IN THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT, IN AND FOR BROWARD COUNTY, FLORIDA

TOTAL CARE RESTORATION, LLC, a/a/o Raquel Alonso-Bolanos,

Plaintiff/Appellant,

vs.

PEOPLE'S TRUST INSURANCE COMPANY, COMPANY,

Defendant/Appellee.
_____/

Appellate Div. Case CACE 19-5629
County Court Case COCE 17-021825

INITIAL BRIEF

ON APPEAL FROM THE CIRCUIT COURT
SEVENTEENTH JUDICIAL CIRCUIT
IN AND FOR BROWARD COUNTY, FLORIDA

Daniel Gross, Esq.
MOISES & GROSS, PLLC
Florida Bar No. 90997
999 Ponce de Leon Blvd., #945
Coral Gables, FL 33134
Ph: (305) 306-3055
Email: dgross@mtgfllaw.com

Gray R. Proctor, Esq.
LAW OFFICE OF GRAY PROCTOR
Florida Bar No. 48192
1108 East Main Street, Suite 803
Richmond, VA 23219
Ph: (888) 788-4280
Email: gray@allappeals.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

INTRODUCTION AND QUESTIONS PRESENTED

Total Care Restoration, LLC ("Total Care") appeals an order granting summary judgment to People's Trust Insurance Company ("PTIC"). At issue here is a clause limiting PTIC's coverage to "The amount 'we' would have paid to Rapid Response Team LLC [("RRT")] for necessary repairs made solely to protect the covered property from further damage."

PTIC argues that its liability is only $2,000 pursuant to its contract with RRT. On summary judgment, PTIC introduced an agreement with RRT to provide water mitigation services "for a flat fee of Two Thousand Dollars ($2000) per assignment." In rebuttal Total Care produced invoices from RRT charging PTIC more than $2,000 for flat rate water mitigation on multiple occasions. Deposition testimony indicated that some of the charges were covered by unwritten agreements to increase the $2,000 cap during catastrophes. Others, however, could not be explained. Total Care and RRT speculated that RRT must have done work outside of the scope of the flat fee schedule of services, though, and RRT's emergency services manager averred that RRT would have done the job at the $2,000 flat rate.

The question in this appeal is: has PTIC conclusively established the amount it would have paid Total Care, with no remaining questions of fact or credibility?

STATEMENT OF THE CASE AND FACTS

On July 3, 2017, Raquel Alonso-Bolanos suffered an air conditioning leak at her residence. (R. 62). She called Total Care to perform water mitigation services, and in return gave a post-loss assignment of benefits ("AOB"). (R. 63). Total Care submitted an invoice for $15,587.96 to PTIC. (R. 65). The invoice indicates that certain charges were necessary because "there is a new born baby living in the home," because contaminated "category 3 water" was present, and because thermal imaging was a "(bid item)." (R. 288). On August 29, 2017, PTIC invoked the coverage limitation described in the option to repair clause:

> If "you" do not notify "us" and allow "us", at our option, to select Rapid Response Team, LLC™ for the covered Reasonable Repairs, "our" obligation for repairs made to protect the covered property from further damage is limited to the lesser of the following:
> (1) The reasonable cost "you" incur for necessary repairs made solely to protect the property from further damage;
> or
> (2) The amount "we" would have paid to Rapid Response Team, LLC™ for necessary repairs made solely to protect the covered property from further damage.

(R. 166). RRT explained that it had a flat-fee service contract with RRT, which performed all water mitigation services for $2,000 per assignment. (R. 166-67).

Total Care filed suit to recover the balance of its invoice on December 6, 2017. (R. 1). This is an appeal of the order granting PTIC's motion for summary judgment.

I. PTIC's Motion for Summary Judgment: Option to Repair Clause and $2,000 Flat-Fee Service Agreement with Rapid Response Team.

On December 6, 2018, PTIC filed a motion for summary judgment. PTIC argued that its liability was limited to "The amount 'we' would have paid to Rapid Response Team, LLC for necessary repairs made solely to protect the covered property from further damage." (R. 64). PTIC argued that, "Had the insured notified PTI of the need for mitigation services, and allowed PTI to select RRT to perform the mitigation services, PTI would have paid RRT $2,000.00 to perform the same services performed by Plaintiff." (R. 66).

