UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 11-20247-CIV-ALTONAGA/Simonton

2000 ISLAND BOULEVARD CONDOMINIUM ASSOCIATION, INC.,

Plaintiff,

vs.

QBE INSURANCE CORPORATION,

Defendant.
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ORDER

THIS CAUSE came before the Court on Defendant, QBE Insurance Corporation's ("QBE['s]") Corrected Motions [sic] *In Limine* . . . ("Motion") [ECF No. 75], filed December 5, 2011. QBE's filing is composed of seven separate "motions"[1] *in limine*. The Court has carefully considered the parties' written submissions, the record, and the applicable law.

This case concerns a breach of contract claim. (*See* Def.'s Notice Removal [ECF No. 1]). Plaintiff, 2000 Island Boulevard Condominium Association, Inc. ("Island"), alleges that QBE breached an insurance policy it issued to Island by failing to pay for damage caused to Island's insured property in 2005 by Hurricane Wilma. (*See* Compl. ¶ 1 [ECF No. 1-3]; Mot. ¶ 1). At issue now are several areas of anticipated testimony and evidence which QBE seeks to have excluded at trial.

"Relevant evidence" is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." FED. R. EVID. 401. Relevant evidence may be excluded if its

[1] A party is capable of addressing in a single motion all of the objected-to evidence it seeks to have excluded at trial. The Court sees no reason why QBE insists on labeling its motion *in limine* in the plural.

probative value "is substantially outweighed by the danger of unfair prejudice." *Id.* 403. "'Unfair prejudice' within its [sic] context means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." *Id.* 403 advisory committee's note. A motion *in limine* is "any motion, whether made before or during trial, to exclude anticipated prejudicial evidence before the evidence is actually offered," *Luce v. United States*, 469 U.S. 38, 40 n.2 (1984), and is not a motion "to determine the sufficiency of the evidence or merits of an issue." *Soliday v. 7-Eleven, Inc.*, No. 2:09-cv-807-FtM-29SPC, 2011 U.S. Dist. LEXIS 42874, at *3 (M.D. Fla. Apr. 20, 2011) (citing *id.*). A district court's exclusion of relevant evidence due to the danger of unfair prejudice is an "extraordinary remedy which the district court should invoke sparingly," and "the balance should be struck in favor of admissibility." *United States v. Dodds*, 347 F.3d 893, 897 (11th Cir. 2003).

The Court addresses each of QBE's objections to Island's proposed evidence in turn.

A. Evidence of Claims Handling Practices of QBE and/or Florida Intracoastal Underwriters, Ltd.

QBE seeks to exclude evidence of "claims handling practices by QBE and/or Florida Intracoastal Underwriters, Ltd. ("FIU"), QBE's managing general agent in Florida." (Mot. 2). According to QBE, this evidence is irrelevant to the determination of whether insurance coverage applies to Island's claims, and if so, the amount due. (*See id.*). QBE further asserts that even if the evidence is relevant in a coverage dispute, "[a]llowing such evidence . . . presents a real danger that testimony would morph the proceeding into a not-yet filed bad faith claim." (*Id.* 3 (quotation omitted)).

The Court has already determined evidence related to QBE's actions in 2006 concerning the investigation and handling of Island's claim is relevant to whether QBE breached the insurance contract. (*See* Order dated November 10, 2011 [ECF No. 65]; Order dated January 12,

2012 [ECF No. 94]). Admittedly, the bifurcation of bad-faith claims from coverage claims in Florida is due to a concern, similar to that expressed by QBE, that "it is prejudicial to allow the injection of issues of bad faith into a coverage case." *XL Specialty Ins. Co. v. Skystream, Inc.*, 988 So. 2d 96, 98 (Fla. 3d DCA 2008). Here, the prejudice that may accompany the presentation of how QBE handled Island's claim in 2006 is far outweighed by the evidence's probative value as such evidence directly speaks to a central issue of the case — which of the two parties committed the first breach. (*See* Order dated November 10, 2011; Order dated January 12, 2012, at 4). In any event, Island does not appear to contest the exclusion of claims-handling evidence that does not pertain to QBE's 2006 handling of Island's claim. (*See* Mot. Opp'n 1 (incorporating and adopting by reference Summ. J. Mot. Opp'n [ECF No. 83]) [ECF No. 86]).

Accordingly, evidence of how QBE (and its managing general agent in Florida, FIU) handled Island's claim in 2006 is allowed. Evidence of QBE's general claims-handling practices is also permitted insofar as it directly speaks to how QBE handled Island's claim in 2006. All other evidence as to how QBE handles other insurance claims is excluded.

