

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D57485
M/htr

_____AD3d_____

Argued - November 9, 2018

WILLIAM F. MASTRO, J.P.
JOHN M. LEVENTHAL
SANDRA L. SGROI
ANGELA G. IANNACCI, JJ.

2017-03541

DECISION & ORDER

Tec-Crete Transit Mix Corp., plaintiff, v Great American Insurance Company of New York, appellant.

(Index No. 707005/14)

Mound Cotton Wollan & Greengrass LLP, New York, NY (Kevin F. Buckley and Daniel M. O’Connell of counsel), for appellant.

In an action to recover damages for breach of a commercial insurance policy, the defendant appeals from an order of the Supreme Court, Queens County (Darrell L. Gavrin, J.), entered March 22, 2017. The order denied the defendant’s unopposed motion for summary judgment dismissing the amended complaint.

ORDERED that the order is affirmed, without costs or disbursements.

The plaintiff, Tec-Crete Transit Mix Corp., was insured under a commercial insurance policy issued by the defendant, Great American Insurance Company of New York. The plaintiff’s facility was damaged on October 29, 2012, as a result of Hurricane Sandy. The plaintiff thereafter filed a claim with the defendant to recover for property damage and loss of business income. Although the parties resolved the claim for property damage, and the defendant made a payment to the plaintiff on its claim for loss of business income, the defendant demanded additional documentation to support any further payment for loss of business income and continuing expenses. The plaintiff thereafter commenced this action to recover additional payment on its claim for loss of business income and continuing expenses. Following discovery, the defendant moved for summary judgment dismissing the amended complaint. The Supreme Court denied the motion, and the defendant appeals.

December 12, 2018

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The defendant failed to establish its prima facie entitlement to judgment as a matter of law dismissing the amended complaint (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324). The defendant failed to demonstrate, prima facie, that the plaintiff breached its obligation under the policy to cooperate in the investigation of the claim (*cf. Conference Assoc., Inc. v Travelers Cas. & Sur. Co. of Am.*, 80 AD3d 552; *Evans v International Ins. Co.*, 168 AD2d 374). Further, the defendant failed to establish, prima facie, that the plaintiff could not prove recoverable damages in excess of those amounts already paid by the defendant. Rather, the evidence submitted by the defendant in support of its motion demonstrated the existence of triable issues of fact with respect to these questions. Accordingly, we agree with the Supreme Court's determination to deny the defendant's motion for summary judgment dismissing the amended complaint.

MASTRO, J.P., LEVENTHAL, SGROI and IANNACCI, JJ., concur.

ENTER:

A handwritten signature in black ink, reading "Aprilanne Agostino". The signature is written in a cursive, flowing style.

Aprilanne Agostino
Clerk of the Court