UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

JENNIFER CUNNINGHAM, and
BARRY CUNNINGHAM,

Plaintiffs,

v. **Case No.: 8:12-cv-1398-T35-TBM**

LIBERTY MUTUAL FIRE
INSURANCE COMPANY,

Defendant.

________________________________/

ORDER

THIS CAUSE comes before the Court for consideration of Defendant's Motion for Summary Judgment (Dkt. 19), and Plaintiffs' Dispositive Motion for Summary Judgment (Dkt. 20). Upon consideration of all relevant filings, and case law, and being otherwise fully advised, the Court **GRANTS** Plaintiffs' motion for summary judgment and **DENIES** Defendant's motion for summary judgment, as described herein.

I. BACKGROUND

This is an action for breach of contract and declaratory judgment arising out of an insurance policy issued by Defendant to Plaintiffs. Defendant issued insurance policy number H32-251-492290-1091 (the "Policy") to Plaintiffs for the effective period of October 5, 2009 through October 5, 2010 for coverage on property located in Lutz, Florida. (Dkt. 20-1, p. 1) The Policy provides coverage for Sinkhole Loss as follows:

SECTION I – PERILS INSURED AGAINST

The following perils are added:

Sinkhole Loss

a. Sinkhole Loss means structural damage to the building, including the foundation, caused by sinkhole activity. Contents coverage shall apply only if there is structural damage to the building caused by sinkhole activity.

    (1) We will pay to stabilize the land and building and repair the foundation in accordance with the recommendations of a professional engineer and in consultation with you.

b. Sinkhole Activity means settlement or systematic weakening of the earth supporting such property only when such settlement or systematic weakening results from movement or raveling of soils, sediments, or rock materials into subterranean voids created by the effect of water on limestone or similar rock formation.

The Section I – Earth Movement Exclusion does not apply to this peril.

(Dkt. 20 at 5) The Policy does not define the term "structural damage."

As explained in Zawadzki v. Liberty Mutual Fire Ins. Co., 2012 WL 3656456, at *3 (M.D. Fla. 2012), from 1981 through 2004, Florida Statute § 627.706(1) required that insurers make coverage available for sinkhole loss. During that time, the definition of "sinkhole loss" incorporated the definition of "sinkhole." Zawadazki, 2012 WL 3656456, at *3 (citations omitted). Additionally, the statute contained a separate definition for the term "loss" which it defined as "structural damage to the building." Id. (citation omitted). In 2005, the Florida Legislature redefined a "sinkhole loss" to mean "structural damage to the building, including the foundation, caused by sinkhole activity." Id. (citation omitted). The 2005 definition incorporated the previous definition of the term "loss" and that term was removed from the statute. Id. (citation omitted). The 2005 version also added definitions for other terms such as "sinkhole" and "sinkhole activity." Id. (citation

omitted). A separate definition for the term "structural damage" was not included. Id. (citation omitted).

In 2011, the Florida Legislature, for the first time, adopted a definition of "structural damage" to be applied when interpreting insurance policies providing coverage for sinkhole losses. Id. (citation omitted). The 2011 Amendment went into effect on May 17, 2011. As amended, the statute provides:

> (j) "Sinkhole loss" means structural damage to the covered building, including the foundation, caused by sinkhole activity. Contents coverage and additional living expenses apply only if there is structural damage to the covered building caused by sinkhole activity.
>
> (k) "Structural damage" means a covered building, regardless of the date of its instruction, has experienced the following:
>
> 1. Interior floor displacement or deflection in excess of acceptable variances as defined in ACI117 – 90 or the Florida Building Code, which results in settlement-related damage to the interior such that the interior building structure or members become unfit for service or represents a safety hazard as defined within the Florida Building Code;
>
> 2. Foundation displacement or deflection in excess of acceptable variances as defined in ACI 318 – 95 or the Florida Building Code, which results in settlement-related damage to the primary structural members or those members or systems from supporting the loads and forces they were designed to support to the extent that stresses in those primary structural members or primary structural systems exceeds one and one-third the nominal strength allowed under the Florida Building Code for new buildings of similar structure, purpose, or location;
>
> 3. Damage that results in listing, leaning, or buckling of the exterior load-bearing walls or other vertical primary structural members to such an extent that a plumb line passing through the center of gravity does not fall inside the middle one-third of the base as defined with the Florida Building Code;
>
> 4. Damage that results in the building, or any portion of the building containing primary structural members or primary structural

> systems, being significantly likely to imminently collapse because of the movement or instability of the ground within the influence zone of the supporting ground within the sheer plane necessary for the purpose of supporting such building as defined within the Florida Building Code; or
>
> 5. Damage occurring on or after October 15, 2005, that qualifies as "substantial structural damage" as defined in the Florida Building Code.

