UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO. 18-CV-24751-DLG

MARICOPA CAPITAL LIMITED,

Plaintiff,

v.

CERTAIN UNDERWRITERS OF LLOYD'S LONDON SUBSCRIBING TO POLICY NUMBER B1 101SSLMA 1711 107, INCLUDING BARBICAN SYNDICATE 1955, NOVAE SYNDICATE 2007, and SKULD SYNDICATE 1897, and REAAL SCHADEVERZEKERINGEN N.V.,

Defendants.
_____/

ORDER GRANTING DEFENDANTS' MOTION FOR JUDGMENT AS A MATTER OF LAW & VACATING & SETTING ASISDE JURY VERDICT

I. BACKGROUND

Plaintiff, Maricopa Capital Limited's ("Maricopa") action against Defendants, Barbican Syndicate 1955, Novae Syndicate 2007, Skuld Syndicate 1897, 1897 (collectively, "Syndicates") collectively d/b/a Certain Underwriters at Lloyd's, London ("Lloyd's") and Reaal Schadeverzekeringen N.V. ("Reaal") (collectively with Lloyd's, "Defendants" or "Underwriters") emanates from a claim for insurance coverage for the alleged damage to the starboard and port engines of a 1989 70' Magnum motor vessel (the "Vessel"). The Vessel was insured under a marine Policy of Insurance (the "Policy") issued by Underwriters. [ECF No. 1-1]. In a section entitled "Notice of Loss And Filing of Proof," the Policy provides:

> It is agreed by the Assured to report immediately to the Assurers or to their representative who shall have issued this Policy every occurrence which may become a claim under this Policy, and shall also file with the Assurers or their

> representative a detailed sworn proof of loss and proof of interest and/or receipted bills in case of a partial loss, within ninety (90) days from date of loss.

(emphasis added). See ECF No. 32-1, Form R12, page 1 of 7.

In their Answer and Affirmative Defenses, as its Fifth Affirmative Defense, Underwriters generally asserted that "Defendant affirmatively alleges that coverage is not afforded due to Plaintiff's failure to comply with duties after loss." [ECF No. 16]. This matter proceeded to trial in November 2019.

a. Motions for Judgment as a Matter of Law

At the close of Maricopa's case-in-chief, Underwriters moved for a directed verdict, and the Court denied their motion, as to the issue of damage to the port engine. After the close of their case-in-chief, Underwriters moved *ore tenus* for directed verdict[1] with regards to Maricopa's failure to file a sworn proof of loss. [Trial transcript, ECF No. 210, p. 56]. Relying on trial testimony that no proof of loss was filed in this claim, Underwriters argued that, regardless of whether it was requested, the Policy required that Maricopa file a sworn proof of loss. *Id.* In response, Maricopa asserted that the Policy requires a proof of loss if it's a total loss and where, like here, there is a partial loss, a sworn proof of loss is not required. Also, because Maricopa provided the "bill with respect to the investigation by Performance Power…[and] the estimates …received… from Ring Power…[t]hat was all that there was. That was all that we had to give." [Trial transcript, ECF No. 210, p. 57]. Underwriters rebutted Maricopa's responsive argument by noting that the Policy language of "and/or [receipted bills] is related to the proof of interest." [Trial transcript, ECF No. 210, pp. 58-60]. Further, Underwriters asserted, that because estimates are not

[1]Rule 50 has now been amended to substitute the term "judgment as a matter of law" for directed verdict and judgment notwithstanding the verdict. *Mendoza v. Borden, Inc*., 195 F.3d 1238, 1258 (11th Cir. 1999); See Fed. R. Civ. P. 50, Notes of Advisory Comm. on Rules 1991 amend. (1993). *Tate v. Government Employees Ins. Co*., 997 F.2d 1433, 1434 (11th Cir. 1993).

receipted bills, Maricopa's reliance on estimates does not satisfy the proof of loss or "receipted bill" requirement of the Policy. [Trial transcript, ECF No. 210, p. 58].

