UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

STEPHEN SIMPSON,

Plaintiff,

v. **Case No. 3:21cv1031-TKW-EMT**

ASPEN AMERICAN INSURANCE COMPANY and **MARINEMAX EAST** d/b/a MarineMax

Defendants.
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ORDER GRANTING MOTION TO DISMISS

This case is before the Court based on the motion to dismiss, etc. filed by Defendant Aspen American Insurance Company (Doc. 14) and Plaintiff's response in opposition (Doc. 17). No hearing is necessary to rule on the motion, and upon due consideration of the motion, the response, and the amended complaint (Doc. 8) and its attachments, the Court finds that the motion is due to be granted.

Plaintiff owns a 51-foot yacht that suffered significant damage when Hurricane Sally impacted the marina where the yacht was docked. The yacht was insured at the time of the hurricane under a marine insurance policy issued by Aspen.

The policy required Plaintiff to have a hurricane preparation plan (HPP) for the safety of the yacht in the event of a hurricane. The HPP was relied on by the

underwriters in deciding whether to issue the policy and it "form[ed] the basis of the insurance contract." Doc. 8-1, at 30.

The HPP submitted by Plaintiff stated that the yacht would be "haul[ed] out" by Defendant MarineMax East, Inc. d/b/a MarineMax and stored on land in the event of a hurricane. The HPP stated that "haulout" was also the "alternative plan[] in the event that the [primary] plan becomes unlikely," *id.*, and although the HPP did not identify who was going to perform the haul-out under the "alternative plan," common sense dictates that it must have been someone other than MarineMax.

Plaintiff had a haul-out agreement (partially funded by Aspen) with MarineMax that was in effect at the time of Hurricane Sally.

Plaintiff alleges in the amended complaint that MarineMax breached the haul-out agreement by failing to haul-out the yacht out before the hurricane, and he alleges that Aspen breached the insurance policy by denying coverage for the damage to the yacht caused by the hurricane. In addition to the property damage to the yacht (and the docks at the marina where the yacht was docked during the hurricane[1]), Plaintiff seeks to recover damages for personal injuries he allegedly suffered while attempting to secure the yacht at the marina during the hurricane. He also seeks an award of attorney's fees against Aspen under §627.428, Fla. Stat.

[1] *See* Doc. 8, at 7 (¶32) (alleging that MarineMax's breach exposed Plaintiff to "liquidated damages and/or actual damages to the marina").

Aspen responded to the amended complaint with a combined motion to dismiss, motion for judgment on the pleadings, and motion to strike. The Court will address the motion to dismiss first because the motion for judgment on the pleadings is premature since the pleadings are not yet closed, *see Sampson v. Washington Mut. Bank*, 453 F. App'x 863, 865 n.2 (11th Cir. 2011), and the motion to strike will be moot if the motion to dismiss is granted.

The Court's review of a motion to dismiss is limited to the allegations in the operative complaint and the documents attached to it. *See Brooks v. Blue Cross & Blue Shield of Fla., Inc.*, 116 F.3d 1364, 1368 (11th Cir. 1997). The Court is required to accept all the well-pled factual allegations as true and construe them in the light most favorable to the plaintiff. *Id.* at 1369. Dismissal is warranted if the complaint fails to provide "sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Wooten v. Quicken Loans, Inc.*, 626 F.3d 1187, 1196 (11th Cir. 2010) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, (2009)); *see also Brooks*, 116 F.3d at 1368 ("The pleadings must show, in short, that the Plaintiffs have no claim before [a Rule] 12(b)(6) motion may be granted.").

Here, Aspen argues that the allegations in the amended complaint and the insurance policy attached to it refute Plaintiff's breach of contract claim because Plaintiff admittedly did not remove the yacht from the water before the hurricane as he was required to do under the HPP that "form[ed] the basis of the insurance

contract." Plaintiff responds that the policy required submission of the HPP, not compliance with it, and that his non-compliance was caused by circumstances beyond his control, namely MarineMax's failure to comply with the haul-out agreement.

The Court agrees with Aspen. The policy unambiguously provides that coverage is "excluded absolutely until a satisfactory [HPP] has been seen and agreed to by underwriters." Doc. 8-1, at 3, 10. Although it is undisputed that Aspen approved Plaintiff's HPP, common sense dictates—and, more importantly, the plain language of the HPP establishes—that compliance with the plan (not merely approval of it) was a condition of Aspen's obligation to pay a claim under the policy. Indeed, the HPP specifically states that "[n]on-compliance may result in claims being denied." *Id.* at 30.