See FLA. STAT. 627.706(j)-(k) (2011).

In this case, Plaintiffs allege they discovered damage to the subject property at issue on June 10, 2010 and thereafter notified Defendant of potential sinkhole loss to the property. (Dkt. 20 at 3) On December 20, 2011, the Defendant retained the services of SDII Global Corporation ("SDII") to perform structural damage evaluation to determine if structural damage was present at the property. (Id. at 6) On April 11, 2012, SDII produced a report, opining that, "within a reasonable professional probability, structural damage as defined by [Section] 627.706(2)(k) Florida Statutes does not exist at the [Plaintiffs'] residence," and that "the observed damage on the exterior and interior of the structure is cosmetic and/or functional in nature, in that the damage has not impaired the ability of the structure to support intended loads." (Dkt. 20-5) As part of its report, SDII utilized two different definitions of structural damage. The first is the new definition added to the 2011 Amendment of the statute. The second is a definition derived from "SDII's review of authoritative texts and discussions with other professionals in [the same] practice area." (Id.) This definition defines structural damage as "[d]amage wherein a load-bearing member, component, or structural assembly of a building or structure suffers a significant reduction in its capacity to support or transmit the loads for which it was designed." (Id.)

In response to SDII's report, Defendant issued a denial letter to Plaintiffs on the grounds that the damage observed at the residence was not structural damage. (Dkt. 20 at 8) In response, Plaintiffs filed this action in state court on May 18, 2012. The action was timely removed to this Court on June 25, 2012. (Dkt. 1) Defendant filed its Answer, Affirmative Defenses, and Counterclaims on the same date the action was removed. (Dkt. 3)

The parties now bring the instant motions for summary judgment requesting that the Court decide: (1) whether the 2011 Amendment to the Florida statutory scheme governing sinkhole insurance, which added a statutory definition of "structural damage," should be applied retroactively to the Policy at issue, and (2) the definition of "structural damage" as it is used in the Policy.

II. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate when the movant can show that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. Fennell v. Gilstrap, 559 F.3d 1212, 1216 (11th Cir. 2009) (citing Welding Servs., Inc. v. Forman, 509 F.3d 1351, 1356 (11th Cir. 2007)). Which facts are material depends on the substantive law applicable to the case. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). The moving party bears the burden of showing that no genuine issue of material fact exists. Clark v. Coats & Clark, Inc., 929 F.2d 604, 608 (11th Cir. 1991). Evidence is reviewed in the light most favorable to the non-moving party. Fennell, 559 F.3d at 1216 (citing Welding Servs., Inc., 509 F.3d at 1356)). A moving party discharges its burden on a motion for summary judgment by showing or pointing out to the Court that there is an absence of evidence to support the non-moving

party's case. Denney v. City of Albany, 247 F.3d 1172, 1181 (11th Cir. 2001) (citation omitted).

When a moving party has discharged its burden, the non-moving party must then designate specific facts (by its own affidavits, depositions, answers to interrogatories, or admissions on file) that demonstrate there is a genuine issue for trial. Porter v. Ray, 461 F.3d 1315, 1321 (11th Cir. 2006) (citation omitted). The party opposing a motion for summary judgment must rely on more than conclusory statements or allegations unsupported by facts. Evers v. Gen. Motors Corp., 770 F.2d 984, 986 (11th Cir. 1985) ("conclusory allegations without specific supporting facts have no probative value.") If material issues of fact exist that would not allow the Court to resolve an issue as a matter of law, the Court must not decide them, but rather, must deny the motion and proceed to trial. Herzog v. Castle Rock Entm't, 193 F.3d 1241, 1246 (11th Cir. 1999).

