

IN THE DISTRICT COURT FOR DOUGLAS COUNTY, NEBRASKA

TO JO Enterprises LLC,)	
Plaintiff,)	Case No. _____
v.)	COMPLAINT
LE MARS INSURANCE COMPANY,)	
Defendant.)	

COMES NOW the Plaintiff, TO JO Enterprises, LLC, and for its Complaint against Defendant, Le Mars Insurance Company, states and alleges as follows:

1. Plaintiff TO JO Enterprises, L.L.C. ("TO JO") is a Nebraska Limited Liability Corporation with its principal place of business located at 14302 C Circle, Omaha, Nebraska 68144.
2. Defendant Le Mars Insurance Company ("Le Mars") is an Iowa Corporation and an insurance company doing business in Douglas County, Nebraska.
3. On or about December 1, 2012 a policy of insurance (Policy Number LCP838491) ("Policy") was entered into between Le Mars and TO JO concerning the premises located at 14302 C Circle, Omaha, Douglas County, Nebraska, 68144 ("Property"). A copy of the Policy (No. LCP838491) is in the possession of the Defendant.
4. TO JO was a named insured under the Policy issued by Le Mars and Le Mars agreed to "pay for direct physical loss of or damage to Covered Property at the premises described in the Declarations caused by or resulting from any Covered Cause of Loss."
5. The Property was Covered Property at the premises described in the declarations.
6. Covered Cause of Loss under the Policy included physical loss or damage caused by hail storm and direct physical loss or damages caused by hail storm are covered under the Policy.

7. The Property was insured for Replacement Cost under the Policy for direct physical loss of or damage to Covered Property caused by or resulting from any Covered Cause of Loss.
8. On or about April 9, 2013 the Property was damaged as a direct result of a severe hail storm that also caused significant damage to other property in the surrounding area.
9. The Replacement Cost for the damage to the Property is no less than \$195,830.38.
10. TO JO promptly contacted Le Mars following the hail storm and reported the damage, made a claim, and requested payment of its claim in order to repair the damage to the Property.
11. TO JO has fulfilled all of its duties required under the Policy and complied with all terms of the policy.
12. Le Mars denied the claim to pay the Replacement Cost damages to the Property.
13. Le Mars asserted 70% of the damage to the roof of the Property was pre-existing and insisted upon an adjustment of the claim based upon paying 30% of the actual cash value to repair the roof with an elastomeric coating, without a replacement cost adjustment after repair, and paying the actual cash value of other items damaged by the hail, subject to a replacement cost adjustment after the repair of other items.
14. Prior to issuing the Policy, Le Mars had an opportunity to inspect the Property to determine the condition of the property and determine whether there was any prior damage before insuring the Property that needed to be repaired before issuing the Policy.
15. The Policy fails to contain any policy provisions or language that permits Le Mars to exclude or limit coverage for pre-existing loss or damage to the Property.
16. The Policy fails to contain any policy provisions or language that permits Le Mars to limit payment to the actual cash value to repair a roof with an elastomeric coating.

17. Le Mars had no reasonable basis to support a loss adjustment of paying 30% of the actual cash value to repair the roof with an elastomeric coating, without a replacement cost adjustment after repair, and paying the actual cash value of other items damaged by the hail, subject to a replacement cost adjustment after the repair of other items.

18. Le Mars failed to extend a good faith offer to resolve the matter under the Policy provisions and has engaged in bad faith by refusing to adjust the loss based upon the clear terms of the Policy, by failing to employ fair settlement practices, by failing to conduct a proper investigation, and by limiting the loss for reasons not supported by the language of the Policy.

19. Le Mars' conduct has compelled TO JO to institute litigation to recover amounts due under the Policy.

COUNT I: BREACH OF CONTRACT

20. For its First Cause of Action and pursuant to Section 44-359 of Nebraska Revised Statutes, TO JO incorporates the foregoing paragraphs 1-19 in the Complaint as if fully set forth herein.

21. Pursuant to the policy, Le Mars had a contractual duty and obligation to properly investigate and pay the hail damage loss to the Property under the terms and provisions of the Policy.

22. Le Mars breached the Policy by, including but not limited to:

- a. failing to objectively investigate TO JO's claim;
- b. failing to repair the damage sustained to the Property;
- c. failing to pay the loss due and owing under the Policy;
- d. undervaluing the loss;

e. requiring a repair to the Property with material of a different kind and quality that the property insured.

23. As a direct and proximate result of Le Mars' breach of the Policy and of its duties and obligations arising under the policy, TO JO suffered damages that include, but are not limited to:

- a. The cost necessary to repair damage to the Property of not less than \$ 229,534.00;
- b. Engineering and consulting costs in an amount to be determined at trial and final judgment;
- c. Attorney fees and costs in being forced to retain counsel to obtain payment on a valid claim and file this action in an amount to be determined at trial and final judgment.

COUNT II: BAD FAITH

24. For its Second Cause of Action, TO JO incorporates the foregoing paragraphs 1-23 in the Complaint as if fully set forth herein.

