.

d. We will not pay on a replacement cost basis for any loss or damage:

(1) Until the lost or damaged property is actually repaired or replaced; and

(2) Unless the repairs or replacement are made as soon as reasonably possible after the loss or damage.

Coverage Form, Optional Coverages (CP 00 17 06 07), at page 14 of 14, §§ G.3(c) & (d).

As the plain terms of these provisions state, a request to have American Coastal pay Majorca on an ACV basis is not mandatory but purely discretionary, or at Majorca's "elect[ion]." Under the ACV term, Majorca had 180 days to exercise its discretion to voluntarily seek ACV, but American Coastal denied the claim within 90 days, rendering the 180-day term moot, inapplicable to the Parties' pre-lawsuit dealings and, accordingly, compliance was not required. The same conclusion applies to the RCV term, which must be read together and in harmony with the ACV provision. Because Majorca never had 180 days to decide whether to seek ACV, it never sought RCV either because American Coastal denied the claim within 90 days.

E. MAJORCA'S POST-DENIAL CONTRACT OBLIGATIONS

At the February 1, 2023 summary judgment hearing, Majorca argued that there are no provisions in the Policy that govern Majorca's post-denial obligations—specifically, that there is no post-denial obligation to seek ACV, RCV, or repair and/or replace the damaged Property within two years after the loss. Upon a full review of the Policy, the Court finds that the Policy contains no provisions that impose any post-loss obligations on Majorca once its claim was denied on February 26, 2018. Neither in its briefs, nor at the February 1 argument, did American Coastal identify any Policy term that governed Majorca's post-denial contract obligations.

IV. SUMMARY JUDGMENT ANALYSIS

On summary judgment, this Court must “view the evidence and all factual inferences therefrom in the light most favorable to the non-moving party, and resolve all reasonable doubts about the facts in favor of the non-movant.” *Davila v. Gladden*, 777 F.3d 1198, 1203 (11th Cir. 2015); accord *Diaz v. Cabeza*, 51 So. 3d 556, 558 (Fla. 3d DCA 2010); *Scott v. Strategic Realty Fund*, 311 So. 3d 113, 116 (Fla. 2d DCA 2020). Summary judgment is only proper when “there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fla. R. Civ. P. 1.510(a). Therefore, “the correct test for the existence of a genuine factual dispute is whether ‘the evidence is such that a reasonable jury could return a verdict for the nonmoving party.’” *In re Amendments to Florida Rules of Civil Procedure 1.510*, 317 So. 3d 72, 75 (Fla. 2021).

A. THE PLAIN TERMS OF THE INSURANCE POLICY PRECLUDE SUMMARY JUDGMENT IN FAVOR OF AMERICAN COASTAL.

Insurance policies are contracts subject to the same rules of construction governing all contracts. *See Trinidad v. Florida Peninsula Ins. Co.*, 121 So. 3d 433, 441 (Fla. 2013). “Where the words of a contract in writing are clear and unambiguous, its meaning is to be ascertained in accordance with its plainly expressed intent.” *Super Cars of Miami, LLC v. Webster*, 300 So. 3d 752, 755 (Fla. 3d DCA 2020) (quoting *M & G Polymers USA, LLC v. Tackett*, 574 U.S. 427, 435 (2015)). As such, “[w]hen a contract is silent as to a term, as this contract is, a court should not remedy the deficiency by divining from its crystal ball the drafter’s intent.” *Pasteur Health Plan v. Salazar*, 658 So. 2d 543, 544 (Fla. 3d DCA 1995). “We cannot determine the rights of the parties by looking at only a part of the contract. We must construe it as a whole.” *Id.* (quoting *Marion Mortg. Co. v. Howard*, 131 So. 529, 531 (1930)). “[A] cardinal principle of contract interpretation is that the contract must be interpreted in a manner that does not render any provision of the contract meaningless.” *Id.* (quoting *Silver Shells Corp. v. St. Maarten at Silver Shells Condo. Ass'n, Inc.*, 169 So.3d 197, 203 (Fla. 1st DCA 2015)). Thus, the Court “‘must construe the provisions of a contract in conjunction with one another so as to give reasonable meaning and effect to all of the provisions.’” *Id.* (quoting *Aucilla Area Solid Waste Admin. v. Madison Cty.*, 890 So.2d 415, 416-17 (Fla. 1st DCA 2004)).

