IN THE CIRCUIT COURT FOR THE TWELFTH JUDICIAL CIRCUIT
IN AND FOR MANATEE COUNTY, FLORIDA
APPELLATE DIVISION

GLASSMAX, INC., a/a/o Juan Vega,

Appellant,

v.

STATE FARM FLORIDA INSURANCE COMPANY,

Appellee.
_____/

CASE NO: 2015-AP-0193
L.T. NO: 2014-SC-2932

REPLY BRIEF

ON APPEAL FROM THE HON. K. DOUGLAS HENDERSON
COUNTY COURT JUDGE

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ARGUMENT

State Farm's arguments should not distract the Court from the essence of this case. The lower court by misinterpreting two cases in granting the motion to dismiss with prejudice. Edwards College, Inc., v. Johnson, 707 So. 2d 801 (Fla. 1st DCA 1998); National Exhibition Co. v. Ball, 139 So. 2d. 489 (Fla. 2d DCA 1962).

Because breach can occur when delay is not brief, and time can be of the essence even when the contract does not contain an explicit clause to that effect, an issue of material fact as to whether the nearly five-month delay in paying Glassmax's invoice constituted a breach of contract. Alternatively, Glassmax could have amended the complaint to allege: that time was of the essence due to the subject matter of the contract; or due to hardship; or, because "notice has been given to the defaulting party requiring that the contract be performed within a stated time, which must be a reasonable time according to the circumstances," on the basis that the invoice was a demand for immediate payment. Command Sec. Corp. v. Moffa, 84 So. 3d 1097, 1099 (Fla. 4th DCA 2012). Confession of judgment was also available as a theory of recovery of attorney's fees.

Rebuttal argument to State Farm's specific points follows.

I. State Farm waived any objection to improper service by filing a motion to dismiss, and it may be found to have confessed judgment by paying benefits after suit was filed.

State Farm Mutual Automobile Insurance Company ("State Farm") appears to contend that the initially improper service somehow renders the lawsuit irrelevant to its decision to ultimately pay Glassmax's invoice. The complaint in this case was filed on August 5, 2014, incorrectly naming State Farm Florida Insurance Company as the defendant. (R. 1). On October 20, 2014, despite the allegedly improper service, State Farm filed a motion to dismiss the complaint. (R. 19). The issue of proper service was not raised.

This belies any claim that State Farm that it lacked notice of the suit when it issued payment to Glassmax sometime between service of the initial complaint and service of the amended complaint on February 27, 2015. (R. 37). State Farm also waived the defense of improper service by failing to raise the issue in its motion to dismiss. Dolan v. Dolan, 81 So. 3d 558, 559-60 (Fla. 3d DCA 2012) (citing cases). While State Farm now attempts to make much of this issue in the Answer Brief (pp. 3-4. 36-37, 40), the issue is irrelevant here.

An award of attorney's fees is appropriate when an insurer "'unreasonably withhold[s] payment under the policy.'" Clifton v. United Cas. Ins. Co. of Am., 31 So. 3d 826, 829 (Fla. 2d DCA 2010) (quoting Wollard v. Lloyd's & Cos. of Lloyd's, 439 So. 2d 217, 218 (Fla. 1983)). Unreasonably withholding payment is the very

claim Glassmax alleges. Whether "the filing of the suit acted as a necessary catalyst to resolve the dispute and force the insurer to satisfy its obligations under the insurance contract" is yet to be determined. Id. (citation omitted).

II. Common-law reasonableness principles apply to contracts of adhesion, such as the insurance policy at issue here.

State Farm accuses appellant of advancing "a fearing-mongering" [sic] argument by invoking common law which imposes a reasonableness requirement on the timely payment of benefits. (Answer Br. 14). State Farm describes the process of obtaining insurance coverage as two parties "agree[ing] on what provisions were mutually agreeable and to be included," with the final policy a product of a mutually considered choice "***not*** to put a timeframe for payment in the contract for windshield only damage repair." (Answer Br. 15) (italics and bold in original). State Farm's characterization of consumer insurance simply fails to comport with reality.

Insurance is a heavily regulated industry, with large insurers on one side and individual consumers on the other. It defies logic and experience to claim that these parties enter into any meaningful negotiation. Automobile insurance policies are examples of "contracts of adhesion, meaning a standardized contract, which, imposed and drafted by the party of superior bargaining strength [insurer], relegates to the subscribing party [insured] only the opportunity to *adhere* to the contract or *reject* it." Pasteur Health Plan v. Salazar, 658 So. 2d 543, 544 (Fla. 3d DCA 1995) (citing cases). A contract of adhesion signed by consumers "without bargaining or

negotiation . . . must be construed in favor" of the non-drafting party. Clearwater Land Co. v. Koepp, 778 So. 2d 1022, 1024 (Fla. 2d DCA 2000). Florida law requires that "any ambiguities and omissions" be construed in favor of the consumer. Pasteur Health Plan, 658 So. 2d at 545 (emphasis added).