In support of its argument, PTIC produced a "services agreement" between PTIC and RRT. (R. 156). The Services Agreement purports to "set forth the terms upon which [PTIC] from time to time may request the inspection, remediation or repair services of Rapid Response." (R. 156). "In consideration for assignments made to Rapid Response, the Company agrees to pay to Rapid Response amounts determined in accordance with exhibit B." (R. 156). "Schedule B" of the services agreement describes the water mitigation services RRT will provide for a flat fee:

> Rapid response will perform the following services, to the extent required under the particular circumstances, in connection with each water mitigation assignment.
>
> 1. Water Extraction
> 2. Drying
> 3. Carpet Cleaning
> 4. Upholstery Cleaning
> 5. Dehumidification

6. Contents removal and restoration
7. Moisture-damaged material removal and restoration
8. Complete IIRC documentation of drying process
9. Emergency leak detection
10. Emergency plumbing services

(R. 163). For water mitigation assignments, "Rapid response will perform the above services for a flat fee of Two Thousand Dollars ($2,000) per assignment." Therefore, PTIC argued, it had conclusively proven that its liability under the policy was limited to $2,000. (R. 69).

For other repair services, RRT agreed to use Xactimate estimating software, with a 5% discount to the portion of the estimate that corresponded to RRT's overhead and profit. The Xactimate figure could be "adjusted for inflation, demand, and supply." (R. 163). Finally, the agreement sets forth a fee schedule if PTIC uses RRT in "the event of a catastrophe as a field estimator." (R. 164).

The services agreement explicitly provides that "Nothing shall guaranty any minimum number of assignments or compensation to Rapid Response, nor that either party will conduct business exclusively with the other." (R. 156). Perhaps inconsistently, the agreement provides that the parties signed it "intending to be legally bound." (R. 159). An integration clause provided the "Agreement sets forth the entire contract between the parties concerning the subject thereof, and supersedes all prior and contemporaneous written or oral negotiations and agreements between them concerning the subject thereof." (R. 159).

PTIC also attached Exhibit A, the "Rapid Response Team, LLC Description of Services" to be routinely provided. (R. 161). The Description of Services is a blueprint for long-term cooperation, providing that RRT will "coordinate with [PTIC] regarding [PTIC]'s then-current and anticipated future needs for Rapid Response services." (R. 161). Rapid Response was to be "operated as a general contracting firm" delivering a full range of services:

> Rapid Response and the Company anticipate that RRT will render, directly or through subcontractors or vendors, those services customarily associated with a general contractor providing services in the personal residential market, including without limitation temporary repairs and loss mitigation, plumbing, electrical, HVAC, roofing, flooring, leak detection, carpentry, drywall repair/replacement, cabinet repair/replacement, painting, tile and grout repair, in installation of roof tarps, window and door board-up, demolition and debris removal.

(R. 161). But RRT was also expected to directly provide water mitigation services. In order to "facilitate its ability to accept assignments of the types typically associated with personal residences," Rapid Response agreed to "maintain an inventory of water mitigation equipment" and repair materials. (R. 161).

Carlos Castillo, RRT's Emergency Services Manager, completed an affidavit as RRT's corporate representative. (R. 686). Mr. Castillo averred that "All of the services performed by Plaintiff, specifically, every line item in Plaintiff's invoice, is encompassed within the Services Agreement between PTI and RRT. RRT would

have performed all of the services performed by Plaintiff' specifically every line item in Plaintiff's invoice, for a flat fee of $2,000.00." (R. 689).

II. Total Care's Opposition and Motion for Partial Summary Judgment: depositions and water mitigation invoices for over $2,000 from RRT to PTIC.

Total Care filed its own motion for partial summary judgment (R. 271) as well as a response in opposition to PTIC's motion for summary judgment. (R. 700). In its opposition to the motion for summary judgment, Total Care explained that depositions and business records "establish that there have been multiple prior instances where Defendant has paid Rapid Response in excess of $2,000 for water remediation services performed by Rapid Response." (R. 705). Total Care submitted depositions of Arielle Peters,[1] corporate counsel for PTIC, and for Steve Berman, Managing Director of RRT, along with selected invoices for water mitigation requesting payment of more than $2,000. (R. 499-595).

A. Deposition of Arielle Peters, corporate counsel for People's Trust.

On August 21, 2018, Arielle Peters, corporate counsel for PTIC, was deposed as its representative. Ms. Peters was asked if there had "been any instances between February 28, 2017 through the present where Peoples Trust paid

[1] The depositions of Ms. Peters and Mr. Berman were taken in *Krystal Care, et al. v. People's Trust Insurance Company*, COWE 17-024288 (17th Cir., Broward County, Aug. 21, 2018).