Here, American Coastal argues that, despite its outright denial of Majorca's claim on February 26, 2018, Majorca was contractually obligated before filing this lawsuit to seek ACV and/or RCV and/or replace the damage to the Majorca I Property within two years after Hurricane

Irma struck, or by September 10, 2019. American Coastal argues that because Majorca did not comply with these post-denial contractual obligations, it may not recover ACV or RCV damage or damages for increased costs of construction (law and ordinance).

The plain terms of the Policy do not support American Coastal's position, rendering summary judgment inappropriate. First, the Policy does not impose any post-loss conditions on Majorca once the claim was denied outright in February 2018. As such, American Coastal seeks to add new terms to the Policy that do not exist, something this Court cannot do. *See Pasteur Health Plan*, 658 So. 2d at 544. As the Second District Court of Appeals observed in *Castro v. Homeowners Choice*, 228 So. 2d 596 (Fla. 2d DCA 2017) in reversing summary judgment in favor of an insurer:

[The Policy does not] include any language that would inform an insured that an attempt to negotiate a settlement after a denial of coverage would act as a reopening of a claim requiring the insured to comply with policy conditions precedent that it never initially invoked or requested. Furthermore, Florida law regulating insurance does not define what constitutes the reopening of a claim of loss after a denial of coverage or reference any obligation that an insured comply with policy conditions precedent after the denial of coverage. *Id.* at 599.

Second, putting aside American Coastal's denial, the Policy does not require Majorca to make an ACV or RCV claim or to repair and/or replace the Property within two years of the loss to obtain coverage. As the plain terms of the Policy state, Majorca did not have that duty as part of its post-loss obligations. Nor was American Coastal obligated to pay on an ACV/RCV basis prior to denying the claim. And, the increased-construction-costs (law and ordinance) and ACV/RCV terms are all premised on a finding by American Coastal that Hurricane Irma caused damage to the Property. Based on the record and its own denial letter of February 26, 2018, there is no dispute that American Coastal unequivocally denied coverage and stated that neither Hurricane Irma (nor any other covered loss) caused damage to the Property.

B. THERE IS A DISPUTED ISSUE OF FACT ABOUT WHETHER AMERICAN COASTAL COMMITTED A PRIOR MATERIAL BREACH OF THE INSURANCE CONTRACT.

Even if the Court were to agree with American Coastal that the Policy contains post-denial contract obligations, American Coastal still would not be entitled to summary judgment because an issue of fact exists as to whether American Coastal materially breached the contract. It is axiomatic that “[a] material breach by one party may be considered a discharge of the other party’s obligations thereunder.” *Nacoochee Corporation v. Picket*, 948 So. 2d 26, at 30 (Fla. 1st DCA 2006); *accord Popular Bank of Fla. v. R.C. Asesores Financieros, C.A.*, 797 So. 2d 614, 622 (Fla. 3d DCA 2001) (“Upon Popular Bank’s material breach of the 1989 amendment by failing to pay service and termination adjustment fees, RCAF was excused as a matter of law from complying with its exclusivity or noncompete provision and to recover damages for the bank’s breach.”); *Bradley v. Health Coalition, Inc.*, 687 So. 2d 329, 333 (Fla. 3d DCA 1997) (“Having committed the first breach, the general rule is that a material breach of the Agreement allows the non-breaching party to treat the breach as a discharge of his contract liability.” (internal quotations and citations omitted)).

Consistent with this basic principle of contract law, the Third District Court of Appeal has held that if an insurer wrongfully denies coverage, then the insured is discharged of its contract obligations.^[1] Federal courts applying Florida law have reached the same conclusion.^[2]

In *Water Restoration Guys*, the Third District Court of Appeal rejected the exact argument advanced here by American Coastal, noting the “absurd[ity]” of any insurance-contract interpretation that requires an insured to provide documentation and comply with post-loss conditions following a denial of a claim:

To require an insured . . . to provide documentation irrelevant to the purported basis for the denial, and after the denial decision is made, would be an absurd reading of the policy at issue... [T]he failure to comply with policy provisions made superfluous by [the Insurer’s] denial, provides no basis for summary judgment or final judgment in favor of [the Insurer]. *Water Restoration Guys*, 347 So. 3d at 451.