After listening to argument on Underwriters' motion for directed verdict and reviewing the Proof of Loss Policy language at issue, there was the following exchange:

> THE COURT: All right. I'm going to deny your motion at this time, but I will revisit this.
>
> MS. MOORE: It was my understanding that you were going to allow us to argue our motion for directed verdict on Monday instead of today. But we're preserving the record. I don't want to waive it.
>
> THE COURT: All right. So you've raised the issue. I'm denying it.
>
> MS. MOORE: Thank you, Your Honor.
>
> THE COURT: But I will entertain additional argument.
>
> [Trial transcript, ECF No. 210, p. 61].

Over the weekend break, Maricopa filed a motion, pursuant to Rule 50(a), for judgment as a matter of law as to Underwriters' seventeen Affirmative Defenses, [ECF No. 138]. Therein, Maricopa moved for judgment in its favor as to Underwriters' Fifth Affirmative Defense, regarding failure to comply with the proof of loss requirements of the Policy, because it complied with the proof of loss provision. [ECF No. 138]. Noting that the Policy specifies that the "Assured …. shall also file…. a detailed sworn proof of loss and proof of interest and/or receipted bills in case of a partial loss, within ninety (90) days from the date of loss," Maricopa contends again that because the claim is a partial loss, the Policy language is clear that no submission of a Proof of Loss was required. *Id*. Alternatively, if the Court disagrees as to its interpretation of the proof of loss requirements, Maricopa asserts that because the Policy's language creates an ambiguity as to the terms and requirements of the Policy, it is entitled to all inferences and all construction of such

ambiguous terms must be against Underwriters. Finally, Maricopa asserts that its submission of the estimated bill from Underwriters selected repair facility satisfied the terms of the proof of loss provision that required "a detailed sworn proof of loss and proof of interest *and/or* receipted bills in case of a partial loss." *Id.* (emphasis added).

Conversely, Underwriters did not file a written renewed motion for directed verdict but instead filed "Defendants' Notice of Filing Case Law in Support of Motion for Directed Verdict on the Sworn Proof of Loss Issue." [ECF No. 140]. In this filing, Underwriters notified the Court of several cases which stand for the proposition that the insured's failure to perform a condition precedent set forth in an insurance contract (i.e., filing a sworn proof of loss) bars the insured from bringing suit. *Id.* Included in the list of cases was *New South Communications, Inc. v. Houston Casualty*., 396 F. Supp 3d 1089 (S.D. Fla. 2019).

In *New South*, Judge James L. King held that the insured's failure to file a sworn proof of loss before commencing suit against its insurer constituted a material breach of the insurance contract thereby relieving the insurer of its duties under the contract. 396 F. Supp. 3d 1089, 1097–99 (S.D. Fla. June 13, 2019). At the time of this trial, *New South* was on appeal to the Eleventh Circuit Court of Appeals.

The following trial day, the Court announced that "[t]here are a number of pleadings filed. There is plaintiff's motion for judgment as a matter of law. And the Court finds that there are many questions of fact remaining in this case which would preclude the Court from granting this motion, so Docket Entry 141 (Plaintiff's Motion for Judgment as a Matter of Law Regarding Confession of Judgment, ECF No 141) is denied." [Trial Transcript, ECF No. 169 p. 2; ECF No. 178]. The Court also denied Plaintiff's motion for judgment as a matter of law as to the Underwriters' affirmative defenses (ECF No. 138). [Trial Transcript, ECF No. 169 p. 43; ECF No. 178]. The parties proceeded with the jury charging conference where the Court entertained oral argument on

which of Underwriters' affirmative defenses would be included in the jury instructions. [Trial Transcript, ECF No. 169 p. 2].

b. Jury Instructions and Renewed Motion for Directed Verdict

During the jury charging conference, Maricopa raised the proof of loss issue and a jury instruction regarding waiver:

> MR. LEONARD: There was a third instruction, I think, also, Your Honor. And the purpose of that was to -- so this goes to the issue, Your Honor, of the existence of a condition precedent, and specifically with regards to the proof of loss, if you will.
> …
> Assuming that the Court disagrees with our position and agrees with Mr. Green's position, then there is also the issue of waiver relevant to the requirement of the proof of loss.

