UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION

Case No.: 11-CV-81339-RYSKAMP/HOPKINS

STRUCTURAL GROUP, INC.,

Plaintiff,

v.

FCCI COMMERCIAL INSURANCE COMPANY et al.,

Defendants.
_____/

OMNIBUS ORDER DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT; GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT; GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO STRIKE

THIS CAUSE comes before the Court on the parties' cross motions for summary judgment **[DE 23, 47]** filed on June 13, 2012 and September 27, 2012, respectively. Also before the Court is FCCI's motion to strike portions of the Affidavit of Colin Meneely **[DE 32]** filed on July 2, 2012. The motions have been fully briefed, and hearings were held on September 12, 2012 and November 16, 2012. These matters are ripe for adjudication.

I. Background

Plaintiff Structural Group, Inc. ("Structural") is a general contractor hired to perform concrete restoration work and railing repairs for condominium associations throughout southeastern Florida. Between 2002 and 2005, Structural made repairs and replacements at Harbourage Place Condominium ("Harbourage"), Bayshore Towers Condominiums ("Bayshore"), Le Chateau Condominium ("Le Chateau"), and Playa Del Mar Condominium ("Playa Del Mar"). For each project, Structural subcontracted the fabrication and installation of

the railings to Aubrix Enterprises, Inc. d/b/a Arista Aluminum Railings ("Aubrix"). Before the railings were installed, however, Aubrix hired[1] American Powder Coatings ("APC") to apply a powder coating to the railings as a protectant against corrosion and wear. After installation, however, the railings began to blister, flake, and delaminate.

The corrosion of the railings was extensive. All railings at all four condominiums were eventually repaired and replaced. Playa Del Mar was the first to manifest defects, and in March 2007 it served Structural with a notice of claim and demand for remediation. In response, Structural filed suit in state court against Aubrix and APC, asserting claims for breach of contract, breach of warranty, and products liability and seeking recovery for damages to the railings.[2] Harbourage's railings began to corrode in April 2007, and Structural amended its complaint to include allegations of damages at Harbourage in 2008. Corrosion appeared at Bayshore and Le Chateau by August 2007 and December 2008, respectively, and Structural separately brought suit in state court against Aubrix and APC for damages at those condominiums thereafter. Structural entered into settlement agreements with Harbourage and Playa Del Mar, under which Structural provided a fixed sum in exchange for a release of future liability. No similar settlements were reached for the Bayshore and Le Chateau condominiums. Ultimately, Structural alleges it incurred $1.5 million in damages because of the defective railings.

---

[1] There is a dispute between the parties as to whether APC is a "subcontractor" within the definition FCCI's commercial general liability ("CGL") policy. While resolution of this issue would be necessary to determine whether Structural fits within FCCI's "your work" policy coverage exclusion, it is not required in this instance. As discussed below, the Court finds Structural does not have a claim for "property damage," and thus, the policy exclusions are inapplicable. *See Amerisure Mut. Ins. Co. v. Auchter Co.*, 673 F.3d 1294, 1301 (11th Cir. 2012) ("Because the present case involves no "property damage," we need not examine the scope of the exclusions to [the insurance company's] CGL policies.").

[2] The Court takes judicial notice of Structural's state court complaints. Federal Rule of Evidence 201 mandates that the Court take judicial notice when requested by a party who provides the Court with the necessary information. Fed. R. Evid. 201(d). Public records are among the types of records the Court may consider. *See Ebeh v. St. Paul Travelers*, No. 09-cv-2628, 2010 WL 5553687, at *3 (M.D. Fla. Oct. 6, 2010).

Defendants FCCI Commercial Insurance Company and FCCI Insurance Company (collectively, "FCCI") issued commercial general liability ("CGL") insurance policies to Aubrix for policy periods dating March 29, 2006 through March 29, 2009. *See* **[DE 1-3]**. Therefore, after Structural asserted claims against Aubrix for the defective railings at Playa Del Mar, Aubrix tendered the defense and indemnity of the suit to FCCI.[3] The subcontracts between Structural and Aubrix required Structural to be listed as an additional insured under its policies; however, Structural was only listed as an additional insured for the work at Playa Del Mar and Le Chateau.