25. Le Mars' refusal to properly adjust and investigate TO JO's claim and failure to pay the hail damage claim as required under the terms and provisions of the Policy was in bad faith.

26. Le Mars' acts of bad faith include, but are not limited to, the following:

- a. Refusing to implement a good faith, prompt, fair, and adequate investigation and settlement of TO JO's claims;
- b. Compelling TO JO to resort to legal action and institute this legal action to recover amounts due under its Policy;
- c. Not attempting in good faith to effectuate prompt, fair, and equitable settlement of claims submitted in which liability has become reasonably clear;
- d. Compelling TO JO to institute litigation to recover amounts due under its Policy by offering an unreasonable loss adjustment not supported by the Policy language.

- e. Attempting to settle the claim with TO JO for an amount less than what a reasonable person would believe TO JO is entitled to recover;
 - f. Failing to comply with the provisions of its own Policy;
 - g. Failing to pay the undisputed amount owed;
27. Le Mars' actions evidence malice, gross negligence, and reckless disregard for TO JO's rights under the Policy.
28. As a result of Le Mars' bad faith practices, bad faith denial of TO JO's claims and failure to honor its obligations under the Policy, TO JO has suffered damages and incurred legal fees and costs.

WHEREFORE, Plaintiff TO JO, prays for judgment against Le Mars for general and special damages both present and future in an amount to be proven at trial but no less than \$229,534.00, for the amounts due under the policy, for pre-judgment interest and post-judgment interest, costs, expenses, and attorney fees as permitted pursuant to Neb. Rev. Stat. § 44-359, along with any other, further relief as may be necessary, fair, or just.

TO JO ENTERPRISES, LLC
PLAINTIFF

By: 

P. Shawn McCann, NE #16612
McGinn, McGinn, Springer & Noethe
20 North 16th Street
Council Bluffs, IA 51501
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ATTORNEY FOR PLAINTIFF

IN THE DISTRICT COURT OF DOUGLAS



TO JO ENTERPRISES, LLC,

Plaintiff,

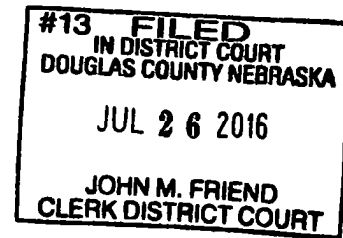
vs.

LE MARS INSURANCE COMPANY,

Defendant,

CI 15 – 10023

ORDER



On the 15th day of April, 2016 the Defendant's motion for partial summary judgment came on for hearing. The Plaintiff appeared by counsel William McGinn and the Defendant appeared by counsel Albert M. Engles and Brock Hubert. Evidence was adduced and the matter was taken under advisement.

This action arises out of a property insurance claim for hail damage occurring on or about April 9, 2013 to a building owned by the Plaintiff and located at 14302 C Street in Omaha, Nebraska. Subsequent to the storm the Plaintiff made a claim under a policy of insurance issued by the Defendant. There is no issue that the Le Mars policy was in full force and effect at the time the damage was sustained.

TO JO has sued for breach of contract alleging that the Defendant failed to objectively investigate the claim; failed to repair the damage sustained to the building; failed to pay the loss due and owing under the policy and that Le Mars undervalued the loss. TO JO has also sued for bad faith alleging that the Defendant refused to implement a good faith, prompt, fair and adequate investigation and settlement of TO JO's claims which compelled the Plaintiff to resort to legal action and that Le Mars did not attempt in good faith to effectuate a prompt, fair and equitable settlement of the claim and in so doing failed to comply with the provisions of its own policy and failed to pay the undisputed amount owed. Le Mars alleges that it acted in a reasonable manner at all times in investigating the claim and in so doing discovered that approximately 70% of the damage to the roof of the property occurred prior to the inception date of the policy involved herein. The Defendant further denies that it acted in bad faith or that it violated any of the terms or conditions of the policy.

The evidence shows the following:

1. The Defendant was notified of the loss on April 18, 2013 (9 days after the damage was sustained);
2. The Defendant had the property inspected by Tri-State Claims Services on April 20, 2013;
3. On June 4, 2013 Le Mars sent a letter to the Plaintiff advising that Tri-State had identified new and old hail damage to the roof;
4. On June 21, 2013 the Defendant had the roof inspected by Donan Engineering Company, Inc.
5. The Defendant then had the property re-inspected by Tri State and Donan;
6. The Defendant also hired Mid Central Claims, Inc. to inspect the property.

All of the inspections indicated that 70% of the hail damage to the roof occurred prior to the Le Mars policy and that 100% of the damage to the siding on the building occurred during La Mars policy period. Tri State's also determined that the total cost to repair the roof was \$38,812.58. Based on that estimate Le Mars issued a check in the amount of \$13,724.02 of that amount \$11,643.77 (30%) was related to the cost to repair the roof and the remaining monies equal 100% of the cost to replace the siding.

In determining whether or not to replace or repair the roof Le Mars contacted Triple C Roofing, Inc. to ensure that the roof coating recommended by Tri State was an appropriate repair. Triple C Roofing that that was an appropriate repair to the roof and based upon that information Le Mars determined that the roof should be repaired as opposed to being replaced which was an option available to it under the terms of the policy.