B. Evidence of Other Claims against QBE, including Affirmative Defenses Used by QBE in Other Lawsuits

Island agrees to the exclusion of this evidence. (*See* Mot. Opp'n 1–2). Why QBE included this argument in its Motion is unclear.

C. Evidence Regarding Costs Related to "Matching" or Aesthetic Uniformity

The policy at issue covers "direct physical loss of or damage to Covered Property." (Insurance Policy 1 [ECF No. 86-2]). "Covered property" includes "the building or structure described in the Declarations," including, among other things, completed additions, fixtures, and permanently installed machinery and equipment. (*Id.*). At issue is whether matching of covered property is covered under the policy.

As an initial matter, the Court observes that matching of replacement building components to undamaged original building components can logically be arrived at by two means. The first is by installing replacement components that are "of like kind and quality" as the original components; uniformity is thus achieved without the replacement of undamaged original components. If that is not possible because, for example, components "of like kind and quality" are unavailable, a second option to achieve matching is to replace all like components (*i.e.*, windows), both damaged and undamaged, so that any damaged components that are replaced are identical to the undamaged ones. *See, e.g.*, *Strasser v. Nationwide Mut. Ins. Co.*, No. 09-60314-CIV-SEITZ/O'SULLIVAN, 2010 U.S. Dist. LEXIS 21632, at *1–2 n.1 (S.D. Fla. Feb. 22, 2010).

QBE asserts that the expert report for Island's public adjuster, Daniel Odess, states that matching in this case can only occur if undamaged building components are replaced, *i.e.*, the second method. (Mot. 8). QBE then states that it is "only obligated to pay the cost of repairing or replacing lost or damaged property with property of 'like kind and quality,'" and that therefore, the insurance contract does not cover the matching method that requires replacement of undamaged components. (*Id.*). Accordingly, QBE seeks to preclude Island from presenting any evidence of "costs for building components that Plaintiff admits were not damaged by [Hurricane] Wilma" because it is irrelevant to the determination of damages, and therefore unduly prejudicial if introduced. (*Id.* 6; *see id.* 9).

QBE supports its position in part by citing to *Strasser v. Nationwide Mutual Insurance Co.*, 2010 U.S. Dist. LEXIS 21632. There, in examining the language of the payment portion of an insurance policy,[2] which is virtually identical to the one at issue here (*see* Mot. 7), the court

[2] The policy at issue in *Strasser* included language that gives the insurer the option to:

concluded that the insured was not entitled to matching and excluded from trial evidence related to matching. The court observed that "[o]nly the last option [Paragraph (a)(4), where the insurer opts to repair or replace the damaged property itself] . . . requires that [the insurer] match," and twice-emphasized that the insurer had elected to compensate for the insured's loss by way of a different option, namely, to "pay the value of lost or damaged property." *Strasser*, 2010 U.S. Dist. LEXIS 21632, at *1, *4; *see also Ocean View Towers Ass'n v. QBE Ins. Corp.*, No. 11-60447-Civ-SCOLA, 2011 U.S. Dist. LEXIS 147579, at *29 (S.D. Fla. Dec. 22, 2011) (noting that the insurer did not elect to compensate the insured through a provision requiring use of materials "of like kind and quality").

While the reasoning of *Strasser* and *Ocean View* is persuasive, the cases are not directly applicable here for two reasons. First, in *Strasser*, "what constituted a direct physical loss under the policy . . . [was] not at issue." *Strasser*, 2010 U.S. Dist. LEXIS 21632, at *4. Similarly, the court in *Ocean View Towers* did not specifically address whether the policy's coverage included "direct physical loss or damage" to the building *as a whole*, likely because the plaintiff did not raise the argument. *See Ocean View Towers*, 2011 U.S. Dist. LEXIS 147579, at *29; Pl.'s Mem. Opp'n Def.'s Partial Mot. Summ. J. [ECF No. 43], *in Ocean View Towers Ass'n, Inc. v. QBE Ins. Corp.*, No. 0:11-cv-60447-RNS. In this case, however, Island maintains that by the policy's own terms, the entire building or structure is "covered property," and thus, damage to the building not only includes physical damage to its individual components, but also physical loss of the building's original condition due to mismatched replacement components. (*See* Mot. Opp'n 7).

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(1) Pay the value of lost or damaged property;
(2) Pay the cost of repairing or replacing the lost or damaged property;
(3) Take all or any part of the property at an agreed or appraised value; or
(4) Repair, rebuild or replace the property with property of like kind and quality . . .

Strasser, 2010 U.S. Dist. LEXIS 21632, at *4.

