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

INITIAL BRIEF

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

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INTRODUCTION AND QUESTIONS PRESENTED

This is an appeal from an order dismissing a breach of complaint claim, filed pursuant to a post-loss assignment of the policy benefits ("AOB"). Glassmax's invoice to State Farm is dated March 13, 2014, the same day the named insured executed the AOB in exchange for windshield repair. On August 5, 2014, Glassmax filed the complaint. State Farm subsequently paid the claim.

Because the policy is silent as to the time for payment of the claim, Florida law imputes a reasonableness requirement to be decided by the factfinder on a case-by-case basis. Nevertheless, the county judge granted State Farm's motion to dismiss because the policy lacked a "time is of the essence" clause. The judge also found that submission of the invoice was an insufficient "demand" to trigger State Farm's obligation to timely pay the claim. Therefore, the county judge concluded that Glassmax could not establish a material breach as a matter of law.

The questions presented in this case are:

1) Whether an issue of fact exists as to whether State Farm materially breached the contract by delaying payment for nearly five months after the loss event?

2) Whether an issue of fact exists as to whether State Farm confessed judgment by paying the claim after suit was filed?

STATEMENT OF THE CASE AND THE FACTS

On February 12, 2014, Juan Vega's vehicle sustained damage to its windshield. (R. 37). His automobile was insured against damage to the windshield pursuant to a comprehensive policy issued by State Farm. (R. 38). On March 13, 2014, Mr. Vega executed a post-loss assignment of benefits ("AOB") assigning to Glassmax the right to benefits associated with the claim. (R. 38, 104). The AOB provided that Mr. Vega "assign[ed] any and all insurance rights, benefits, and proceeds" to Glassmax, and "authorize[d] direct payment of any benefits or proceeds [to Glassmax] as consideration for any repairs made by GlassMax." (R. 104). The AOB also directs State Farm to "release any relevant information to [Glassmax] for the direct purpose of obtaining actual benefits to be paid by my insurance carrier to my repair facility for services rendered or to be rendered for my appropriate property damage." (Id.). Glassmax presented State Farm with an invoice in the amount of $276.64. (R. 38).

The invoice is also dated March 13, 2014. (R. 43). A check mark indicates that it is not an "estimate," but rather an "invoice." In addition to contact information for Mr. Vega, the invoice specifies his insurance company and policy number.

On August 5, 2014, Glassmax filed a complaint. (R. 1-3). State Farm filed a motion to dismiss claiming that it had paid Glassmax for its work after the

complaint was filed.[1] (R. 19-24). On February 27, 2015, pursuant to a stipulation, Glassmax filed an amended complaint naming State Farm Mutual Automobile Insurance Company as the defendant. (R. 37-39). Glassmax alleged that State Farm's policy covered the damage, and that it had performed all conditions precedent to recover benefits. (R 38). Nevertheless, State Farm had not made "full payment . . . within thirty (30) days or as required under the Insured's policy of insurance." (Id.). Glassmax did not have a copy of the policy, but believed State Farm had the original. (Id.).

On March 2, 2015, State Farm filed a motion to dismiss the amended complaint. (R. 96-102). State farm explained that it had "issued payment to Plaintiff pursuant to the conditions of their policy with the insured prior to Plaintiff amending its Complaint." (R. 97). State Farm contended that the complaint was defective because it "failed to state the exact provision, term, or condition of the policy were breached." (R. 99). State Farm also argued that the policy did not provide that time was of the essence, and that State Farm's "brief delay" in performing the contract did not constitute a material breach. (R.100). According to State Farm, Glassmax's failure to attach a copy of the policy was also sufficient ground for dismissal. (R. 101).

[1] Although the complaint incorrectly named State Farm Florida Insurance Company, State Farm Mutual Automobile Insurance Company filed the motion to dismiss, which is the same as the motion to dismiss the amended complaint.

The following day, the parties stipulated that the Florida Rules of Civil Procedure would apply. (R. 111).

