

Wing On Realty, Inc. v DB Ins. Co., LTD. (US Branch)

2025 NY Slip Op 31379(U)

April 4, 2025

Supreme Court, New York County

Docket Number: Index No. 656844/2020

Judge: Mary V. Rosado

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. MARY V. ROSADO PART 33M

Justice

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INDEX NO. 656844/2020

WING ON REALTY, INC.,

MOTION DATE 02/27/2024

Plaintiff,

MOTION SEQ. NO. 002

- v -

DB INSURANCE CO., LTD. (US BRANCH),

DECISION + ORDER ON MOTION

Defendant.

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DB INSURANCE CO., LTD. (US BRANCH)

Third-Party Index No. 595037/2022

Plaintiff,

-against-

A.M. PHARMACY INC., AMGUARD INSURANCE COMPANY

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 93, 95, 97, 99, 128, 129, 130, 132, 134, 136, 137, 138, 139, 140, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER).

Upon the foregoing documents, and after oral argument, which took place on January 14, 2025, where Evan Van Leer-Greenberg, Esq., appeared for Plaintiff Wing On Realty, Inc. ("Plaintiff"), and John M. Krug, Esq. appeared for Defendant/Third-Party Plaintiff DB Insurance Co., LTD. (US Branch) ("Defendant"), Plaintiff's motion for summary judgment against Defendant is granted in part and denied in part.

I. Background

Plaintiff owns a three-story building at 5702 8th Avenue, Brooklyn, New York (the "Premises"). Defendant issued a property insurance policy (the "Policy") to Plaintiff which insured

the Premises against losses arising from fire. On September 15, 2019, there was a fire at the Premises. Plaintiff hired AK Contracting to conduct emergency repairs, and in December of 2019, submitted a claim in the amount of \$18,000, which Defendant paid. Defendant retained its own engineer and field adjuster to conduct its own assessment of the condition of the Premises. Reports from Defendant's field adjuster and engineer recognized fire damage, including charred joists, but Defendant informed Plaintiff that due to the first-floor tenant's repairs of the ceiling, the full extent of the damage could not be assessed. After offering the pharmacy a rent reduction, Plaintiff was able to access the tenant pharmacy's unit and hired their own contractor (Naccarato"), and architect ("Munoz"), to assess the Premises' condition.

In May of 2020, Naccarato removed drywall and informed Plaintiff the Premises were in an unstable situation. Naccarato replaced the joists by September of 2020. An invoice from Naccarato stated repairs were "due to rot, corrosion and/or fire damage." (NYSCEF Doc. 53 at 24). In September of 2020, Plaintiff's counsel sent a demand letter to Defendant seeking reimbursement for damages related to lost rent and remediation. Defendant did not reimburse Plaintiff for the amount sought in the demand letter, nor is there any record of a denial of the claim. Plaintiff then initiated this lawsuit. Defendant has still not reimbursed Plaintiff for any amount sought in the September 2020 demand letter. Plaintiff now seeks summary judgment.

II. Discussion

A. Standard

"Summary judgment is a drastic remedy, to be granted only where the moving party has tendered sufficient evidence to demonstrate the absence of any material issues of fact." (*Vega v Restani Const. Corp.*, 18 NY3d 499, 503 [2012]). The moving party's "burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-

moving party.” (*Jacobsen v New York City Health and Hosps. Corp.*, 22 NY3d 824, 833 [2014]). Once this showing is made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial (*See e.g., Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

B. CPLR 3123(a)

As a preliminary matter, Plaintiff’s request that this Court to deem its statement of material facts admitted based on Defendant’s failure to provide a sworn response to Plaintiff’s notice to admit dated February 22, 2021 is denied. First, the record does not contain any objection by Plaintiff to the unsworn response to the notice to admit at the time it was served. Second, substantial portions of the notice to admit were improper in that they sought admissions that go to the heart of the issues in this insurance coverage matter (*Stranger v Morgan*, 100 AD3d 545, 546 [1st Dept 2012]). Lastly, a notice to admit is not to be used in lieu of more appropriate disclosure devices such as depositions (*Genna v Kelmpner*, 195 AD3d 444 [1st Dept 2021]). Plaintiff deposed two witnesses, whose deposition transcripts are included in Plaintiff’s motion in chief, and who responded to most, if not all the questions posed by Plaintiff’s notice to admit. Based on the record and applicable law, Plaintiff’s request to deem its statement of material facts admitted is denied.¹

C. Breach of Contract (First Cause of Action)

Plaintiff’s motion for summary judgment on its breach of contract claim is granted as to liability. There exists a valid insurance policy between the parties and Plaintiff performed by paying premiums. Moreover, Defendant agreed to cover damages to the Premises resulting from a