In sum, regardless of which method QBE used to compensate Island for its loss, Island is entitled to matching. Notably QBE fails to address this argument in its Reply. (*See* Reply Mot.).

Second, nothing in QBE's Motion indicates QBE did not elect to compensate Island under Paragraph (a)(4). Indeed, to the contrary, QBE refers to the language of Paragraph (a)(4) — "like kind and quality" — as the provision of the insurance contract that governs its obligations. (*See* Mot. 8 ("Pursuant to this [loss payment] provision, QBE is only obligated to pay the cost of repairing or replacing lost or damaged property with property of "like kind and quality.")). Thus, although QBE states that it must "pay" as opposed to "replace or repair" the damage to Island's property, QBE appears to agree that matching via the first method is appropriate, *i.e.*, damaged items must be replaced with property of "like kind and quality," which is language belonging to Paragraph (a)(4). True, in its Reply, QBE disassociates itself from Paragraph (a)(4) by asserting that it "has not opted to repair, rebuild, or replace the property," although it fails to cite to the record. (Reply Mot. 5). The contrast between QBE's assertions in its Motion and its Reply shows a lack of clarity as to whether QBE elected to be governed under Paragraph (a)(4). Moreover, QBE's suggestion that Island did not request specific performance as a remedy in its Complaint does not bear on whether QBE chose to be governed under Paragraph (a)(4). (*See* Mot. 5). Indeed, if QBE opted to compensate Island under Paragraph (a)(4), money damages for breaching the insurance contract could simply contemplate what Island would have been entitled to: matching building components.

QBE, who carries the burden in seeking exclusion of evidence before trial, has not demonstrated that evidence of matching costs is irrelevant in this matter.

D. The Opinions of Jeff Dobbins of TSSA Storm Safe Related to Causation of Damage and Pricing

QBE seeks to preclude the opinions of Island's expert, Jeff Dobbins, as to causation of the damages suffered by Island, as well as to the reasonableness of the cost to replace the windows and sliding glass doors identified by Island's public adjuster, Daniel Odess. (*See* Mot. 9–14). Island agrees as it pertains to use of Mr. Dobbins's opinions as to damages. (*See* Mot. Opp'n 13). Again, it is unclear why QBE raises this issue in the Motion.

As to QBE's request to preclude Mr. Dobbins's opinions regarding pricing, QBE's argument in support is sparse (*see* Mot. 13–14), and Island's arguments in response are confusingly intertwined with its arguments pertaining to a separate issue concerning the testimony of Ivan Browner. (*See* Mot. Opp'n 13–15). QBE appears to suggest that because at the time of his November 9, 2011 deposition, Mr. Dobbins was "unaware of any pricing" and had not yet reviewed the estimate of Mr. Odess, QBE was unable to question Mr. Dobbins about his opinion regarding the reasonableness of Mr. Odess's cost assessment. (Mot. 13; *see also* Reply Mot. 6). Accordingly, QBE requests that Mr. Dobbins be precluded from testifying as to the reasonableness of Mr. Odess's estimate for replacing windows and sliding glass doors, "[g]iven that Mr. Dobbins has not even reviewed this information." (Mot. 13–14). In its Reply, QBE adds that it has been "prejudiced by the untimely disclosure." (Reply Mot. 7).

Nowhere in the Motion does QBE expressly take issue with the adequacy of Island's disclosures regarding Mr. Dobbins's testimony or any expert reports supplied. Moreover, although QBE states it has been "prejudiced by the untimely disclosure," it provides the Court with no explanation of how Island failed to timely provide Rule 26 disclosures,[3] but rather simply points to Mr. Dobbins's testimony to show that he "had not even reviewed [Mr. Odess's]

[3] In its Reply, QBE identifies Federal Rules of Civil Procedure 26(a)(2)(B)(ii)–(vi) and 37(c)(1), but fails to expressly state how Island violated either Rule. (*See* Reply Mot. 6–7).

pricing information." (*Id.*). While the Court understands that QBE considers itself disadvantaged due to the dearth of Mr. Dobbins's deposition testimony regarding pricing, QBE is essentially asking the Court to assess evidence, namely, Mr. Dobbins's testimony, which it cannot do on a motion *in limine*. *See Soliday v. 7-Eleven, Inc.*, 2011 U.S. Dist. LEXIS 42874, at *3.