On March 2, 2015, the county judge held a hearing on the motion to dismiss. (Supp. 2).[2] Glassmax argued that it was "a standard business practice" to "issu[e] payments within a reasonable time" or else deny coverage. (Supp. 6). The parties agreed that the contract did not require payment within a specific time frame. (Supp. 8).

State Farm conceded that that the common law required a "reasonable timeframe" nevertheless; however, it also contended that principle did not apply here. (Supp. 8-9). Counsel for State Farm cited two cases[3] it claimed stood for the following propositions: without a "time is of the essence" clause, no material breach could occur and no cause of action could accrue; and, when suit is filed but no prior demand for payment made, the plaintiff waives the right to sue for untimely payment. (Supp. 12-13). According to State Farm, Glassmax's claim failed because the policy contained no such clause, and Glassmax had waived its right to payment within any certain time at all by failing to make a formal demand

[2] The transcript was not filed before the record was prepared. A motion to supplement has been filed contemporaneously with this brief. The numbering corresponds with the page number of the PDF file of the transcript.

[3] Edwards College, Inc., v. Johnson, 707 So. 2d 801 (Fla. 1st DCA 1998); and, National Exhibition Co. v. Ball, 139 So. 2d. 489 (Fla. 2d DCA 1962), respectively.

for paymen that would trigger State Farm's obligation to pay in a timely fashion. (Supp. 10-11).

Glassmax responded that that the court was bound to look only at the four corners of the complaint, and the invoice allegedly provided could be a sufficient demand under the facts of the case. (Supp. 14-15). State Farm replied that "You have to submit the bill and then provide a demand once you haven't received payment after you've waited a reasonable amount of time and you provide the other party with a reasonable amount of time." (Supp. 16).

Glassmax also argued that because payment issued after the suit was filed, State Farm had confessed judgment. (Supp. 17).

The judge explained that he would grant the motion to dismiss, and because the defects in the complaint could not be cured, leave to amend would be denied. (Supp. 17).

On March 9, 2015, the court entered an order granting the motion to dismiss. (R. 112-113). The county judge reasoned that "the only remaining issue in the case was whether Defendant breached the applicable insurance contract due to the timeliness of the payment." (R 113). Finding as the only "material facts that there is no 'time of the essence' clause in the contract nor did Plaintiff ever make a sufficient demand for payment," the county court granted the motion to dismiss with prejudice.

On March 13, 2015, Glassmax filed a motion for rehearing. (R. 114-18). Glassmax explained that the court had gone beyond the four corners of the complaint and considered matters outside the motion to dismiss by deciding whether a "demand" had been send. (R. 115). As for the time payment becamse due, Glassmax had not intended the reference to 30 days without payment to correspond to any "policy or law setting down a brightline 30 day rule," but merely to show that State Farm had been given a reasonable amount of time to respond to Glassmax's demand for payment. (Id.).

If dismissal were appropriate, Glassmax requested leave to amend the complaint to allege that State Farm had failed to act reasonably, and that time was of the essence. (R. 116). Glassmax urged the court to give the policy an interpretation that was "practical, sensible and just," and to construe the contract as a whole rather than reading provisions in isolation. (Id.). To the extent the contract was ambiguous, it should be construed in favor of the insured. (R. 117). Glassmax also pointed out that the policy did not contain any requirement that a formal demand letter be filed. (R. 116).

On June 1, 2015, the county court denied the motion for rehearing without explanation. (R. 119).

Glassmax appeals.

SUMMARY OF ARGUMENT

There was no dispute that the insurance policy obligated State Farm to pay any covered loss within a reasonable time. The county court erred by concluding that, as a matter of law, no material breach could occur because time was not of the essence.

