2024 WL 3812295
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United States District Court, W.D. Texas, Austin Division.

Chester & Sherry HURST, Plaintiffs,
v.
LIBERTY MUTUAL INSURANCE COMPANY, Defendant.

CIVIL ACTION NO. 1:22-cv-1093-DAE
|
Signed August 7, 2024

**Attorneys and Law Firms**

Derek Clinton Brasher, Joseph Muckleroy, Nishi V. Kothari, Brasher Law Firm, PLLC, Beaumont, TX, for Plaintiffs.

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ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

David Alan Ezra, Senior United States District Judge

***1** Before the Court is Defendant Liberty Mutual Insurance Company's ("Defendant" or "Liberty") Motion for Summary Judgment, filed on September 1, 2023. (Dkt. # 13.) Plaintiffs Chester and Sherry Hurst ("Plaintiffs") Responded on September 26, 2023. (Dkt. # 19.) Defendant Replied on October 3, 2023 and asked the Court to wait for the Texas Supreme Court to decide a certified legal question integral to this case before issuing a ruling. (Dkt. # 20.) On February 20, 2024, Defendant filed a Letter Brief informing the Court that the Texas Supreme Court had ruled on the certified question. (Dkt. # 26.) Plaintiffs responded to Defendant's Letter Brief on March 14, 2024. (Dkt. # 27.)

The Court held a hearing on July 30, 2024. After carefully considering the parties' briefs, the oral advocacy, and the relevant law, the Court **GRANTS** Defendant's Motion for Summary Judgment for the reasons below.

BACKGROUND

This lawsuit arises from hailstorm damage to Plaintiffs' home located at 102 Estrella, Horseshoe Bay, Texas 78657 (the "property"). The property was insured by Defendant Liberty Mutual, under Policy No. H3V-291-921464-40 ("policy") effective February 1, 2021 through February 1, 2022.

Plaintiffs first filed a claim on August 6, 2021. Liberty conducted an initial inspection of the property on August 16, 2021. Liberty determined the estimate for covered damages at that point was below the deductible, and no payment was issued. Plaintiffs then invoked the policy's appraisal provision on September 15, 2021. (Dkt. # 19-1, Exhibit F, at 164.) The policy's appraisal clause sets a deadline of "20 days after receiving a written request from the other" for each side to select an appraiser. (Dkt. # 13-2 at 31.) Plaintiffs again notified Defendants that they were invoking the appraisal provision on September 28, 2021. (Dkt. # 19-1, Exhibit G at 165.) Liberty had not responded to Plaintiffs' invocation on October 14, 2021, twenty-nine days after Plaintiffs gave written notice. (Id.) Plaintiffs allege this is the first breach of contract.

On October 18, 2021, Defendant finally reached out to Plaintiffs, notifying them that the claims representative assigned to the case was Brian Smith. (Id. at 169.) Plaintiffs selected Micah Harrison as their appraiser. Defendant selected Scott Cornwall as its appraiser. Defendant also continued to investigate the claim and hired Rimkus Engineering to perform a second inspection.

The appraisers failed to reach an agreement on the amount of the loss. The 424$^{th}$ Judicial District of Burnet County issued an order appointing an umpire on December 3, 2021. On March 22, 2022 the umpire issued an appraisal award, finding the Actual Cash Value ("ACV") to be $248, 696.05 ("appraisal award").

On April 5, 2022, Defendant informed Plaintiffs it still thought the damage was not covered under the policy and that the company would continue to deny their claim, despite the umpire's final appraisal award.

Plaintiffs filed this suit on September 14, 2022, alleging breach of contract, violations of the Deceptive Trade Practices Act, violations of Chapters 541, 542, and 542A of the Texas Insurance Code, misrepresentations, and breach of the duty of good faith and fair dealing. It was only after filing this lawsuit that Defendant tendered payment for the appraisal award in August 2023, approximately 500 days after the umpire issued the final appraisal award. (Dkt. # 19 at 8.) Plaintiffs have refused the tender of Defendant's payment and continue with the current suit. (Id. at 19.) Defendant has moved for summary judgment, arguing its payment of the final award eliminates Plaintiffs' claims. (Dkt. # 13 at 1.)

LEGAL STANDARD

***2** Summary judgment is appropriate if 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 genuine dispute of material fact exists 'if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.' " Bennett v. Hartford Ins. of Midwest, 890 F.3d 597, 604 (5th Cir. 2018) (quoting Anderson v. **Liberty** Lobby, Inc., 477 U.S. 242, 248 (1986)).

