

P11/033

24th JUDICIAL DISTRICT COURT FOR THE PARISH OF JEFFERSON

STATE OF LOUISIANA

NUMBER: 730-422

DIVISION "D"

MANHATTAN TREASURE COVE, LLC

V.

LOUISIANA CITIZENS PROPERTY INSURANCE CORPORATION

FILED: _____
DEPUTY CLERK

MEMORANDUM OPINION

The plaintiff, Manhattan Treasure Cove, LLC ("Manhattan"), alleges in this suit that the defendant has failed to make any payments on an insurance claim for damages caused by Hurricane Isaac to a commercial strip shopping center owned by the plaintiff. A judge trial was held on February 22, 2019. The Court took the matter under advisement upon the filing of post-trial memoranda on April 19, 2019.

FINDINGS OF FACT

Manhattan purchased the property, located at 3251 Manhattan Blvd., Harvey, Louisiana, in June 2008 and made significant repair and renovations to the property in 2008 and 2012. Additionally, before purchasing the property, a new TPO roof had been installed by GAF Materials Corporation, which pro . . . *Mye-b* . . . *Jt. Ex. 3; Jt. Ex. 60.*

Unfortunately, Hurricane *Charnelle* y, Louisiana on August 29, 2012, damaging the property. As a *Charnelle* ts insurer, the defendant, shortly afterwards that it intended to file . . . g from the storm.

The insurer responded promptly and sent out an adjuster, Charles Baldwin, who inspected the property only 8 days after the storm on September 5, 2012. Mr. Baldwin testified that he inspected the roof for approximately an hour to an hour and half, and did not find any damages to the TPO roofing system. *Jt. Ex. 58 – Deposition of Charles Baldwin* at 25, 28 35-36, 68; *Jt. Ex. 47*. He further testified that he did not observe any interior water damage to any of the strip mall's units resulting from the storm. *Jt. Ex. 58* at 27, 68. He did notice, however, damage to (1) multiple air conditioning units; (2) metal siding; (3) gutter; (4) exterior lights; (5) glass panes;

(6) fences and (7) an electric timer. *Jt.Ex. 58* at 26; *Jt. Ex. 47*; *Transcript* at 215. There was also a displacement of an air-conditioning drain line and an air conditioning gas line. *Id.* He estimated that the replacement costs of repairing the damage to the property resulting from Hurricane Isaac was \$7,652.69. *Jt. Ex. 47*; *Transcript* at 216. However, because this amount was less than the deductible on the policy of \$20,223, the defendant sent a letter to Manhattan on September 27, 2012, denying coverage.

Ms. Anjier testified that defendant next received a letter from a public adjuster with U.S. Adjusters advising of their representation of plaintiff. U.S. Adjusters did not come to inspect at that time though, despite numerous requests from defendant, and did not provide its own estimate. Consequently, Ms. Anjier testified that defendant decided to send another adjuster, Michael Long, to perform a re-inspection. *Transcript* at 217-18; *Jt. Ex. 48*. Mr. Long, who inspected the property on February 7, 2013, agreed with Mr. Baldwin's findings, but found some additional HVAC damage on the roof. Mr. Long concluded that the damages to the property related to Hurricane Isaac were \$8,845.49. This amount, though, was still below the deductible amount so the defendant again denied the claim. *Transcript* at 220; *Jt. Ex. 48*. The plaintiff was dissatisfied with the defendant's adjustment of its insurance claim, filed the pending suit on August 27, 2013, and hired its own expert.

On June 13, 2014, almost two years after Hurricane Isaac, the plaintiff's expert, Michael Gurtler, inspected the property. *Jt. Ex. 6*. During his inspection, Mr. Gurtler used a thermal imaging device and found what he believed to be moisture in many different areas of the building. Even though Mr. Gurtler could not find any punctures or holes in the roof, he concluded that there must be a leak in the roof at each of the places where he found water. Mr. Gurtler's conclusion, however, was based upon the assumption that the building was or should have been in perfectly good and well maintained condition before the storm.

Strikingly, Mr. Gurtler was not given any reports from other inspections of the property for hurricane damages, nor was he given any specific information about the renovations that went up all the way until August before Hurricane Isaac. *Transcript* at 59. He was told that the roof was replaced in 2008, and that the building was renovated between the purchase in 2008 and before Hurricane Isaac. *Transcript* at 59. He also did not even speak to the owners about the

pre-storm condition of the property. *Transcript* at 60-61. He was only told by the plaintiff's lawyers that the roof had been replaced in 2008 and that the building had been renovated. Thus, Mr. Gurtler admitted that he could not say for sure whether or not each item of repair damage he saw in June 2014 on the roof had actually been damaged in Hurricane Isaac. *Transcript* at 61. Mr. Gurtler spoke at length about his findings using his thermal imaging camera, which showed changes in temperature, and how this suggests the presence of water in the building. But he never independently verified the presence of moisture in any part of the building by actually climbing up on a ladder, or by using a moisture meter to test for moisture. *Transcript* at 73.

William P. Janowsky, the defendant's expert who is a board-certified forensic engineer, on the other hand, conducted an extensive physical inspection of the property on October 22 and November 3, 2015 for a total of about a day and a half. *Transcript* at 160-61. He also performed a background investigation to identify the potential source of the damages alleged to have occurred as a result of Hurricane Isaac, including research about the weather conditions at the time of the hurricane and the hailstorm that occurred shortly before it. Additionally, he considered aerial photographs of the property's roof and standing water patterns on it before the installation of the TPO roof in 2008. Finally, Mr. Janowsky investigated the source of every interior water stain or apparent damage he found. *Transcript* at 181.