The "time is of the essence" requirement only applies to brief delays in performance. Neither case cited below dealt with delays of even one month. Even if the rule applies here, the cases do not establish that time is only of the essence when the contract explicitly contains such a clause, or when a demand is made. Florida law also provides that time is of the essence when "the treating of time as a non-essential [sic] would produce a hardship, and delay by one party in completing or in complying with a term would necessarily subject the other party to a serious injury or loss." That condition is present in a consumer insurance contract. Moreover, an invoice is a demand for payment, and in the context of a consumer insurance contract should be considered a "demand" sufficient to trigger a contractual duty to pay within a reasonable time.

Even if Glassmax could not establish breach of contract, an issue of fact would exist as to whether State Farm confessed judgment by paying Glassmax's claim after the initial complaint was filed. Therefore, this Court should reverse and remand for further proceedings.

STANDARD OF REVIEW

This appeal presents an issue of law that is reviewed *de novo*. Regis Ins. Co. v. Miami Mgmt., Inc., 902 So. 2d 966 (Fla. 4th DCA 2004) (stating that because a ruling on a motion to dismiss raises issues of law, it is reviewed *de novo*); Palumbo v. Moore, 777 So. 2d 1177, 1178 (Fla. 5th DCA 2001) ("Generally, the standard of review of an order dismissing a complaint with prejudice is *de novo*."). No deference is granted to the trial court's ruling in such circumstance. Reyes v. Roush, 99 So. 3d 586, 589 (Fla. 2d DCA 2012).

ARGUMENT

1. Where, as here, a contract lacks a time for performance, the performance must occur within a reasonable time, as decided by the facts of the individual case.

This issue was not disputed below, and is not reasonably subject to dispute here. Steinberg v. Sachs, 837 So. 2d 503, 505-06 (Fla. 3d DCA 2003) (citing, *inter alia*, De Cespedes v. Bolanos, 711 So. 2d 216, 218 (Fla. 3d DCA 1998) (stating that "the general Florida rule is that when a contract does not expressly fix the time for performance of its terms, the law will imply a reasonable time.")); Bentley Constr. Dev. & Eng'g, Inc. v. All Phase Elec. & Maint., Inc., 562 So. 2d 800, 803 (Fla. 2d DCA 1990) (imputing reasonableness where contract was ambiguous as to date subcontractor was entitled to payment). The Florida Supreme Court thought the issue clear enough to memorialize in Florida Model Jury Instruction 416.19, which articulates two principles. The first principle is that when a contract is silent as time for performance, "then the party must perform the requirement within a reasonable time." The second principle is that the jury decides reasonableness: "What is a reasonable time depends on the facts of each case, including the subject matter and purpose of the contract and the expressed intent of the parties at the time they entered into the contract." Therefore, unless some exception applies, the issue of whether State Farm paid the claim within a reasonable amount of time should have been decided by the jury.

2. The trial court erred in determining that whether State Farm unreasonably delayed paying the claim was legally irrelevant.

The trial court did not find that State Farm paid the claim in a reasonable time. Instead, applying the erroneous rule that time is not of the essence absent an explicit clause in the contract, the court found the issue irrelevant. The trial court should not have required any showing that time was "of the essence" because the delay of nearly five months was not a brief *de minimus* delay. Even if the county court was correct as to that issue, it subsequently applied the incorrect law by requiring Glassmax to allege that the contract contained a "time is of the essence" clause and that Glassmax had sent a formal demand letter after sending the invoice. Other factors can render time "of the essence" in a Florida contract. This Court should reverse and remand for a determination of whether the delay in paying the claim was reasonable.

A. The delay was not "brief" enough to trigger the "time is of the essence" requirement.

Not every failure to timely perform is a material breach. In certain cases, Florida courts have held that "a brief delay in the performance of a contract covenant does not discharge the other party's contractual obligations" unless "'time was of the essence.'" Thomas v. Fusilier, 966 So. 2d 1001, 1003 (Fla. 5th DCA 2007). Florida courts have found delays as long as twelve days to be "brief" for the purposes of requiring time to be of the essence. Id. at 1002-03 (citing

cases). There should be no "time is of the essence" inquiry here because State Farm delayed payment for nearly five months, which does not appear to be "brief" under Florida law.