[Trial transcript, ECF No. 169, p. 31:19-23, p. 32:2-5]. In response, counsel for Underwriters stated the following:

> MR. GREEN: Your Honor, if I may be heard on this particular issue?
>
> THE COURT: Yes, sir.
>
> MR. GREEN: I think that, quite frankly, the recent decision out of the Southern District by Judge King on this exact contract issue would preclude any waiver argument based upon the facts in this case. In *New South Communications vs. Houston Casualty Company,* a June 23, 2019, case, Judge King actually speaks to these issues in quite some detail, and actually states that waiver is not appropriate in this type of situation because even when an insurance company investigates the claim, even offers and tenders payment, that does not waive the obligation of the insured to file a sworn proof of loss. So to the extent that would be raised as an issue, *we believe, quite frankly, the way the facts have come in, that that's enough for directed verdict in this case*.

[Trial transcript, ECF No. 169, p. 32:17-25, p.33:1-8][emphasis added].

After hearing rebuttal argument from Maricopa, the Court took a break to consider the issue and returned stating:

THE COURT: We've narrowed the affirmative defenses, and so I'm going to rule on the affirmative defenses.
So what I'm going to do is deny that motion [Plaintiff's Motion for Judgment as a Matter of Law, ECF No. 138] at this time and consider the affirmative defenses, and then I'll let you know which affirmative defenses will be given or not.

[Trial transcript, ECF No. 169, p.42: 17-25; p. 43: 2-7].

Without specifically ruling on Underwriter's motion for directed verdict, the Court decided the following:

THE COURT: Now, with regard to the notice issue, I read the cases carefully, and I do believe that the Judge King case is applicable as it refers to the sworn proof of loss.
So the plaintiffs will be precluded from recovering if this was a typical sworn proof of loss where everything is set forth as it is in the Judge King case.
The problem with this case is that on Yacht Form R12, page 1 of 7, the notice of loss and filing of proof, it's very ambiguous. It's almost impossible to read it and understand what it is referring to.
So, for example, it states: Shall file with the assurers or their representative a detailed sworn proof of loss and proof of interest and/or received bills in case of a partial loss within 90 days.
Well, I don't understand that. Is it you file a sworn proof of loss and proof of interest and/or receipted bills in case of a partial loss? Does it apply to a partial loss? Does it apply to the entire hull and machinery? Where do the ands stop? Where do the commas go? It's very ambiguous.
So it seems to me that the jury has to make a determination as to whether this affirmative defense applies
So the jury is going to have to be referred to this sentence in the paragraph in Yacht Form R12 to decide whether the proof of loss was properly filed or not. And it's your responsibility, as attorneys, to make your argument accordingly.
Mr. Green will argue that it means: You need to file that detailed sworn proof of loss. And if you don't file it, you're not entitled to anything, whether it's partial loss or total loss.

The defense has a different argument. It's so ambiguous, you can't tell which. Because of that, you look at it in terms of the plaintiff. And in case of a partial

> loss, receipted bills, you have the estimates. What is a receipted bill? Is it a receipt? Is it a bill? Do you have to pay? Or do you not have to pay? And this is all in conjunction with the defendant telling the plaintiff: You've done everything you should do.

Based on the Court's ruling, the Jury Instructions included Underwriters' affirmative defense of the following:

> Certain Underwriters of Lloyd's denies that the June 30, 2017 incident involving the engines of the insured Vessel warranted insurance coverage for any damage based upon select policy language. Certain Underwriters of Lloyd's also claims the following:
> . . .
> 3. Maricopa Capital Limited failed to comply with the terms and conditions post-loss in order for coverage to be afforded under the contract; and . . . .