Whether an expert witness may testify at trial is largely governed by Federal Rules of Civil Procedure 26 and 37, and Federal Rule of Evidence 702. *See* FED. R. CIV. PROC. 26, 37(c)(1); FED. R. EVID. 702. QBE does not assert that Island failed to comply with Rule 26 (thereby not implicating Rule 37), or that Mr. Dobbins fails to meet the standards of Rule 702. Further, QBE identifies no law or rule that prohibits an expert witness from testifying at trial if the opposing party was unable to obtain particular answers from the expert during deposition. QBE does not contest the admissibility of Mr. Odess's report nor Mr. Dobbins's qualifications. That Mr. Dobbins's deposition testimony may impeach his credibility is an issue for the trier of fact, and not one that compels the Court to preclude his testimony. For these reasons, Mr. Dobbins is permitted to testify about pricing.

E. "Expert" Testimony by Ivan Browner of TSSA

Ivan Browner helped to prepare a "repair/replacement protocol" ("protocol") concerning the cost of replacing windows and sliding glass doors in this matter. (*See* Mot. 14). The protocol was disclosed six days after the discovery deadline. (*See* Reply Mot. 8). According to QBE, Mr. Browner has not been timely disclosed as an expert pursuant to Rule 26 and the Court's Scheduling Order [ECF No. 12], and as such, he should be "exclude[d] . . . as an expert witness." (Mot. 14). Island does not contest that it failed to comply with Rule 26 as to Mr. Browner, but states if "QBE raises an objection to Dr. Anurag Jain and Jeff Dobbins [two of

Island's disclosed expert witnesses] testifying based on Mr. Browner's work, then 2000 Island reserves the right to call Mr. Browner to lay any necessary foundation for the testimony of Dr. Anurag Jain and Jeff Dobbins," and that the Court should not otherwise bar the protocol. (Mot. Opp'n. 14; *see id.* 15). QBE nevertheless "objects to the introduction of Ivan Browner's work regarding pricing through Jeff Dobbins and Anurag Jain." (Reply Mot. 7). Based on the parties' submissions, it appears they do not contest that Mr. Browner should be excluded from testifying as an expert witness, which is the argument QBE raises in its Motion.

F. Limiting Plaintiff's Recovery to Actual Cash Value

QBE asserts that Island's recovery, "if any, is limited to the Actual Cash Value [ACV] of the property" because Island failed to file a claim for Replacement Cost Value ("RCV") according to the terms of the policy, and as such, "any damages which may be awarded at the trial . . . should be limited to the Actual Cash Value coverage provided for in the insurance policy." (Mot. 14, 18; *see id.* 16). Nowhere in QBE's Motion does QBE ask that particular evidence be precluded from trial, although QBE later clarifies that it "does not seek to preclude evidence of RCV [which evidence shows is greater than ACV] for the limited purpose of demonstrating ACV. However, Plaintiff is not entitled to RCV benefits pursuant to the clear and unambiguous terms on the insurance contract." (Reply Mot. 9). Thus, as presented, QBE appears to ask that evidence of RCV be restricted to the purpose of determining damages as limited by ACV.

The Court is at a loss as to what relief QBE seeks, other than a statement that Island cannot recover more than ACV. This does not require that the Court exercise its discretion to exclude or limit the use of prejudicial evidence. Indeed, by the plain language employed by QBE in its Motion as previously recounted, QBE asks that the Court rule on an issue of law, not

on the relevance or prejudicial effect of particular evidence. Such a request is not properly before the Court on a motion *in limine*, and therefore, it is denied. *See Soliday*, 2011 U.S. Dist. LEXIS 42874, at *3. Moreover, as previously explained, whether Island is required to strictly comply with the terms of the policy hinges on the trier of fact's decision regarding whether QBE first breached the policy. *See* Part III.A.; (*see also* Order dated November 10, 2011; Order dated January 12, 2012).

G. Evidence Regarding Costs in Excess of Ordinance or Law Coverage

QBE asserts that coverage under the policy does not include "expenses incurred due to the enforcement of a building code or other law or ordinance," and therefore seeks to preclude any costs that Island attempts to introduce at trial that exceed this limitation of the policy. (Mot. 18). Island did not respond to this argument. Certainly evidence of undisputed, unrecoverable costs may prejudice or confuse the trier of fact and should be excluded. Accordingly, the Motion is granted in this respect.

For the foregoing reasons, it is

ORDERED AND ADJUDGED that QBE's Motions [sic] *In Limine* **[ECF No. 75]** is **GRANTED IN PART and DENIED IN PART**.

DONE AND ORDERED in Chambers, at Miami, Florida, this 19th day of January, 2012.

Cecilia M. Altonaga

CECILIA M. ALTONAGA
UNITED STATES DISTRICT JUDGE

cc: counsel of record