Here, the Court rejects American Coastal’s contention that it can materially breach the policy and still rely on the policy to deny Majorca damages in this litigation. That position runs counter to contract law and the unanimous view among Florida appellate courts that have squarely addressed the question. Under binding Third District precedent, Majorca was not required to comply with post-denial policy conditions made superfluous and moot by American Coastal’s quick denial of the claim. *See Water Restoration Guys*, 347 So. 3d at 450-51; *Wegener*, 494 So. 2d at 259. And, the question of whether the damage to the Property was a “covered loss” and whether American Coastal’s denial was wrongful are hotly contested fact issues that the jury must decide. Indeed, causation and damages are the two central, disputed issues in the case. If the jury agrees with Majorca that Hurricane Irma did, in fact, cause damage to its Property, then Majorca will not be constrained by policy terms and alleged post-lost conditions that may limit its damages, such as those American Coastal raises in its motions for partial summary judgment.

American Coastal cites cases that do not support its position. In each of those cases, the insurer either granted coverage or otherwise never denied coverage, thereby requiring the insured to comply with contractual obligations.^[3] For example, in *Buckley Towers*, the insurer did not deny the insured’s claim and construed the claim as a request for RCV damages. 395 F. App’x at 661-62. The court held that the insured was bound by the insurance contract to comply with the RCV term to repair and replace the property, which the insured had not done. *Id.* at 663-64. The court distinguished a situation where an insurer wrongfully denies a claim denial (as here), acknowledging that Florida law holds that an insurer cannot rely on noncompliance with policy terms after a claim is denied. *Id.* at 664 n.1 (discussing and distinguishing *Kovarnik*, 363 So. 2d at 169, where the appellate court reversed summary judgment for the insurer, reasoning: “The underlying rationale throughout this line of cases is that an insurer may not repudiate a policy, deny liability thereon, and at the same time be permitted to stand on the failure to comply with a provision inserted in the policy for its own benefit.”).

Likewise, in *CMR Construction & Roofing*, 843 F. App’x 189, the insurer acknowledged coverage and paid the claim. *Id.* at 191 (“After Hurricane Irma, [the insured] reported to [the insurer] that its buildings had been damaged. [The insurer] inspected the property and, based on its estimate of the repair cost and factoring in the deductible and depreciation, it paid [the insured]

\$96,763.53.”). The issue presented in *CMR* was whether the insurer owed more under the policy. The insured sued and claimed that the insurer breached the policy by not paying RCV and ACV. *Id.* at 191-92. As in *Buckley Towers*, the Eleventh Circuit concluded that the insured had contractual obligations related to ACV and RCV. *Id.* The court concluded that “[t]here is no reason to think that if [the insured] had actually repaired the damaged property, as the policy requires, Empire would have denied coverage for the cost of the completed repairs.” *Id.* at 192.

Here, it is undisputed American Coastal denied coverage. The Third District Court of Appeal, as well as numerous other Florida appellate courts, have uniformly held that an insured like Majorca need not comply with policy conditions after an insurer wrongly denies a claim outright. American Coastal has not cited a single case that involves the situation presented here—an alleged material breach of contract and repudiation of coverage within 90 days of a claim being filed. Nor does any case upon which American Coastal relies involve a situation where, as here, the policy conditions upon which the insurer relied were rendered moot and/or superfluous in light of a claim denial (i.e., requiring Majorca to elect ACV 180 days after the loss when the claim was denied before the expiration of the 180-day period).

Finally, the Court rejects American Coastal’s contention that the cases involving denials of coverage only involve conditions precedent to filing suit. *Tio*, for example, involves the same claims made by American Coastal in this case. *Tio*, 304 So. 3d at 1279. There, the insurer “asserted that [the insured] was not entitled to any consideration of replacement cost value damages because [the insured] had not undertaken any repairs to the subject property.” *Id.* The Third District Court of Appeals held that the insured was not required to comply with this RCV policy condition—which was not a condition precedent to filing suit—because the insurer wrongfully denied coverage. *Id.* (holding that insurer cannot enforce the terms of its policy “at its convenience” when the insurer “breached the insurance contract”); *accord Perez*, 2021 WL 1390398, at *1-*2 (same). Several other cases make clear that an insured like Majorca need not comply with post-loss policy conditions that are not conditions precedent to filing suit. *See, e.g., Goldberg*, 302 So. 3d at 925 (repudiation of coverage discharged insured of obligation to file supplemental insurance claim); *Bryant*, 271 So. 3d at 1021 (repudiation of coverage discharged insured of obligation to file proof of loss); *Ifergane*, 232 So. 3d at 1065 (repudiation of coverage relieves insured of having to provide insurer information and examination under oath post-denial).