On December 17, 2007, FCCI denied coverage for Aubrix, taking the position that Structural's claims against Aubrix for damages caused by the defective railings at Playa Del Mar were not covered under the policy. Specifically, FCCI stated that "the policy is reserved for accidents causing collateral property damage or injury; not for remediation of the alleged improper work performed by [Aubrix] for Structural." **[DE 25-6]** at 41. While FCCI subsequently agreed to defend Aubrix under a reservation of rights, it refuses to indemnify Aubrix and maintains, *inter alia*, that the corrosion to the railings is not "property damage" within the definition of the policy, and further, that any such claim for damage is excluded under the terms of the policy.

On December 9, 2011, Structural brought this action for declaratory judgment and breach of contract against FCCI, seeking an adjudication of the rights and duties of Structural and FCCI under the policies. Specifically, Structural seeks coverage on behalf of Aubrix for the claims Structural asserts against it in state court, and also as an additional insured under the policies. In response, FCCI claims there is no coverage for Structural's claims under the policies and Structural may not make a claim for coverage on behalf of Aubrix for the claims Structural

[3] It was Structural that actually tendered the defense and indemnity of Aubrix to FCCI for the damages at Playa Del Mar. *See* **[DE 50, at 7– 8]**.

asserts against it. The state court proceedings are stayed pending resolution of this matter. For the reasons stated below, the Court finds that the corrosion to the railings does not constitute "property damage," and therefore, summary judgment in favor of FCCI is proper.

II. Legal Standard

"The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). The movant "always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (quoting FED. R. CIV. P. 56(c)(1)(A)). Where the non-moving party bears the burden of proof on an issue at trial, the movant may simply "[point] out to the district court that there is an absence of evidence to support the nonmoving party's case." *Id.* at 325.

After the movant has met its burden under Rule 56(c), the burden shifts to the non-moving party to establish that there is a genuine issue of material fact. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 585 (1986). Although all reasonable inferences are to be drawn in favor of the non-moving party, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986), he "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita*, 475 U.S. at 586. The non-moving party may not rest upon the mere allegations or denials of the adverse party's pleadings, but instead must come forward with "specific facts showing that there is a *genuine issue for trial*." *Id.* at 587 (citing FED. R. CIV. P. 56(e)). "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" *Id.* "A mere 'scintilla' of evidence supporting the opposing party's position will not suffice; there must be enough of a showing that

the jury could reasonably find for that party." *Walker v. Darby*, 911 F.2d 1573, 1577 (11th Cir. 1990). If the non-moving party fails to make a sufficient showing on an essential element of his case on which he has the burden of proof, the moving party is entitled to a judgment as a matter of law. *Celotex Corp.*, 477 U.S. at 323.

The interpretation of an insurance contract is a matter of law to be decided by the Court. *Gulf Tampa Drydock Co. v. Great Atl. Ins. Co.*, 757 F.2d 1172, 1174 (11th Cir. 1985) (citing *Smith v. State Farm Mut. Auto. Ins. Co.*, 231 So. 2d 193, 194 (Fla. 1970)).[4] "Under Florida law, an insurance policy should be construed in its entirety and given the construction which reflects the intent of the parties." *Id.* It is well-settled that when the contractual language is clear and unambiguous, the actual language used in the contract is the best evidence of parties' intent, and the contract terms will be given their plain meaning. *Rey v. Guy Gannett Pub. Co.*, 766 F. Supp. 1142, 1146 (S.D. Fla. 1991) (citing *Hurt v. Leatherby Ins. Co.*, 380 So. 2d 432 (Fla. 1980)). "When the language of a policy is unclear or confusing, the language must be construed against the insurer." *Gulf Tampa Drydock*, 757 F.2d at 1174. "However, ambiguity exists in an insurance policy only when its terms make the contract susceptible to different reasonable interpretations, one resulting in coverage and one resulting in exclusion." *Id.* at 1174-75. "In other words, a court is not free to rewrite an insurance policy or add meaning to it that really is not there." *Nat'l Union Fire Ins. Co. of Pennsylvania v. Carib Aviation, Inc.*, 759 F.2d 873, 876 (11th Cir. 1985).