Rapid Response in excess of $2,000 for water mitigation services?" (R. 321). Ms. Peters explained that she believed the cap was always applied unless the cause of loss was a hurricane. She conceded that the contract did not differentiate between any types of water mitigation assignments, which provided for a $2,000 cap in all cases. However, she did not believe the contract was intended to cover hurricane or "catastrophe claims," which were generally treated separately from "daily claims." (R. 321-24). She stated that if the contract were intended to apply to "cat claims," it would have explicitly stated so; but, "the contract is silent as to catastrophe circumstances where Rapid Response Team provides water mitigation services. So that's why we do not apply it to mitigation in the event of a hurricane." (R. 322-23; *see also* R. 329 (agreeing that "Schedule B is silent on what to charge for water mitigation services in the event the peril is a catastrophe")).

Total Care then confronted Ms. Peters with a list of payments from PTIC to RRT, including several instances where RRT was paid more than $2,000 for mitigation. (R. 342- 380). Ms. Peters believed that they were all catastrophe claims, and explained she had it on "good authority" that RRT did not charge more than $2,000 for water mitigation in connection with any non-catastrophe loss. (R. 326-27). "Believe me, we would like to enforce the $2,000 limit on catastrophe claims as well." (R. 328).

B. Deposition of Steve Berman, Managing Director of Rapid Response Team.

On November 20, 2018, Steve Berman was deposed as RRT's managing director. He also served as a "Managing Director & Real Estate Development Executive Committee" member for PTIC. (R. 602).

Mr. Berman explained that the Service Agreement was a continuation of a verbal agreement between RRT and PTIC to try out the arrangement. (R. 443). Other flat rate fee schedules existed for mold, fire, board-up, and tarping services. (R. 443-46). And, there was a "whole separate agreement between Rapid Response and People's Trust that pertains to hurricane losses." (R. 445). RRT's counsel explained that she was unsure whether the hurricane loss agreement and other flat rate schedules had been reduced to final writing and "executed and/or approved." (R. 446).

Mr. Berman was asked whether all the services outlined in the Service Agreement were included within the $2,000 cap. He replied that was true, "within reason." (R. 421). There were "rare exceptions" that depended on "the scope of the services that will have to be provided." (R. 423). These exceptions were not necessarily dependent on the cause of loss, although "the cause of loss dictates the amount of damage and mitigation." (R. 424). For example:

> Q:If you show up to a property and the roof is ripped off by Hurricane Irma and the entire property's wet, that's a situation where someone from Rapid Response will call

> People's Trust and say, "Look, we can't do this job for 2,000. We're going to have to exceed that cap."
> A: We probably wouldn't do the job.
> Q: Okay.
> A: It would be above our – you know, what we would want to do.
> Q: Okay. Well, let me – I'll give you a different hypothetical. You show up to a property and it's a Cateogory 3, dirty water backup, and it's flooded several rooms in the property. Is that a set of circumstances where hypothetically Rapid Response will call Peiople's Trust and say, "Hey, we have to go above the $2,000 cap to complete this work."
> A: In very rare instance, we would – when that would occur, we would call People's Trust if we had to do additional services.

(R. 424-25).

As a practical matter RRT obtained permission from PTIC to exceed the cap in specific cases, although no written procedures governed exceptions to the flat fee schedule. (R. 433). Mr. Berman further testified that wherever the $2,000 cap had been exceeded for a non-catastrophic loss, there must be "additional items" that did not correspond to water mitigation services. (R. 459-60). Mr. Berman thought that RRT had only billed more than $2,000 for water mitigation work "a handful less than three" times. (R. 426). He could not explain, however, the reason the cap was exceeded in a series of invoices that contradicted him. (R. 448 ("Flat-rate water mitigation, $2160"); R. 450-51 (Invoice 392, $6,500 for "Water Mitigaiton" [sic]; *see* R. 540); R. 451 (Invoice 408, $3,300 for "Water Mitigation," *see* R. 542); R. 454 (Invoice 456, $3,000 "Flat Fee for Water Mitigation Services,"

see R. 546); R. 455 (invoice 464, *see* R 547 ($3,431.80 for "Flat Fee Water Mit Billing"), and invoice 466, *see* R. 548 ($2,495 for "Flat Fee Billing Water Mit")).

C. RRT's water mitigation invoices.

In connection with the cross-motions for summary judgment, Total Care also submitted a series of RRT's water mitigation invoices. (R. 499-595).