C. THERE IS A DISPUTED ISSUE OF FACT ABOUT MAJORCA’S REASONS FOR NOT COMPLYING WITH POST-DENIAL POLICY CONDITIONS, THUS PRECLUDING SUMMARY JUDGMENT.

Notwithstanding that summary judgment is denied based on the terms of the Policy and because there are disputed fact issues as to whether American Coastal materially breached the Policy, summary judgment should be denied for another separate and independent reason. Where, as here, an insurer alleges noncompliance with post-loss conditions, “if [] the insured cooperates to some degree or provides an explanation for its noncompliance, a fact question is presented for resolution by a jury.” *El Dorado Towers Condo. Ass’n, Inc. v. QBE Ins. Corp.*, 717 F. Supp. 2d 1311, 1318 (S.D. Fla. 2010) (interpreting Florida law) (*quoting Coconut Key Homeowners Ass’n, Inc. v. Lexington Ins. Co.*, 649 F. Supp. 2d 1363, 1369 (S.D. Fla. 2009)); *El Dorado Towers Condominium Ass’n, Inc. v. QBE Ins. Corp.*, Case No. 09-20047, 2010 WL 2400082, at *6 (S.D.

Fla. June 16, 2010) (interpreting Florida law) (denying insurer's motion for summary judgment; holding that genuine issues of material fact existed whether insured complied with policy conditions); *Vision I Homeowners Ass'n, Inc. v. Aspen Specialty Ins. Co.*, 674 F. Supp. 2d 1333, 1340 (S.D. Fla. 2009) (interpreting Florida law) (denying insurer's motion for summary judgment; finding that genuine material issues of fact exist whether insured cooperated with policy conditions to some degree); *Schnagel v. State Farm Mut. Auto. Ins. Co.*, 843 So. 2d 1037, 1038 (Fla. 4th DCA 2003) (demand for production of documents under insurance policy was part of the policy's cooperation clause; summary judgment was improper where the insured cooperated to some degree); *Haiman v. Fed. Ins. Co.*, 798 So. 2d 811, 812 (Fla. 4th DCA 2001) ("Whether the failure to produce documents requested is a material breach would be a question of fact for the jury."); *Continental Ins. Co. v. Roberts*, Case No. 8:05-CV-1658, 2008 WL 1776552, *6 (S.D. Fla. April 18, 2008) (whether insured failed to cooperate as required by "cooperation clause" of the policy is an issue of fact, not one of law).

That is the case here. Majorca states, through sworn statements by its public adjuster and its Board president, that it has neither made permanent repairs nor has it otherwise replaced the roofs at the Property because American Coastal materially breached the Policy by denying the insurance claim outright within 90 days of a claim being made. According to these witnesses, Majorca made temporary repairs to the Property only and paid for those expenses out of its own pocket after American Coastal denied coverage. American Coastal disputes this explanation. However, the jury, not this Court on summary judgment, should decide whether this explanation is justified and whether, as an issue of fact, Majorca substantially complied with the Policy terms at issue or took such justifiable actions that excuses it from additional compliance.

V. CONCLUSION

For the foregoing reasons, American Coastal's two Motions for Partial Summary Judgment (Dkt. No. 49 and Dkt. No. 50) are hereby DENIED.