[ECF No. 145, p. 8].

c. The Jury Verdict

On November 5, 2019, the jury returned its verdict answering "no" to the above affirmative defense and finding that only the starboard engine was covered under the Policy. In a bifurcated verdict the Jury also awarded Maricopa $182,818.82 for said damages. (see ECF No. 151; ECF No. 152). The Court thereafter determined that "the 'Hull etc' deductible of $37,500 applies to the loss" and that "[t]he jury award of $182,818.82 shall be reduced by the total deductible amount of $37,500 plus $25,000 for the amount paid to Plaintiff during the claims handling process for a total reduction of $62,500." [See ECF No. 165, pp. 9-10].

d. Post-Verdict and New South

Post-verdict, Maricopa filed a Motion for Determination of Prejudgment Interest Start Date [ECF No. 166]. On April 22, 2020, the Court held a telephonic status conference during which the Court informed the parties that it was still considering the post-loss issues raised by Underwriters during its motion for directed verdict. Specifically, during the status conference the Court advised the parties of its preference to await the Eleventh Circuit's decision in *New South* before entering

final judgment in this matter. [ECF No. 172]. Subsequently, the Court directed the parties to file memorandums in support of their respective positions on the issues raised at the April 22, 2020 status conference and "to address the Court's concerns with and consideration of *New South*'s impact, if any, on this matter." [ECF No. 174].

In response to the Court's directive, Underwriters filed "Defendants' Memorandum of Law Regarding the Decision in *New South Communications v. Houston Casualty Company* and in Support of Setting Aside the Jury's Verdict and Entering Judgment in Favor of Defendants on the Issue of Plaintiff's Failure to File a Sworn Proof of Loss." [ECF No. 176]. Therein, Underwriters states that "[g]iven the case law and facts in this case, Underwriters respectfully request the Court to revisit its ruling on Defendants' Motion for Directed Verdict and enter judgment notwithstanding the verdict because Plaintiff's lawsuit was barred due to its failure to satisfy the Policy's Proof of Loss requirement, a condition precedent to bringing suit. *Id*. Further, Underwriters asserts that "the jury's verdict is against the manifest weight of the evidence and the controlling law. Consequently, if the jury verdict is not overturned, there will be manifest injustice that should not be sanctioned by this Court." *Id.*

On November 2, 2020, the Eleventh Circuit Court of Appeals issued its opinion in *New South* finding that a "failure to provide a sworn proof of loss to prove damages can be a material breach of a policy's conditions precedent." *New South Communications, Inc. v. Houston Casualty Company*, 835 Fed. Appx. 405, 412 (11th Cir. 2020) (citing *Rodrigo v. State Farm Fla. Ins. Co*., 144 So. 3d 690, 692 (Fla. 4th DCA 2014). Further, the Eleventh Circuit determined that, under *American Integrity Insurance Co. v. Estrada*, 276 So. 3d 905, 912 (Fla. 3d DCA 2019), the burden shifts to Plaintiff to establish that its material breach of the proof-of-loss requirement did not prejudice Defendants. *New South Communications*, 835 Fed. Appx. 405, 413 (11th Cir. 2020).

Based thereon, and the present status and posture of this matter, the Court directed the parties to brief the issue of prejudice to the insurer. [ECF No. 186].

After the prolonged post-trial litigation on the post-loss issues discussed above, at this point in the litigation, a verdict for Maricopa has been returned, but judgment has not been entered, and a motion for judgment as a matter of law remains outstanding.

II. DISCUSSION AND ANALYSIS

a. Procedural Discussion

Federal Rule of Civil Procedure 50(a) permits courts to grant judgment on a claim or defense where:

> (1) If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.

Fed. R. Civ. P. 50(a).

