IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

MANOR HOUSE, LLC, OCEAN VIEW, LLC AND MERRITT, LLC,

Appellants,

v.

Case No. 5D17-2841

CITIZENS PROPERTY INSURANCE CORPORATION,

Appellee.

_____/

Opinion filed May 31, 2019

Appeal from the Circuit Court
for Brevard County,
Charles J. Roberts, Judge.

Mark Boyle, Alexander Brockmeyer, and Molly Chafe Brockmeyer, of Boyle & Leonard, P.A., Ft. Myers, and Christopher N. Mammel of Merlin Law Group, P.A. West Palm, for Appellants.

Kara Berard Rockenbach, and Rachel Jenny Glasser, of Link & Rockenbach, P.A., West Palm Beach, and J. Pablo Caceres, of Butler, Weihmuller, Katz and Craig, LLP, Tampa, for Appellee.

EDWARDS, J.

This case involves the snail-paced resolution of insurance claims for property damage caused by a hurricane in 2004. Manor House, LLC, Ocean View, LLC, and

Merritt, LLC (collectively "Manor House"), appeal the trial court's final orders granting Citizens Property Insurance Corporation's ("Citizens") (1) motion for partial summary judgment to prevent Manor House from pursuing a claim for extra-contractual, consequential damages, (2) motion for partial summary judgment regarding appraiser and umpire fees, and (3) motion for judgment on the pleadings on Manor House's claim for fraud. For the reasons set forth below, we affirm the partial summary judgment regarding appraiser and umpire fees, and affirm the judgment on the pleadings, but reverse the partial summary judgment regarding the consequential damages claim.

Citizens insured nine apartment buildings owned by Manor House that were damaged in September 2004 when Hurricane Frances struck. Manor House presented its claims under the Citizens insurance policy; following an inspection of the property, Citizens issued payments totaling $1,927,747. In April 2006, Manor House's public adjuster, Dietz International, asked Citizens to reopen the claim. In June 2006, Manor House presented another claim, this time for $10,000,000. After reopening the claim and assigning a new adjuster, Citizens made additional payments in September 2006 totaling $345,192. Then, in December 2006, Citizens' field adjuster informally estimated the "actual cash value" of the loss at $5,489,062 and the "replacement cost value" of the loss at $6,410,456. Meanwhile, Manor House's public adjuster estimated the replacement cost value at $10,027,087.

In an effort to resolve the dispute over costs, in March 2007 Jeffrey Wells, the apartment complex's new owner and Manor House's litigation agent, sent Citizens a letter requesting payment of the "undisputed" amount of $6.4 million, i.e. the field adjustor's informal estimate of replacement costs, and demanding an appraisal. Citizens responded

by challenging Mr. Wells' authority to act on behalf of Manor House and asked for documentary proof of his authority. Citizens also asked Mr. Wells to supply documentation it said was necessary to consider the requests for appraisal and payment, including articles of incorporation, certified ownership records, invoices for actual costs of replacement, and contracts for the work in progress. Mr. Wells responded with a letter denying that the invoices and other documents requested by Citizens were necessary to trigger an appraisal; however, he provided the insurer with a copy of his appointment as Manor House's agent.

In August 2007, Manor House filed suit demanding prompt payment of the allegedly "undisputed" amount of $6.4 million and seeking the court to compel Citizens to engage in the policy-provided appraisal procedures.[1] The trial court granted serial motions to abate the action based upon the failure of Manor House to provide all necessary documents to Citizens. In June 2009, the trial court ordered the action stayed and directed the parties to go forward with the appraisal process. In November 2009, the appraisal panel awarded Manor House $8,649,816 in replacement cost value and $8,388,752 in actual cash value. In January 2010, Citizens paid an additional $5,502,022 to Manor House.

Manor House later filed suit against Citizens alleging, inter alia, breach of contract and fraud. On the breach claim, Manor House alleged that Citizens failed to: properly adjust the loss, pay the undisputed amount after estimates, honor Manor House's demand for appraisal, provide Manor House with documents it needed to adjust the loss,

[1] Citizens maintained that its field adjustor had no authority to convey any estimate that was binding on Citizens; hence the dispute over the supposedly "undisputed" amount.

and timely pay the appraisal award. Manor House sought to recover extra-contractual damages related to rental income that it allegedly lost due to the delay in repairing the apartment complex based on Citizens' procrastination in adjusting and paying the Manor House claims. On the fraud claim, Manor House alleged that Citizens' representations of the nature and extent of its coverage obligations were intentionally false and misleading and that it engaged in misleading claims handling practices by aggregating various general construction costs to a single building so as to exceed the policy limits applicable to that building, demanding immaterial documents regarding Manor House's insurable interest and corporate ownership, and attempting to mislead the appraisal panel by concealing information related to the estimate of damages announced by Citizens' field adjustor.

The trial court granted Citizens' motion for partial summary judgment regarding Manor House's claim that it should not have to pay its own appraiser's fees and half the cost of the umpire's fees. We agree with the trial court's analysis: the insurance policy specifically called for each party to pay its own appraiser and to share the umpire's fees. Accordingly, we affirm as to that issue with no need for further discussion.