^[1] See *Water Restoration Guys, Inc. v. Citizens Property Ins. Corp.*, 347 So. 3d 449, 450 (Fla. 3d DCA 2022) (reversing summary judgment for insurer; "When an insurance carrier investigates a claim of loss and denies coverage because it concludes that a covered loss has not occurred, the insurance carrier cannot assert the insured's failure to comply with the policy's conditions precedent to filing suit as a basis for summary judgment." (internal quotations and citation omitted)); *Citizens Property Ins. Co. v. Tio*, 304 So. 3d 1278, 1280 (Fla. 3d DCA 2020) ("Citizens contracted with Tio to provide coverage for a direct loss to property covered by the policy. After Citizens breached that contractual obligation, the trial court properly instructed the jury on how to value the insured's relevant damages, and the jury rendered a verdict for Tio that was supported by competent substantial evidence."); *Ifergane v. Citizens Property Ins. Corp.*, 232 So. 3d 1063, 1065 (Fla. 3d DCA 2017) (reversing summary judgment for the insurer; "should the factfinder determine

that Citizens' letter was a denial of coverage letter, then as a matter of law, Citizens waived any right it had to enforce the insured's post-loss conditions..."); *Wegener v. International Bankers Ins. Co.*, 494 So. 2d 259, 259 (Fla. 3d DCA 1986) (reversing directed verdict in favor of insurer; "as a matter of law, the effect of the thus-found-to-be-improper repudiation of coverage was to waive any right to insist upon the insured's necessarily-thus-futile compliance with the various conditions to recovery"); see also *Bryant v. GeoVera Specialty Ins. Co.*, 271 So. 3d 1013, 1021 (Fla. 4th DCA 2019) (same); *Goldberg v. Universal Prop. & Cas. Ins. Co.*, 302 So. 3d 919, 925 (Fla. 4th DCA 2020) ("[B]y failing to pay any amount for the personal property loss [of Plaintiff], Universal effectively denied coverage for the loss. Such a denial of coverage waives the insurer's right to insist upon the insured's compliance with policy conditions"); *Castro*, 228 So. 3d at 599 ("When an insurance carrier investigates a claim of loss and denies coverage because it concludes that a covered loss has not occurred, the insurance carrier cannot assert the insured's failure to comply with the policy's conditions precedent to filing suit as a basis for summary judgment."); *Mercury Ins. Co. of Fla. v. Anatkov*, 929 So. 2d 624, 627 (Fla. 3d DCA 2006) ("Where, as here, an insurer denies coverage which actually exists, the insurer has breached the contract and therefore cannot be allowed to rely upon a contractual provision ...in order to relieve itself from liability." (internal quotations and citation omitted)); *Kovarnik v. Royal Globe Ins. Co.*, 363 So. 2d 166, 169 (Fla. 4th DCA 1978) (reversing summary judgment for insurer; "an insurer may not repudiate a policy, deny liability thereon, and at the same time be permitted to stand on the failure to comply with a provision inserted in the policy for its own benefit."); *Indian River State Bank v. Hartford Fire Ins. Co.*, 35 So. 228, 246 (Fla. 1903) ("Did the defendant company absolutely repudiate or deny all liability upon the policy sued upon? If it did, then it follows as a legal consequence that it has waived the making of proofs of loss provided for in the policy.").

[2] See *Perez v. Brit UW Limited*, Case No. 19-CV-22024, 2021 WL 1390398, at *1 (S.D. Fla. April 13, 2021) (interpreting Florida law) ("The [Insureds] did not receive any monies from the [Insurer] for any of its damages resulting from Hurricane Irma and therefore could not have provided proof that the "Actual Cash Value" of its damages were used before seeking additional monies from the [Insurer]."); *id.* ("The [Insurer] denied a majority of the [Insured] damages claiming that they pre-existed and therefore were not covered under the insurance policy. *This clearly is a question of fact that must be resolved by the jury.* If the [Insureds] are correct then the Defendant would be in breach of its insurance contract and all damages resulting from said breach would be compensable. *The simple fact that the contract at issue in this case is an insurance policy does not change the principles of damages in contract law*" (emphasis added); *id.* at *2 ("[B]ased on the competing estimates of damages, it is clear that the [Insurer] is taking the position that only a small fraction of the damages resulting from Hurricane Irma are covered under the insurance policy. Therefore, *the determination of what amount is necessary to put the Plaintiffs' home in its pre-loss condition is a question of fact for the jury.*" (emphasis added)); *2000 Island Boulevard Condominium Ass'n, Inc. v. QBE Ins. Corp.*, Case No. 11-20247, 2012 WL 13071266, at *5 (S.D. Fla. Jan. 19, 2012) (interpreting Florida law) (denying insurance carrier's motion *in limine* because "whether [the insured] is required to strictly comply with the terms of the policy hinges on the trier of fact's decision regarding whether [the insurer] first breached the policy."); *Nu-Air Mfg. Co. v. Frank B. Hall of N.Y.*, 822 F.2d 987, 993 (11th Cir. 1987) (interpreting Florida law) ("Where an insurer unconditionally denies liability, it waives all policy provisions governing notification of loss, proof of loss, and payment of premiums.").