RRT had submitted bills for up to $9,772.31 for "water extraction and remediation" (R. 569, June 8, 2017 invoice) without any line-item explanation. On two occasions the flat rate structure had been bypassed entirely, billing a total of $8,892.73 on March 29, 2017 (R. 534-36) and $8,684.50 on May 1, 2017. (R. 551-555). On several other occasions RRT had billed the $2,000 flat rate along with a line item charge that appeared to be at least arguably encompassed within mitigation services specified in Schedule B, such as leak detection[2] (R. 529, 533, 537, 551, 559), plumbing services (R. 521, 549), or additional subcontracted remediation services. (R. 556 (additional $395 charge for "water extraction & remediation (bid item)")). The majority of the invoices, however, lack any line-item descriptions of the reason for exceeding the $2000 cap.

Some evidence supports the idea of an unwritten flat-rate agreement for hurricanes only. There are a series of invoices charging $4,000 or $3,000 that are

[2] Item 9 of Schedule B's list of flat see services covers "emergency leak detection." (R. 163).

consistent with the testimony that RRT and PTIC negotiated flat rates for individual catastrophes (i.e., Hurricane Irma). These begin with a $4,000 for "water mitigation" on September 18, 2017 (R. 578) and continue.[3] However, there are many invoices for which flat-rate catastrophe pricing would not seem to apply:

1) $2150.00 for "RRT invoices (water mitigation) 5-25-17 (R. 565)
2) $2154.00 for "water mitigation services" on May 19, 2017 (R. 561)
3) $2,185.00 for "water mitigation" on June 15, 2017 (R. 571)
4) $2,225 for "rrt invoice (water mitigation) 5-25-17" (R. 563)
5) $2,264.00 for "water mitigation services" on June 2, 2017 (R. 567)
6) $2,347.22 for "water mitigation services" on May 19, 2017(R. 560)
7) $2,375 for "RRT invoices (water mitigation) 5-25-17 (R. 564)
8) $2495.00 for "Flat Fee Billing Water Mit" on April 25, 2017 (R. 548)
9) $2,692 for "water mitigation services" on May 9, 2017 (R. 557)
10) $2,750" for "RRT Invoices (water mitigation) 5-24-7" (R. 562)
11) $3,000 for "flat fee for water mitigation services" on March 23 and April 24, 2017 (R. 531, 546);
12) $3,300 for "water mitigation" on April 14, 2017 (R. 542)
13) $3,431.80 for "Flat Fee Water Mit Billing" on April 25, 2017 (R. 547)
14) $3,500 for "water extraction and remediation" dated March 13, March 15, March 27, and April 19, 2017 (R. 520, 523, 532, 545)
15) $4000 for "water extraction & remediation" on March 20, 2017 (R. 526).
16) $5,000 for "flat rate billing – water mitigation" on June 14, 2017 (R. 570 (noting expenditure was "Approved by Josh Wilson"))
17) $5,250.00 for "water mitigation" on March 21 (R. 528)
18) $6,500 for "water mitigation" on April 12, 2017 (R. 540)
19) $8,034.76 for "water mitigation" on March 21, 2017 (R. 527)

None of these invoices include line-item detail explaining why RRT charged more than $2,000.

[3] (R. 579, 580, 581, 584, 588-89 (late September and early October invoices charging $4,000 because equipment was left onsite); R. 592 (Charging $3,000 where "No Equipment On Site")).

D. Cost Allocation Agreement.

Total Care also submitted a "Cost Allocation Agreement" dated July 28, 2011 between, *inter alia*, PTIC, RRT, and People's Trust Holdings, LLC. (R. 596).[4] The cost allocation agreement refers to a preceding "Service Agreement between People's Trust Insurance Company and Rapid Response Team, LLC dated September 14, 2009," which is not in this record. (R. 596).

The Agreement defines "allocable expenses" as "those expenses incurred by one or more Companies conferring a direct benefit on another Company, a portion of which expense is properly allocable . . . to the Company receiving the benefit." (R. 596). "A Company initially bearing a disproportionate share of such an expense will be reimbursed by the Company receiving the benefit . . . ." (R. 596). The agreement provides for direct allocation unless "the Companies are not able to readily and practically determine the proportional benefit to each of them," in which case allocation would be "according to revenues unless accounting principles dictate that another method of allocation is required or preferable." (R. 597). The agreement specifically allocated RRT a 1% share of payroll and 3% share of rent for corporate headquarters. (R. 597-98).

[4] The Agreement is signed by a representative for People's Trust Holdings, LLC; PTIC; People's Trust MGA, LLC; GS TWO, LLC; DPF Store, LLC; and, Rapid Response Team, LLC. (R. 599). It appears as though the CFO of People's Trust Holdings, LLC signed on behalf of every entity, and that his signature was witnessed by the same individual each time.