[4] The parties agree that Florida substantive law controls in this diversity action. *Trans Coastal Roofing Co., Inc. v. David Boland, Inc.*, 309 F.3d 758, 760 (11th Cir. 2002) (citing *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817 (1938)).

III. Discussion

A. Motion to Strike

FCCI requests that the Court strike portions of the Affidavit of Colin Meneely submitted with Structural's motion for summary judgment because it contains impermissible legal conclusions, conclusory averments, and hearsay statements under Rule 56(c)(4). Rule 56(c)(4) provides:

> ***Affidavits or Declarations.*** An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated.

FED. R. CIV. P. 56 (c)(4). A review of the affidavit reveals statements by Mr. Meneely contain improper conclusions as to legal issues within the sole purview of the Court. Whether the corrosion of the railings constitutes "property damage," whether the railings are real property and not products, and whether APC was a subcontractor have legal consequence under the terms of the policy and thus are matters of law for the Court to determine. Mr. Meneely may not testify as to conclusions of law, and therefore, the Court holds that those portions of the affidavit which aver such legal conclusions are stricken.

Mr. Meneely also asserts that the damage to the railings was caused by APC's defective powder coating. This matter is disputed between parties, and while this assertion is not based on Mr. Meneely's personal knowledge, the Court finds it is appropriate as it is supported by business records submitted by Structural concurrently with the affidavit, namely, an inspection report finding that the powder coating was the main reason for the railings' corrosion. *See* **[DE 25-6]** at 11. Notably, FCCI introduces no evidence to contradict this finding.

FCCI further contends that Mr. Meneely's statements that "Aubrix tendered the defense and indemnity lawsuit to FCCI," **[DE 25]** ¶ 31, and "FCCI reversed its earlier position and

agreed to defend [Aubrix] and investigate the claims . . . under a full reservation of rights," **[DE 25]** ¶ 38, are impermissible as they are not based on his personal knowledge. The Court finds FCCI's arguments in this respect unconvincing. The record supports that Structural, on behalf of Aubrix, tendered the defense and indemnity of the Playa Del Mar lawsuit to FCCI on November 19, 2007, and that FCCI initially denied coverage and defense but later agreed to defend Aubrix under a reservation of rights. *See* **[DE 50, 25-6]**. Moreover, Mr. Meneely may testify to these matters as a company representative under Rule 30(b)(6) as Structural's general manager. *See Sunbelt Worksite Mktg. v. Metro. Life Ins. Co.*, 2011 U.S. Dist. LEXIS 87387, *6 (M.D. Fla. Aug. 8, 2011) (a Rule 30(b)(6) designee does not need to have direct, personal knowledge of every fact in the affidavit).

These issues, while potentially material to the substantive issues in this case, are not dispositive to the Court's determination in this instance. As discussed below, whether the railings were corroded by APC's defective coating does not alter the Court's finding that Structural does not have a proper claim for "property damage" under the policies. Nonetheless, for the foregoing reasons, FCCI's motion to strike is granted in part and denied in part.

B. Structural's Standing to Sue to FCCI

Structural filed this action for declaratory judgment seeking coverage for the damages sustained because of the defective railings. It claims that (1) FCCI is required to indemnify Aubrix for the claims Structural asserts against it and (2) it is an additional insured under the FCCI policies. In response, FCCI contends that (1) Structural's claim for coverage on behalf of Aubrix violates Florida's nonjoinder statute as it has not obtained a settlement or verdict against Aubrix as an insured; and, (2) Structural is an additional insured solely under the Playa Del Mar

and Le Chateau policies and is not entitled to coverage because it has not proved Aubrix was negligent as those policies require.

