

Nebraska Judicial Branch

Case Summary

In the District Court of Douglas County
 The Case ID is CI 16 0004709
 1001 Apartments, L v. Acuity, A Mutual I
 The Honorable Horacio J Wheelock, presiding.
 Classification: Contract Disputes
 Filed on 06/06/2016
 This case is Open as of 06/06/2016

Parties/Attorneys to the Case

| Party | Attorney |
|--|---|
| Plaintiff ACTIVE 1001 Apartments, LLC | Stacy L Morris 10306 Regency Parkway Drive Omaha NE 68114 402-397-7300 |
| Defendant ACTIVE Acuity, A Mutual Insurance Company | Thomas M Locher 200 The Omaha Club 2002 Douglas St. Omaha NE 68102 402-898-7000 |

Court Costs Information

| Incurred By | Account | Date | Amount |
|-------------|---------------------------|------------|---------|
| Plaintiff | Petition | 06/06/2016 | \$35.00 |
| Plaintiff | Filing Fee - State | 06/06/2016 | \$5.00 |
| Plaintiff | Automation Fee | 06/06/2016 | \$8.00 |
| Plaintiff | NSC Education Fee | 06/06/2016 | \$1.00 |
| Plaintiff | Dispute Resolution Fee | 06/06/2016 | \$0.75 |
| Plaintiff | Indigent Defense Fee | 06/06/2016 | \$3.00 |
| Plaintiff | Uniform Data Analysis Fee | 06/06/2016 | \$1.00 |
| Plaintiff | J.R.F. | 06/06/2016 | \$6.00 |
| Plaintiff | Filing Fee-JRF | 06/06/2016 | \$2.00 |
| Plaintiff | Legal Aid/Services Fund | 06/06/2016 | \$5.25 |
| Plaintiff | Complete Record | 06/06/2016 | \$15.00 |

Financial Activity

No trust money is held by the court
 No fee money is held by the court

| Receipt | Type | Date | For | Amount |
|-----------------------------------|------------------|------------|------------------------|---------|
| Payments Made to the Court | | | | |
| 228351 | Electronic Trans | 06/07/2016 | 1001 Apartments, LLC | \$82.00 |
| | | | Petition | \$35.00 |
| | | | Filing Fee - State | \$5.00 |
| | | | Automation Fee | \$8.00 |
| | | | NSC Education Fee | \$1.00 |
| | | | Dispute Resolution Fee | \$.75 |
| | | | Indigent Defense Fee | \$3.00 |
| | | | Uniform Data Analysis | \$1.00 |
| | | | J.R.F. | \$6.00 |
| | | | Filing Fee-JRF | \$2.00 |
| | | | Legal Aid/Services Fun | \$5.25 |
| | | | Complete Record | \$15.00 |

Register of Actions

07/08/2016 Answer
 This action initiated by party Acuity, A Mutual Insurance Company
 kr
 Image ID N16190XSYD01

06/06/2016 Complaint-Praecipe
 This action initiated by party 1001 Apartments, LLC
 ts no praecipe filed
 Image ID N16158OYWD01

IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

1001 APARTMENTS, LLC, a domestic)
limited liability company,)

Plaintiff,)

vs.)

ACUITY, A MUTUAL INSURANCE)
COMPANY, a foreign corporation,)

Defendant.)

Case No. _____

COMPLAINT

COMES NOW the Plaintiff, 1001 Apartments, LLC (“Plaintiff”), and for its action against Defendant Acuity, a Mutual Insurance Company (“Defendant”), states and alleges as follows:

NATURE OF ACTION

1. This action is brought under the Uniform Declaratory Judgments Act (Neb. Rev. Stat. §§ 25-21,149 to 25-21,164), under which an interested person is entitled to have determined any question of construction or validity arising under a written contract when such person’s right, status or other legal relations are affected by such written contract. Plaintiff requests that the Court determine and declare the obligations and duties arising under certain provisions of a commercial property insurance policy issued by Defendant. Additionally, Plaintiff alleges that Defendant violated the Unfair Insurance Claims Settlement Practices Act (Neb. Rev. Stat. §§ 44-1539 to 44-1544).

2. Plaintiff also brings this action for common law claims of breach of contract and bad faith.

PARTIES

3. Plaintiff is a limited liability company organized under the laws of the State of Nebraska. At all times relevant hereto, Plaintiff was the owner of 1001 Apartments, a commercial apartment complex located at 1001 North 90th Street, Omaha, Douglas County, Nebraska (“the Property”).

4. Defendant is an insurance company incorporated in the State of Wisconsin, and is licensed to do business and sell insurance in the State of Nebraska.

JURISDICTION AND VENUE

5. Jurisdiction is proper in this Court pursuant to Neb. Rev. Stat. §§25-535, 25-536 and 25-539.

6. Venue is proper in Douglas County, Nebraska, under Neb. Rev. Stat. §25-401, as Plaintiff’s action seeks to recover damages to real estate located in Omaha, Douglas County, Nebraska; and alternatively, under Neb. Rev. Stat. §25-403.01, as this cause of action arose in Omaha, Douglas County, Nebraska.

GENERAL ALLEGATIONS

7. Plaintiff and Defendant entered into a contract for primary commercial property insurance, and Defendant issued policy number K69716 (“the Policy”) to Plaintiff. The Policy was renewed for additional terms, and was in force and effect from June 17, 2012 to June 17, 2013, and from June 17, 2013 to June 17, 2014. At all times relevant hereto, the Property was identified in the Description of Premises, and is therefore defined as Covered Property to which the Policy applies.

8. The Policy provides, in relevant part, that Defendant “will pay for direct physical loss or damage to Covered Property at the premises described in the Declarations caused by or resulting from any Covered Cause of Loss.”

9. The Policy further provides that Defendant is obligated to provide coverage for loss or damage commencing during the policy period.

10. A hail storm occurred in Omaha, Douglas County, Nebraska on April 9, 2013.

11. In early April 2014, Plaintiff obtained a roofing consultation from a third party, Surface Solutions, which revealed that roofs of three buildings, and five garages, which were located on the Property had sustained hail damage from the April 9, 2013, storm. The damage extended to the roofing system itself, as well as to other roofing components including, but not limited to, vent caps and air conditioning condenser units.

12. Each of the three apartment building roofs damaged by the hail storm is constructed in the same way, and consists of five separate layers: the first, or bottom, layer, is made up of plywood decking; the second layer consists of 1” of a “Built-Up layered roof system”; the third layer is ½” fiberboard; the fourth layer is ¾” EPS insulation; and finally, the fifth, or top, layer of each roof contains a 45 millimeter rubber roofing membrane (“EPDM”), covered with rock ballast. The roofs of the five garages are constructed of smooth “Built-Up layered roof system,” installed over plywood sheathing.

13. Upon learning from Surface Solutions in April 2014 about the hail damage to the three apartment building roofs and five garage roofs located on the Property, Plaintiff notified Defendant of its insurance claim on April 15, 2014.

14. Ms. Carol Reisinger, a claim representative for Defendant, was assigned to the claim. On April 22, 2014, Defendant sent Ms. Reisinger to inspect the roofs at the Property, and

Ms. Reisinger informed Plaintiff's principals and Surface Solutions that buildings located on the Property "definitely" sustained hail damage. Ms. Reisinger then stated that further testing and inspection would be necessary in order to ascertain the extent of the damage. Ms. Reisinger explained that before this further inspection could be completed, Plaintiff must move the rock ballast from various sections of the ballasted roofs. Ms. Reisinger then instructed Plaintiff and Surface Solutions to perform these tasks, and to advise her once they had been completed so that she could re-inspect the Property and evaluate the damages.

15. An agent of Plaintiff followed Ms. Reisinger's explicit instructions and moved the rock ballast from various sections of the roofs. Once Plaintiff's agent had performed these tasks, approximately two weeks later, Plaintiff's principals and Surface Solutions advised Ms. Reisinger that the rock ballast had been moved, per her instructions, and that the Property was ready for re-inspection.

16. Defendant subsequently sent Ms. Reisinger, along with individuals from a roofing expert engaged by Defendant, back to the Property and conducted a re-inspection. Upon information and belief, however, at no time did Defendant inspect the roofs of the garages located on the Property.

17. At some point, Defendant replaced Ms. Reisinger on the claim with another adjuster, Paul Georgescu. Mr. Georgescu invoked the appraisal provision of the Policy, but had not yet adjusted the claim as required under the Policy.

18. Despite numerous requests by Plaintiff that Defendant investigate Plaintiff's claim, it was not until April 29, 2015—more than one year after Plaintiff filed its claim—that Defendant finally rendered a decision. On that date, Defendant issued a denial and stated that its investigation concluded that there is no coverage for Plaintiff's claimed loss under the Policy.

19. Plaintiff has made demand upon Defendant to provide coverage under Plaintiff's claim, but Defendant has neglected and refused, and continues to neglect and refuse, to pay Plaintiff's claim in accordance with Defendant's contractual obligations under the terms of the Policy.

20. On April 14, 2016, Defendant terminated its insurance contract with Plaintiff, effective June 17, 2016. Among the reasons Defendant provided for the termination was as follows: "Our investigation of your claims of June 2014 indicated uninsured roof damage that has not been repaired."

21. Upon information and belief, Ms. Reisinger, Mr. Georgescu and all others acting on Defendant's behalf were, at all times relevant hereto, employed by Defendant and were acting within the course and scope of their employment or as authorized agents of Defendant. Defendant is therefore vicariously liable for the acts and/or omissions of such persons under the doctrines of respondeat superior and/or agency law.

**FIRST CAUSE OF ACTION
DECLARATORY JUDGMENT**

22. Plaintiff hereby incorporates by reference paragraphs 1-21, as though fully set forth herein.

23. Plaintiff paid due consideration for the Policy issued by Defendant and is named as the insured under the Policy, and is therefore a person interested under the Policy.

24. Pursuant to Neb. Rev. Stat. §§ 25-21,149 to 25-21,164, Plaintiff seeks a declaration of the rights and legal obligations of the parties under the Policy, and specifically asks the Court to declare that Defendant is liable, under the terms of the Policy, to provide coverage for Plaintiff's loss.

25. Defendant's delay in adjusting Plaintiff's claim, and Defendant's ultimate denial of Plaintiff's claim more than one year later, has damaged Plaintiff by causing it to incur significant damages in an amount of the reasonable cost to replace the roofs, air conditioning condensers, and other components that were damaged in the hail storm as set forth in Plaintiff's claim of April 15, 2014.

26. In addition, several units of the Property have sustained interior water damage as a result of the hail-damaged roof, and Plaintiff has been forced to forego monthly rental payments from various units which had to be vacated while necessary repairs were completed. Defendant's actions have also caused several buildings located on the Property to become susceptible to further damage, as the rock ballast has been moved from the roofs and no repairs have yet been completed.

27. Defendant has no legitimate basis for denial under the Policy, and Defendant should be required to honor the terms thereof, and to pay damages for, Plaintiff's loss.

28. Defendant's failure to provide coverage under the terms of the Policy has caused damage to Plaintiff in an amount, to be proven at trial, sufficient to repair the hail damage to the roofing system as well as to air conditioning condenser units and other components. Defendant's delay in adjusting Plaintiff's claim has also caused interior damage to several units, and has caused the roof to be susceptible to further damage due to unprotected exposure to the elements. Such real and consequential damages are the direct and proximate result of the actions of Defendant.

**SECOND CAUSE OF ACTION
BREACH OF CONTRACT**

29. Plaintiff hereby incorporates by reference paragraphs 1-28 of its Complaint, as though fully set forth herein.

30. For due consideration in the form of premiums paid by Plaintiff, Defendant executed and delivered to Plaintiff the Policy.

31. Defendant agreed to provide coverage to Plaintiff, as an insured, for losses due to property damage. Under these and additional terms of the Policy, Defendant has an obligation to provide coverage for those damages, costs and/or expenses arising from a covered loss.

32. Plaintiff furnished Defendant with a "Sworn Statement in Proof of Loss," dated July 29, 2015, and made a property claim under the Policy in the amount of \$930,836.75. Plaintiff paid all premiums and performed all conditions precedent required under the Policy.

33. Plaintiff has no legitimate basis for denial under the Policy, and Defendant should be required to honor the terms thereof, and to pay damages, for Plaintiff's loss.

34. Plaintiff has made demand that Defendant provide coverage for Plaintiff's loss from the hail damage, but Defendant has refused to pay such costs, expenses and damages. This refusal by Defendant is a breach of the contract terms between Plaintiff and Defendant.

35. Further, the Policy states that Defendant is permitted to cancel coverage only for certain enumerated reasons.

36. Defendant cancelled the Policy for reasons other than those set forth in the endorsement, and therefore Defendant is in breach of this provision.

37. Defendant's breach of its duty to provide coverage under the Policy has damaged Plaintiff in an amount, to be proven at trial, sufficient to repair the damage to the roofing system as well as to the air conditioning condenser units and other components. Defendant's delay in adjusting Plaintiff's claim has caused interior damage to several units, and has caused the roof to be susceptible to further damage due to unprotected exposure to the elements. Such real and consequential damages are the direct and proximate result of the actions of Defendant.

**THIRD CAUSE OF ACTION
VIOLATION OF NEBRASKA UNFAIR INSURANCE CLAIMS
SETTLEMENT PRACTICES ACT**

38. Plaintiff hereby incorporates by reference paragraphs 1-37 of its Complaint, as though fully set forth herein.

39. Under the Unfair Insurance Claims Settlement Practices Act (Neb. Rev. Stat. §§ 44-1536 to 44-1544), an insurer is obligated to, inter alia, “adopt and implement reasonable standards for the prompt investigation and settlement of claims arising under its policies;” and to effectuate prompt, fair, and equitable settlement of claims submitted in which liability has become reasonably clear. Additionally, an insurer may not refuse “to pay claims without conducting a reasonable investigation.”

40. Defendant has failed to inspect the Property, failed to conduct a prompt investigation, and in general failed to act as a reasonable insurer, and did so flagrantly and in conscious disregard of the Unfair Insurance Claims Settlement Practices Act.

41. As a direct consequence of Defendant’s actions, Plaintiff has been damaged in the amount necessary to repair the damage from the hail and additional consequential costs, expenses, attorney fees, pre and post judgment interest, and other losses. Such real and consequential damages are the direct and proximate result of the actions of Defendant.

**FOURTH CAUSE OF ACTION
INSURANCE BAD FAITH**

42. Plaintiff hereby incorporates by reference paragraphs 1-41 of its Complaint, as though fully set forth herein.

43. Defendant is obligated under the terms of the Policy to provide coverage for losses.

44. Defendant further owes Plaintiff, as a policyholder and beneficiary under the Policy, a duty of good faith and fair dealing.

45. Defendant has refused in good faith to investigate Plaintiff's claim in a timely manner, and to provide coverage under the Policy in a timely manner. Defendant breached said duty in one or more of the following particulars:

- a. By unreasonably failing to properly construe the Policy;
- b. By explicitly instructing Plaintiff's principals and Surface Solutions to move the rock ballast covering the roofing membrane;
- c. By unreasonably failing to conduct a timely and proper investigation, which would have revealed that there was no basis to deny coverage;
- d. By failing to render a decision until more than one year after Plaintiff's claim;
- e. By invoking the appraisal provision of the Policy without first adjusting the claim;
- f. By failing to cite a reasonable basis for the denial; and
- g. By terminating Plaintiff's coverage under the Policy in retaliation for Plaintiff filing a claim.

46. On the basis of the above allegations, no reasonable basis exists for Defendant's failure to timely investigate Plaintiff's claim, nor for Defendant's ultimate denial of coverage under the Policy. Defendant's denial of such obligations was made with full knowledge and reckless disregard of such absence of a reasonable basis therefore, and Defendant has violated its obligation of good faith and fair dealing to Plaintiff, its insured.

47. As a direct consequence of Defendant's bad faith, Plaintiff has been damaged in the amount necessary to repair the damage from the hail and additional consequential costs, expenses, attorney fees, pre and post judgment interest and other losses. Such real and consequential damages are the direct and proximate result of the actions of Defendant.

STATUTORY ATTORNEY FEES

48. Plaintiff has been required to employ its attorneys in order to bring this action under the Policy, and Plaintiff thereby requests that all attorney fees, costs and expenses it incurs in prosecuting this action against Defendant be awarded, pursuant to Neb. Rev. Stat. § 44-359.

WHEREFORE, Plaintiff prays for the following relief:

- (1) A declaratory judgment determining the obligations and rights of the respective parties, and requiring Defendant to fulfill its coverage obligations under the Policy by paying Plaintiff's claim of April 15, 2014;
- (2) For general damages suffered by Plaintiff as a result of Defendant's breach of contract, violation of the Unfair Insurance Claims Settlement Practices Act, and insurance bad faith, in amounts to be proven at trial, as well as for direct and consequential damages as requested herein;
- (3) For an award of Plaintiff's costs, expenses, interest, and attorney fees, as required by law; and
- (4) For such other and further relief as this Court deems just and proper.

JURY DEMAND

Plaintiff hereby demands a trial by jury on all suitable matters.

1001 APARTMENTS, LLC,
Plaintiff,

By: /s/ Stacy L. Morris
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Stacy L. Morris, #22761
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