UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PANAMA CITY DIVISION

BRENDA RUTHERFORD and
SKIPPER RUTHERFORD,

Plaintiffs,

v. **Case No. 5:19cv372-TKW-MJF**

SCOTTSDALE INSURANCE COMPANY,

Defendant.
_____/

ORDER DENYING ATTORNEY'S FEES AND CLOSING CASE

This case is before the Court based on Plaintiffs' motion for entitlement to attorney's fees (Doc. 18). No hearing is necessary to rule on the motion,[1] and upon due consideration of the motion, Defendant's response in opposition (Doc. 21), Plaintiff's reply (Doc. 24), and the documents submitted by Defendant (Docs. 21-1 through 21-5 and 23-1 through 23-13), the Court finds that the motion is due to be denied for the reasons that follow.

[1] The Court also sees no reason to authorize the discovery that was belatedly requested by Plaintiffs in their reply because Plaintiffs have the burden to establish their entitlement to attorney's fees and if they believed that discovery was necessary for them to meet that burden, they should have sought leave to pursue discovery when they filed the motion. Moreover, many of the issues Plaintiffs want to pursue in discovery (*see* Doc. 24, at 6) do not appear to have anything to do with the dispositive question of whether the claims adjusting process had broken down at the time the suit was filed.

This case is a Hurricane Michael insurance dispute between the insureds (Plaintiffs) and their insurer (Defendant). The dispute was resolved through the appraisal process under the insurance policy pursuant to which Plaintiffs were awarded an additional $94,524.65 in insurance proceeds. *See* Doc. 21-2.

Plaintiffs contend that the appraisal award is tantamount to a confession of judgment pursuant to which they are entitled to an award of attorney's fees under §627.428, Fla. Stat., or its "sister statute," §627.7152. Defendant responds that Plaintiffs are not entitled to an award of attorney's fees because the claims adjusting process had not broken down and Plaintiffs did not need to file suit to obtain the additional insurance proceeds. The Court agrees with Defendant.

As an initial matter, Plaintiffs' reliance on §627.428 is misplaced because that statute does not apply to surplus lines insurers such as Defendant. See *Bryant v. GeoVera Specialty Ins. Co.*, 271 So.3d 1013, 1019 n. 1 (Fla. 4th DCA 2019) (citing § 626.913(4), Fla. Stat.). Likewise, Plaintiffs' reliance on §627.7152 is misplaced because that statute governs assignment-of-benefits agreements and no such agreement is involved in this case.[2] That said, even if Plaintiffs had cited the correct

[2] Plaintiffs assert in their reply that the reference to §627.7152 was a "clerical error."

statute, §626.9373(1),[3] they would not be entitled to an award of attorney's fees in this case.

An insured may recover attorney's fees under §626.9373(1) in the absence of a literal judgment or decree if the insured obtains "the functional equivalent of a confession of judgment or a verdict in favor of the insured," such as an appraisal award that exceeds what the insurer would have otherwise paid. *Maloy v. Scottsdale Ins. Co.*, 376 F. Supp. 3d 1249, 1253-54 (M.D. Fla. 2019) (quoting *Wollard v. Lloyd's & Cos. of Lloyd's*, 439 So.2d 217, 218 (Fla. 1983)); *see also Bryant*, 271 So.3d at 1019 n.1 (explaining that "the confession-of-judgment doctrine applicable to section 627.428 applies equally to section 626.9373."); *Lewis v. Universal Prop. & Cas. Ins. Co.,* 13 So.3d 1079, 1081 (Fla 4th DCA 2009) ("Florida's cases have uniformly held that a [statutory] attorney's fee award may be appropriate where, following some dispute as to the amount owed by the insurer, the insured files suit and, *thereafter*, the insurer invokes its right to an appraisal and, as a consequence of the appraisal, the insured recovers substantial additional sums.") (emphasis in original). However, "an award of attorneys' fees [is] not appropriate if the insurer was taking steps to resolve the dispute without court intervention." *J.P.F.D. Inv.*

[3] This statute is virtually identical to §627.428 and provides that "[u]pon the rendition of a judgment or decree ... against a surplus lines insurer in favor of any named ... insured ..., the trial court ... shall adjudge or decree against the insurer and in favor of the insured ... a reasonable sum as fees or compensation for the insured's ... attorney prosecuting the lawsuit for which recovery is awarded."

Corp. v. United Specialty Ins. Co., 322 F. Supp. 3d 1263, 1270 (M.D. Fla. 2018), *aff'd*, 769 F. App'x 698 (11th Cir. 2019).

The insured is entitled to attorney's fees only if the insurer incorrectly denies benefits due to the insured under the insurance policy, *see Johnson v. Omega Ins. Co.*, 200 So. 3d 1207, 1219 (Fla. 2016), and if the insured "races to the courthouse" without giving the insurer a chance to complete the claims adjusting process, then there has not been an incorrect denial of benefits and the insured is not entitled to fees, *see J.P.F.D. Inv. Corp.*, 769 F. App'x at 706 ("[A]ttorney's fees ... were not warranted where 'the insured never gave the insurer the opportunity to incorrectly deny the benefits before filing a lawsuit[.]' ") (quoting *Goldman v. United Servs. Auto. Ass'n*, 244 So.3d 310, 312 (Fla. 4th DCA 2018)). Stated another way, unless there has been a breakdown in the claims adjusting process or the insurer is taking an inordinate amount of time to complete the process, the insureds must let the process fully play out before filing suit. *See Hill v. State Farm Fla. Ins. Co.*, 35 So.3d 956, 960 (Fla. 2d DCA 2010) ("Adjusting and settling property claims under insurance policies is never an easy process. It requires a level of good faith and cooperation from all parties. The law does not provide any general mechanism to impose attorneys' fees against one party or the other merely because the negotiation process is difficult. It is only when the claims adjusting process breaks down and the parties are no longer working to resolve the claim within the contract, but are actually

taking steps that breach the contract, that the insured may be entitled to an award [of] fees[.]").