Accordingly, "[w]here the non-movant bears the burden of proof at trial, the movant may merely point to the absence of evidence and thereby shift to the non-movant the burden of demonstrating ... that there is an issue of material fact warranting trial." Nola Spice Designs, LLC v. Haydel Enters., 783 F.3d 527, 536 (5th Cir. 2015) (quotations omitted). "When the moving party has met its Rule 56(c) burden, the nonmoving party cannot survive a summary judgment motion by resting on the mere allegations of its pleadings." Duffie v. United States, 600 F.3d 362, 371 (5th Cir. 2010). Instead, the non-movant must identify specific evidence in the record and articulate how that evidence supports the party's claim. Willis v. Cleco Corp., 749 F.3d 314, 317 (5th Cir. 2014).

At the summary judgment stage, evidence need not be authenticated or otherwise presented in an admissible form. See Fed. R. Civ. P. 56(c); Lee v. Offshore Logistical & Transp., LLC, 859 F.3d 353, 355 (5th Cir. 2017). The court draws all reasonable inferences in the light most favorable to the nonmoving party. Wease v. Ocwen Loan Servicing, LLC, 915 F.3d 987, 992 (5th Cir. 2019). But "unsubstantiated assertions, improbable inferences, and unsupported speculation are not sufficient to defeat a motion for summary judgment." United States v. Renda Marine, Inc., 667 F.3d 651, 655 (5th Cir. 2012).

DISCUSSION

I. Breach of Contract Claim

The Fifth Circuit has held that payment and acceptance of an appraisal award bars breach of contract claims. Randel v. Travelers Lloyds of Tex. Ins., 9 F.4th 264, 267 (5th Cir. 2021). Plaintiffs argue that Defendant's breach of contract "came in two different instances: a) its failure to timely designate an appraiser and participate in the appraisal process; and b) its failure to timely pay for covered damages." (Dkt. # 19 at 17.) Defendant argues that it has paid the appraisal award in full, so it is entitled to summary judgment on Plaintiffs' breach of contract claim. (Dkt. # 13 at 1.)

Plaintiffs argue Defendant's payment of the appraisal award does not bar their breach of contract claim because (1) Plaintiff did not accept tender of the payment (2) the payment does not comprise the interior damages, and (3) Defendant did not timely pay the award.

A. Tender

Plaintiffs argue that their refusal to accept Defendant's payment of the appraisal award means their breach of contract claim is not barred. (Dkt. # 19 at 18.) Plaintiffs state they did not accept tender of Defendant's payment for the appraisal award because Defendant paid "500 days late." (Dkt. # 19 at 8.) Plaintiffs argue that because they have not accepted Defendant's payment of appraisal, there has been no payment made, so "Defendant is not entitled to summary judgment on Plaintiffs' breach of contract claims." (Id. at 19.) This argument is unavailing under the relevant precedent.

***3** Plaintiffs rejecting Defendant's tender does nothing to change that Defendant tendered payment pursuant to the conditions of the appraisal clause, which estops Plaintiffs from raising a breach of contract claim. United Neurology, P.A. v. Hartford Lloyd's Ins., 101 F. Supp. 3d 584, 619–20 (S.D. Tex. 2015), aff'd, 624 Fed. Appx. 225 (5th Cir. 2015) ("A number of courts have .... Determined that if the appraisal award has been reached in accordance with the terms of the insurance policy and the insurer has timely tendered the full amount ..., that conduct is legally sufficient to entitle the insurer to summary judgment on the breach-of-contract-claim against it.") (citations omitted); see also Caso v. Allstate Texas Lloyds, 2014 WL 528192, at *5 (S.D. Tex. 2014) ("[T]he award remains both binding and enforceable until it is set aside, notwithstanding Plaintiffs' rejection of Allstate's tender, an apparently baseless rejection for which Plaintiffs have not offered an explanation."); Nat'l Sec. Fire & Cas. Co. v. **Hurst**, 523 S.W.3d 840, 845 (Tex. App.—Houston [14th Dist.] 2017, no pet.) ("Generally, tender of the full amount owed pursuant to the conditions of an appraisal clause is all that is required to estop the insured from raising a breach of contract claim.").

B. Sufficiency of the Appraisal Award

Plaintiffs complain that the Appraisal Award is underinclusive of the damage to the property for the first time in their Response to Defendant's Motion for Summary Judgment. (Dkt. # 19 at 17.) Since the award has not been paid in full, Plaintiffs argue their breach of contract claim cannot be barred. (Id. ("Defendant's refusal to still to date make payment of the interior damages that its own appraiser and first adjuster acknowledged were damaged from a covered cause of loss shows its continual breach of its policy."))

The umpire issued an appraisal award for the "Building" with an actual cash value ("ACV") of $248,696.05. (Dkt. # 13-6 at 2.) Plaintiffs argue this does not include interior damages, so it is not a full appraisal award. (Dkt. # 19 at 17.) Defendant's appraiser, Cornwall, explained in his report that the "interior damage had already been repaired" before **Liberty's** initial inspection. (Dkt. # 13-5 at 3.) **Liberty's** original estimate included the interior damage to the garage and kitchen. (Id.) Cornwall again addressed the damage in his estimate. It was Plaintiff's appraiser, Harrison, who did not address the interior and only inspected the roof. (Id.) Plaintiffs' own appraisal therefore excluded interior damage.

Plaintiffs argue that their appraiser did not include the repair costs since the interior repairs were completed before Harrison's appraisal. (Dkt. # 19 at 17.) But Harrison's failure to suggest an alternative estimate for the interior damages does not mean there is a "dispute over the interior damages." (Id.) Indeed, Plaintiff's Response does not put forward a different estimate of interior damages, instead relying on Defendant's valuation. (Id. at 18.) Plaintiffs' and their appraiser's actions indicate Plaintiffs agreed with **Liberty** and its appraiser as to the amount of interior damages.

Plaintiffs assert that the umpire's award does not include interior damages. Plaintiffs point to Cornwall's report as proof that the umpire did not consider the interior damages so the "appraisal was not even a full appraisal of all damages claimed, as the garage and kitchen damages were not addressed." (Dkt. # 19 at 6 – 7 (emphasis omitted).) But Cornwell did address the interior damage in his estimate. (Dkt. # 13-5 at 3.) And Cornwell's estimate, including interior damage, was sent to the umpire. (Id.) The umpire then determined that the coverage for the "Building" was an ACV of $248,696.05. (Id. at 5.) The umpire's report and Cornwell's report show that the umpire found this ACV for the "Dwelling" in total. (Id. at 4.) And Plaintiff's own appraiser signed off on the appraisal award, even when Cornwell did not. (Id. at 5.) Plaintiff provides no reason to believe the umpire did not consider the total damage before him in determining the appraisal award, including the interior damage assessment provided by Cornwell. Defendant did not subsequently address "the interior damages that its own appraiser believed would be owed in the claim" because there is no indication this estimate, provided to the umpire, is not included in the appraisal award. (Dkt. # 19 at 8.)

***4** At the summary judgment stage, the court draws all reasonable inferences in the light most favorable to the nonmoving party. Wease, 915 F.3d at 992. But the non-movant must identify specific evidence in the record and articulate how that evidence supports the party's claim. Willis, 749 F.3d at 317. "[U]nsubstantiated assertions, improbable inferences, and unsupported speculation are not sufficient to defeat a motion for summary judgment." Renda Marine, 667 at 655.

Here, Plaintiffs have not identified evidence in the record that either (1) shows a material question of fact as to how much the interior damages should be or (2) presents a material question of fact as to whether the umpire included interior damages in the appraisal award. Plaintiffs point only to Defendant's estimate of the interior damages and make no argument for how or why the estimate is insufficient. (See Dkt. # 19.) Then Plaintiffs speculate without support that the umpire did not consider interior damages in the appraisal award even though Defendant's own appraiser included those damages in his estimate, which was sent to the umpire. (Dkt. # 13-5.) Plaintiffs show nothing in the record that supports finding the umpire did not consider interior damages. Even drawing all reasonable inferences in the light most favorable to the non-moving party, there is no evidence that the appraisal award did not include interior damages and should be adjusted. Defendant has paid the award in full.

C. Timeliness of the Award

Defendant's own policy says that it has 5 business days to issue payment for covered losses. (Dkt. # 19 at 17.) But Defendant took 500 days to pay the appraisal award. (Id.) Plaintiffs therefore argue that their breach of contract claims are not estopped by Defendant's payment. (Id. at 18 ("Here, the Plaintiffs' breach of contract claim is premised on the fact that Defendant failed to ... timely pay the appraisal award."))