B. Time is of the essence in an insured's claim for windshield repairs, and remains of the essence after a post-loss assignment of benefits.

Assuming *arguendo* that a five-month delay in paying a claim on an insurance policy is "brief," the lower court nevertheless erred by failing to consider all of the criteria that render time "of the essence" in performance. Below, State Farm argued that under Florida law, lack of timely payment is never a material breach unless the contract contains a "time is of the essence" clause and a formal demand letter is sent. (Supp. 12-13 (citing Edward Waters Coll. v. Johnson, 707 So. 2d 801 (Fla. 1st DCA 1998) and Nat'l Exhibition Co. v. Ball, 139 So. 2d 489 (Fla. 2d DCA 1962)). In Johnson, the college reached a settlement with Ms. Johnson to pay her back salary. 707 So. 2d at 802. The college was one day late in making payment, and the trial court allowed Ms. Johnson to enforce a clause granting her $250,000 in the event of a default. Id.

On appeal, the First District explained that such a brief delay was not actionable unless one of three conditions existed:

> Time is considered to be of the essence when one of the following three circumstances apply: (1) where there has been an express recital by the parties; (2) where, from the nature of the subject matter of the contract, the treating of time as a non-essential [sic] would produce a hardship,

> and delay by one party in completing or in complying with a term would necessarily subject the other party to a serious injury or loss; and (3) where an express notice has been given by a party not in default to the other party who is in default, requiring the contract to be performed within a stated time, which must be a reasonable time according to the circumstances.

Id. Because the contract lacked a "time is of the essence" clause, Ms. Johnson had made no demand for payment, and Ms. Johnson faced no prejudice from the one-day delay, the court found no material breach occurred.

The Johnson court relied on a case from 1962 describing the then-current movement away from hypertechnical insistence on exact compliance with any time condition, even when the noncompliance was minor and no prejudice accrued to the other party. Id. (citing Ball, 139 So. 2d 489). In Ball, the Second District remarked on that "[t]he modern trend of decisions concerning brief delays . . .in the absence of an express [time is of the essence clause], is to not treat such delays as . . . discharging the other party unless performance on time was clearly an essential and vital part of the bargain." 139 So. 2d at 493 (emphasis added). The Ball court faced a real estate purchaser who demanded the deposit be returned for violation of the marketable title clause. Id. at 490. The clause provided that if the seller failed to provide title insurance on a certain date, the seller would return the deposit "if after reasonable diligence on his part said title shall not be made good and

marketable within a reasonable time." Id. The buyer furnished a letter terminating the contract seventeen days after the date the title insurance was due. Id.

The Ball court started with a presumption against time being of the essence due to the subject matter of the contract. Id. at 492 (observing that "as to land sale contracts, time is not of the essence for the reason that no substantial injury will normally result from the breach of a time term"). Comparing the case to other "equitable results in given cases where the failure to perform strictly on time substantially prejudiced no one," the court found that disposition as a matter of law was inappropriate because "substantial genuine issues of material fact" existed as to whether a breach had occurred and whether the buyer waived the right to recover for breach by failing to demand immediate payment where the contract explicitly provided that the buyer "was willing to wait a reasonable time . . . in the event of a cloud" on the title. Id. at 492-93.

Thomas v. Fusilier, not cited in proceedings below, offers a more expansive set of criteria for determining whether time is of the essence. 966 So. 2d at 1003. The Thomas court explained that "Time is considered to be 'of the essence' when one of the following circumstances apply":

> (1) where there is an express recital in the party's contract;
> (2) where it can be determined from the subject matter of the contract that time was clearly an essential and vital part of the bargain;
> (3) where the treatment of time as non-essential would

> produce a hardship to the non-defaulting party; or
> (4) where notice has been given to the defaulting party requiring that the contract be performed within a stated time, which must be reasonable according to the circumstances.