At the completion of his investigation, Mr. Janowsky concluded that the roof had had a long term problem with moisture intrusion. He based this conclusion on his finding of corroded interior decking underneath the TPO roof. *Transcript* at 168-69. He also opined that the new/existing TPO roof did not leak and did not need to be replaced as a result of Hurricane Isaac. *Transcript* at 186. He testified that some of the water damage had been caused by water pooling on the roof and leaking into the structures from the time before the new TPO roof had been installed, and others had been caused by leaking air ducts, water heaters, interior plumbing, or holes purposely left in the roof where contractors had cut vent pipes and failed to remove them and patch the roof, or cap them. *Transcript* at 166-69, 182. This is consistent with the testimony of Mr. Baldwin, who first inspected the property, who found detachment of drain lines and gas lines, gutter detachment, and damage to air conditioning condensers, and damage to

interior ceiling tiles that predated the date of the storm, but no penetrations to the membrane of the roof. *Jt. Ex. 58* at 26, 34, 38-39, 58, 67-68, 72, 78.

Mr. Janowsky further testified that the roof had only one area, about 12 inches long, that had been repaired, and for which he could not eliminate the possibility that it had been caused by Hurricane Isaac. *Transcript* at 171. He stated that this area could be repaired for about 25% of the \$2,500 to \$3,000 range that had been estimated by Richard Lyons. *Id.*

Rich Lyons, plaintiff's repair cost estimator, had a very different opinion on the total cost of repair. He concluded that Manhattan sustained damages of \$421,592.81, which was based, however, entirely upon the opinions provided to him by Mr. Gurtler. *Jt. Ex. 5* at 5.

The Insurance Policy

The Wind and Hail Only policy issued to Manhattan in effect at the time of Hurricane Isaac contained the following provision:

Commercial Wind and Hail Endorsement

Section A. of CAUSES OF LOSS – BASIC FORM (CP 10 10), attached to this policy, is hereby deleted and replaced by the following:

A. COVERED CAUSES OF LOSS

When Basic is shown in the Declarations, Covered Causes of Loss means the following, unless excluded elsewhere in this policy:

1. Windstorm or Hail, but not including:

a. Frost or cold weather;

b. Ice (other than hail), snow or sleet, whether driven by wind or not; or

c. Loss or damage to the interior of any building or structure, or the property inside the building or structure, caused by rain, snow, sand or dust, whether driven by wind or not, unless the building or structure first sustains wind or hail damage to its roof or walls through which the rain, snow, sand or dust enters.

All other provisions of this policy remain unchanged.

Jt. Ex. 60 at 2.

LEGAL STANDARD

Under Louisiana law, an insurance policy is a contract between the parties, and is construed according to the general rules of contract interpretation. *Moreno v. Entergy Corp.*, 233 So. 3d 176, 181–82 (La. App. 5th Cir. 2017). Contracts have the effect of law for the parties and the interpretation of a contract is the determination of the common intent of the parties. *Id.*

Thus, the Commercial Wind and Hail Endorsement provision referred to above is the law between the parties.

The Louisiana Fifth Circuit Court of Appeal has given the burden of proof in civil cases in the case of *Carrier Corp. v. Cousins*, 170 So. 3d 1168, 1171–72 (La. App. 5th Cir. 2015) as follows:

In a civil case, Louisiana courts require the plaintiff to fulfill his or her burden to prove a *prima facie* case. In ordinary civil actions, the plaintiff, in general, has the burden of proof and must prove the facts at issue by a preponderance of the evidence. Proof by a preponderance of the evidence is defined as taking the evidence as a whole, the fact to be proved is more probable than not. *Crescent City Motors, L.L.C. v. Rafidi*, 10–609 (La.App. 5 Cir. 12/14/10), 54 So.3d 1170, 1171.

See also Graver v. Leach, 264 So. 3d 568, 573–74 (La. App. 5th Cir. 2018).

ANALYSIS

The Court is not persuaded by the testimony of the plaintiff's expert, Mr. Gurtler, because he did not do any independent investigation into the potential source of any leaks, did not speak with the plaintiff, did not verify the condition of the building prior to Hurricane Isaac, relied only on the thermal images and made far too many assumptions, including the assumption that the entire roof needs to be replaced, and that there is no cost effective way to locate and patch/replace specific areas of leaks if/when found. Mr. Gurtler's methodology greatly undermines the reliability of his conclusions.

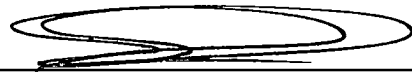
Consequently, Mr. Lyons' testimony, which is based upon Mr. Gurtler's report, is also not persuasive.

By contrast, the Court finds the testimony of the defendant's expert, Mr. Janowsky, to be credible. He studied the history and condition of the building as well as the weather in the area prior to Hurricane Isaac. He reviewed the previous damages reports on the building. He investigated every purported leak found by Mr. Gurtler, and found logical explanations as to why there was a leak at each of those places, with one exception. For the one exception that he concluded may have been caused by Hurricane Isaac, he testified the damage the area could be repaired for about 25% of the \$2,500 to \$3,000 range that had been estimated by Mr. Lyons. This amount is still below the deductible on the policy.

The Court concludes that plaintiff failed to carry its burden and prove by a preponderance of the evidence that the damage caused by Hurricane Isaac covered by the Commercial Wind and Hail Endorsement provision of the insurance policy exceeds the applicable deductible. Thus, the Court finds in favor of the defendant.

Judgment will be entered in accordance with these reasons dismissing the plaintiff's case.

Gretna, Louisiana, this 14 day of May, 2019.



JUDGE SCOTT U. SCHLEGEL