

**Certain Underwriters at Lloyd's, London v Bioenergy  
Dev. Group LLC**

2018 NY Slip Op 32704(U)

October 17, 2018

Supreme Court, New York County

Docket Number: 655792/17

Judge: Charles E. Ramos

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: COMMERCIAL DIVISION

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CERTAIN UNDERWRITERS AT LLOYD'S, LONDON  
SUBSCRIBING TO GCUBE POLICY NUMBER  
BI154335601 and RSA INSURANCE GROUP PLC  
SUBSCRIBING TO PERSE POLICY NUMBER  
BI154335601,

Index No. 655792/17

Plaintiffs,

-against-

BIOENERGY DEVELOPMENT GROUP LLC and  
AGRILEUM LLC,

Defendants.

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**Hon. C. E. Ramos, J.S.C.:**

Plaintiffs (insurers) move to dismiss defendants' counterclaims pursuant to CPLR 3211 (a) (4) and (7).

**Background**

As set forth in the complaint, defendant Bioenergy Development Group LLC (Bioenergy) is a manufacturer of renewable bio-diesel fuel, and operates its sole manufacturing plant in Memphis, Tennessee. Bioenergy purchased two all risk property damage and business interruption loss insurance policies (policies) in September 2015, with collective limits of liability of \$41,130,000. The property damage coverage part contains an interim payments provision entitling Bioenergy to receive payments in advance of a final settlement of a claim.

On March 18, 2016, a fire destroyed Bioenergy's Memphis plant, and with it, Bioenergy lost all of its production capacity and its only revenue stream.

Bioenergy made a timely demand for coverage by notifying the insurers of its loss, and sought to rebuild and reopen its Memphis plant as soon as possible. The insurers acknowledged coverage and made a series of interim payments to Bioenergy on its property damage claim, totaling \$8.25 million. Bioenergy's property damage claim presently exceeds \$24 million, which the parties have agreed to appraise.

Following appraisal of Bioenergy's business interruption claim, the insurers agreed to pay the full business interruption limit of liability of \$15.1 million.

The insurers commenced this action in September of 2017 seeking a declaration that the policy limits coverage for Bioenergy's business interruption loss to \$15.1 million, and that the policies do not afford coverage for the tax adjusted value of Bioenergy's claim for lost blender's tax credits.

In its answer, Bioenergy alleges that the insurers refused to timely respond to its interim payment claims after the fire, which increased its losses because it could not rebuild its facility without the funding. In addition, Bioenergy maintains that it is entitled to business interruption losses beyond the policy limits pursuant to an escalation clause set forth in the policies, and reimbursement based upon its actual gross profit in the form of business interruption loss and lost bio-diesel blender's credits.

Bioenergy interposed counterclaims for breach of the covenant of good faith and fair dealing and seeks a declaration that the policies' escalation clause entitles Bioenergy to coverage beyond the policy limits of liability for its business interruption losses. Bioenergy seeks actual and consequential damages including attorneys' fees.

#### **Discussion**

The Court concludes that Bioenergy has failed to sufficiently plead a claim for breach of the covenant of good faith and fair dealing entitling it to recovery of consequential damages and attorneys's fees.

The Court of Appeals has recognized that an insurance carrier has a duty under a policy to investigate in good faith and to pay covered claims (see *Bio-Economy Mkt., Inc. v Harleystown Ins. Co. of N.Y.*, 10NY3d 187, 195-96, rearg denied 10 NY3d 890 [2008]; *Panasia Estates, Inc. v Hudson Ins. Co.*, 10 NY3d 200, 203 [2008]). The Court also recognized that the breach of such duty gives rise to a contract, rather than tort claim, and may entitle the insured to recovery of consequential damages including litigation costs and attorneys' fees that extend beyond the policy limits where the specific damages sought by the insured were foreseeable damages as the result of the insurer's breach (*Id.*). Consequential damages, in contrast to consequential losses, refer to losses in addition to a calamitous

event, and include those additional damages caused by an insurer's injurious conduct (*Id.*; *Bio-Economy Mkt., Inc.*, 10 NY3d at 196).

Here, Bioenergy's counterclaim fails to plead the requisite element of bad faith claims processing on the part of the insurers. Bioenergy has alleged that the insurers breached their payment obligations with respect to its losses by initially refusing to and thereafter delaying the payment of interim advancements on its business interruption claim and denying its property damage claim up to the policy limits. These allegations are the predicate for breach of express provisions of the policies and do not state a claim for breach of the implied covenant of good faith and fair dealing. Bioenergy does not plausibly claim that the insurers' conduct has created losses which would otherwise be remedied by a full payment of its losses under the policies.

Generally speaking, good faith imposes a duty on the insurer to act in accordance with "standards of honesty and in a manner faithful to its obligations" (*see generally Pinto v Allstate Ins. Co.*, 221 F3d 394,399 [2d Cir 2000]). Bioenergy fails to allege any non-conclusory facts that the insurers failed to investigate its claims honestly and pay promptly, and does acknowledge that the insurers paid its business interruption claims up to the policy limits (\$15.1 million), and the valuation of its property

damage claim was submitted to an appraisal proceeding.

The failure to plead the requisite bad faith component, and any additional damages in a non-conclusory fashion that it suffered losses beyond the losses covered by the policies, renders its claim redundant and is fatal to a claim for breach of the implied covenant of good faith and fair dealing for extra-contractual consequential damages.

Bioenergy also fails to allege entitlement to attorneys' fees. Bioenergy essentially argues that attorneys' fees and court costs are a recoverable component of consequential damages. Generally, an insured may not recover the expenses incurred in an action against an insurer to settle its rights under policy (*New York University v Continental Ins. Co.*, 87 NY2d 308, 324 [1995]).

The Court notes that the parties are awaiting the results of an appraisal proceeding valuing Bioenergy's property damage claim. Thus, the Court declines to dismiss the counterclaim seeking a declaratory judgment.

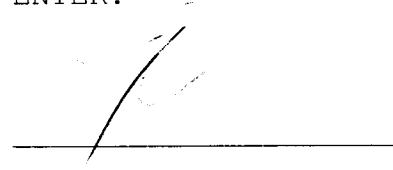
Accordingly, it is

ORDERED that plaintiff's motion to dismiss the counterclaims is granted in part with respect to the first counterclaim, which is severed and dismissed; and it is further

ORDERED that the plaintiff shall answer the second counterclaim within 20 days of entry of this order.

Dated: October 17, 2018

ENTER:



J.S.C.

**CHARLES E. RANC**

*10/18/18*