Florida's nonjoinder statute provides in pertinent part:

> It shall be a condition precedent to the accrual or maintenance of a cause of action against a liability insurer by a person not an insured under the terms of the liability insurance contract that such person shall first obtain a settlement or verdict against a person who is an insured under the terms of such policy for a cause of action which is covered by such policy.

Fla. Stat. § 627.4136(1). Thus, an injured third party may not file a direct action against a liability insurer for a cause of action covered by a liability insurance policy without first (1) obtaining a settlement against the insured or (2) obtaining a verdict against the insured. *Hazen v. Allstate Ins. Co.*, 952 So. 2d 53, 534 (2007). The public policy behind the statute is to ensure that jurors do not consider the existence of insurance coverage as a factor in determining the insured's liability to the injured third party. *See General Star Indemnity Co. v. Boran Craig Barber Engel Const. Co.*, 895 So. 2d 1136, 1138 (Fla. Dist. Ct. App. 2005); *Hough v. Huffman*, 555 So. 2d 942, 944 (Fla. Dist. Ct. App. 1990) ("[T]he reason for [the nonjoinder statute] was to prevent undue prejudice to insurance companies, and to avoid 'deep-pocket' jury verdicts."). The mere fact that the third party's suit against the insurer is separate from its action against the insured is not enough to avoid dismissal under the statute. *See S. Owners Ins. Co. v. Mathieu*, 67 So. 3d 1156, 1159 (Fla. Dist. Ct. App. 2011).

The nonjoinder statute, however, only applies to a party who is "not an insured under the terms of the liability insurance contract," or in other words, a party who lacks a beneficial interest in the policy. *See General Star*, 895 So. 2d at 1138. Thus, where a third party is an additional insured under the policy, or has some other beneficial interest in the rights provided

under the policy, it may file an action against the insurer without first obtaining a settlement or verdict against the insured.

Here, Structural, the injured third-party, is directly suing FCCI, the insurer, for damage to the railings caused by Aubrix, the insured. Structural has not obtained a settlement or verdict against Aubrix. Thus, such suit is generally prohibited under the nonjoinder statute. As discussed below, however, Structural has a beneficial interest in the policies as an additional insured. Therefore, a direct suit against FCCI is proper unless otherwise expressly limited by the policy language. *Cf. S. Owners Ins. Co.*, 67 So. 3d at 1157 (holding that third party's declaratory action against insurer seeking to establish coverage for construction defects under the contractor's policy was premature because the third party was not an additional insured under the policy and had not obtained a settlement or verdict against the contractor).

Structural is expressly listed as an additional insured under the Playa Del Mar and Le Chateau policies. *See* **[DE 1-3]** at 66. The Additional Insured Endorsement CGL 021 (04 03) for those policies state:

> **Who is an Insured (Section II)** is amended to include as an insured the person or organization shown in the Schedule, *but only with respect to your negligent actions* which cause liability to be imposed on such person or organization without fault on the part of said person or organization, as a result of "your work" performed for that insured.

[DE 1-3] at 58, 76 (emphasis added). Thus, the Playa Del Mar and Le Chateau policies provide coverage for Structural, but only to the extent Aubrix is negligent.

Structural is not expressly listed as an additional insured under the Bayshore and Harbourage policies. However, under those policies' Additional Insured Endorsement CGL 026 (12 03), Structural is considered an additional insured because the subcontracts between

Structural and Aubrix require Structural to be added as an additional insured in the policies. *See* **[DE 25-5]** at 6, 17. In pertinent part, the Additional Insured Endorsement states:

> **Section II – Who is an Insured** is amended to *include as an insured any person or organization for whom you are performing operations when you and such person or organization have agreed in writing in a contract or agreement that such person or organization be added as an additional insured on your policy*. Such person or organization is an insured but only with respect to your negligent actions . . . caused by your ongoing operations performed for that insured. A person's or organization's status as an insured under this endorsement ends when your operations for that insured are completed.

