

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

CASE NO. 16-22041-CIV-ALTONAGA/O'Sullivan

**BALFOUR BEATTY
CONSTRUCTION, LLC,**

Plaintiff,

v.

**ABG CAULKING
CONTRACTORS, INC., et al.,**

Defendants.

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ORDER

THIS CAUSE came before the Court upon Plaintiff, Balfour Beatty Construction, LLC's ("BBC[']s") Motion to Join . . . ("Motion") [ECF No. 47], filed on July 27, 2016. On August 15, 2016, Non-Party, American Home Assurance Company ("American Home") filed a Memorandum of Law in Opposition . . . ("Response") [ECF No. 57]. BBC filed a Reply . . . ("Reply") [ECF No. 60] on August 16, 2016. The Court has considered the parties' submissions, the record, and applicable law.

BBC is a general contractor that performed construction management for a Miami project known as "Midtown II." (*See* Complaint . . . ("Complaint") [ECF No. 1] ¶ 3). BBC's subcontractor, Defendant ABG Caulking Contractors, Inc. ("ABG"), provided caulking and waterproofing services for Midtown II. (*See id.* ¶ 4). American Home underwrote liability insurance for the Midtown II's Owner's Controlled Insurance Program, and issued the Commercial General Liability Policy ("Policy") attached as Exhibit B to the Complaint. (*See id.* ¶ 5; Ex. B [ECF No. 1-2]).

BBC became aware of some construction defects in Midtown II, prompting it to initiate arbitration against ABG. (*See* Arbitration Award [ECF No. 1-1] 2). American Home was given written notice of these construction defects, but it repeatedly refused to participate in reviewing the claims that prompted the arbitration, although it provided a defense to ABG in the arbitration. (*See* Compl. ¶ 2). On April 25, 2016, BBC obtained a final arbitration award (“Final Award”) against ABG for \$823,377.00, plus attorney’s fees, costs, expert fees, and interest. (*See* Final Award [ECF No. 1-1] 5). On August 25, 2016, the Court entered an Order [ECF No. 63] confirming the award into a collectible judgment (“Final Judgment”) under the Federal Arbitration Act.

BBC presently seeks to join American Home to the Final Judgment pursuant to Florida Statutes section 627.4136, which provides:

At the time a judgment is entered or a settlement is reached during the pendency of litigation, a liability insurer may be joined as a party defendant for the purposes of entering final judgment or enforcing the settlement by the motion of any party, unless the insurer denied coverage under the provisions of s. 627.426(2) or defended under a reservation of rights pursuant to s. 627.426(2).

FLA. STAT. § 627.4136(4). Section 627.426(2) states:

A liability insurer shall not be permitted to deny coverage based on a particular coverage defense unless:

- (a) Within 30 days after the liability insurer knew or should have known of the coverage defense, written notice of reservation of rights to assert a coverage defense is given to the named insured by registered or certified mail sent to the last known address of the insured or by hand delivery

FLA. STAT. § 627.426(2) (alteration added).

In its Response, American Home argues it should not be joined to the Final Judgment under section 627.4136 because it defended under a reservation of rights under section 627.426(2). (*See generally* Resp.). Specifically, American Home states it issued a reservation of

rights letter (“ROR Letter”) to ABG on October 14, 2015, which it attaches to its Response. (*See id.*, Ex. 1 [ECF No. 57-1]). In its Reply, BBC argues American Home’s reservation of rights is invalid because it did not comply with the procedures set forth in section 627.426(2). (*See generally* Reply). BBC asserts American Home did not send the ROR Letter to ABG within “30 days after [American Home] knew or should have known of the coverage defense.” FLA STAT. § 627.426(2) (alteration added).

BBC states it notified ABG about the construction defects in a Notice of Claim letter dated October 25, 2012, listing four areas “which were possibly attributable to the scope of work performed or to be performed by ABG on this project.” (Reply 2 (quoting Arbitration Award 2)). Further, BBC filed its Complaint in Arbitration on January 20, 2015. (*See* Arbitration Award 3). American Home waited nine months after BBC filed its Complaint in Arbitration, until October 14, 2015, to send ABG its ROR Letter. (*See generally* ROR Letter). Thus, BBC asserts American Home has failed to comply with section 627.426(2)’s requirement that an insurer send its ROR Letter within 30 days of when it “knew or should have known of the coverage defense,” FLA STAT. § 627.426(2), because, at the latest, BBC’s January 20, 2015 Complaint in Arbitration put American Home on notice of its coverage defense.

There is limited case law regarding situations where, as here, a party seeking to join an insurer to its judgment argues the insurer cannot avoid joinder by asserting its untimely reservation-of-rights letter. Nonetheless, it is well established that when an insurer fails to comply with section 627.426(2)’s 30-day requirement, it is estopped from asserting coverage defenses raised in its untimely reservation-of-rights letter. *See Mid-Continent Cas. Co. v. Basdeo*, 477 F. App’x 702, 707 (11th Cir. 2012) (finding an insurer estopped from asserting a coverage defense when it knew or should have known of the defense by October 3, 2007, but did

not send its reservation-of-rights letter until February 29, 2008); *Shopping Ctr. Mgmt. v. Arch Specialty Ins. Co.*, No. 09-21426-CIV, 2010 WL 1302967, at *6 (S.D. Fla. Mar. 31, 2010) (finding an insurance company barred from asserting its coverage defense where the insurer received notice of the underlying personal injury claim on May 9, 2006, but did not issue its reservation-of-rights letter until June 22, 2006).

A similar conclusion is warranted here. Giving American Home the benefit of every doubt, it at least knew of the underlying dispute by January 20, 2015, when BBC filed its Complaint in Arbitration. (*See* Arbitration Award 3). Yet American Home did not send its reservation-of-rights letter until October 14, 2015, far more than 30 days later. (*See generally* ROR Letter). Thus, American Home did not comply with the requirements of section 627.426. Just as it would be estopped from asserting the coverage defenses raised in its ROR Letter, American Home also should not be able to rely on this untimely letter to prevent joinder. Accordingly, for the foregoing reasons, it is


ORDERED AND ADJUDGED as follows:

1. The Motion [ECF No. 47] is **GRANTED**.
2. American Home Assurance Company is hereby **JOINED** to BBC's Final Judgment.
3. By **August 30, 2016**, BBC shall submit a proposed order of final judgment.¹

¹ Pursuant to the CM/ECF Administrative Procedures, proposed orders shall be filed as an attachment to a motion, notice, or other filing. The proposed document must also be e-mailed to altonaga@flsd.uscourts.gov. The proposed document shall be submitted by e-mail in Word format. The e-mail line and the name of the attachment should include the case number, followed by a short description of the attachment (e.g., 00-cv-00000 Order).

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DONE AND ORDERED in Miami, Florida, this 26th day of August, 2016.



CECILIA M. ALTONAGA
UNITED STATES DISTRICT JUDGE

cc: counsel of record