[3] See *Ceballo v. Citizens Property Ins. Co.*, 967 So. 2d 811, 812 (Fla. 2007) (insurer covered and paid face value of policy as a result of total loss of home by fire; question was whether insured could automatically recover policy limits of supplemental insurance for same loss without providing additional damages); *State Farm Fire & Cas. Co. v. Patrick*,

647 So. 2d 983, 983 (Fla. 3d DCA 1994) (coverage granted and claim paid; question presented was whether insurer wrongfully withheld depreciation); *CMR Construction & Roofing, LLC v. Empire Indemnity Ins. Co.*, 843 F. App'x 189, 191 (11th Cir. 2021) (*per curiam*) (interpreting Florida law) (insurer granted coverage and paid claim; dispute was whether insurer should have paid more); *Buckley Tower Condominium, Inc. v. QBE Ins. Corp.*, 395 F. App'x 659, 661-62, 663-64 (11th Cir. 2010) (interpreting Florida law) (insurer never "fully rejected" insured's claim; court held that insured had contractual obligations under RCV provision of the policy); *Diamond Lake Condominium Ass'n, Inc. v. Empire Indemnity Ins. Co.*, Case No. 19-CV-547, 2021 WL 6118076, at *1 (M.D. Fla. Dec. 27, 2021) (interpreting Florida law) (insurer granted coverage but the parties disagreed over valuation of the loss); *Oriole Gardens Condominium Ass'n v. Aspen Specialty Ins. Co.*, 875 F. Supp. 2d 1379, 1381 (S.D. Fla. 2012) (interpreting Florida law) (coverage granted and ACV paid; insured failed to timely file supplemental claim for RCV as requested by the insurer); *Vision I Homeowners Ass'n, Inc. v. Aspen Specialty Ins. Co.*, 674 F. Supp. 2d 1328, 1329, 1333 (S.D. Fla. 2009) (interpreting Florida law) (insurer made no coverage decision; it "failed to adjust, pay, and/or settle the claim"; insured claimed breach of contract for failing to pay ACV or RCV).

DONE and **ORDERED** in Chambers at Miami-Dade County, Florida on this 9th day of February, 2023.


2021-005183-CA-01 02-09-2023 2:38 PM

2021-005183-CA-01 02-09-2023 2:38 PM

Hon. Ariana Fajardo Orshan

CIRCUIT COURT JUDGE

Electronically Signed

No Further Judicial Action Required on THIS MOTION

CLERK TO RECLOSE CASE IF POST JUDGMENT

Electronically Served:

Charles L. Gowland, Jr., Esq., charles@constable-law.com

Charles L. Gowland, Jr., Esq., lit@constable-law.com

Charles L. Gowland, Jr., Esq., kate@constable-law.com

Charles Louis Gowland Jr., charles@constable-law.com

Charles Louis Gowland Jr., cgowland24@gmail.com

David J. Maldoff Esq., dmaldoff@butler.legal

David J. Maldoff Esq., hkerr@butler.legal

David J. Maldoff Esq., dmaldoff@butlerpappas.com

James S. Constable, james@constable-law.com

James S. Constable, kate@constable-law.com

James S. Constable, lit@constable-law.com

Kristina Cucinotta, kcucinotta@foley.com

Robert M Daisley, rob@daisleymediation.com
Scott J Frank, sfrank@butler.legal
Scott J Frank, ehorton@butler.legal
Shannon Nicolas, snicolas@butler.legal
Shannon Nicolas, pwilliams@butler.legal
Ugo Colella, ucolella@czlaw.com
Ugo Colella, rcastro@czlaw.com

Physically Served: