

# SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. ROBERT R. REED  
J.S.C. Justice

PART 43

Index Number : 650733/2017  
D.K. PROPERTY, INC.  
vs  
NATIONAL UNION FIRE  
Sequence Number : 002  
DISMISS

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_, were read on this motion tofor \_\_\_\_\_

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_

Answering Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_


Replying Affidavits \_\_\_\_\_ | No(s). \_\_\_\_\_

Upon the foregoing papers, it is ordered that this motion is

*decided in accordance with the attached  
decision.*

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE  
FOR THE FOLLOWING REASON(S):

Dated: 4/2/18

  
J.S.C.

1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: I.A.S. PART 43

-----X  
D.K. PROPERTY, INC.,

Plaintiff,

- against -

Index No. 650733/2017  
**DECISION & ORDER**  
(Motion Seq. 002)

NATIONAL UNION FIRE INSURANCE  
COMPANY OF PITTSBURGH, PA.,

Defendant.

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**ROBERT R. REED, J.:**

This is an action to recover first-party insurance proceeds for alleged property damage to a building owned by plaintiff D.K. Property, Inc. (plaintiff or D.K. Property). Defendant National Union Fire Insurance Company of Pittsburgh, Pa. (National Union) moves, pursuant to CPLR 3211 (a) (7), for partial dismissal of the amended complaint.

**FACTUAL ALLEGATIONS, CLAIMS AND PROCEDURAL HISTORY**

Plaintiff is the owner of a building located at 40 Prince Street in Manhattan that was allegedly damaged by a neighboring construction project in or around October 2014. Plaintiff alleges that the rear wall of the neighboring building provided lateral support to the east exterior wall of plaintiff’s building, and when that rear wall was demolished, plaintiff’s building suffered structural movement and damage.

Defendant National Union issued a property insurance policy, Policy No. BB014917749-02 (Policy), providing coverage for “direct physical loss of damage to” plaintiff’s premises. Plaintiff alleges that it made a claim for coverage under the Policy

and that it has otherwise complied with all of the Policy's terms and conditions for coverage, but that National Union has acted in bad faith by making unreasonable and burdensome requests for information and by failing to provide a coverage determination. Plaintiff alleges that National Union's actions have forced it to incur substantial costs and expenses, including attorneys' fees.

The original complaint alleged a cause of action for breach of the Policy and a second cause of action for breach of the covenant of good faith and fair dealing, by which plaintiff sought to recover consequential damages

“including, without limitation, prejudgment interest on the amount owed under the Policy, and the attorneys' fees, costs and disbursements incurred by DK Property in enforcing its rights as a consequence of National Union's bad faith conduct”

(Cmplt., ¶ 36). National Union moved to dismiss the second cause of action, arguing that it was duplicative of the breach of contract claim. The carrier also argued that the complaint contained insufficient allegations to support plaintiff's demand for consequential damages, particularly the request for attorney's fees, costs and disbursements. By order dated June 16, 2017, this court granted the motion. The dismissal, however, was “without prejudice, specifically for plaintiff to replead allegations that are specific in nature as to the consequential damages being sought and the legal underpinning for bad faith claims with respect to the insurer's investigation thus far.”

Plaintiff filed an amended complaint on July 14, 2017. The amended complaint retains the same two causes of action for breach of contract and breach of the covenant of

good faith and fair dealing. However, the pleading provides much greater detail regarding the efforts made by plaintiff to obtain coverage for its alleged loss between October 2014 and the filing of this action in February 2017, and details National Union's handling of the claim. Plaintiff now alleges that National Union undertook unreasonable claims handling in bad faith, for the purpose of making the claim too expensive for plaintiff to pursue and, thereby, allegedly, inducing plaintiff to abandon its claim for coverage (Am. Cmplt., ¶ 19). In a November 2016 meeting between the engineers hired by both sides, National Union's engineer is alleged to have "expressed agreement that the negligent renovation design and construction" of the neighboring building was the source of distress to plaintiff's building (*id.*, ¶ 31). Plaintiff says that it has been "abandoned" by National Union, forcing it to sue the tortfeasors in a separate action in this court (*id.*, ¶ 20).

The amended complaint also alleges that National Union's delay and unreasonable demands for information and inspections of the premises has caused plaintiff to incur certain other expenses. In this regard, the amended complaint alleges:

"37. What is more, DK Property expended significant monies responding to National Union's requests for information. Such expenses include: (a) legal fees amounting to date to tens of thousands of dollars; and (b) engineering and monitoring services in excess of \$150,000.

38. Additionally, because National Union has failed to provide coverage, DK Property has incurred costs and additional damages in temporarily fixing the 40 Prince Building to prevent further damage, including: (a) approximately \$30,000 to mitigate the water intrusion as a result of the damage to the east wall of the 40 Prince Building; (b) approximately \$8,500 in painting repairs; and (c) continued loss of rents and inability to increase rents due to damage to the 40 Prince Building. To date, National Union has refused to acknowledge coverage."

National Union again moves for partial dismissal of the amended complaint, arguing that plaintiff's attempt to cure the pleading deficiencies that plagued its original complaint do not cure the fundamental issues presented by its demand for consequential damages and the separate cause of action for breach of the implied covenant of good faith and fair dealing.

### DISCUSSION

National Union argues that New York courts do not, in the first-party insurance context, recognize a separate, independent, non-contractual cause of action for breach of the implied duty of good faith and fair dealing or for "bad faith claims handling." Plaintiff argues to the contrary. The case law on this issue, unfortunately, is not a model of clarity.

In support of National Union's position, just last December, the First Department ruled that "[t]here is no independent cause of action for bad faith breach of insurance contract arising from an insurer's failure to perform its obligations under an insurance contract" (*Head v Emblem Health*, 156 AD3d 424, 424 [1st Dept 2017], citing *Orient Overseas Assocs. v XL Ins. Am., Inc.*, 132 AD3d 574, 577 [1st Dept 2015]; *McGowan v Great N. Ins. Co.*, 78 AD3d 1137, 1137 [2d Dept 2010]). However, in the *Orient Overseas* case, the First Department was careful to distinguish cases where the insured had asserted, not a tort claim, but a separate claim for breach of the covenant of good faith and fair dealing (132 AD3d at 576). Likewise, the holding of the other case cited by the First Department, *McGowan v Great N. Ins. Co.* (*supra*), was that "[t]here is no

separate cause of action *in tort* for an insurer's failure to perform its obligations under an insurance contract" (78 AD3d at 1137 [emphasis added]). Indeed, the cause of action at issue in *Head v Emblem Health (supra)* was a tort claim seeking damages for the wrongful death and pain and suffering of an insured allegedly arising from his insurance company's bad faith in denying approval for in-patient detoxification treatment for substance abuse.

Other cases do recognize a separate contract-based cause of action against an insurer for breach of its implied duty of good faith and fair dealing as long as the claim is not wholly duplicative of the insured's claim for breach of the policy (*see 25 Bay Terrace Assoc., L.P. v Public Serv. Mut. Ins. Co.*, 144 AD3d 665, 668 [2d Dept 2016]; *Gutierrez v Government Empls. Ins. Co.*, 136 AD3d 975, 976-977 [2d Dept 2016]; *see also Utica Mut. Ins. Co. v Fireman's Fund Ins. Co.*, 238 F Supp 3d 314, 324-25 [ND NY 2017]). Both of the Second Department cases cited above relied on *Bi-Economy Mkt., Inc. v Harleysville Ins. Co. of N.Y.* (10 NY3d 187, 195 [2008]), where the Court of Appeals ruled that an insurance carrier has a duty to "investigate in good faith and pay covered claims," and a breach of that duty may entitle the insured to pursue a claim for extra-contractual consequential damages.

Plaintiff's second cause of action is not duplicative of the breach of contract claim. In the first cause of action, plaintiff alleges that National Union has breached its obligations under the Policy by refusing to acknowledge coverage for plaintiff's property

loss, and seeks the coverage it is owed under the Policy.<sup>1</sup> This is fundamentally different from the second cause of action, which alleges that National Union has breached the implied covenant of good faith and fair dealing by refusing to effectuate a prompt, fair, and equitable settlement of plaintiff's property damage claim; by making unreasonable and burdensome demands for information; by ignoring plaintiff's documentation demonstrating the nature, extent and cause of the damage; and by forcing plaintiff to bring a lawsuit against the tortfeasors for damages and the instant lawsuit against National Union for a determination as to coverage under the Policy. The relief sought in the second cause of action is not for coverage under the Policy, but for plaintiff to be made whole for all of the legal and engineering fees and other costs that it has allegedly incurred as a result of National Union's alleged bad faith conduct and two-year delay in making a determination (*accord O.K. Petroleum Distrib. Corp. v Travelers Indem. Co.*, 2010 WL 2813804, \*4, 2010 US Dist LEXIS 71465, \*10-12 [SD NY July 15, 2010, No. 09-CV-10273 (LMM)] [finding bad faith allegations that insurer inadequately investigated and inordinately delayed were not duplicative, because they extended beyond the breach of policy claim]).

Even were the second cause of action improper as its own separate cause of action, several courts have held that an insured may be entitled to consequential damages on its breach of contract claim, beyond the limits of the Policy, based on the insurer's bad faith

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<sup>1</sup> As discussed below, the first cause of action seeks "damages, including consequential damages," resulting from National Union's refusal to acknowledge coverage of plaintiff's property loss (Am. Cmplt., ¶¶ 44-45).

(*Acquista v New York Life Ins. Co.*, 285 AD2d 73, 82 [1st Dept 2001] [“while plaintiff’s cause of action alleging bad faith conduct on the part of the insurer cannot stand as a distinct tort cause of action, we conclude that its allegations may be employed to interpose a claim for consequential damages beyond the limits of the insurance policy for the claimed breach of contract”]; *Sikarevich Family L.P. v Nationwide Mut. Ins. Co.*, 30 F Supp 3d 166, 172 [ED NY 2014] [“Although plaintiff’s claim for breach of the implied covenant of good faith and fair dealing cannot stand because it is duplicative of plaintiff’s breach of contract claim, plaintiff may be entitled to consequential damages on its breach of contract claim, beyond the limits of its Policy, based on bad faith”]).

In this court’s view, plaintiff has properly segregated out its claim for coverage under the Policy and the bases for its claim for consequential damages in two separate causes of action. Thus, the court declines to dismiss the second cause of action, but dismisses the claim for consequential damages in the first cause of action.

Plaintiff must allege and prove that the type of consequential damages it seeks were reasonably contemplated by the parties prior to contracting (*Bi-Economy Mkt., Inc. v Harleystown Ins. Co. of N.Y.*, 10 NY3d at 192; *Panasia Estates, Inc. v Hudson Ins. Co.*, 10 NY3d 200, 203 [2008]). To make this determination, courts look to “what liability the defendant fairly may be supposed to have assumed consciously, or to have warranted the plaintiff reasonably to suppose that it assumed, when the contract was made” (*Bi-Economy*, 10 NY3d at 193 [internal quotation marks and citation omitted]).

Here, the amended complaint alleges only in a general conclusory fashion that “consequential damages for bad faith breach of the Policy were reasonably contemplated



by DK Property and National Union at the time they entered into the Policy” (Am. Cmplt., ¶ 51). Plaintiff’s pleading does not, as was alleged in the complaint in *Sikarevitch Family L.P. v Nationwide Mut. Ins. Co.* (30 F Supp 3d at 173), allege that the particular types of consequential damages sought, *i.e.*, attorneys’ fees, engineering fees, cost of monitoring services, cost of mitigation of water damages, painting repairs, and lost rent, were a natural and probable result of National Union’s breach of its duty of good faith.