III. Hearing and order granting summary judgment.

At the hearing, the judge displayed a familiarity with the "Rapid Response Team, $2,000 cap" issue." (App. 3).[5] PTIC argued that the July 3, 2017 date of loss meant that this "was not a hurricane" case. (App. 4). In addition to the "flat fee agreement," PTIC had also produced the affidavit of Carlos Castillo, who attested that RRT "would have invoiced the $2,000 to Peoples Trust, which would have been paid pursuant to the flat fee arrangement." (App. 5). According to PTIC, evidence that "on a few occasions more has been paid than that $2,000 amount" was irrelevant "to the considerations of what the policy says and what the contractual obligations are." (App. 5). "If there's an instance where Peoples Trust – an adjuster, mistakenly, has paid more, then Rapid Response Team got the windfall that it wasn't otherwise entitled to or authorized to have." (App. 5-6).

PTIC's counsel reiterated that the "services agreement didn't reference catastrophe claims and, thus, it was never applied to those instances." (App. 6-7). Total Care countered by arguing that the daily/catastrophe claim distinction, which was not indicated by any of the invoices, would not explain why the "cap goes anywhere from $3,000 to $6,000. Okay? There have been invoices as high as $7,000." (App. 7). Moreover, relying on a distinction not memorialized in the

[5] The hearing transcript was not in the record at the time this brief was filed. Appellant has filed it as an appendix, along with a motion to supplement the record.

Service Agreement rendered the $2,000 cap ambiguous and arbitrary in application. (App. 8). An issue of fact existed because PTIC relied on the affidavits of Ms. Peters and Mr. Berman where the Service Agreement was "silent on that issue" of catastrophic claims. (App. 9).

PTIC argued in return that "The applicability of the $2,000 cap is not a factual issue. It's an issue of law for the Court's determination" because PTIC's "contractual obligation" to RRT would have been the $2,000 flat fee, which Carlos Castillo had averred would apply. (App. 11).

The court expressed concern about granting summary judgment where there was no evidence "Other than after the fact, Rapid Response Team saying we would have charged a flat fee of $2,000; but, clearly, they were paid more than in other situations." (App. 13). Here, however, Carlos Castillo had averred that every line in Total Care's invoice was within the ten categories of flat-rate services. (App. 14).

The Court found that "this particular contract, it purports to limit the amount that it would pay . . . ten specified services that are set at a flat fee of $2,000." (App. 15). "There's no allegations that Rapid Response Team couldn't have done this. So, respectfully, I'm granting summary judgment in favor of the defense in this case." (App. 16). Total Care appeals.

SUMMARY OF ARGUMENT

PTIC argues that as a matter of law, its agreement with RRT conclusively demonstrates that it would pay no more than $2000 for water remediation at the Alonso-Bolanos residence. But the Service Agreement is not even a contract, because PTIC is not bound to use RRT, and RRT is not bound to take any jobs from PTIC. PTIC's main argument – that it had a legal right to demand RRT complete the job for $2,000 – is erroneous.

Even if there were a contract, PTIC cannot prevail on summary judgment. The Service Agreement as written obviously does not govern PTIC's relations with RRT, leaving PTIC to explain why it tendered so many above-cap payments for water mitigation jobs. PTIC argues that the contract was intended to recognize an extraneous distinction between catastrophic claims and non-catastrophic or daily claims. PTIC needs parol evidence of intent, and where there is parol evidence, there is a jury issue.

Finally, to the extent the lower court relied on general statements that RRT and PTIC abided by the agreement unless RRT provided additional services, it invaded the jury's province by making a credibility determination. The Court should reverse the order granting summary judgment and remand for trial.

STANDARD OF REVIEW

Review of an order granting summary judgment is *de novo*. *Volusia Cty. v. Aberdeen at Ormond Beach*, 760 So. 2d 126, 130 (Fla. 2000). On summary judgment, the court's function is solely to determine whether the movant has conclusively "proved a negative, that is, the nonexistence of a genuine issue of a material fact." *Winston Park, Ltd. v. City of Coconut Creek*, 872 So. 2d 415, 418 (Fla. 4th DCA 2004) (citation omitted). Evidence and all inferences arising therefrom are construed in the light most favorable to the nonmovant. *Delotta v. J & J Auto., Inc.*, 895 So. 2d 1167, 1168 (Fla. 4th DCA 2005). "'If the evidence raises any issue of material fact, if it is conflicting, if it will permit different reasonable inferences, or if it tends to prove the issues, it should be submitted to the jury as a question of fact to be determined by it.'" *Id.* (quoting *Moore v. Morris*, 475 So. 2d 666, 668 (Fla. 1985)). Thus, the Fourth DCA has reversed where "factual inconsistency between unwritten policies and written forms" created an issue of fact as to whether an insured complied with the procedures for changing a beneficiary. *Schwartz v. Guardian Life Ins. Co. of Am.*, 73 So. 3d 798, 808-09 (Fla. 4th DCA 2011).