"While a district court is permitted to enter judgment as a matter of law [pursuant to Rule 50(a)] when it concludes that the evidence is legally insufficient, it is not required to do so. To the contrary, the district courts are, if anything, encouraged to submit the case to the jury, rather than granting such motions." *Unitherm Food Systems. v. Swift-Eckrich. Inc.*, _U.S. _, 126 S. Ct. 980, 988 (2006). “If a court does not grant a motion for judgment as a matter of law made under Rule 50(a), the court is considered to have submitted the action to the jury subject to the court’s later deciding the legal questions raised by the motion.” Fed. R. Civ. P. 50(b). Given the clear language of this rule, it is unnecessary for the district court to expressly reserve its ruling on a motion for directed verdict. *Norton v. Snapper Power Equipment, Div. of Fuqua Industries, Inc*., 806 F.2d 1545, 1547 (11th Cir. 1987).

Here, the Court did not specifically rule on Underwriters' pending Motion for Directed Verdict. Instead, the Court entertained argument on Underwriters' affirmative defenses, including their Fifth Affirmative defense regarding the post-loss issue. At the time, the Court read the conjunctions "and" and "and/or" between the Policy language which states "a detailed sworn proof of loss and proof of interest and/or receipted bills in case of a partial loss" to mean any of the three were acceptable under the Policy. [See ECF No. 166-2, p. 2]. The Court, having determined in error that there was ambiguity in the Policy language, submitted this to the jury despite Maricopa's failure to file a sworn proof of loss. Although a verdict for Maricopa was returned, no judgment has been entered, and Underwriters' motion for judgment as a matter of law remains outstanding.

A party may renew its motion for judgment as a matter of law after a jury verdict under Rule 50(b). Any renewal of a motion for judgment as a matter of law under Rule 50(b) must be based upon the same grounds as the original request for judgment as a matter of law made under Rule 50(a) at the close of the evidence and prior to the case being submitted to the jury. *Howard v. Walgreen Co*., 605 F.3d 1239, 1243 (11th Cir. 2010). However, a Rule 50(b) motion is unnecessary where the district court reserves ruling on a party's Rule 50(a) motion until after the jury returns its verdict. See *Miller v. Kenworth of Dothan, Inc*., 277 F.3d 1269, 1275 n.4 (11th Cir. 2002). Moreover, Rule 50(b) does not require that a motion be made after the entry of judgment; instead, it provides that the non-prevailing party may file its "motion no later than [28] days after entry of judgment." As the Advisory Committee Notes for the 1995 amendments to Rule 50 state: "[t]he phrase 'no later than' is used—rather than 'within'—to include post-judgment motions that sometimes are filed before actual entry of the judgment by the clerk." *Presutti v. F.D.I.C*., 24 Fed. Appx. 92, 94, 2002 WL 4562, at *2 (2d Cir. 2001).

Although not necessary because the Court has yet to rule on Underwriters' motion for directed verdict under Rule 50(a), Underwriters' post-trial written "Memorandum Of Law

Regarding The Decision In *New South Communications v. Houston* Casualty Company and In Support Of Setting Aside The Jury's Verdict And Entering Judgment In Favor Of Defendants On The Issue of Plaintiff's Failure to File a Sworn Proof of Loss" is the functional equivalent of a renewed motion under Rule 50(b) because it is based on the same grounds as the original request for directed verdict prior to the case being submitted to the jury. See *Miller*, 277 F.3d 1269, 1275 n.4 (11th Cir. 2002); *Howard*, 605 F.3d 1239, 1243. Also, although it was filed before the entry of judgment, Underwriters renewed motion is timely. *Presutti v. F.D.I.C.*, 24 Fed. Appx. 92, 94, 2002 WL 4562, at *2 (2d Cir. 2001). Accordingly, the court will address Underwriters' outstanding motions for judgment as a matter of law.

