United States District Court

EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

HIDDEN COVE PARK & MARINA, MARINE QUEST HIDDEN COVE, LP, MQTXM, LLC d/b/a TEXOMA PARK & MARINA	§	
	§	Civil Action No. 4:17-CV-00193
v.	§	Judge Mazzant
LEXINGTON INSURANCE COMPANY, and AIG CLAIMS, INC.	§	

MEMORANDUM OPINION AND ORDER

Pending before the Court is Defendants Lexington Insurance Company ("Lexington") and AIG Claims, Inc.'s Motion for Partial Summary Judgment Regarding Policy Interpretation (Dkt. #31) and Plaintiffs Hidden Cove Park & Marina, Marine Quest Hidden Cove, LP (collectively, "Hidden Cove"), and MQTXM, LLC d/b/a Texoma Park & Marina's ("Texoma Park") Motion for Partial Summary Judgment Against Defendants Lexington Insurance Company and AIG Claims Inc. (Dkt. #32). After reviewing the motions, the Court finds that Defendants' Motion should be denied and Plaintiffs' Motion should be granted.

BACKGROUND

Hidden Cove owns property at 20400 Hackberry Creek Park Rd., Denton County, The Colony, Texas 75034 and Texoma Park owns property at 449 Creek Park Rd., Grayson County, Whitesboro, Texas, 76273 (collectively, "the Property"). The Property was insured by Lexington. In May and June 2015, several storms occurred that caused damage to the Property. Lexington issued advanced payments on the policy to Plaintiffs of $1,000,000.00 to cover undisputed flood damage.

The dispute in this case arises out of the amount of coverage owed under the language in the policy. The policy provides for all-risk coverage except for losses listed in the exclusions, even caused concurrently with an included peril pursuant to the anti-concurrent-causation ("ACC") clause. The policy, in relevant part, reads:

> **B. Coverage**
>
> . . .
>
> **3. Covered Causes of Loss**
>
> Covered Causes of Loss means all risk of direct physical "loss" to Covered Property except those causes of "loss" listed in Section C. Exclusions.
>
> . . .
>
> **C. Exclusions**
>
> **1.** We will not pay for a "loss" if one or more of the following exclusions apply to the "loss" regardless of other causes or events that contribute to or aggravate the "loss", whether such causes or events act to produce the "loss" before, at the same time as or after the excluded causes or events:
>
> . . .
>
> **e. Flood**
>
> "Flood", unless a Limit of Insurance is shown on the Supplemental Declarations page, and then coverage applies only up to specified amount. Nevertheless, if a Limit of Insurance is not indicated on the Supplemental Declarations and "flood" results in fire or explosion, we will pay for the "loss" or damage caused by the resulting fire or explosion.

(Dkt. #31, Exhibit A at pp. 10–11). Further, the Supplemental Declarations page states:

> **Optional and Additional Coverages:**
>
> . . .
>
> | Flood: | **Limit of Insurance** |
> | --- | --- |
> | Per Occurrence | $1,000,000 |
> | "Policy Period" Aggregate | $1,000,000 |

(Dkt. #31, Exhibit A at p. 8).

Based on this language, Defendants moved for partial summary judgment because they contend the policy language makes clear that flood is an exclusion with a $1,000,000.00 exception (Dkt. #31). Plaintiffs filed a response (Dkt. #39), Defendants filed a reply (Dkt. #41), and Plaintiffs

filed a sur-reply (Dkt. #46). Plaintiffs also moved for partial summary judgment based on the policy language, arguing that flood is a covered peril (Dkt. #32). Defendants filed a response (Dkt. #38) and Plaintiffs filed a reply (Dkt. #42).

LEGAL STANDARD

The purpose of summary judgment is to isolate and dispose of factually unsupported claims or defenses. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323–24 (1986). Summary judgment is proper under Rule 56(a) of the Federal Rules of Civil Procedure "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 dispute about a material fact is genuine when "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 248 (1986). Substantive law identifies which facts are material. *Id.* The trial court "must resolve all reasonable doubts in favor of the party opposing the motion for summary judgment." *Casey Enters., Inc. v. Am. Hardware Mut. Ins. Co.*, 655 F.2d 598, 602 (5th Cir. 1981).