The Court did not overlook that the HPP uses the permissive term "may" rather than the mandatory term "shall." *Id.* However, even if this wording removes the HPP from the realm of an "express warranty,"[2] this provision cannot reasonably

[2] Non-compliance with certain "express warranties" in marine insurance policies will result in the loss of coverage even if the breach is unrelated to the loss, but if the warranty is not based on an "entrenched federal maritime rule," state law governs the effect of the breach. *See Travelers Prop. Cas. Co. of Am. v. Ocean Reef Charters, LLC*, 996 F.3d 1161, 1167-68 (11th Cir. 2021). Here, the Court need not determine whether there is an "entrenched federal maritime rule" requiring compliance with a HPP because the policy provides that the scope of its coverage is determined by New York law, *see* Doc. 8-1, at 24, and strict compliance with the HPP would be required under New York law, *see Kephart v. Certain Underwriters at Lloyd's of London*, 427 F. Supp. 3d 508, 515-17 (S.D.N.Y. 2019). Moreover, even if strict compliance was not required, Plaintiff would be hard-pressed to argue that his non-compliance with the HPP played no part in

be interpreted to mean that compliance with the HPP is not a required condition of the policy. Indeed, it would defy common sense (and be an absurd interpretation of the policy) to conclude that the insured was required to have a HPP but he was not required to comply with it. *See XL Specialty Ins. Co. v. Level Glob. Invs., L.P.*, 874 F. Supp. 2d 263, 283 (S.D.N.Y. 2012) (explaining that under New York law absurd results should be avoided when interpreting insurance contracts.).

Nor did the Court overlook that the HPP states that "[i]f the circumstance does not allow for compliance with the hurricane plan, [the underwriters] should be consulted immediately." *Id.* This provision simply authorizes the insured to ask the underwriters for guidance about what to do if it turns out that he will not be able to comply with the HPP. *See* https://www.dictionary.com/browse/consult (defining "consult" to mean "seek advice or information from [or] ask guidance from"); Webster's Seventh New Collegiate Dictionary, at 179 (1965) (defining "consult" to mean "to ask the advice or opinion of"). This language does not, however, establish a judicially enforceable mandate requiring the underwriters to prospectively (or retroactively) excuse the insured's non-compliance with the HPP whenever circumstances do not (or did not) allow compliance with the plan.

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the loss or did not increase Aspen's risk considering that the HPP expressly states that the underwriters relied on the information in the plan in deciding whether to issue the policy.

In any event, this language is not implicated in this case because the amended complaint does not allege that Plaintiff consulted the underwriters immediately (or otherwise) when it became apparent that he would not be able to comply with his obligations under the HPP. Thus, the underwriters never had the chance to give Plaintiff guidance about what he should do to mitigate his (and Aspen's) risk if circumstances did not allow him to comply with the HPP. Moreover, although the amended complaint alleges that circumstances did not allow compliance with the HPP as a result of MarineMax's breach of the haul-out agreement, it does not explain why circumstances did not allow Plaintiff to comply with the "alternate plan" in the HPP of having the yacht hauled out by someone else.

Nor did the Court overlook that the policy could have more explicitly stated that compliance with the HPP was mandatory. *See*, *e.g.*, *Kephart*, 427 F. Supp. 3d at 511 (quoting policy language stating that "[i]t is warranted by you that the Hurricane Preparedness Plan is strictly adhered to and that any changes to it are advised to and agreed in writing"). However, as discussed above, there is nothing ambiguous about the language of the policy that would allow the Court to conclude that Aspen was required to provide coverage to Plaintiff despite his admitted non-compliance with the HPP.

This does not leave Plaintiff without a remedy. If, as he claims, his non-compliance with the HPP (and the resulting loss of insurance coverage) was

MarineMax's fault, his remedy is to pursue a claim against MarineMax as he has done in Count II of the amended complaint. The rulings in this Order do not impact that claim.

In sum, because the amended complaint and its attachments establish that Plaintiff failed to comply with the HPP and that his non-compliance was a proper basis under the policy for the claim to be denied, Plaintiff has not (and cannot) state a plausible breach of contract claim against Aspen. Accordingly, it is

ORDERED that Aspen's motion to dismiss, etc. (Doc. 14) is **GRANTED** insofar as the Plaintiff's claim against Aspen in Count I of the amended complaint is **DISMISSED**.

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

T. Kent Wetherell, II

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UNITED STATES DISTRICT JUDGE