b. Substantive Discussion

A directed verdict is appropriate only when there can be but one reasonable conclusion as to the verdict." *Pelletier v. Stuart-James Co., Inc.*, 863 F.2d 1550 (11th Cir.1989) (quoting *Dempsey v. Auto Owners Ins. Co.*, 717 F.2d 556, 559 (11th Cir.1983)). To succeed under Rule 50(b), the movant must show that no reasonable jury could find that the evidence was sufficient to support the verdict. *Chaney v. City of Orlando*, 483 F.3d 1221, 1227 (11th Cir. 2007). In reviewing this motion, "the court must examine the whole record in a light most favorable to the party opposing the motion. In ruling on a renewed motion brought under Rule 50(b), the Court may "(1) allow judgment on the verdict, if the jury returned a verdict; (2) order a new trial; or (3) direct entry of judgment as a matter of law." Fed. R. Civ. P. 50(b). Even where a Rule 50(b) motion does not request a new trial in the alternative, the Court retains a "discretionary power" to set aside the verdict and grant a new trial, rather than award a final judgment in the movant's favor. See *Network Publ'ns, Inc. v. Ellis Graphics Corp.*, 959 F.2d 212, 214 (11th Cir. 1992); see also *Cone v. W. Va. Pulp & Paper Co.*, 330 U.S. 212, 215–16 (1947) ("[R]ule [50(b)] does not compel a trial judge to enter a judgment notwithstanding the verdict instead of ordering a new trial; it permits him to

exercise a discretion to choose between the two alternatives." (alterations added; citation and footnote call number omitted)).

In its motions made under 50(a) and 50(b), Underwriters contend they are entitled to judgment as a matter of law because Maricopa failed to meet its post-loss obligations under the Policy by not providing a detailed sworn proof of loss. The Policy's proof of loss provision specifies that "[i]t is agreed by the Assured to report immediately to the Assurers or to their representatives who shall have issued this Policy every occurrence which may become a claim under this Policy, and shall also file with Assurers or their representatives, a detailed *sworn proof of loss and proof of interest and/or receipted bills* in case of a partial loss, within ninety (90) days from the date of loss." (See ECF No. 32-1 Exhibit A, p. 1 of 7) (emphasis added). Additionally, the Policy requires a "satisfactory proof of loss and proof of interest in the property insured" be submitted to Underwriters before "such loss [is] paid within ninety (90) days[.]" *Id*.

Florida courts construe insurance contracts in accordance with the plain meaning of the policies as bargained for by the parties. *New South Communications, Inc.*, 835 Fed. Appx. 405, 409 (11th Cir. 2020) (citing *Prudential Prop. & Cas. Ins. Co. v. Swindal*, 622 So. 2d 467, 470 (Fla. 1993)). Under Florida law, "interpretation of a contract is generally a question of law." *PartyLite Gifts, Inc. v. MacMillan*, 895 F. Supp. 2d 1213, 1232 (M.D. Fla. 2012) (citations omitted). Further, "[t]he determination of whether the terms of a contract are ambiguous is a question of law." *Id*. (citations and footnote call number omitted). A policy provision is ambiguous when "the relevant policy language is susceptible to more than one reasonable interpretation, one providing coverage and the [other] limiting coverage." *New South Communications, Inc.*, 835 Fed. Appx. 405, 409 (11th Cir. 2020) (citing *Auto-Owners Ins. Co. v. Anderson*, 756 So. 2d 29, 34 (Fla. 2000)). The Court must construe ambiguous coverage provisions and exclusions against the insurer and in favor of the insured. *Id.* "[T]rue ambiguity does not exist merely because a document can possibly

be interpreted in more than one manner." *Lambert v. Berkley S. Condo. Ass'n, Inc*., 680 So. 2d 588, 590 (Fla. 4th DCA 1996) (alteration added; citation omitted). The Court must read the policy as a whole and give meaning and operative effect to every provision. *New South Communications, Inc.*, 835 Fed. Appx. 405, 409 (11th Cir. 2020) (citing Auto-Owners Ins. Co. v. Anderson, 756 So. 2d 29, 34 (Fla. 2000)).