III. DISCUSSION

Both parties agree there are no disputed issues of material fact for purposes of their summary judgment motions and that the issues presented are purely legal issues. Plaintiffs argue that the term "structural damage" is not defined in the Policy and was not defined in the statute at the time the Policy was issued. Plaintiffs argue the 2011 Amendment to Chapter 627 Florida Statues cannot be applied retroactively to the Policy. Plaintiffs also argue that contrary to the "technical" definition used by SDII, this Court should define the term "structural damage" to mean "damage to the structure" as numerous previous courts have done. Defendant, for its part, contends that the Florida Legislature intended the 2011 Amendment to be remedial and procedural in nature as opposed to substantive. Thus, Defendant contends, the Amendment should apply

retroactively. Defendant also contends that the term "structural damage" as it is used in the Policy does not mean "damage to the structure" as Plaintiffs argue because this would not be a reasonable interpretation of the term. Defendant contends, rather, the only reasonable definition to the term "structural damage" should be "damage to that part of a building that affects the safety of such building and/or which supports any dead or designed live load and the removal of which part, material or assembly, could cause a portion of the building to collapse or fail." (Dkt. 19, p. 24) Defendant contends this definition is consistent with Florida Building Code § 202 which defines the term "structural" as "any part, material or assembly of a building or structure which affects the safety of such building or structure and/or which supports any dead or designed live load and the removal of which part, material or assembly could cause, or be expected to cause, all or any portion to collapse or fail."

In urging the Court to accept its position, Defendant is requesting that this Court ignore numerous decisions from this District that have addressed the exact same legal issues raised in this case. See Bay Farms Corp. v. Great American Alliance Ins. Co., 835 F.Supp.2d 1227,1235-1243 (M.D. Fla. 2011) (2011 amendment to Chapter 627 Florida Statutes which added new definition of "structural damage" was substantive in nature and could not be applied retroactively to insurance policy predating the amendment because there was no clear evidence of legislative intent in favor of retroactive application of the 2011 Amendment, and because, in any event, retroactive application of the statute would substantially impair Plaintiff's contractual right to coverage under the policy); Ayres v. USAA Casualty Ins. Co., 2012 WL 1094321 (M.D. Fla. 2012) (undefined phrase "structural damage" in insurance policy means "damage to

the structure”); Zawadzki v. Liberty Mutual Fire Ins. Co., 2012 WL 3656456 (M.D. Fla. 2012) (holding that the 2011 Amendment to Florida Statute § 627.706 cannot be applied retroactively to insurance policies that predate the enactment of the 2011 Amendment and that, as defined in Ayres, the undefined term “structural damage” means “damage to the structure”); Leon v. The First Liberty Ins. Corp., 2012 WL 5417294 (M.D. Fla. 2012) (holding that the 2011 Amendment does not retroactively apply to insurance policies that predate its enactment and that the phrase “structural damage” should be read according to its plain meaning to mean “damage to the structure”); Garcia v. First Liberty Ins. Corp., 2012 WL 5328660 (M.D. Fla. 2012) (holding the 2011 Amendment does not retroactively apply to insurance policies that predate its enactment and that the phrase “structural damage” is defined as “damage to the structure”); Shelton v. Liberty Mutual Ins. Co., 2013 1663290 (M.D. Fla. 2013) (“with respect to the undefined phrase “structural damage,” numerous Florida trial courts and courts within this district, including this Court, have already held that the phrase should be read according to its plain meaning . . . the phrase “structural damage” is defined as “damage to the structure”).

The Court sees no reason to depart from these rulings. They are well-reasoned and supported by bedrock principles of contract construction and retroactivity. Accordingly, the Court holds that the 2011 Amendment to the statute does not apply retroactively to the Policy in this case as the Policy predates the amendment to the statute, the amendment is not merely procedural but substantive in nature, there is no clear legislative intent to apply the statute retroactively, and retroactive application of the statute would substantially impair Plaintiff’s contractual right to coverage under the

Policy. The Court further holds that, consistent with the numerous courts that have decided this issue, the undefined phrase “structural damage” in the Policy at issue is defined as “damage to the structure.” Accordingly, Defendant’s motion for summary judgment is **DENIED**, and Plaintiffs’ motion for summary judgment is **GRANTED**.

DONE and ORDERED in Tampa, Florida, on this 29th day of May 2013.

MARY S. SCRIVEN
UNITED STATES DISTRICT JUDGE

Copies Furnished to:
All Counsel of Record
Any Unrepresented Parties