With the exception of attorneys’ fees, discussed more fully below, some of the damages plaintiff seeks appear more in the nature of a property damage loss, such as painting and water mitigation. And since National Union issued only coverage for property loss, not business interruption coverage, as was the case in *Bi-Economy Market, Inc. v Harleysville Ins. Co. of N.Y.* (10 NY3d at 191), the claim for lost rents and inability to increase rents is deficient as a matter of law. As for the engineering fees and costs of monitoring the alleged movement of the building over time, these types of costs appear to be typical expenses that are commonly incurred in order to prove a claim for structural movement property damage. The court finds that the amended complaint fails to properly plead a claim for these types of consequential damages.

As for the recovery of attorneys’ fees, the amended complaint appears to be making a claim for two different types of attorneys’ fees and costs: (1) the legal fees and other costs necessitated by plaintiff having to commence a separate lawsuit against the tortfeasors for damages; and (2) the legal fees and costs in prosecuting this action for insurance coverage (*see* Am. Cmplt., ¶¶ 20, 37, 50). The first type of legal fees and costs

may be considered as part of plaintiff's reasonably foreseeable damages resulting from National Union's bad faith in delaying resolution of plaintiff's property loss claim (*accord Panasia Estates, Inc. v Hudson Ins. Co.*, 2006 WL 5427555 [Sup Ct, NY County 2006], *affd* 39 AD3d 343 [1<sup>st</sup> Dept 2007], *affd* 10 NY3d 200 [2008]), assuming plaintiff prevails on liability and submits appropriate proof of its damages at trial.

As for plaintiff recovering its legal fees in this action, it has long been held that an insured may not recover the legal fees it incurs in bringing an action to settle its rights in an insurance policy (*Mighty Midgets v Centennial Ins. Co.*, 47 NY2d 12, 21 [1979]; *Pandarakalam v Liberty Mut. Ins. Co.*, 137 AD3d 1234, 1236 [1st Dept 2016]). However, a narrow exception exists where the insured can prove that the carrier had no arguable basis to challenge its claim and can further show that no reasonable carrier would, under the given facts, challenge the claim (*Sukup v State of New York*, 19 NY2d 519, 522 [1967]; *Wurm v Commercial Ins. Co. of Newark, N.J.*, 308 AD2d 324, 336-337 [1st Dept 2003]; *Greenburgh Eleven Union Free School Dist. v National Union Fire Ins. Co. of Pittsburgh, PA*, 304 AD2d 334, 336-337 [1st Dept 2003]). Accepting all of the allegations of the amended complaint as true, particularly the claim that National Union's own engineer agreed, in November 2016, that the negligent design and construction of the neighboring building was the source of distress to plaintiff's building, the amended complaint sufficiently alleges a claim for the recovery of plaintiff's attorneys' fees in prosecuting this action.

For these reasons, the court grants National Union's motion to dismiss the amended complaint to the extent of dismissing the demand for consequential damages in

the first cause of action, and the demand for all consequential damages in the second cause of action, with the exception of the claim for attorney's fees and other legal costs.

### CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

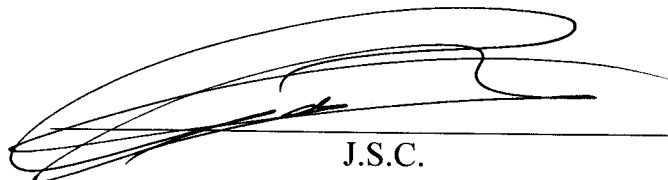
**ORDERED** that defendant's motion to dismiss the amended complaint is granted to the extent of dismissing the demand for consequential damages in the first cause of action and the demand for all consequential damages in the second cause of action, with the exception of the demand for attorneys' fees and other legal costs; and it is further

**ORDERED** that defendant shall file an answer to the amended complaint within thirty (30) days hereof; and it is further

**ORDERED** that counsel for the parties shall appear for a preliminary conference in Part 43, at 111 Centre Street, Room 581, on Thursday, July 12, 2018 at 9:30 a.m.

Dated: April 2, 2018

ENTER:



J.S.C.