Even "where the evidence as to a material fact is *undisputed*," summary judgment is not appropriate "if there are conflicting inferences of fact reasonably deducible from that undisputed evidence." *Ham v. Heintzelman's Ford, Inc.*, 256

So. 2d 264, 267 (Fla. 4th DCA 1971). "Where reasonable men might justifiably make different inferences and deductions and reach different conclusions it cannot be said that there is no genuine issue of material fact." *Berlanti Constr. Co. v. Miami Beach Fed. Sav. & Loan Asso.*, 183 So. 2d 746, 748 (Fla. 3d DCA 1966). Where a credibility determination is "inherent" in evaluating evidence, *Ham*, 256 So. 2d at 268, courts should beware of crediting an unopposed affidavit on an ultimate issue, lest they exceed their authority through "adjudication of the issues rather than the determination of the nonexistence of a genuine issue of material fact." *Blanco v. Allen*, 509 So. 2d 1356, 1357 (Fla. 4th DCA 1987).

ARGUMENT: PTIC FAILED TO PROVE THAT RRT WOULD HAVE CHARGED ONLY $2,000 FOR THE SERVICES TOTAL CARE PROVIDED

PTIC has argued itself out of summary judgment. It has produced a contract that it claims entitles it to have RRT perform water mitigation for Ms. Alonso-Bolanos for $2,000. The Service Agreement is not an enforceable contract, but let us assume it here that it is. To explain other instances where it paid more than $2,000 for flat rate water mitigation, PTIC relies on evidence of a latent ambiguity caused by the need to treat catastrophic claims differently. PTIC also relies on parol evidence to supply terms missing from the Service Agreement contract. Florida law is absolutely clear that a jury question exists when parol evidence is used to interpret a contract in light of a latent ambiguity.

RRT's other record explanation (through Mr. Berman) for the over-cap invoices was mere *ipse dixit*: "we apply the agreement, so the agreement must not have applied to that invoice." The finder of fact should determine whether RRT is fit to lead us onto that path of circular reasoning. As for the affidavit from RRT's emergency services manager, the record indicates that RRT has a long and close relationship with PTIC. RRT cannot claim to be disinterested in whether the Service Agreement contract is effective in limiting PTIC's liability here. The affidavit presents an inherent credibility issue that Florida law leaves for the jury.

The lower court erred, and the case should be reversed and remanded.

I. The Service Agreement is an illusory promise, not a binding contract.

PTIC argues that the Service Agreement proves it had a legal right to pay $2,000 for the services described in Total Care's $15,587.96 invoice. But despite its promissory language, the Service Agreement is an illusory promise that does not bind the parties in any particular case.

"Where one party retains to itself the option of fulfilling or declining to fulfill its obligations under the contract, there is no valid contract and neither side may be bound." *See Contractpoint Fla. Parks, LLC v. State of Florida*, 958 So. 2d 1035, 1036 (Fla. 1st DCA 2007); *see also Johnson Enter. of Jacksonville, Inc. v. FPL Group, Inc.*, 162 F.3d 1290, 1311 (11th Cir. 1998) (explaining that promisor "who says, in effect, 'I will if I want to'" has not entered an enforceable contract).

An illusory promise is composed of "words in a promissory form that promise nothing. . . . They do not purport to put any limitation on the freedom of the alleged promisor. If A makes an illusory promise, A's words leave A's future action subject to A's own future whim, just as it would have been had A said nothing at all." *Harby v. Wachovia Bank, N.A.*, 915 A.2d 462, 469 (Md. 2007) (citing *Corbin on Contracts* § 5.28). Because one party "has not promised to do anything, there is no consideration and no contract." *Office Pavilion S. Fla., Inc. v. ASAL Prods., Inc.*, 849 So. 2d 367, 370-71 (Fla. 4th DCA 2003) (discussing Restatement, *supra* at § 77 cmt. a, illus. 1); *see also Petroleum Traders Corp. v. Hillsborough Cty.*, No. 8:06-cv-2289-T-TBM, 2008 U.S. Dist. LEXIS 109717, at *11-16 (M.D. Fla. Oct. 14, 2008) (applying Florida law).