The party seeking summary judgment bears the initial burden of informing the court of its motion and identifying "depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials" that demonstrate the absence of a genuine issue of material fact. FED. R. CIV. P. 56(c)(1)(A); *Celotex*, 477 U.S. at 323. If the movant bears the burden of proof on a claim or defense for which it is moving for summary judgment, it must come forward with evidence that establishes "beyond peradventure *all* of the essential elements of the claim or defense." *Fontenot v. Upjohn Co.*, 780 F.2d 1190, 1194 (5th Cir. 1986). Where the nonmovant bears the burden of proof, the movant may discharge the burden by showing that there is an absence of evidence to support the nonmovant's case. *Celotex*, 477 U.S. at 325; *Byers v. Dall. Morning*

News, Inc., 209 F.3d 419, 424 (5th Cir. 2000). Once the movant has carried its burden, the nonmovant must "respond to the motion for summary judgment by setting forth particular facts indicating there is a genuine issue for trial." *Byers*, 209 F.3d at 424 (citing *Anderson*, 477 U.S. at 248–49). A nonmovant must present affirmative evidence to defeat a properly supported motion for summary judgment. *Anderson*, 477 U.S. at 257. Mere denials of material facts, unsworn allegations, or arguments and assertions in briefs or legal memoranda will not suffice to carry this burden. Rather, the Court requires "significant probative evidence" from the nonmovant to dismiss a request for summary judgment. *In re Mun. Bond Reporting Antitrust Litig.*, 672 F.2d 436, 440 (5th Cir. 1982) (quoting *Ferguson v. Nat'l Broad. Co.*, 584 F.2d 111, 114 (5th Cir. 1978)). The Court must consider all of the evidence but "refrain from making any credibility determinations or weighing the evidence." *Turner v. Baylor Richardson Med. Ctr.*, 476 F.3d 337, 343 (5th Cir. 2007).

ANALYSIS

Both Plaintiffs and Defendants move for summary judgment based on their interpretation of the language of the policy. Both parties agree that Defendants have paid the $1,000,000.00 in flood coverage, but dispute whether Plaintiffs can recover an additional payment for wind damage that was contributed to or aggravated by flood.

Defendants assert that the policy language clearly and unambiguously establishes that flood is an exclusion with a $1,000,000.00 exception. Defendants contend that, because flood is excluded after the $1,000,000.00 exception, the ACC clause applies to damage caused by flood even in combination with any covered loss, such as wind.

Plaintiffs claim that the policy language does not contain an exception to an exclusion because such a reading is unreasonable as it would allow Defendants to unilaterally decide what

is covered under the policy. Rather, Plaintiffs maintain that the language in the policy is an affirmation of coverage, which takes flood from an exclusion to a covered peril. Plaintiffs argue that Defendants could have included language to make flood an exclusion after payment reached the sublimit listed on the Supplemental Declarations page, but aver that Defendants did not. As such, Plaintiffs represent that the ACC clause does not apply, and they can recover for wind damage that may have been contributed to or aggravated by flood.

Insurance policies are simply a specialized form of contract. *Tex. Farmers Ins. Co. v. Murphy*, 996 S.W.2d 873, 879 (Tex. 1999). As such, general rules of contract construction apply. *Am. Mfrs. Mut. Ins. Co. v. Schafer*, 124 S.W.3d 154, 157 (Tex. 2003). The primary goal of contract construction "'is to give effect to the written expression of the parties' intent.'" *Nautilus Ins. Co. v. Country Oaks Apartment Ltd.*, 566 F.3d 452, 454 (5th Cir. 2009) (quoting *Balandran v. Safeco Ins. Co. of Am.*, 972 S.W.2d 738, 741 (Tex. 1998)). While it is generally the insured's burden to show that a claim is within the scope of coverage, if "'the insurer relies on the policy's exclusions, it bears the burden of proving that one or more of those exclusions apply.'" *Trinity Universal Ins. Co. v. Emp'rs Mut. Cas. Co.*, 592 F.3d 687, 691–92 (5th Cir. 2010) (quoting *Federated Mut. Ins. Co. v. Grapevine Excavation, Inc.*, 197 F.3d 720, 723 (5th Cir. 1999)).

Policy language that is unambiguous or, in other words, so clearly worded that it can be given a definite legal meaning, is applied as written. *Nautilus Ins. Co.*, 566 F.3d at 454 (citing *Coker v. Coker*, 650 S.W.2d 391, 393 (Tex. 1983)). However, if a provision "is susceptible of two or more reasonable interpretations," the provision is deemed ambiguous and courts will construe the meaning of the ambiguous provision in the light most favorable to the insured. *Am. Mfrs. Mut. Ins. Co.*, 124 S.W.3d at 157 (citing *Kelley-Coppedge, Inc. v. Highlands Ins. Co.*, 980 S.W.2d 462, 465 (Tex. 1998)). Further, "[w]hen assessing the insurer's proffered exclusion, '[t]he court must

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