Plaintiffs' argument is again in direct conflict with the relevant precedent. The Fifth Circuit in Randel explained that "[a]n insured's payment of an appraisal award may defeat a contract claim, but it does not automatically prevent a prompt-payment claim.... an insurer may be liable under the Texas Prompt Payment of Claims Act even when it pays in full if that payment is not timely." Randel, 9 F.4th at 265. The Texas Insurance Code provides that an insurer must pay a claim within 60 days of receiving all requested information necessary to evaluate the claim. Tex. Ins. Code § 542.058(a). If the full payment occurs after the 60-day deadline as here, the insurer must pay interest under the TPPCA. Id. § 542.060(a). But the breach of contract claims are still estopped. Great Am. Ins. of New York v. Midland Chin Baptist Church, Inc., No. MO:20-CV-00025-DC, 2022 WL 1811206, at *3 (W.D. Tex. Jan. 11, 2022) (quoting Nat'l Sec. Fire & Cas. Co. v. Hurst, 523 S.W.3d 840, 845 (Tex. App.—Houston [14th Dist.] 2017, no pet.)) ("Tender of the full amount owed pursuant to the conditions of an appraisal clause is [generally] all that is required to estop the insured from raising a breach of contract claim."); see also Randel 9 F.4th at 268 (quoting Ortiz v. State Farm Lloyds, 589 S.W.3d 127, 129 (Tex. 2019) (finding that the rule that "the insurer's payment of the [appraisal] award bars the insured's breach of contract claim premised on failure to pay the amount of the covered loss"—"applies even when ... the insurer initially denies the insured's claim" and explaining that "[a]s Ortiz has failed to identify any breach other than the failure to timely pay the amount of the covered loss under the policy, State Farm was entitled to summary judgment on the breach of contract claim.")) (internal citation omitted).

***5** Defendant's late payment of the appraisal award entitles Plaintiffs to interest under the TPPCA, but Plaintiffs breach of contract claim is still estopped.

D. Failure to Timely Participate in Appraisal Process

Even if Plaintiffs' breach of contract claim were not estopped, Plaintiffs still fail to sufficiently claim breach of contract for Defendant's failure to timely participate in the appraisal process. The Court briefly addresses this point to demonstrate the insufficiency of the evidence Plaintiffs present.

Plaintiffs invoked the policy's appraisal provision on September 15, 2021. (Dkt. # 19-1, Exhibit F, at 164.) The policy's appraisal clause sets a deadline of "20 days after receiving a written request from the other" for each side to select an appraiser. (Dkt. # 13-2 at 31.) Plaintiffs again notified Defendants that they were invoking the appraisal provision on September 28, 2021. (Dkt. # 19-1, Exhibit G at 165.) **Liberty** had not responded to Plaintiffs' invocation on October 14, 2021, twenty-nine days after Plaintiffs gave written notice. (Id.) Plaintiffs allege this is the first breach of contract.

To prevail on a valid breach of contract claim, a plaintiff must prove that 1) there was a valid contract; 2) that plaintiff has performed her obligations under the contract or tendered performance; 3) that defendant has breached the contract in some manner; and 4) plaintiff has sustained damages because of defendant's breach. See Brooks v. Excellence Mortgage, Ltd., 486 S.W.3d 29, 36 (Tex.App.—San Antonio 2015, pet. denied). Plaintiffs here fail to demonstrate any damages resulting from Defendant's breach of contract. On a Motion for Summary Judgement, Plaintiffs should point to evidence in the record to reasonably support their claim. Willis, 749 F.3d at 317. With no argument or evidence that Defendant's two-week delay in participating in the appraisal process resulted in damages, Plaintiff's breach of contract claim based on appraisal participation would be denied even if it were not estopped by Defendant's payment of the appraisal award. [1]

II. Independent Injuries and Bad Faith

Plaintiffs argue that Defendant's failure to pay the award in a timely fashion demonstrates bad faith because Defendant had an obligation to pay when the liability for claims was reasonably clear and Defendant failed to pay once the evidence showed the liability was reasonably clear. (Dkt. # 19 at 22.)

Under Texas Supreme Court precedent, "the payment of an appraisal award forecloses statutory and common law 'bad faith' claims unless the insurer acted in bad faith in such a way that it caused an injury independent of the benefits owed under the policy." Gonzalez v. Allstate Fire &

Cas. Ins., No. SA-18-CV-00283-OLG, 2019 WL 13082120, at *4 (W.D. Tex. Dec. 2, 2019) (citing Ortiz v. State Farm Lloyds, 589 S.W.3d at 134; USAA Tex. Lloyds Co. v. Menchaca, 545 S.W.3d 479, 499-500 (Tex. 2018)). Independent injury only includes damages that are "truly independent" of policy benefits and does not include damages that "flow" or "stem" from the denial of the claim for policy benefits. USAA Tex. Lloyds Co. v. Menchaca, 545 S.W.3d at 499–500.