Here, the agreement provides that PTIC "from time to time may issue assignments to Rapid Response." (R. 156). But "Nothing in this Agreement shall guaranty any minimum number of assignments or compensation to Rapid Response, nor that either party will conduct business exclusively with the other." (R. 156). And, nothing in the contract requires PTIC to accept assignments.

Moreover, the price terms remain indefinite. In most circumstances RRT is to use Xactimate in its quote. (R. 163). However, the Xactimate estimate may be "adjusted for inflation, demand and supply," and the parties "may agree upon reduced charges based upon market conditions or competitive considerations." (R.

163). And although Exhibit B does purport to set a "flat fee of Two Thousand ($2,000) per assignment" for water mitigation claims, PTIC clearly cannot enforce this provision unless RRT agrees. (R. 318 ("Believe me, [PTIC] would like to enforce the $2,000 limit on catastrophe claims as well;" R. 424 (RRT "probably wouldn't do the job" at the $2,000 flat rate if the work were more than "what we would want to do")). To the extent the lower court relied on any legal right to have RRT perform Total Care's services for $2,000, the court erred.

II. Even if there were some binding contract, the jury must weigh the parol evidence of the unwritten agreements PTIC claims exist.

Assuming *arguendo* that PTIC and RRT have a contract, summary judgment would still be inappropriate. PTIC is in the position of establishing that its relations with RRT are controlled by the contract. PTIC has to square the plain language of the Service Agreement with evidence that RRT has been paid more than $2,000 on many occasions. RRT and PTIC have explained that the contact is silent as to catastrophic claims because it is not intended to apply to them. In effect, PTIC argues that a latent ambiguity exists, at least as to catastrophic claims, and seeks to introduce parole evidence of the flat rate fee schedule that applies during a catastrophe. PTIC's argument precludes summary judgment because where there is parole evidence, there is a question for trial.

A latent ambiguity occurs "when a contract is rendered ambiguous by some collateral matter." *Fi-Evergreen Woods, LLC v. Robinson*, 135 So. 3d 331, 336

(Fla. 5th DCA 2013) (quoting *Mac-Gray Servs., Inc. v. Savannah Assocs. of Sarasota, LLC*, 915 So. 2d 657, 659 (Fla. 2d DCA 2005)). The matter cannot be "apparent from the face of the document," but must instead arise when "some extrinsic fact or extraneous evidence creates a necessity for interpretation or a choice among two or more possible meanings." *Mac-Gray*, 915 So. 2d at 659 (citations omitted). Here, the distinction between catastrophic claims and daily claims is an extraneous fact that PTIC argues renders the Service Agreement ambiguous.

The law is clear that "[u]se of parol evidence to determine either the intent of the parties or the terms of a contract precludes summary judgment." *Montealegre v. Banco de Credito Centroamericano*, S.A., 895 So. 2d 1097, 1099 n.7 (Fla. 3d DCA 2004) (citing *Bayco Dev. Co. v. Bay Med. Ctr.*, 832 So. 2d 921, 922 (Fla. 1st DCA 2002)); *see also Nationstar Mortg. Co. v. Levine*, 216 So. 3d 711, 716 (Fla. 4th DCA 2017) (extending principle where parol evidence was necessary to resolve patent ambiguity as to relationship between signatories). Although Schedule B contains no exceptions to the $2,000 flat rate schedule, including for catastrophes Ms. Peters testified that the parties had an implicit understanding that catastrophic claims would be treated differently, and that Schedule B's silence on the issue meant that the flat rate did not apply. (R. 202-03, 210 (agreeing that "Schedule B is silent on what to charge for water mitigation

services in the event the peril is a catastrophe")). PTIC and RRT operated under a separate catastrophe pricing schedule that increased RRT's rates, presumably to reflect the increased demand for RRT's services and the general shortage of remediation equipment. (R. 321-23 (Deposition testimony of Arielle Peters, corporate counsel for PTIC describing)); (R. 317-19 (Deposition testimony of RRT Managing Director Steven Berman, describing practice of negotiating flat fees during Hurricanes Irma, Michael, and Matthew).

