<<COURT\_NAME>>

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| <<PROVIDER\_SUITNAME>>  a/a/o <<INJUREDPARTY\_NAME>>,  Plaintiff,  vs.  <<INSURANCECOMPANY\_SUITNAME>>,  Defendant. | Case No.: <<INDEXORAAA\_NUMBER>> |
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**PLAINTIFF’S RESPONSE TO DEFENDANT’S MOTION TO DISMISS**

Plaintiff, <<PROVIDER\_SUITNAME>>, by and through the undersigned counsel, hereby files this Response to Defendant’s Motion to Dismiss, and in support thereof further states:

1. On <<DOS\_START>>, the Plaintiff, <<PROVIDER\_SUITNAME>> was retained in order to provide certain assessment services at the home of <<INJUREDPARTY\_NAME>>.
2. <<INJUREDPARTY\_NAME>> (hereinafter “Assignor”) are Insured of the Defendant, <<INSURANCECOMPANY\_SUITNAME>> under an insurance policy numbered <<POLICY\_NUMBER>>.
3. In exchange for the services provided by <<PROVIDER\_SUITNAME>>, <<INJUREDPARTY\_NAME>>on behalf of the Assignor executed a contract for services and assignment of insurance benefits.
4. Following their inspection, <<PROVIDER\_SUITNAME>> sent a copy of its invoice, service contract, assignment of benefits, and demand for payment to the Defendant and/or its agents and representatives.
5. Following the Defendant’s denial of <<PROVIDER\_SUITNAME>>’s demand for payment, <<PROVIDER\_SUITNAME>> initiated this lawsuit for breach of contract against Defendant for failing to issue insurance benefits for the amount invoiced by Plaintiff to the Insured for services rendered.
6. In response to <<PROVIDER\_SUITNAME>>’s filed Complaint, Defendant filed its Motion to Dismiss claiming that the statement of claim be dismissed for failure to attach the subject policy of insurance, Plaintiff’s invoice(s) and because the subject policy of insurance does not provide coverage for engineering services.
7. In support of its Motion to Dismiss for failure to attach the subject policy and invoice(s) Defendant cites to Rule 7.050 of Florida’s Small Claims Rules; however, Defendant ignores the fact that Parties have earlier stipulated to invoke the Florida Rules of Civil Procedure.
8. Since the Parties have stipulated to invoke the Florida Rules of Civil Procedure the rule that governs here is Rule 1.130(a) which states in pertinent part:

(a) Instruments Attached. All bonds, notes, bills of exchange, contracts, accounts, or documents upon which action may be brought or defense made, or a copy thereof or a copy of the portions thereof material to the pleadings, **must be incorporated in or attached to the pleading**. No documents shall be unnecessarily annexed as exhibits. The pleadings must contain no unnecessary recitals of deeds, documents, contracts, or other instruments. [Emphasis Added]