[DE 1-3] at 81 (emphasis added). Therefore, under the Harbourage and Bayshore policies, Structural is an additional insured only to the extent Aubrix is negligent, and only during Aubrix's ongoing operations.

The Court finds that Structural may properly assert a claim for coverage under the Playa Del Mar and Le Chateau policies but not under the Bayshore and Harbourage policies. The latter policies' express preclusion is clear: "[Structural's] status as an insured . . . ends when [Aubrix's] operations for [Structural] are completed." Therefore, Structural's status as an additional insured existed only during Aubrix's ongoing operations—the fabrication and installation of the railings—and ceased to exist after Aubrix's operations were complete, i.e., the railings were installed.

The railings were completely installed at Harbourage by December 2004 and at Bayshore by April 2007. The defects did not manifest at Harbourage until April 2007 and at Bayshore until July or August 2007. Thus, Structural's status as an additional insured under the two policies terminated after Aubrix installed the railings and before the defects occurred. According to the plain language of the policies, Structural has no beneficial interest in the insurance contract and thus may not bring a claim against FCCI without first obtaining a settlement or verdict against Aubrix. *See General Star*, 895 So. 2d at 1138.

On the contrary, Structural's declaratory action for coverage under the Playa Del Mar and Le Chateau policies are proper because it maintains a beneficial interest in the policies as an additional insured. *See Auto-Owners Insurance Co. v. Pozzi Window Co.*, 984 So. 2d 1241 (Fla. 2008) (a manufacturer, as the assignee of a builder, filed suit against the builder's insurer seeking coverage under the policy). That Structural's status as an additional insured is limited to damage caused by Aubrix's negligence does not preclude Structural's claims against FCCI. *General Star* is instructive on this issue. There, considering facts almost identical to the facts before this Court, the court held that a declaratory judgment action by a general contractor for coverage under its subcontractor's CGL policy as an additional insured must either be stayed or severed from the action against the subcontractor for damages caused by the subcontractor's alleged defective work. 895 So. 2d at 1138. While the court found that a claim by the general contractor as an additional insured against the subcontractor's insurer is "essentially [ ] a claim against its own insurer for coverage," *id.*, it reasoned that permitting the additional insured to sue the insurer in the same action as the insured would "result in irreparable harm." *Id.* It therefore ordered that the declaratory judgment action against the insured to be stayed or severed. In reaching this conclusion, the court relied on other Florida cases prohibiting the "joining" of claims against an insured and insurer. *See, e.g., Merchants & Businessmen's Mut. Ins. Co. v. Bennis*, 636 So. 2d 593 (Fla. Dist. Ct. App. 1994). Notably, it did not *require* that the general contractor's action against the insurer be stayed pending resolution of the claims by the general contractor against its subcontractor. Rather, it focused on the legislative intent underpinning the statute: claims should not be asserted jointly against insurers and insureds in order that jurors do not consider the existence of insurance coverage in determining the insured's liability. *See General Star*, 895 So. 2d at 1138–39.

Here, Structural is suing FCCI in a separate action for declaratory relief as an additional insured to determine the scope of coverage under the Playa Del Mar and Le Chateau policies. While Structural's status as an additional insured is limited to Aubrix's negligent conduct, such a finding, in this case, is restricted by the fact that proceedings against Aubrix by Structural are stayed in state court pending resolution of this action. Following the reasoning of *General Star*, the Court finds that suit by Structural against FCCI for a determination of insurance coverage under the Playa Del Mar and Le Chateau policies is proper as Structural has beneficial interest in the policies and brought its claims in a separate action. While Structural's claim for coverage under these policies is properly before the Court, pursuant to the analysis below, the Court finds that the damage incurred by Structural does not constitute "property damage" within the meaning of the policies.