***6** Here, Plaintiffs fail to establish that they suffered independent damages. Plaintiffs claim that Defendant's denial of the claim even after the umpire's appraisal award has forced Plaintiffs to "hire multiple experts to prosecute this claim, including a clay tile roofing expert, their original appraiser, and a claims' handling expert." (Dkt. # 19 at 20–21.) Plaintiffs claim the other expenses incurred includes "$9,391.91 in expenses that Plaintiffs' counsel (and by extension, Plaintiffs) have come out of pocket ... [and] $1,937.50 in appraisal costs ..." (Id. at 21.) Plaintiffs also assert the interior repairs made to the property constitute independent injury.

Contrary to Plaintiff's assertion that these are independent damages outside the policy benefits, these damages flow directly from Defendant's denial of the claim. See Rodriguez v. Safeco Ins. of Indiana, 73 F.4th 352, 354 n.1 (5th Cir. 2023) ("The appraisal costs in this case 'flow' and 'stem' from the denial of Rodriguez's claim, thus, the costs do not meet the independent injury rule under Menchaca."). But for Defendant's denial, Plaintiffs would not have had to hire experts or appraisers. And Defendant established that the interior repairs made to the property were covered under the policy benefits. As explained above, nothing suggests that the appraisal award did not account for the interior damages, and they are not independent of Plaintiffs' policy benefits or Defendant's denial of the claim. Since Defendant has paid the entire appraisal award and all statutory interest possibly owed under the TPPCA, Plaintiffs cannot sustain a bad faith claim without independent injury.

III. Attorney's Fees

The Texas Supreme Court's holding in Rodriguez v. Safeco Ins. of Indiana clearly forecloses Plaintiffs' ability to recover attorney's fees in this case. 684 S.W.3d 789 (2024). The Rodriguez court held that Section 542.A007 of the Texas Insurance Code "prohibits an award of attorney's fees when an insurer has fully discharged its obligations under the policy by voluntarily paying the appraised amount, plus any statutory interest, in compliance with the policy's appraisal provisions." Id. at 792. Here, Defendant has paid the full appraisal amount plus the statutory interest it could owe. Plaintiffs are not entitled to attorney's fees.

Plaintiffs argue that the Rodriguez court only addressed the availability of attorney's fees when an insured timely pays the arbitration award. (Dkt. # Response at X.) While true, the Texas Supreme Court concluded that "unavailability of attorney's fees in cases like this one—*or in any case*—comes nowhere close to an unthinkable or unfathomable result." 684 S.W.3d at 796 (emphasis added). "[I]t is not for courts to decide if legislative enactments are wise or if particular provisions of statutes could be more effectively worded to reach what courts or litigants might believe to be better or more equitable results." Id. at 795 (citing In re Dep't of Fam. & Protective Servs., 273 S.W.3d 637, 645 (Tex. 2009)). Only if a legislative enactment creates genuinely absurd results may a court question it, and the "absurdity safety valve is reserved to truly exceptional cases." Id. at 796 (citing Combs v. Health Care Servs. Corp., 401 S.W.3d 623, 630 (Tex. 2013)). The Texas Supreme Court found this is not such a case. "The default rule is the American Rule, under which parties pay their own attorney's fees." Id. (citing Ashford Partners, Ltd. v. ECO Res., Inc., 401 S.W.3d 35, 41 (Tex. 2012)). When attorney's fees are available, it is because the Legislature created an exception to the American Rule. Id. "The Legislature's later decision to restrict—or to eliminate entirely—an exception of its own creation and thereby to move back toward the default American Rule raises no absurdity concerns." Id. The Legislature is free to eliminate attorney's fees entirely, and the Texas Supreme Court found that is exactly what it did when an insured pays an arbitration award and any statutory interest in full. Id. at 792.

***7** This Court is bound by the Rodriguez decision. Packard v. OCA, Inc., 624 F.3d 726, 729 (5th Cir. 2010) (citing United Teacher Assocs. Ins. v. Union Lab. Life Ins., 414 F.3d 558, 565 (5th Cir. 2005)) ("In determining questions of Texas law, [federal courts] look[ ] to the decisions of the Texas Supreme Court, which are binding."). Plaintiffs may not recover attorney's fees.

CONCLUSION [2]

  

Defendant's Motion for Summary Judgment is **GRANTED**. (Dkt. # 13.)

**All Citations**

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## Footnotes

1 Plaintiffs also do not assert that Defendant did not participate in the appraisal or that their chosen appraise refused to communicate or otherwise respond to Plaintiffs appraiser. See., e.g., Lape v. Amica **Mut**. **Ins**. **Co**., No. CV 21-1479, 2022 WL 2659329, at *1 (E.D. La. June 7, 2022). The two-week delay, while inconvenient, has not, from the evidence presented and arguments made, resulted in damages.

2 This Court's ruling should in no way be seen as an endorsement of Defendant **Liberty's** conduct in this matter, which was unprofessional at best.