

IN THE COUNTY COURT IN AND FOR HENDRY COUNTY, FLORIDA
SMALL CLAIMS DIVISION

TAR CAPITAL, LLC, D/B/A TOTAL LEAK
DETECTION A/A/O URIEL
PALOBLANCO,

CASE NO.: 21000212SCAXMX

Plaintiff,

v.

FOREMOST INSURANCE COMPANY,

Defendant.

FINAL JUDGMENT IN FAVOR OF DEFENDANT

THIS CAUSE came before the Court for non-jury trial on September 22, 2021 at 1:30pm over zoom. Both parties were represented by counsel. Both sides presented their cases and rested. The Court allowed written closing arguments, which have been submitted and considered. The Court is fully advised in the premises.

It is ORDERED and ADJUDGED that judgment be, and the same is, entered in favor of Defendant and against Plaintiff for the reasons stated herein. Plaintiff shall take nothing by this action, and Defendant shall go hence without day. The Court reserves jurisdiction to determine attorney fees and costs upon timely motion.

I. Summary of the dispute.

Plaintiff filed this declaratory judgment action seeking a declaration from the Court that an insurance policy issued by Defendant covers a loss that occurred at Uriel Paloblanco's mobile home involving a leak under the kitchen sink and that Plaintiff's bill for leak detection services is compensable under the insurance policy. Plaintiff is Mr. Paloblanco's assignee.

II. The law with regard to insurance interpretation, insurance coverage, and the burdens of proof in this case.

“In interpreting an insurance contract, we are bound by the plain meaning of the contract’s text. We may consult references such as dictionaries to discern the plain meaning of an insurance policy’s language. If the language used in an insurance policy is plain and unambiguous, a court must interpret the policy in accordance with the plain meaning of the language used so as to give effect to the policy as it was written. We construe an insurance contract as a whole, endeavoring to give every provision its full meaning and operative effect.” *Bioscience W., Inc. v. Gulfstream Prop. & Cas. Ins. Co.*, 185 So. 3d 638, 640 (Fla. 2d DCA 2016) (internal quotations and citations omitted).

“It is elementary that in order to recover on a claim for breach of contract the burden is upon the claimant to prove by a preponderance of the evidence the existence of a contract, a breach thereof and damages flowing from the breach.” *Knowles v. C.I.T. Corp.*, 346 So. 2d 1042, 1043 (Fla. 1st DCA 1977). The burden is on the insured/assignee to prove that the insurance policy covers a claim against it. Once the insured/assignee shows coverage, the burden shifts to the insurer to prove an exclusion applies to the coverage.” *E. Fla. Hauling, Inc. v. Lexington Ins. Co.*, 913 So. 2d 673, 678 (Fla. 3d DCA 2005).

An assignee stands in the shoes of an insured and can pursue insurance rights in its own name. As such, the assignee bears the burden of proving that the loss is covered and also bears the burden of proving that the assignee’s service is compensable under the insurance policy. *Id.* See also *Nationwide Mut. Fire Ins. Co. v. Pinnacle Med., Inc.*, 753 So. 2d 55, 57 (Fla. 2000).

III. Plaintiff did not prove by the greater weight of the evidence that the loss was direct, sudden and accidental.

In order to prove that the loss is covered by this particular insurance policy, Plaintiff was required to present evidence during the trial that the loss falls within what this particular insurance policy covers. This is not an “all-risk” insurance policy. An all-risk policy is one that provides coverage for “all losses not resulting from misconduct or fraud unless the policy contains a specific provision expressly excluding the loss from coverage.” (emphasis added by underline). *Mejia v. Citizens Prop. Ins. Corp.*, 161 So. 3d 576, 578 (Fla. 2d DCA 2014) *citing Hudson v. Prudential Prop. & Cas. Ins. Co.*, 450 So. 2d 565, 568 (Fla. 2d DCA 1984) (contrasting an all-risk policy from a specific peril policy which insures only against named risks).