C. The Policy Coverage

Structural seeks coverage under the CGL policies for the repair and replacement of the defective railings. FCCI argues that the damage to the railings does not constitute "property damage" as interpreted by Florida courts within the meaning of the policy. To have property damage, FCCI avers, there must be damage to tangible property other than the railings themselves. The Court agrees. For the reasons set forth below, the Court finds that Structural's claim is solely for the costs of repairing and replacing the defective railings, which is not a claim for "property damage."

FCCI's CGL policies provide coverage for "property damage" caused by an "occurrence." The parties do not dispute that Aubrix's defective fabrication and installation of the railings constituted an occurrence. *See U.S. Fire Ins. Co. v. J.S.U.B., Inc.*, 979 So. 2d 871, 888 (Fla. 2007) ("[F]aulty workmanship that is neither intended nor expected from the standpoint of the contractor can constitute an 'accident' and, thus, an 'occurrence' under a post-1986 CGL

policy."). Rather, the sole dispute is whether the defective coating applied by APC which caused damage to the railings constitutes "property damage."

Two seminal Florida cases discuss at length the scope of coverage provided by CGL policies for "property damage" in construction-defect cases. *See Pozzi*, 984 So. 2d 1241 (Fla. 2008); *J.S.U.B.*, 979 So. 2d 871. In *J.S.U.B.* the Florida Supreme Court drew the following distinction:

> [F]aulty workmanship or defective work that has damaged the otherwise nondefective completed project has caused "physical injury to tangible property" within the plain meaning of the definition of the policy. If there is no damage beyond the faulty workmanship or defective work, then there may be no resulting "property damage."

979 So. 2d at 889. The court went on to explain that "there is a difference between a claim for the costs of repairing or removing defective work, which is not a claim for 'property damage,' and a claim for the costs of repairing damage *caused by* the defective work, which is a claim for 'property damage.'" *Id.* (emphasis added). Thus, where a contractor's claim is for the cost of repairing the subcontractor's defective work, it is not covered under a CGL policy.[5] Where a contractor's claim is for the cost of repairing damage to property outside of the subcontractor's defective work (caused by the subcontractor's work), it is covered under a CGL policy. *See Amerisure Mut. Ins. Co. v. Auchter Co.*, 673 F.3d 1294, 1304–07 (11th Cir. 2012) (discussing the definition of "property damage" as interpreted by *J.S.U.B.* and *Pozzi* in detail).

The Court finds that Structural's claim is for the cost of repairing the defective railings, and thus does not constitute a claim for "property damage." Importantly, Structural's claims

[5] It is of no importance whether the damage was caused by the contractor, the subcontractor, or the sub-subcontractor. Where any of those parties causes damage by its defective work, the contractor—if properly insured under the policy—may bring a declaratory judgment action for coverage against the insurer. *See J.S.U.B.*, 979 So. 2d at 890 (contractor brought declaratory action as insured to determine whether CGL policy covered property damage caused by the defective work of its subcontractors). The key inquiry, here, is whether the type of damage incurred by Structural is the type that is covered under FCCI's CGL policies.

against Aubrix and APC are for the failure to "install and furnish a railing system that was free of defects." **[DE 33-1]**, at 3. Structural does not contend that the corrosive railings damaged any other part of the condominiums. Structural's sole damages arise from the repair and replacement of the railings, which Aubrix defectively fabricated and installed. Thus, the damage to the railings does not constitute "property damage" within the meaning of the policies. *See J.S.U.B.*, 79 So. 2d at 889–90 ("A claim limited to faulty workmanship or materials is one in which the sole damages are for replacement of a defective component or correction of faulty installation.")

Structural attempts to make a distinction between the defective powder coating applied by APC and the otherwise nondefective railings installed by Aubrix. Structural compartmentalizes the damage to the railings into components, arguing that the defective powder coating caused "property damage" to the railings and thus there is coverage for the damage sustained to the railings under the policies. Structural's argument is misplaced, however.