1. Plaintiff has incorporated the subject policy of insurance and its invoice by reference as allowed under the rules.
2. Furthermore, Defendant is in possession of copies of both the policy of insurance and invoice(s).
3. Aside from the procedural arguments made in its Motion to Dismiss Defendant also alleges that the statement of claim must be dismissed because the policy of insurance does not provide coverage for engineering services.
4. Defendant’s Motion to Dismiss is predicated on a false notion that the Plaintiff cannot formulate a cause of action for breach of contract and thus lacks standing to bring the instant suit.
5. Defendant is improperly seeking the Court to make a determination of coverage by granting its Motion to Dismiss.
6. To rule on a motion to dismiss, a court's gaze is limited to the four corners of the complaint, including the attachments incorporated in it, and all well pleaded allegations are taken as true. U.S. Project Mgmt., Inc. v. Parc Royale E. Dev., Inc., 861 So. 2d 74, 76 (Fla. 4th DCA 2003)
7. At the motion to dismiss stage, the court is limited to determining whether the complaint on its face contains allegations that are legally sufficient to state a cause of action. Gallon v. Geico Gen. Ins. Co., 150 So. 3d 252, 254 (Fla. 2d DCA 2014) citing Maynard v. Taco Bell of Am., Inc.*,* 117 So.3d 1159, 1160–61 (Fla. 2d DCA 2013) (quoting *Reyes ex rel. Barcenas v. Roush,* 99 So.3d 586, 589 (Fla. 2d DCA 2012).
8. The function of a motion to dismiss a complaint is to raise as a question of law the sufficiency of the facts alleged to state a cause of action, and a court is not permitted to speculate as to whether a plaintiff has any prospect of proving the allegations. Chaires v. North Florida National Bank, 432 So.2d 183 (Fla. 1st DCA 1983)
9. A complaint should not be dismissed on this basis unless the movant can demonstrate there is no set of facts that would support a claim for relief. Meadows Cmty. Ass’n, Inc. v. Russell-Tutty, 928 So. 2d 1276, 1280 (Fla. 2d DCA 2006).
10. Here, Plaintiff may maintain a cause of action in at least three ways.
11. First, the Plaintiff can show that the loss suffered by the Insured was covered under the subject policy of insurance and the Defendant was required by contract to pay for the cost of repair of the damage which included the cost of the engineering services provided by the Plaintiff. Failure to issue payment for said services was a breach of the insurance contract.
12. The case law cited by the Defendant showing that certain services are not covered under an all-risk policy of insurance ss distinguishable from the facts in the instant matter.
13. In the cases cited, the Courts found that services **not** relating to a physical loss were not covered; such as the services of a feng shui consultant who was hired to perfect the flow of Chi, which is clearly not a physical damage.
14. Here, the services provided by the Plaintiff were directly related to physical damage to the property and thus distinguishable from the cases cited by the Defendant.
15. In Zurich American Insurance Company v. Keating Building Corporation, 513 F. Supp. 2d 55 (D.C. N.J. 2007), a case cited by the Defendant in its Motion to Dismiss, the Court specifically stated that engineering services used in the debris removal of the collapsed building was compensable under the policy.
16. Second, the Plaintiff can show that it had a valid assignment of benefits which entitled it to any payments made by the Defendant to the Insured. When the Defendant issued payment directly to the Insured it breach its own contract of insurance which states that Defendant “will pay the [Insured] unless some other person is named in the policy or is **legally entitled to receive payment**.” By way of the assignment of benefits, Plaintiff was legally entitled to payment and the Defendant breached the contract by failing to issue said payments to the Plaintiff.
17. Third, the Plaintiff can show that even if the policy of insurance did provide for compensation for engineering services, the engineering services were a reasonably foreseeable consequential damage; thus, compensable as a consequence of the Defendant’s breach of contract to issue coverage over the loss.
18. In addition to the foregoing, it is well settled that the Court may consider only the legal sufficiency of the allegations and may not determine questions of fact or consider issues of proof or credibility. Id. citing Reyes ex rel. Barcenas, 99 So.3d at 589 (noting that the trial court may not determine the veracity of a plaintiff's allegations when considering a motion to dismiss) *see also* Hamide v. State Dept. of Corrections, 548 So. 2d 877 (Fla. 1st DCA 1989).
19. Here, the Plaintiff has laid out the elements for breach of contract cause of action:
    1. a contract existed between the Defendant and Insured;
    2. subsequently, the Insured suffered a loss contemplated under the contract that required payment of certain insurance benefits under the insurance contract;
    3. Insured complied with all conditions to receive payment:
    4. Defendant failed to issue payment to the Plaintiff who had an assignment of benefits from the Insured;
    5. Plaintiff suffered damages as a result of Defendant’s material breach of the contract.
20. Plaintiff’s Complaint is legally sufficient on its face; and thus, the Court cannot grant Defendant’s Motion to Dismiss.
21. Lastly, the Florida Supreme Court has held that affirmative defenses are not proper for consideration on a motion to dismiss. *See* Pizzi v. Central Bank Trust Company, 250 So. 2d 895 (Fla. 1971).
22. The issue of coverage and standing are affirmative defenses that are not proper for consideration in Defendant’s Motion to Dismiss.

**WHEREFORE** Plaintiff respectfully requests that this Honorable Court enter an Order denying Defendant’s Motion to Dismiss, requiring an Answer to Plaintiff’s Complaint be filed within ten (10) days, and any other further relief this Court deems just and equitable.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on February 20, 2022, a true and correct copy of the foregoing was served to all parties registered for this case via the Florida E-filing Portal.

**Florida Insurance Law Group, LLC**

8724 Sunset Drive, #260, Miami, FL 33173

Tel. (305) 906-4262



Robert F. Gonzalez, Esq.

Fla. Bar No. 68865

[Pleadings@flinslaw.com](mailto:Pleadings@flinslaw.com)