



July 30, 2018

Via E-Service

Alexandra Ramon, Esq.
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Re: DANNY DANIEL v. CERTAIN UNDERWRITERS AT LLOYD'S, LONDON
Case Number: 2018-003899-CA-01
Claim Number: 152209
Date of Loss: December 16, 2016

Dear Ms. Ramon,

The subject claim was not reported until four and a half months post-loss. The guest bathroom, which reportedly had a backup resulting in damage, was completely renovated at the time of the carrier's inspection and there was no evidence of a loss or water damage. As a result, the Defendant's investigation was prejudiced. The current case law is very clear on this issue.

Enclosed please find Defendant's Motion to Dismiss and for sanctions pursuant to Florida Statute § 57.105. If we do not receive Plaintiff's voluntary dismissal with prejudice within twenty-one (21) days of the date of this letter, we will file the attached Motion with the Court. Hopefully, that will not be necessary.

Should you have any questions or would like to discuss this further, please feel free to contact me.

Sincerely,

/s/ Lindsay F. LoBello

LINDSAY F. LOBELLO, ESQ.
Enclosures: as stated

IN THE CIRCUIT COURT OF THE
11TH JUDICIAL CIRCUIT IN AND
FOR MIAMI-DADE COUNTY,
FLORIDA

DANNY DANIEL,

Case No.: 2018-003899-CA-01

Plaintiff,

Claim No.: 152209

vs.

CERTAIN UNDERWRITERS AT
LLOYD'S, LONDON,

Defendant.

_____ /

DEFENDANT'S MOTION TO DISMISS AND FOR SANCTIONS
PURSUANT TO § 57.105, FLORIDA STATUTES

COMES NOW the Defendant, Certain Underwriters at Lloyd's, London, by and through the undersigned counsel, and files this Motion to Dismiss and for Sanctions pursuant to §57.105, Florida Statutes and as grounds therefore would state as follows:

Material Facts

1. Plaintiff, Danny Daniel, has filed the instant action for breach of contract for insurance proceeds pursuant to a homeowner's insurance policy issued by Defendant.

2. Certain Underwriters at Lloyd's, London issued a policy of insurance to Danny Daniel for property located at 8601 Caribbean Blvd, Cutler Bay, Florida 33157.

3. The insurance policy, ARG536141R1, was in full force and effect from August 20, 2016 through August 20, 2017, subject to the terms, conditions, exclusions, and limitations of the subject policy and applicable Florida law.

4. On April 28, 2017, Plaintiff first reported a loss to the Defendant which allegedly occurred on December 16, 2016, four and a half months prior.

5. Defendant made multiple requests to coordinate an inspection of the property with Plaintiff's loss consultant, which went ignored. Finally, parties coordinated the inspection for May 25, 2017 at 12:00pm.

6. Defendant's adjuster arrived at the subject property at the mutually scheduled time. Plaintiff's loss consultant failed to appear. Plaintiff's loss consultant agreed to allow the inspection to proceed but would not allow a recorded statement to be taken of the insured.

7. Mr. Daniel advised the adjuster that there was a backup affecting both bathrooms and that water migrated from each bathroom into other areas of the home including the master bedroom, kitchen, and dining room.

8. At the time of the inspection, the guest bathroom was in the process of complete renovation. The bathroom where the loss had allegedly occurred had been demolished and a new toilet, flooring, and wall panel were already installed.

9. The adjuster found no evidence of a loss or any water damage in either bathroom or any rooms where water had purportedly migrated as a result of the subject loss.

10. Thereafter, Defendant made numerous requests to Plaintiff for written documentation evidencing the reported loss, including damage photographs, receipts, plumber's bill, reports, and invoices. Defendant advised Plaintiff that it was in need of this information so it could make a coverage decision. Despite same, all requests were ignored.

11. As a result of Plaintiff's late notice, completely renovated bathroom, and failure to comply with Defendant's requests for documentation, Defendant was prejudiced in its ability to investigate the subject loss.

12. Notwithstanding all of the above, Plaintiff then filed the instant action for breach of contract against the Defendant without ever providing the Defendant with an estimate or advising the amount at issue.

13. Accordingly, the instant action is frivolous and should be dismissed with prejudice.

Legal Analysis

14. It is a longstanding principle in Florida, “[i]f the insured breaches the notice provision, prejudice to the insurer will be presumed, but may be rebutted by a showing that the insurer has not been prejudiced by the lack of notice.” *Bankers Ins. Co. v. Macias*, 475So.2d 1216, 1218 (Fla. 1985). Where the insurer was deprived of the opportunity to investigate the facts and examine the loss, the burden of proof is on the insured. *Id.*

15. However, the facts of the present action are almost identical to those in the recent 4th DCA case, *De La Rosa v. Fla. Peninsula Ins. Co.* No. 4D17-1294 (May 16, 2018). In *De La Rosa*, the insureds noticed a water backup in the master bathroom and later renovated the bathroom due to the water damage. One year later, the insureds filed a claim with their carrier. An adjuster for the carrier inspected the property and could not observe any water damage from a backup because of the renovation. The carrier denied the insureds’ claim and the insureds filed suit. The carrier moved for summary judgment on the grounds that the failure to timely report the claim had prejudiced the carrier.

16. Unlike the present case, the insureds in *De La Rosa* provided the carrier with pictures of the bathroom prior to the renovation and kept the damaged building

materials from the leak. However, the carrier's adjuster was unable to determine the cause or origin of the loss or the extent or scope of any damage. The insureds hired a public adjuster and an engineer who provided affidavits in support of the insureds that this was a one-time waste backup.

17. The trial court in *De La Rosa* found that the issue of prejudice was a question of law and the lack of notice and renovations could not be rebutted and granted the carrier's summary judgment. The 4th DCA affirmed the lower court's ruling and determined that the carrier was prejudiced by the passage of time in investigating the extent of the loss, and thus, the cost of repair.

18. In the present action, Mr. Daniel did not even provide any pictures or damaged materials, despite numerous requests for same. The late reporting and renovation to the bathroom have prejudiced Defendant's investigation and, as a result, Defendant is unable to determine the cause or origin of the loss and the extent of same. Accordingly, this claim is barred.

19. Additionally, Plaintiff never provided the Defendant with an estimate, receipts, or advised how much it was seeking for the loss prior to filing the subject lawsuit (and it is still unknown as of the date of this motion). Consequently, Plaintiff never gave the Defendant the opportunity to incorrectly deny the benefits or breach the contract before filing the lawsuit.

20. “It is only when the claims adjusting process breaks down and the parties are no longer working to resolve the claim within the contract, but are actually taking steps that breach the contract, that the insured may be entitled to an award of fees under section 627.428, Florida Statutes.” *Hill v. State Farm Fla. Ins. Co.*, 35 So.3d 956, 960 (Fla. 2d DCA 2010).

21. Where the insureds never gave the insurer the opportunity to incorrectly deny the benefits before filing a lawsuit, summary judgment in favor of the insurer is proper. *Goldman v. USAA*, No. 4D17-1098 (Fla. 4th DCA 2018).

Motion for Sanctions pursuant to § 57.105, Florida Statutes

22. Florida Statute § 57.105 specifically states,

(1) Upon the court's initiative or motion of any party, the court shall award a reasonable attorney's fee to be paid to the prevailing party in equal amounts by the losing party and the losing party's attorney on any claim or defense at any time during a civil proceeding or action in which the court finds that the losing party or the losing party's attorney knew or should have known that a claim or defense when initially presented to the court or at any time before trial:

- (a) Was not supported by the material facts necessary to establish the claim or defense;
- (b) Would not be supported by the application of then-existing law to those material facts.

23. The Defendant is entitled to reimbursement of its attorney's fees and costs expended in defending this frivolous action herein pursuant to Florida Statute §57.105.

24. As of the date of the filing of this Motion, Plaintiff has yet to issue his voluntary dismissal with prejudice despite the knowledge that the claim is barred.

25. In accordance with Florida Statute § 57.105(4), Defendant has served the foregoing motion on the Plaintiff in accordance with the Certificate of Service herein, but has not filed or presented this motion to this Honorable Court until 21-days after service of this motion and the Plaintiff's failure to voluntarily dismiss the instant action.

WHEREFORE, the Defendant, Certain Underwriters at Lloyd's, London, respectfully requests that this Honorable Court dismiss the instant action with prejudice and award sanctions in the form of attorney's fees and costs to the Defendant pursuant to § 57.105, Florida Statutes.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via e-mail this 30th day of July 2018 to:

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BY: /s/ Lindsay F. LoBello
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