The insurance policy in this case does not contain the term “all-risk”, nor does the insuring language say “all losses not resulting from misconduct or fraud unless the policy contains a specific provision expressly excluding the loss from coverage.” The insurance policy was admitted into evidence by stipulation of the parties. Here is what it says it covers:

**SECTION I —
Insured Perils
Coverage A — Dwelling
Coverage B — Other Structures
Coverage C — Personal
Property**

We insure risk of direct, sudden and accidental physical loss to the property described in Coverage A — Dwelling, Coverage B — Other Structures and Coverage C — Personal Property unless the loss is excluded elsewhere in this policy.

If an insurance policy only covers against certain types of loss, the claimant must put on evidence that the loss falls within the types of that particular insuring language in

order to prove coverage. *Frank v. State Farm Mut. Auto. Ins. Co.*, 109 So.2d 594, 595-96 (Fla. 3rd DCA 1959). There must be proof of all of the terms to bring the loss within the insuring language. *Id. citing to Sparrow v. American Fire & Cas. Co.*, 1955, 243 N.C. 60, 89 S.E. 2d 800 (“[h]owever, to recover under this clause, it is noted that the loss or damage must be both ‘direct’ and ‘accidental.’”). When the word “and” is used in a list, it means that all the elements in the list must be met. *Galleon Bay Corp. v. Bd. County Comm’rs Monroe County*, 105 So. 3d 555, 567-68 (Fla. 3d DCA 2012) *citing Harrington v. Citizens Prop. Ins. Co.*, 54 So. 3d 999, 1003 (Fla. 4th DCA 2010).

Plaintiff’s counsel called two witnesses. They were Mr. Paloblanco and Plaintiff. Plaintiff testified that it had no knowledge of how the loss occurred. Mr. Paloblanco testified that the loss was a leak from the plumbing under the kitchen sink. But Mr. Paloblanco did not testify how the leak occurred or that the leak was direct or accidental. Mr. Paloblanco testified that he reported the leak to Defendant the same day he discovered it.

Defendant’s counsel called Defendant’s insurance adjuster Tracy Scully as a witness. She was cross-examined by Plaintiff’s counsel. Ms. Scully testified that she is an insurance adjuster licensed by the State of Florida, and that she has handled a thousand insurance claims that involve leaking plumbing. Ms. Scully testified that she has both personal knowledge and experience doing the sort of plumbing involved in this claim as well as professional training on the sort of plumbing involved in this claim.

Ms. Scully testified as to how the loss occurred. Ms. Scully testified that “you could see a slow drip at the collar of the drain line where water was slowly dripping.” “I visually observed the slow drip and it wasn’t a sudden discharge, that was slowly

dripping and causing damage each time the sink was run. It's not a pressurized line, it was the actual drain line of the sink."

Ms. Scully's un rebutted testimony regarding how the loss occurred tends to prove that there was no direct or sudden loss. Ms. Scully observed the collar of the drain line under Mr. Paloblanco's kitchen sink. When the sink would be sufficiently filled with water, eventually a slow drip would come from the collar of the pipe fitting because the collar was not tight. The drip would stop when the sink had no water.

Ms. Scully's testimony tends to prove that the water damage was an indirect result of the collar not being tight, which would slowly (not suddenly) allow water to escape when the sink was sufficiently filled. As Ms. Scully testified, this is not a situation where a pressurized supply line suddenly burst and sprayed water into the mobile home. Ms. Scully testified that she observed rot and deterioration underneath where the slow leak was occurring. That tends to prove the leak was a slow leak and not sudden loss.

Plaintiff has not proven by the greater weight of the evidence that the loss was direct, sudden, and accidental. Accordingly, the Court's verdict is for Foremost.

IV. Foremost proved by the greater weight of the evidence that the loss was caused by wear and tear.

Even if Plaintiff had carried its burden to show the loss was direct, sudden, and accidental, Foremost would still be entitled to a judgment in its favor because Foremost proved by the greater weight of the evidence that the loss is excluded from coverage under the insurance policy. Foremost's coverage determination letter was admitted into evidence by stipulation of the parties as Exhibit 4. Foremost's coverage determination letter states that the loss is excluded from coverage because the loss was caused by

wear and tear. Here is the wear and tear exclusion from the insurance policy:

SECTION I — Exclusions

Coverage A — Dwelling

Coverage B — Other Structures

**Coverage C — Personal
Property**

We do not insure loss caused directly or indirectly by any of the following. Such loss is excluded regardless of any other cause or event contributing concurrently to the loss.