Id. (emphasis added to illustrate additional criteria). Thus, the Thomas court reversed the lower court, which held that a wife forfeited her right to a $250,000 payment on conditioned on vacating the marital home by vacating twelve days late. Id. at 1002. The Court explained that complications of a known pregnancy had caused the delay, and the husband was not prejudiced thereby.

The criteria numbered two (timeliness due to subject matter) and three (prejudice) exist here. As a general matter, timely payment of auto glass windshield claims keeps our roads safe by enabling consumers to repair unsafe vehicles. The legislature has formalized this common-sense truism into public policy by prohibiting insurers from charging comprehensive insurance consumers a deductible for windshield repair. Section 627.7288, Fla. Stat. Citizens without the cash or credit to pay a deductible can thereby repair windshield damage in a timely fashion, assuming the claim itself is paid timely. Thus, unlike the Ball, there should be no presumption that the time of payment is not important. Indeed, the presumption should be the opposite.

This prejudice is a factor here even though the named insured transferred the right to payment for repairs to Glassmax with an AOB. First, as an AOB-holder,

Glassmax "possesses the same rights, benefits, and remedies as the assignor once possessed." Robert Lamb Hart Planners and Architects v. Evergreen, Ltd., 787 F. Supp. 753, 757 (S.D. Ohio 1992) (citing John D. Calamari & Joseph Perillo, *The Law of Contracts* §18-3 at 633, 634 (2d ed. 1977)). The AOB-holder "stands in the shoes of the assignor and is able to maintain suit in its own name as the real party in interest." United Water Restoration Group, Inc. v. State Farm Fla. Ins. Co., No. 1D14-3797, slip op. at 4 (nonfinal; citing cases); see also Cont'l Cas. Co. v. Ryan Inc. Eastern, 974 So. 2d 368 (Fla. 2008). Thus, the same conditions and terms that applied to Mr. Vega should apply to Glassmax as a matter of law.

Second, time matters to consumers even after an AOB occurs due to simple market forces. AOBs allow consumers to obtain the benefit of insurance before the claim is paid. Delaying payment effectively forces AOB-holders to grant insurers like State Farm an interest-free loan while they wait to be paid for the services and materials they have provided. The longer it takes to get paid, the greater the reverse interest payment and the lower the value of the AOB. Fewer repair facilities will accept them, and more insureds would have to wait until the policy was actually paid to repair their windshields, making all of us less safe and requiring the consumer to either forego transportation or risk a ticket under Section 316.610, Florida Statutes. Finding that time is not of the essence after an AOB occurs would prejudice Florida's insurance consumers.

Thus, the Court should find that time is of the essence when an AOB-holder makes a claim for payment after repairing the windshield of an auto insurance consumer.

C. Alternatively, an invoice is a sufficiently clear and direct demand for payment to render time "of the essence" in payment.

Arguing that an invoice is not a demand for payment goes against our normal understanding of an invoice's function and meaning. In everyday life, we recognize that "an invoice generally serves as a demand for payment." Daewoo Int'l (Am.) Corp. Creditor Trust v. SSTS Am. Corp., No. 02-cv-9629, 2004 U.S. Dist. LEXIS 12298, *9 n.3, 2004 WL 1488511 (S.D.N.Y. July 1, 2004).