In retrospect and upon further consideration, the Court now determines that the language of the "Notice of Loss And Filing of Proof" policy provision is unambiguous. The Court now finds that the Policy clearly requires Maricopa, as the insured, to submit a sworn proof of loss along with a proof of interest or receipted bills when an insured is seeking to recover damages for partial losses. That is, the conjunction "and" between "a detailed sworn proof of loss and proof of interest" is to be read to require a sworn proof of loss in every claim.[2] The conjunctions "and/or" between "proof of interest and/or receipted bills" is to be read to require either a proof of interest, receipted bills, or both a proof of interest and receipted bills in cases involving partial loss along with the required sworn proof of loss. [3] Noticeably absent from the "Filing of Proof" provision are commas between "sworn proof of loss" and "proof of interest" further supporting the aforementioned interpretation. The canons of contract interpretation mandate this is the proper reading and interpretation of the Policy language. The Policy's "Payment of Loss" provision also supports this interpretation as it provides the conjunction "and" between "after satisfactory proof of loss and proof of interest in the property insured" thereby requiring a sworn proof of loss in every case. Under the Policy's plain language, Maricopa's submission of "proof of loss" is a

[2] See, e.g., Antonin Scalia & Bryan A. Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 116 (2012) ("The conjunctions 'and' and 'or' are two of the elemental words in the English language. Under the conjunctive/disjunctive canon, 'and' combines items while 'or' creates alternatives. . . . A common interpretive issue involves the conjunction 'and,' which . . . entails an express or implied 'both' before the first element.").

[3] See, e.g., Loc. Div. 589, Amalgamated Transit Union v. Massachusetts, 666 F.2d 618, 627 (1st Cir. 1981) (Breyer, Stephen G., J.) ("the words 'and/or' commonly mean 'the one or the other or both.'").

condition precedent to its ability to sue Underwriters. *New South Communications, Inc.*, 835 Fed. Appx. 405, 411 (11th Cir. 2020).

Maricopa argues that, because the claim was for a partial loss, it satisfied the sworn proof of loss requirement by providing Underwriters with estimates for the alleged loss that are the equivalent of "receipted bills." Maricopa's interpretation of "receipted bills" as used in the "Notice of Loss And Filing of Proof" is irreconcilable with the plain language in the Policy requiring a "sworn proof of loss." Even if the Court accepted Maricopa's interpretation, Maricopa's reliance on "estimates" as "receipted bills" to support its interpretation is similarly misplaced because its submission of estimates, invoices, and other documents to prove damages is insufficient to satisfy and irrelevant to the "sworn proof of loss" requirement. See *Edwards v. SafePoint Insurance Company*, 318 So.3d 13, 19 (Fla. 4th DCA 2021) ("That the insured ultimately submitted an estimate and other documents is irrelevant."); *Rodrigo v. State Farm Florida Ins. Co.*, 144 So. 3d 690, 692 (Fla. 4th DCA 2014) ("While the insured argued that she provided the insurer with bills, estimates, invoices, and other documents to prove her damages, she failed to file a sworn proof of loss.").

Given the Policy's plain language and Maricopa's failure to submit a proof of loss, Underwriters has established that, as a matter of law, Maricopa materially breached the Policy's post-loss conditions precedent. *New South Communications, Inc*., 835 Fed. Appx. 405, 413. Under *New South*, Maricopa's material breach gives rise to a presumption of prejudice in favor of Underwriters. *Id.* The burden then shifts to the Maricopa to show that its material breach of the proof-of-loss requirement did not prejudice Underwriters. *Id.*

Notwithstanding the trial evidence that Maricopa never submitted a proof of loss, the jury answered "no" to the affirmative defense that "Maricopa Capital Limited failed to comply with the terms and conditions post-loss in order for coverage to be afforded under the contract."