Here, the record does not establish a breakdown in the claims adjusting process or inordinate "foot-dragging" by the insurer. Defendant conveyed its coverage position and made an initial payment on the claim in November 2018, a little more than a month after the loss was reported. At the same time, Defendant advised Plaintiffs that it would reopen the claim if they had additional information for Defendant to consider. Doc. 23-2, at 3. There is no evidence that Plaintiffs submitted any additional information until April 2019 when Plaintiff filed a proof of loss along with an $416,676.41 estimate from a public adjuster.

A little more than a month later, Defendant sent Plaintiffs letters stating that it had engaged an adjuster to re-inspect the property. The documents submitted by the parties do not reflect when the re-inspection took place, but they clearly show that the claims adjusting process was still ongoing as of August 7, 2019, because on that date Defendant sent Plaintiffs' public adjuster a letter pointing out what appeared to be a material error in the estimate on which Plaintiffs' proof of loss was based that required clarification. *See* Doc. 23-5, at 1 (pointing out that the esimate included a $265,750 line item for replacement of an asphalt shingle roof even though the insured dwelling had a metal roof).

Defendant never got clarification from the public adjuster because Plaintiffs filed suit in state court on August 9, 2019. Three days later, Plaintiffs' attorney sent Defendant a letter of representation informing Defendant that "a lawsuit has been filed." Doc. 23-6.

Three days after receiving the letter of representation, Defendant sent Plaintiffs' attorney a letter explaining that Defendant had been dealing with Plaintiffs' public adjuster and that it has "been making efforts to get clarification [of the roof estimate] from [the public adjuster] and to discuss resolution of this matter" but that it had not yet received any response. *See* Doc. 23-7, at 1. The letter attached Defendant's estimate[4] and indicated that a check for the "undisputed damages" would be forthcoming. *Id.*

Defendant had not been served with the suit when it made the additional payment, but because the letter of representation informed Defendant that "a lawsuit has been filed," it is reasonable to infer that the filing of the suit was a catalyst for Defendant making the additional "undisputed" payment when it did. That, however, does not necessarily mean that—as Plaintiffs contend—Defendant would not have made any additional payments or requested appraisal if the suit had not been filed,

[4] The estimate referenced in the letter was not included in the documents submitted by the parties but it is reasonable to infer that it was a new estimate that resulted from the re-inspection of the property because the "undisputed damages" in the estimate ($28,433.26) were considerably higher than the damages in the original estimate ($8,753.08). *Compare* Doc. 23-7, at 1 *with* Doc. 23-2, at 2.

and the timeline summarized above does not indicate a breakdown of the claims adjusting process or a final denial of additional payments that required Plaintiffs to file suit when they did. Specifically, the record reflects that (1) Defendant made a prompt coverage decision and initial payment; (2) Defendant promptly hired an independent adjuster to re-inspect the property after receiving Plaintiffs' proof of loss; (3) only four months had passed from the filing of the proof of loss to the filing of the suit;[5] and, most significantly, (4) Defendant was still awaiting clarification from Plaintiffs' adjuster regarding a material error in the estimate on which the proof of loss was based when the suit was filed.

Although Defendant arguably could have made the additional "undisputed" payment or invoked the appraisal process when it sent the August 7 letter, it was not unreasonable under the circumstances for Defendant to await clarification from Plaintiffs' public adjuster regarding the amount claimed before doing so. And, by filing suit when they did, Plaintiffs effectively short-circuited Defendant's efforts to obtain the clarification necessary to properly adjust the claim and comply (or not) with its obligations under the policy. *Accord Nix v. Kinsale Ins. Co.*, 2021 WL

[5] The Court did not overlook that the loss was reported 10 months before the suit was filed, but Plaintiffs did not proffer any evidence showing that they provided any additional information for Defendant to consider in re-evaluating their claim until April 2019 when the proof of loss was filed along with the public adjuster's estimate.

1976462 (N.D. Fla. May 17, 2021); *Apostolic Pentecostal Church of Panama City, Inc. v. Scottsdale Ins. Co.*, 2020 WL 5627221 (N.D. Fla. Sept. 18, 2020).

In sum, because the record reflects that Plaintiffs did not let the claims adjusting process fully play out before they filed suit, it is **ORDERED** that Plaintiffs' motion for attorney's fees (Doc. 21) is **DENIED**. Additionally, because the appraisal award has been paid and no further judicial action is necessary, it is **FURTHER ORDERED** that this case is **DISMISSED with prejudice**, and the Clerk shall close the case file. *See J.P.F.D.*, 322 F. Supp. 3d at 1267 n.3 (citing *Federated Nat'l Ins. Co. v. Esposito*, 937 So. 2d 199, 200 (Fla. 4th DCA 2006)).

DONE and ORDERED this 15th day of June, 2021.

T. Kent Wetherell, II

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UNITED STATES DISTRICT JUDGE