Other jurisdictions have found an invoice or bill to be a sufficient demand for payment to trigger the obligation to pay for the purposes of various statutes. Gordon v. Leasman, 365 S.W.3d 109, 116-17 (Tex. App. 2011) (bills and invoices satisfy pre-suit demand requirement for Texas statute on attorney fees) (citing cases); All Automatic Transmission Parts, Inc. v. Corwin, 2009 Pa. Dist. & Cnty. Dec. LEXIS 233, *4 (Pa. County Ct. 2009) (invoices sufficient demand for payment for prejudgment interest); Whalen v. Mont. Right to Life Ass'n, No. 04-076, 2004 MT 319N, ¶ 23, 2004 Mont. LEXIS 582 (Mont. November 16, 2004) (holding that "invoice . . . served as the demand necessary to trigger" limitations period commencing on "demand"); Gen. Dynamics Corp. v. Fed. Pac. Elec. Co., 2482 N.E.2d 824, 830 (Mass. 1985) (interpreting invoice to satisfy statute

providing interest on damages in breach of contract from time of demand as long as party is "informed 'of the basis and extent of its obligation, as well as the fact that performance [is] then due'" (quoting Lexington v. Bedford, 378 Mass. 562, 576 (1979)). This illustrates further that an invoice is generally treated as a demand for payment to be either paid or denied.

No mandatory precedent on all fours appears to exist in Florida. However, a similar principle was recognized in State v. Diaz, 814 So. 2d 466, 467 (Fla. 3d DCA 2002). In Diaz, a contractor was charged with grand theft in connection with payments made for landscaping services to Miami-Dade county. Of the 23 invoices that formed the basis of the complaint, the trial court ruled that 22 were not relevant because they were issued beyond the statute of limitations. On appeal, the decision was affirmed because each invoice constituted a separate taking. If an invoice were not a firm demand for payment, it is difficult to understand how they could be the relevant unit in such a criminal prosecution.

Because an invoice is generally understood to be a demand for payment in life and at law, the Court should not require that any other "demand" occur for time to be of the essence in payment to an AOB holder under a consumer insurance policy.

3. State Farm's payment of the claim after suit was filed presents a question of fact as to whether judgment was confessed, and is an independent basis for denying the motion to dismiss.

Whether State Farm breached the insurance contract by delaying payment is a matter for the jury to decide. However, even if no breach had occurred as a matter of law, a jury could also find that State Farm waived the right to contest the issue by paying the claim. "Florida courts have repeatedly held that when an insurer pays additional policy proceeds after suit is filed, 'it has, in effect, declined to defend its position in the pending suit. Thus, the payment of the claim is, indeed, the functional equivalent of a confession of judgment or a verdict in favor of the insured.'" 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)). The caveat to this rule is that "the filing of the suit [must have] acted as a necessary catalyst to resolve the dispute and force the insurer to satisfy its obligations under the insurance contract." Clifton, 31 So. 3d at 829 (quoting Lewis v. Universal Prop. & Cas. Ins. Co., 13 So. 3d 1079, 1081 (Fla. 4th DCA 2009)). A lawsuit can be a catalyst when filed after "an insurer that is aware of a dispute with its insured [] simply ignore[s] that dispute." Clifton, 31 So. at 831.

It is not apparent from the four corners of the complaint that State Farm would have paid the claim even if no suit had been filed. Therefore, the confession of error rule cannot be resolved on a motion to dismiss.

CONCLUSION

The county court found it irrelevant whether State Farm paid the claim in a reasonable time, because time was not of the essence. In fact, whether time is of the essence is irrelevant, because a nearly five-month delay in paying a windshield repair claim is not a "brief" delay or merely technical breach. Nevertheless, if the Court finds that five months is a "brief" delay, it should hold that time is of the essence in the insurance contract because of the purpose of the contract (to enable consumers to repair windshields quickly and keep Florida roads safe) and the prejudice that would result from delays (dangerous conditions for the insured and the public as a whole).

In the alternative, the Court should hold that time was of the essence because Glassmax demanded payment on the existing contract when it sent State Farm its invoice.

The Court must also recognize that State Farm paid the claim after this suit was filed, and the complaint does not definitively establish that it did not thereby confess judgment. The lower court's judgment should be reversed, and the case remanded for further proceedings consistent with this Court's state of the applicable law.

Respectfully Submitted,

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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 4th day of September 2015.

s/Gray R. Proctor
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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).

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