Moreover, no special jury instruction on the burden of proof was requested and prejudice to Underwriters was not raised by the parties or considered by the jury. The jury's finding that Maricopa complied with the terms and conditions post-loss under the contract and failure to consider prejudice to Underwriters was inconsistent with controlling law. *New South Communications*, 835 Fed. Appx. 405, 412 (11th Cir. 2020).

Having reviewed the whole record in a light most favorable to Maricopa, the Court finds that a judgment as a matter of law in favor of Underwriters, that Maricopa materially breached the proof-of-loss condition precedent is appropriate. Further, the Court finds that the record evidence creates genuine issues of material fact, i.e. whether Underwriters was, in fact, prejudiced by Maricopa's failure to conform to the proof-of-loss provisions of the Policy. For example, the record evidence shows that Underwriters was informed of the facts surrounding the loss, was afforded an opportunity to investigate, and approved payment of the first estimate of at least $182,000. [ECF No. 189-2 Roberts Tr., Vol. I, at pp. 48:19-49:12]. Underwriters received a signed request for an advance payment of $25,000, which led to the release of the $25,000 advance to Maricopa. *Id*. at p. 140:16 – 141:5. Mr. Brenchley at Yachtline (the intermediary between Underwriters and Maricopa) had informed Mr. Boutboul, the director of Maricopa, that Maricopa complied with all obligations imposed on it under the Policy. [ECF No. 189-4, Brenchley Tr., at pp. 53:3-54:14]. Mr. Brenchley also informed Mr. Boutboul that Underwriters agreed to include the examination of the second engine as part of the claim. [ECF No. 189-2 Roberts Tr., Vol. I, at p. 188:5-23; 190:6 – 191:2]. Further, on March 15, 2018, Mr. Brenchley wrote to Mr. Boutboul and conveyed to him that Underwriters agreed to pay an additional $70,318.82, which was the number they believed they owed based on the first $182,818.82 estimate dated September 5, 2017. [ECF No. 189-4, Brenchley Tr., at pp. 62:11 – 64:16]. Based thereon, there are genuine issues of material fact whether Underwriters suffered prejudice.

A new trial on the issue of prejudice, if any, to Underwriters will ensure that the unanswered questions with respect to prejudice, on which this case hinges, are answered by a jury. Specifically, a new trial will allow Maricopa the opportunity to overcome the presumption created by its material breach and prove to the jury that Underwriters was not prejudiced by its failure to comply with the proof-of-loss provision. *See Allstate Floridian Ins. Co. v. Farmer*, 104 So.3d 1242, n.11 (Fla. 5th DCA 2012) (finding that the prejudice question was properly before the jury where there is conflicting evidence as to whether the insurer was prejudiced); *American Integrity Insurance Company v. Estrada*, 276 So.3d 905, 912 (Fla. 3rd DCA 2019)(Where the insurer establishes such a material breach by the insured, the burden then shifts to the insured to prove that any breach did not prejudice the insurer.).

III. CONCULSION

Based on the foregoing, it is

ORDERED and ADJUDGED that the verdict in favor of plaintiff is **VACATED AND SET ASIDE**. It is further

ORDERED and ADJUDGED that Underwriters' motion for directed verdict made pursuant to Rule 50(a), Fed. R. Civ. P., at the conclusion of all the evidence, is **GRANTED.** It is further

ORDERED and ADJUDGED that Underwriters' renewed motion for judgment notwithstanding the verdict (i.e., judgment as a matter of law) pursuant to Rule 50(b), Fed. R. Civ. P. [ECF No. 176] is **GRANTED.** The Court finds that, as a matter of law, Maricopa Materially breached the Policy's condition precedent by failing to provide a sworn proof of loss. It is further

ORDERED and ADJUDGED that this matter be set for a new trial, at a time to be determined, on the issue of whether Underwriters were prejudiced by Maricopa's material breach of the Policy's proof-of loss provision.

DONE AND ORDERED in Chambers at Miami, Florida, this 6th day of January, 2022.

s/ Donald L. Graham
DONALD L. GRAHAM
UNITED STATES DISTRICT JUDGE