¹ Plaintiff’s other procedural argument, namely that this Court should consider the opposition of failing to proffer any evidence is denied. Plaintiff makes this argument simply because Defendant filed exhibits under motion sequence 003 and referenced those exhibits in its opposition to motion sequence 002. The Court can take judicial notice of documents filed on NYSCEF (*see Kazantzis v Cascade Funding RMI Acquisitions Grantor Trust*, 217 AD3d 410, 411 [1st Dept 2023]).

fire. There is no dispute that there was, at a minimum, charring to some of the joists in the Property because of the fire. Indeed, the NYPD fire incident report states that the fire extended vertically to the floor joists (NYSCEF Doc. 47), numerous photographs show charred joists, Defendant's own claims file states "three (3) wooden floor joists contained some surface discoloration and light charring from exposure to fire" (NYSCEF Doc. 56), correspondence from the Defendant's field adjuster stated "[t]he fire....caused significant damage to both the flooring and joists between the 1st and 2nd floors." (NYSCEF Doc. 48), and Defendant's own expert engineer wrote "with a reasonable degree of engineering certainty" that "[t]he wooden floor frame above right rear corner of the ground floor commercial tenancy sustained fire damage." (NYSCEF Doc. 55). Mr. Munoz, Plaintiff's engineer, likewise testified that there were six feet of fire damaged joists (NYSCEF Doc. 46. at 169).

The Court finds Defendant's contention that the Premises' structural integrity was not compromised, at least in part, from charred floor joists to be without merit. There is no support for the argument that it is safe to leave charred joists in place. Thus, Defendant's failure to provide any compensation for the structural repairs made and/or lost rental income constitutes a breach of the insurance policy. Therefore, Plaintiff is granted liability on its first cause of action alleging breach of contract.

However, viewing the facts in the light most favorable to the non-movant, there is an issue of fact as to the total damages for which Defendant must indemnify Plaintiff. Remediation of a latent and unrelated problem with a building's infrastructure that is uncovered due to exploratory openings from a covered occurrence, such as a fire, does not automatically require coverage for the remediation of the unrelated and latent defects (*St. George Tower v Insurance Co. of Greater New York*, 139 AD3d 200, 206 [1st Dept 2016]). The parties agreed in § I(4)(a)(5) that direct

physical loss does not include damage to the interior of any building or structure caused by rain, snow, sleet, ice, sand or dust. Further in § I(B)(g)(4)(a), damage to the foundations, walls, floors or paved surfaces because of water seeping through is excluded from coverage, while § I(B)(i) excludes from coverage related to fungi, wet or dry rot bacteria. Finally, § I(B)(p) excluded from coverage damages related to the continuous or repeated seepage or leakage of water. Defendant argues that a substantial part of the necessity for remediation falls under these exclusions.

There is a sharp factual dispute for the trier of fact to determine: how much of the remediation damages and lost rental income was a result of long-term rot and decay, and how much was a result of the fire? While Plaintiff argues the remediation efforts related to the structural integrity of the building are directly related to the fire, this is undercut by Plaintiff's engineer's testimony and contradicted by Defendant's engineer. Mr. Munoz testified that over the years cuts had been made to the joists which reduced their structural capacity (NYSCEF Doc. 46 at 36). Mr. Munoz testified about other evidence of a lack of structural support prior to the fire and evidence of rot (*Id.* at 55-58; 83-84; 115). Based on this testimony, the Court is unable to grant Plaintiff summary judgment on damages. Thus, Plaintiff is granted summary judgment solely on the issue of liability with respect to its cause of action for breach of contract.

D. Good Faith and Fair Dealing (Second and Third Causes of Action)

Plaintiff's motion for summary judgment on its second and third causes of action alleging a breach of the covenant of good faith and fair dealing is granted as to liability. To establish a *prima facie* case of bad faith, there must be evidence showing "the insurer's conduct constituted a 'gross disregard' of the insured's interests – that is, a deliberate or reckless failure to place on equal footing the interests of its insured with its own interests" (*Pavia v State Farm Mut. Auto. Ins. Co.*, 82 NY2d 445, 451 [1993]). The insurer "must not manufacture factually incorrect reasons to deny

insurance coverage” and “must not deviate from its own practices or from industry practices” (*East Ramapo Central School District v New York Schools Ins. Reciprocal*, 199 AD3d 881, 884 [2d Dept 2021]). As held by the Court of Appeals, when a policy contains business interruption coverage, an insurer has an obligation to evaluate a claim “honestly, adequately, and – most importantly – promptly.” (*Bi-Economy Market, Inc. v Harleystown Ins. Co. of New York*, 10 NY3d 187, 195 [2008]).