In *Pozzi*, the court held that "the mere inclusion of a defective component . . . does not constitute property damage unless that defective component results in physical injury to some other tangible property." 984 So. 2d at 1248. Here, assuming, *arguendo*, that APC's powder coating is a defective component, it cannot be said, nor is it alleged, to cause physical damage to property outside of the railings. As *Auchter* illustrates, the defective components were the railings themselves; they are what the condominiums hired Structural to provide and what Structural seeks coverage for under the policies. *See* 673 F.3d at 1308.

In *Auchter*, a subcontractor's defective installation of roof tiles caused the roof as a whole to be replaced. *Id.* The court stated that the roof tiles were not the relevant components, but rather, the relevant component was the roof itself, which the subcontractor was hired to install. *Id.* Relying on *Pozzi*, the court reasoned that because the owner brought suit against the

contractor to obtain the nondefective roof that should have been built in the first place, the "defect" to be remedied was the roof as a whole, not the individual tiles. *Id.* In this context, the court held "[a]lthough the loss of roof tiles may be said to have "damaged" the structural integrity of the roof, thereby rendering it defective, "there is no damage beyond the faulty workmanship" because the defective roof has not damaged some "otherwise nondefective" component of the project. *Id.* at 1307 (citing *J.S.U.B.*, 970 So. 2d at 889).

The Court follows the analysis in *Auchter* to find that corrosion to the railings caused by the defective coating does not constitute "property damage." The condominiums hired Structural to repair and replace the railings. The faulty workmanship, then, were the railings as a whole, not the powder coating. *See W. Orange Lumber Co. v. Ind. Lumbermens Mut. Ins. Co.*, 898 So. 2d 1147, 1148 (Fla. Dist. Ct. App. 2005) (holding the cost of removing and replacing defective siding shingles was not "property damage" even though the defect necessitated a total replacement of the siding). Because the corrosive railings did not damage some other tangible property at the condominiums, Structural did not sustain "property damage" within the meaning of the policies. To hold otherwise would effectively render the policy language null. Contractors would rely on defective components, subcomponents, and sub-subcomponents to recover for the faulty project as a whole. The term "property damage," requiring some other property damage outside the faulty project itself, would be made useless.

To wit: the damages Structural claim are those to correct the faulty railings installed by Aubrix. In so claiming, Structural is seeking to secure the nondefective railings that Aubrix should have installed in the first instance. Structural's claim is thus simply a "claim for the cost

of repairing the subcontractor's defective work," and is not "property damage" within the meaning of the policies.[6] *Auchter*, 673 F.3d at 1307.

IV. Conclusion

In sum, the Court finds that Structural has standing solely in regards to its claims as an additional insured under the Playa Del Mar and Le Chateau policies. Further, the Court finds that Structural did not suffer "property damage" within the definition of the CGL policies, and thus FCCI is entitled to judgment as a matter of law.

The Court has carefully considered the motions, responses, replies, applicable law, and pertinent portions of the record. For the foregoing reasons, it is hereby

ORDERED AND ADJUDGED that

1) FCCI's motion to strike **[DE 32]** portions of the Affidavit of Colin Meneely is **GRANTED IN PART AND DENIED IN PART**;
2) Structural's motion for summary judgment **[DE 23]** against FCCI is **DENIED**; and
3) FCCI's motion for summary judgment **[DE 47]** is **GRANTED**;

Final judgment will be entered by separate order.

DONE AND ORDERED in Chambers at West Palm Beach, Florida this 10 day of December, 2012.

/s/ Kenneth L. Ryskamp
KENNETH L. RYSKAMP
UNITED STATES DISTRICT JUDGE

[6] The Court notes that FCCI raised other defenses to indemnity in this instance. FCCI contends it is not bound by Structural's settlements with Harbourage and Playa Del Mar under the voluntary payments doctrine. It further contends that Structural failed to give timely notice of its claims for coverage as an additional insured. The Court declines to address these arguments given its finding that Structural did not sustain "property damage" in this case. *See Auchter*, 673 F.3d at 1301.