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TLSS Partner Burks Smith and Associate Katie Keller Win Summary Judgment on Late Reported Water Seepage Case in South Florida

Related Attorneys: Burks A. Smith, III, Kathryn Keller

On July 9, 2019, Traub Lieberman Straus & Shrewsberry LLP Partner, Burks A. Smith, III and Associate, Kathryn A. Keller, secured Summary Judgment on behalf of a major homeowners' insurer in a breach of contract action in the United States District Court for the Southern District of Florida. See *Lehrfield v. Liberty Mutual Fire Insurance Company*, 2019 WL2994270 (S.D. Fla. 2019). The underlying claim involved a water loss at the Plaintiffs' residence allegedly resulting in \$91,147.32 worth of damage to their home. The claim was reported eight (8) months after the alleged date of loss, and during the inspection, the adjuster observed rot, decay, mold, and warping wood, prompting the carrier to deny the claim based on the Seepage Endorsement. The Plaintiffs filed a breach of contract action alleging that the insurer breached the Policy by denying the claim.

Mr. Smith and Ms. Keller argued that Plaintiffs' Policy with the insurer imposes a duty on the Plaintiffs to comply with the Duties After Loss conditions of the Policy, including the requirement to provide prompt notice of the loss and show the damaged property. As mentioned above, the Plaintiffs provided notice of the claim eight (8) months late, and performed various repairs prior to notifying the insurer of the claim. After the close of discovery, Mr. Smith and Ms. Keller filed a Motion for Summary Judgment on behalf of the insurer based on the late reporting, and further argued that the Plaintiffs had the burden of proving direct physical loss to property within the first 13 days of the loss, given the recent decision of *Hicks v. American Integrity Insurance Company of Florida*, 241 So.3d 925 (Fla. 3d DCA 1018). In Florida, when an insured fails to comply with their Duties After Loss, a presumption of prejudice to the insurer arises. *Bankers Ins. Co. v. Macias*, 475 So. 2d 1216, 1218 (Fla. 1985)). In order to recover, the Plaintiffs bear the burden of overcoming the presumption, and must prove that no prejudice existed. *Id.* Mr. Smith and Ms. Keller's comprehensive arguments successfully proved to the Court that the Plaintiffs' failure to timely report the claim prejudiced the insurer by prohibiting the insurer from being able to independently validate the loss, or distinguish between multiple causes of loss. Mr. Smith and Ms. Keller further argued that Plaintiffs did not meet their burden to prove that the insurer was not prejudiced by the Plaintiffs' failure to comply with the Duties After Loss provision of the Policy. The Motion cited numerous cases and extensive analysis supporting the insurer's position.

United States District Court Judge, Robert N. Scola, Jr., issued an Order Granting Defendant's Motion for Summary Judgment on July 9, 2019. Judge Scola agreed with Mr. Smith and Ms. Keller's arguments that the Plaintiffs violated the Conditions of the Policy via their late reporting of the claim. The Court noted that no evidence was proffered to explain the delayed reporting, and that the eight (8) month delay in notifying the insurer of the loss was unreasonable. Accordingly, the Court ruled that the Plaintiffs did not provide prompt notice of the loss as a matter of law. Once late reporting was established, presumption of prejudice to the insurer arises under Florida law, which the Plaintiffs were required to rebut. The Plaintiffs contended that a question of fact existed as to whether the delay prejudiced the insurers ability to independently validate and determine the cause of the damage. The Plaintiffs further argued that since the insurer rendered a coverage decision after its investigation, there was no prejudice from the delayed reporting. Mr. Smith and Ms. Keller offered extensive arguments to rebut this contention. The Court agreed with Mr. Smith and Ms. Keller's arguments that the evidence provided by the Plaintiffs to support their argument did not rebut the presumption of prejudice to the insurer, and most importantly, that the denial of the claim did not waive the carrier's right to rely upon the prompt notice Condition in the Policy. The Court further held that, if anything, the Plaintiffs' failure to allow the insurer to perform a timely inspection of the property prejudiced its ability to defend the claim denial in this case. As such, the insurer's Motion for Summary Judgment was granted, and the case was dismissed with prejudice. Because Proposals for Settlement were served upon the Plaintiffs and were not accepted, the carrier plans to seek its attorneys' fees and costs incurred defending the litigation.