State Farm chose to omit from its insurance policy any requirement to timely pay benefits for auto glass. Indeed, there is nothing in the record to suggest that State Farm or any other insurer actually offers a policy that would require the insurer to pay an auto glass claim within a certain time. This feature of the consumer insurance market should not be interpreted to grant State Farm the power to unilaterally determine when (or, effectively, whether) to pay benefits for covered auto glass damage. Florida law imposes a reasonableness standard as to the time for payment for insurance benefits even when the policy is silent.

III. Glassmax pleaded a cause of action for failure to pay benefits within a reasonable time.

State Farm appears to argue that unless an insurance policy contains a specific time for payment, no breach can occur unless and until State Farm refuses payment. In so doing, State Farm attempts to create an unwarranted distinction between explicit timeliness provisions and those implied by law. There is no such distinction.[1] For more than 100 years Florida law has recognized that "when the

[1] Cases from other jurisdictions recognizing that a cause of action exists for material breach of an implicit timeliness requirement include: LimoLiner, Inc. v.

contract is silent as to time," the law "impliedly inserts reasonable time the same as if it had been expressly agreed upon and inserted by the parties." Whiting v. Gray, 8 So. 726, 727 (Fla. 1891) (emphasis added). When breach is asserted based on untimely performance, "whether or not a reasonable time for performance ha[s] expired [i]s a material issue" that can determine whether a party is "in breach of the contract." Tyner v. Woodruff, 206 So. 2d 684, 686 (Fla. 4th DCA 1968); Grieser v. Myers, 267 So. 2d 673, 676 (Fla. 4th DCA 1972) (holding that in contract with no time for delivery, buyer was entitled to refund when seller breached by failing to deliver insurance binder within a reasonable time). Thus, excessive delay can lead to a finding of breach. Guerrera v. Eldred Constr. Corp., 378 So. 2d 327, 328 (Fla. 4th DCA 1980) (finding competent, substantial evidence to support verdict of breach because delay could support inference of abandonment of contract and therefore breach).

Only a "brief delay by one party in the performance of a contract" may be excused absent a determination that time is of the essence. Thomas v. Fusilier, 966 So. 2d 1001, 1003 (Fla. 5th DCA 2007); see also Sublime, Inc. v. Boardman's Inc.,

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Dattco, Inc., 809 F.3d 33, 39 (1st Cir. 2015) (Massachusetts law); Omar v. Rozen, , 55 A.D.3d 705, 705-06 (N.Y. App. Div. 2008); Singer v. W. Publ. Corp., 310 F. Supp. 2d 1246, 1254 (S.D. Fla. 2004) (Minnesota law); Black Horse Lane Assocs., L.P. v. Dow Chem. Corp., 228 F.3d 275, 286 (3d Cir. 2000) (New Jersey law); Aldridge v. Dolbeer, 567 So. 2d 1267, 1269 (Ala. 1990); and, Pastega v. Zwald, 743 P.2d 1151, 1153 (Or. 1987) (finding breach of duty to perform in a reasonable time even where "time is of the essence" clause was waived).

849 So. 2d 470, 471-72 (Fla. 4th DCA 2003) (finding time of the essence even where contract did not so state), cited in Centurion Air Cargo, Inc. v. United Parcel Serv. Co., 420 F.3d 1146, 1151 (11th Cir. 2005) (finding no material breach by five-day delay in making payment)). The question of whether the delay is excusable, as with what length of time is reasonable for performance, is a question of fact not suitable for a motion to dismiss. Hunt v. First Nat'l Bank, 381 So. 2d 1194, 1198 (Fla. 2d DCA 1980). As Florida's Chief Financial Officer has observed, "Although Florida law does not address a timeframe for an insurer to settle a claim, 30 days is normally ample time." "Most Common Concerns," http://www.myfloridacfo.com/division/Consumers/UnderstandingCoverage/PersonalAutoInsuranceOverview.htm. Additionally, counsel's statement at the hearing on the motion to dismiss is not evidence that an incorrect part number caused the delay. (Answer Br. 2).

The facts alleged state a claim for breach of contract, and the lower court erred by granting the motion to dismiss.

CONCLUSION

Florida law does not permit insurers to unreasonably delay the payment of claims, even where the policy is silent as to the time for payment. Unreasonable delay is a breach of the implicit covenant to perform contractual obligations within a reasonable time. Only *de minimis*, brief delays require that time be "of the essence" in performing. Moreover, no explicit "time is of the essence" clause is required. The lower court erred as a matter of law in dismissing this action with prejudice because the policy contained no time is of the essence clause. Additionally, the court erred in deciding that the invoice could not be a demand for immediate payment that rendered time "of the essence." Finally, the complaint could have been amended to allege confession of judgment as a basis for recovery. The Court should reverse the decision and remand for further proceedings, or in the alternative find that a breach occurred and that State Farm confessed judgment by delaying payment for nearly five months, until after suit was filed.

Respectfully Submitted,

/s/ Gray Proctor

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished, by email through the e-filing portal, to:

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this 15th day of February 2016.

s/Gray R. Proctor
Attorney

CERTIFICATE OF TYPEFACE COMPLIANCE

I further certify that this brief is typed in Times New Roman 14-point font in compliance with Florida Rule of Appellate Procedure 9.210(a)(2).

s/Gray R. Proctor
Attorney