Total Care observes that there is evidence of a flat-rate catastrophe pricing schedule that also compensates RRT for the business it loses when equipment is left at a PTIC job site. (R. 579, 580, 581, 584, 588-89 (late September and early October invoices charging $4,000 because equipment was left onsite); R. 592 (Charging $3,000 where "No Equipment On Site")). However, Florida law is clear that when parol evidence is necessary to resolve latent ambiguities, summary judgment cannot lie.

III. The affidavit of Carlos Castillo, and general statements that RRT and PTIC abide by the agreement as written, all present credibility issues that cannot be resolved on summary judgment.

Mr. Castillo's affidavit and Mr. Berman's general statements notwithstanding, the facts in this case are not "so crystallized that nothing remains but questions of law." *Shaffran v. Holness*, 93 So. 2d 94 (Fla. 1957). The record indicates that RRT and PTIC's interests are close enough that RRT is a party

"whose interest in the litigation invests the affidavit with an issue of credibility." *Jenkins v. Graham*, 237 So. 2d 330, 333 (Fla. 4th DCA 1970). Especially when the subject matter of an affidavit cannot be contradicted directly, Courts should be wary of preventing credibility from being assessed by the finder of fact. Where other facts would permit a different reasonable inference, granting summary judgment based on an affidavit can "weighing of conflicting inferences and an assessment of the credibility of interested witnesses." *Tucker v. Am. Emp'rs Ins. Co.*, 218 So. 2d 221, 223 (Fla. 4th DCA 1969).

In *Tucker*, Plaintiff/Appellant alleged that the defendant "conducted a surveillance . . . for the purpose of annoying, harassing and intimidating her into a settlement of her claim . . . for less than she otherwise would accept." *Id.* at 221. The defendants "flatly denied" following Ms. Tucker, and neither she nor her husband could identify "the trespassers or the driver of the white panel truck." *Id.* at 223. The trial court granted summary judgment. The Fourth DCA reversed, because other facts in the record precluded the affidavit from conclusively settling the issue of fact.[6] *Id.*

[6] The *Tucker* court mentioned "the coincidence in time between the obnoxious surveillance and the innocuous surveillance admitted to by the defendants," along with "the admission of the defendants that the defendant . . . was employed to conduct a secret surveillance of the plaintiff . . . indicate the existence of a genuine issue of material fact as to the defendants' responsibility for the obnoxious surveillance." *Id.*at 223.

A similar case from the Third DCA is in accord. *Berlanti Constr. Co. v. Miami Beach Fed. Sav. & Loan Asso*., 183 So. 2d 746 (Fla. 3d DCA 1966). In *Berlanti Construction*, plaintiff/appellant's employee deposited company money into his personal account. It alleged that the defendant bank should have known that the employee was not authorized. The bank submitted an affidavit from the employee stating that the Plaintiff's president had instructed him to use his personal account. The plaintiff did not submit counter-affidavits, and summary judgment was entered for the bank.

The Third DCA reversed. The employee was "an interested witness because he would be liable to the savings and loan association if it prevailed." *Id.* The decision relied on "an evaluation and credibility process which is not an aspect of the summary judgment procedure." *Id.* at 748; *see also GEICO Indem. Ins. Co. v. Reed*, 13 So. 3d 99, 100 (Fla. 4th DCA 2009) (reversing; summary judgment improper on affidavit that interested person "mistakenly titled the van in Barton Reed's name, but it actually was used solely as a business vehicle").

And so it is here. PTIC and RRT are operating together to limit liability and reduce costs on water mitigation claims. It is easy to make claims about what RRT would have done. It should be for the jury to decide whether those claims are credible.

CONCLUSION

This case cannot be decided on the Service Agreement alone. It is either a contract that needs parol evidence to interpret, or it is not a contract at all. Regardless, the case cannot be resolved on this record without making an improper credibility determination. It should be for the jury to determine whether PTIC could really have gotten the Alonso-Bolanos job done for only $2,000 if it were afforded an opportunity to invoke its option to repair.

Respectfully Submitted,

/s/ Gray Proctor

Daniel Gross, Esq.
MOISES & GROSS, PLLC
Florida Bar No. 90997
999 Ponce de Leon Blvd., #945
Coral Gables, FL 33134
Ph: (305) 306-3055
Email: dgross@mtgfllaw.com

Gray R. Proctor, Esq.
LAW OFFICE OF GRAY PROCTOR
Florida Bar No. 48192
1108 East Main Street, Suite 803
Richmond, VA 23219
Ph: (888) 788-4280
Email: gray@allappeals.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished, via email through the efiling portal, to counsel of record this 1st day of August, 2019.

/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).

/sGray R. Proctor
Attorney