Here, the Policy covers loss of business income due to the necessary suspension of operations during a “period of restoration” (NYSCEF Doc. 40 at § I [5][f][1][a]). Plaintiff offered a rent reduction to its commercial tenant on the first floor while renovations were ongoing and has suffered lost rent as residential units on the second and third floors remained vacant. Indeed, the rent reduction to the first-floor pharmacy was offered in part to allow for Defendant’s request for further investigation into the structural integrity of the Premises. Despite numerous reports, which have long been in Defendant’s possession, that the Premises was fire damaged, Defendant has to date failed to provide any reimbursement for Plaintiff’s loss of business income (*see also Certain Underwriters at Lloyd’s v BioEnergy Dev. Group LLC*, 178 AD3d 463, 464 [1st Dept 2019]). Defendant also admits that in response to Plaintiff’s September 8, 2020, demand package, Defendant prepared an initial estimate of \$11,876.86 in damages (NYSCEF Doc. 129 at ¶ 59). Yet, to date, not even that amount has been paid. Nor is there any documentation in the record of Defendant communicating to Plaintiff a pre-suit disclaimer or limitation of coverage after receiving the September 8, 2020, demand package.

Defendant’s own engineer stated with a reasonable degree of engineering certainty “[t]he wooden frame above right rear corner of the ground floor commercial tenancy sustained fire damage” but “the extent and severity of the fire damage could not be evaluated” (NYSCEF Doc.

88). This “wait-and-see” strategy employed by Defendant in handling Plaintiff’s claim constitutes a breach of the covenant of good faith and fair dealing (*see Rockefeller Univ. v Aetna Cas. & Surety Co.*, 231 AD3d 457, 458 [1st Dept 2024]).

However, for the same reason the Court finds an issue of fact as to damages under Plaintiff’s breach of contract cause of action, the Court likewise finds issues of fact as to the total damages owed based on Defendant’s breach of the covenant of good faith and fair dealing. While the Court finds Defendant acted in bad faith in failing to provide any compensation for lost business income and property damage, there are issues of fact as to the compensable consequential damages that flow from that bad faith, namely the apportionment of Plaintiff’s damages related to Defendant’s failure to adjust in good faith the fire damage claim, and the damages related to long term wood rot (*see Acquista v New York Life Ins. Co.*, 285 AD2d 73, 81-82 [1st Dept 2001]).

E. Account Stated (Fourth Cause of Action)

Plaintiff’s motion for summary judgment on its account stated cause of action is denied. The September 8, 2020, demand letter to the Defendant insurer is not an invoice falling within the ambit of an account stated claim.

F. Dismissal of Defendant’s Eighth, Ninth, Twelfth, Fourteenth and Eighteenth Affirmative Defenses

Plaintiff’s motion to dismiss Defendant’s affirmative defenses is denied. On a motion to dismiss an affirmative defense pursuant to CPLR 3211(b), the plaintiff bears the heavy burden of showing the affirmative defenses is without merit as a matter of law (*Granite State Ins. Co. v Transatlantic Reinsurance Co.*, 132 AD3d 479 [1st Dept 2015]). Although Plaintiff requests this relief in its notice of motion, Plaintiff proffers no particularized arguments in support of this relief.

Moreover, as the Court has found there exists an issue of fact as to damages, because not all of Plaintiff’s alleged damages may be covered, there is no basis to dismiss Defendant’s eight,

ninth, twelfth, fourteenth, and eighteenth affirmative defenses, which allege that Plaintiff's losses are not covered and are barred by exclusions and limitations within the Policy. While this Court has determined that some modicum of Plaintiff's damages must be covered, there is no determination that all of Plaintiff's damages are covered.

Accordingly, it is hereby,

ORDERED that Plaintiff's motion for summary judgment against Defendant is granted in part and denied in part; and it is further

ORDERED that Plaintiff's motion for summary judgment is granted solely to the extent that Plaintiff is granted summary judgment on the issue of liability with respect to its first, second, and third cause of action; and it is further

ORDERED that at the time of trial, an inquest shall be held to determine the total amount of damages owed Plaintiff under its first through third causes of action; and its further

ORDERED that Plaintiff's motion for summary judgment is otherwise denied; and it is further

ORDERED that within ten days of entry counsel for Plaintiff shall serve a copy of this Decision and Order, with notice of entry, on all parties via NYSCEF.

This constitutes the Decision and Order of the Court.

4/4/2025 DATE					<i>Mary V Rosado JSC</i> HON. MARY V. ROSADO, J.S.C.	
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION		
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER		
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE