

Wing On Realty, Inc. v DB Ins. Co., LTD. (US Branch)
2025 NY Slip Op 31380(U)
April 8, 2025
Supreme Court, New York County
Docket Number: Index No. 656844/2020
Judge: Mary V. Rosado
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. MARY V. ROSADO PART 33M

Justice

-----X

WING ON REALTY, INC.,

Plaintiff,

- v -

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

Defendant.

-----X

DB INSURANCE CO., LTD. (US BRANCH)

Plaintiff,

-against-

A.M. PHARMACY INC., AMGUARD INSURANCE COMPANY

Defendant.

-----X

INDEX NO. 656844/2020

MOTION DATE 02/28/2024

MOTION SEQ. NO. 003

**DECISION + ORDER ON
MOTION**

Third-Party
Index No. 595037/2022

The following e-filed documents, listed by NYSCEF document number (Motion 003) 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 94, 96, 98, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 131, 133, 135, 141, 142, 143

were read on this motion to/for JUDGMENT - SUMMARY

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”), Defendant’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 first-floor tenant pharmacy a rent reduction, Plaintiff accessed the tenant pharmacy's unit and Plaintiff hired its 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 \$295,886.83 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 still has not reimbursed Plaintiff for any amount sought in the September 2020 demand letter. Defendant 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. Breach of Contract and Breach of the Implied Covenant of Good Faith and Fair Dealing (First, Second, and Third Causes of Action)

Defendant’s motion for summary judgment dismissing Plaintiff’s causes of action alleging breach of contract and breach of the implied covenant of good faith and fair dealing are denied. In motion sequence 002, this Court found that Defendant breached its obligations under the parties’ insurance policy by failing to provide any reimbursement related to fire damage or lost rental income as requested in Plaintiff’s September 8, 2020 demand letter. While the Court found there is an issue of fact as to the total amount of damages owed Plaintiff, the Court found it was undisputed that some of the replaced floor joists were charred and fire damaged, causing at the very least some compensable property damage and at least some modicum of damages for loss of rental income, irrespective of whether damages for other floor joists, which needed to be replaced due to long-term rot and decay, are not compensable under the policy. Although Defendant prepared an initial estimate reimbursing Plaintiff \$11,876.86 in damages (NYSCEF Doc. 129 at ¶ 59), to date Defendant has not paid anything in response to Plaintiff’s September 8, 2020 demand letter. The failure to pay even a modicum of damages when there was undisputed charring and fire damage to some of the wooden floor joists requires denying Defendant’s motion for summary judgment dismissing the breach of contract claim.

Likewise, the Court denies Defendant’s motion for summary judgment dismissing Plaintiff’s second and third causes of action alleging breach of the implied covenant of good faith

and fair dealing. In motion sequence 002, the Court found for Plaintiff on the issue of liability on its second and third causes of action. This was due to multiple defense witnesses admitting that there was fire damage to floor joists, the preparation of an initial estimate evaluating \$11,876.86 in damages, and based on uncontradicted evidence of rental abatements offered in part to allow Defendant access to investigate the loss in a leased portion of the Premises, without any subsequent reimbursement to Plaintiff after the September 8, 2020, demand letter. The Court also found Defendant acted in bad faith in failing to promptly issue any written disclaimers or limitations on coverage, and for essentially employing a “wait-and-see” strategy while Plaintiff’s costs continued mounting and its rentals remained unleased as Plaintiff awaited a response from the Defendant insurer.

Contrary to Defendant’s contention, the damages sought by Plaintiff in its second and third cause of action are not identical to the breach of contract cause of action. Plaintiff seeks consequential damages flowing from its failure to lease and to restore the Premises, which were not restored based on Defendant’s failure to adjust timely and adequately Plaintiff’s claims. Although the Court did not make any finding as to the damages owed Plaintiff due to issues of fact, the record before the Court precludes it from granting Defendant’s motion for summary judgment dismissing the second and third causes of action.

C. Account Stated (Fourth Cause of Action)

Defendant’s motion for summary judgment dismissing Plaintiff’s account stated cause of action is granted. This is an insurance coverage dispute, which does not give rise to a claim for account stated. This cause of action is limited to situations where, pursuant to a contract, the receiver of services is invoiced a fee pursuant to an agreement, fails to object to the fee, and fails to pay the fee. It “assumes the existence of some indebtedness between the parties, or an agreement

to treat the statement as an account stated. It cannot be used to create liability where none exists” (*Ryan Graphics, Inc. v Bailin*, 39 AD3d 249, 251 [1st Dept 2007] quoting *M. Paladino, Inc. v J. Lucchese & Son Contracting Corp.*, 247 AD2d 515, 516 [2d Dept 1998]). There is no agreement in the record whereby Defendant agreed to treat any claim as an account stated, or that Defendant would be automatically indebted to Plaintiff for any claim submitted. Thus, Plaintiff’s cause of action alleging account stated fails as a matter of law and is dismissed.

Accordingly, it is hereby,

ORDERED that Defendant’s motion for summary judgment dismissing Plaintiff’s Complaint is granted in part and denied in part; and it is further

ORDERED that Defendant’s motion for summary judgment is granted solely to the extent that Plaintiff’s fourth cause of action alleging account stated is dismissed; and it is further

ORDERED that in all other respects Defendant’s motion for summary judgment is 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.

<u>4/8/2025</u> DATE	<u>Mary V Rosado JSC</u> 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