...

10. Loss caused by:

a. Wear and tear, marring, scratching, deterioration;

Ms. Scully provided substantial, un rebutted testimony that the loss was caused by wear and tear. Ms. Scully observed the loss. She testified that the mobile home was built in 1977. She testified the plumbing material was made of plastic. She testified that she observed the threads in the plumbing collar, and she was able to see the wear and tear causing the loss. Ms. Scully's testimony was un rebutted with regard to the issue of wear and tear. Accordingly, the Court's verdict is for Foremost.

V. Foremost proved by the greater weight of the evidence that the loss was caused by continuous or repeated seepage or leakage of water.

Even if Plaintiff had carried its burden to show the loss was direct, sudden, and accidental, Foremost would still be entitled to a judgment in its favor because Foremost proved by the greater weight of the evidence that the loss is excluded from coverage under the insurance policy. Foremost's coverage determination letter states that the loss is excluded from coverage because the loss was caused by continuous or repeated seepage or leakage of water. That is a separate and independent basis for exclusion in addition to the wear and tear exclusion. Here is the leakage exclusion from the insurance policy:

SECTION I — Exclusions
Coverage A — Dwelling
Coverage B — Other Structures
Coverage C — Personal
Property

We do not insure loss caused directly or indirectly by any of the following. Such loss is excluded regardless of any other cause or event contributing concurrently to the loss.

...

11. Loss caused by continuous or repeated seepage or leakage of water or steam from within a plumbing, heating, automatic fire protection sprinkler or air conditioning system or from within an appliance that occurs over a period of weeks, months or years.

There was no dispute that there was a leak occurring under Mr. Paloblanco's kitchen sink. Foremost proved by the greater weight of the evidence that the leak was occurring over a period of weeks, months, or years. Ms. Scully provided substantial testimony on that point.

Ms. Scully observed severe rot and deterioration located immediately below the kitchen sink, the cabinet below that, and the subfloor area underneath the mobile home in that location below the kitchen sink. Ms. Scully testified that plywood takes six months to reach the state of rot and deterioration observed here. Ms. Scully testified that the rot and deterioration below the sink shows the leak was going on for months.

Mr. Paloblanco testified that he thought the rotten wood could occur in a shorter period of time. But Mr. Paloblanco concedes that there is "rotten wood" under the area where the leak is occurring. There was no other testimony from any other witness regarding the duration of time of the leak. Accordingly, the Court's verdict is for Foremost.

VI. Plaintiff's leak detection services in this case are not covered by the insurance policy in this case.

The insurance policy covers risk of direct, sudden and accidental physical loss to the property. The insurance policy states what it pays for in the event of a covered loss:

Replacement Cost Payment Method

The amount we pay for loss to your dwelling will be the lowest of:

1. The replacement cost of the damage to your dwelling.
2. The amount actually spent for necessary repair or replacement of the damaged portion to your dwelling.
3. The Amount of Insurance shown on the Declarations Page for your dwelling.

As this provision states, the insurance policy pays for "damage", "repair" or "replacement." A leak detection report is not loss or damage. It is a report. Also, a leak detection report is not a repair or a replacement. Plaintiff testified that it did not make any repair or do any replacement at Plaintiff's property. Because Plaintiff's services do not fall within what this insurance policy covers and pays for, Plaintiff's services are not compensable under this insurance policy, assuming the loss was covered. *See Hudson v. Prudential Prop. & Cas. Ins. Co.*, 450 So. 2d 565, 568 (Fla. 2d DCA 1984).

DONE and ORDERED in Chambers at LaBelle, Hendry County, FL, on this 18 day of NOV, 2021.



Darrell R. Hill, County Judge

Copies Furnished To:

Michael D. Redondo, Esq. (counsel for Plaintiff)

Timothy Engelbrecht, Esq. and Brigette E. Perl, Esq. (counsel for Defendant)