The trial court also granted Citizens' motion for partial summary judgment on the breach of contract claim regarding lost rental income, based on the fact that the insurance policy essentially provided for property damage coverage, but did not provide coverage for lost rent. While that is an accurate reading of the insurance policy, the trial court's ruling ignores the more general proposition that "the injured party in a breach of contract action is entitled to recover monetary damages that will put it in the same position it would have been had the other party not breached the contract." *Capitol Envtl. Servs., Inc. v.*

Earth Tech, Inc., 25 So. 3d 593, 596 (Fla. 1st DCA 2009). Thus, when an insurer breaches an insurance contract, the insured "is entitled to recover more than the pecuniary loss involved in the balance of the payments due under the policy" in consequential damages, provided the damages "were in contemplation of the parties at the inception of the contract." *Life Inv'rs Ins. Co. of Am. v. Johnson*, 422 So. 2d 32, 34 (Fla. 4th DCA 1982). In *T.D.S. Inc. v. Shelby Mutual Insurance Co.*, the Eleventh Circuit noted that Florida courts "allow recovery of [consequential] damages if they were in the contemplation of the parties at the time of the creation of the insurance contract." 760 F.2d 1520, 1532 n.11 (11th Cir. 1985). Similarly, in *Rondolino v. Northwestern Mutual Life Insurance Co.*, the court held that "[i]f a party can prove loss of profits [from breach of an insurance contract] with reasonable certainty, then damages will be awarded." 788 F. Supp. 553, 555 (M.D. Fla. 1992). While *T.D.S.* and *Rondolino* are federal cases, we find them to be well-reasoned and to be consistent with this Court's opinion in *Travelers Insurance Co. v. Wells*, which held that in a claim for breach of an insurance contract, "[c]onsequential or resulting collateral damage may . . . be recovered if it can be sufficiently proved." 633 So. 2d 457, 461 (Fla. 5th DCA 1993).

In granting summary judgment, the trial court denied Manor House the opportunity to prove whether the parties contemplated that Manor House, an apartment complex, would suffer consequential damages in the form of lost rental income if Citizens breached its contractual duties to timely adjust and pay covered damages, which in this case allegedly resulted in a significant delay in completing repairs so that units could once again be rented. We hold that the trial court erred in so ruling, and we reverse that partial summary judgment so that the parties may litigate all issues related to Manor House's

claim of lost rent. It is undisputed that Citizens, a creature of statute, is immune from bad faith claims. *See* § 627.351(6)(s)1, Fla. Stat. (2017). However, the consequential damages Manor House seeks are based squarely on breach of contract claims requiring no allegation or proof that Citizens acted in bad faith.[2] Thus, Citizens is not statutorily immune from this aspect of Manor House's claim.

Finally, the trial court granted Citizens' motion for judgment on the pleadings regarding the fraud claim pursued by Manor House. The trial court agreed with Citizens that the fraud claim was barred by the independent tort doctrine. In other words, the trial court found that the allegations of Manor House's fraud claim were not distinguishable from its breach of contract claim. "A breach of contract, alone, cannot constitute a cause of action in tort. . . . It is only when the breach of contract is attended by some additional conduct which amounts to an independent tort that such a breach can constitute [a separate action in tort]." *Tiara Condo. Ass'n v. Marsh & McLennan Cos.*, 110 So. 3d 399, 408–09 (Fla. 2013) (Pariente, J., concurring) (quoting *Elec. Sec. Sys. Corp. v. S. Bell Tel. & Tel. Co.*, 482 So. 2d 518, 519 (Fla. 3d DCA 1986)); *see also HTP, Ltd. v. Lineas Aereas Costarricenses, S.A.*, 685 So. 2d 1238, 1239 (Fla. 1996) (noting that the independent tort doctrine "requires proof of facts separate and distinct from the breach of contract"). We note that certain allegations in the fraud count essentially alleged a fraudulent breach of contract, which would not amount to an independent tort, and we affirm the trial court's judgment on the pleadings of the fraud count on this ground. But we also note that Manor

[2] While it originally pled a count for breach of the covenant of good faith and fair dealing, Manor House did not contest Citizens' motion for judgment on the pleadings on that count based on its immunity from first-party bad faith claims.

House's fraud complaint contained additional allegations that attempted to assert bad faith liability, including unfair claims handling practices, which would generally amount to an independent tort precluding entry of a judgment on the pleadings. However, as discussed above, Citizens is immune from an action for first-party bad faith. *See Citizens Prop. Ins. Corp. v. Perdido Sun Condo. Ass'n,* 164 So. 3d 663, 666 (Fla. 2015) ("[T]he Legislature never listed statutory first-party bad faith claims as one of the exceptions to Citizens' immunity."). Therefore, to the extent that the trial court's judgment on the pleadings on the fraud count foreclosed bad-faith claims for failure to allege an independent tort, we affirm based on the "tipsy coachman"[3] doctrine, as we find that the trial court reached the right result even if for the wrong reasons.

Accordingly, we affirm in part and reverse in part, and remand the case for further proceedings consistent with this opinion

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED WITH INSTRUCTIONS.

ORFINGER and EISNAUGLE, JJ., concur.

[3] *Robertson v. State*, 829 So. 2d 901, 906 (Fla. 2002).