In Radecki vs. Mutual of Omaha Insurance Company, 255 Neb. 224, 583 NW 2d 320 (1998) the Nebraska Supreme Court found that "if a lawful basis for denial actually exists, the insurer, as a matter of law, cannot be held liable in an action based on the tort of bad faith." The Court further stated that it must be determined "whether, at the time of each denial, [the insurer] had an arguable basis on which to deny the claim" and if the insurer "had such a basis, [the insured's] bad faith cause of action fails as a matter of law regardless of the manner in which an investigation was or was not conducted." In LeRette

vs. American Medical Security, 270 Neb. 545, 705 NW 2d 44 (2005) the Nebraska Supreme Court made it clear that whether or not a claim is fairly debatable is appropriately decided by the trial court as a matter of law and such a determination is based on the information available to the insurance company at the time the demand is presented.

The only evidence contrary to the inspections done by the various companies retained by the Defendant is set forth in an affidavit of E. Ralph Walden a public adjuster, Nebraska licensed insurance consultant, a HAGG certified roofing consultant and a licensed architect. However, Mr. Walden's opinions regarding the manner in which Le Mars handled the instant claim and regarding the issue of bad faith do not negate the fact that the Defendant's denial of payment for 100% of the hail damage to the roof was based upon the numerous inspections available to Le Mars which the Court finds created an arguable basis on which to deny the claim and, therefore, the Defendant's motion for partial summary judgment as to the second cause of action for bad faith should be sustained and said cause of action dismissed with prejudice.

IT IS SO ORDERED.

Dated this 26th day of July, 2016.

BY THE COURT:


District Judge

cc: Bill McGinn
Attorney at Law
20 North 16th Street
Council Bluffs, IA 51501

Albert M. Engles
Brock Hubert
Attorneys at Law
1350 Woodmen Tower
1700 Farnam Street
Omaha, NE 68102

CERTIFICATE OF SERVICE

I, the undersigned, certify that on July 27, 2016 , I served a copy of the foregoing document upon the following persons at the addresses given, by mailing by United States Mail, postage prepaid, or via E-mail:

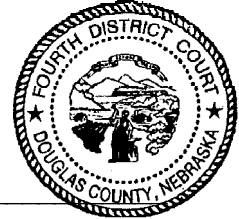
Brock S Hubert
bhubert@ekoklaw.com

P S McCann
smccann@themcginnlawfirm.com

Date: July 27, 2016

BY THE COURT:

John M. Friend
CLERK



IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

TO JO ENTERPRISES, LLC,)	CASE NO. CI 15-10023
)	
Plaintiff,)	
)	
vs.)	MOTION FOR SUMMARY JUDGMENT
)	
LEMARS INSURANCE COMPANY,)	
)	
Defendant.)	

COMES NOW, Defendant, LeMars Insurance Company, pursuant to Neb. Rev. Stat. § 25-1330, et seq., and moves the Court for an Order granting it summary judgment for the reason that the pleadings and evidence demonstrate no genuine issue of material fact exists and that Defendant is entitled to summary judgment as a matter of law. In particular, the undisputed facts support entry of a judgment in Defendant's favor finding *inter alia*:

- (1) Plaintiff cannot prove its damages without expert witness testimony; and
- (2) The language of the policy of insurance at issue in this case, Policy No. LCP838491, is unambiguous and cannot support the allegations of breach set forth in the Complaint.

WHEREFORE Defendant, LeMars Insurance Company, respectfully requests the Court enter an Order for summary judgment in its favor dismissing all claims alleged against it in this case with prejudice and for such other relief as the Court deems appropriate.

LEMARS INSURANCE COMPANY, Defendant,

By: s/ Michael L. Moran
ENGLES, KETCHAM, OLSON, & KEITH, P.C.
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(402) 348-0900 Fax (402) 348-0904
Michael L. Moran, #24042
mmoran@ekoklaw.com

NOTICE OF HEARING

YOU ARE HEREBY NOTIFIED THAT the above matter will come for hearing on the 14th day of September, 2017, before the Honorable J. Michael Coffey, Douglas County Courthouse, Courtroom No. 507, Omaha, Nebraska at the hour of 1:30 o'clock p.m. or as soon thereafter as counsel may be heard.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the above and foregoing was mailed to the following by regular United States mail, postage prepaid, this 7th day of August, 2017:

P. Shawn McCann, #16612
McGinn, McGinn, Springer & Noethe
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Council Bluffs, IA 51501
(712) 328-1566 Fax (402) 328-3707
smccann@themcginnlawfirm.com

s/ Michael L. Moran

Certificate of Service

I hereby certify that on Tuesday, August 08, 2017 I provided a true and correct copy of the Motion-Summary Judgment to the following:

TO JO Enterprises, L.L.C. represented by P. Shawn McCann (Bar Number: 16612) service method: Electronic Service to smccann@themcginnlawfirm.com

Le Mars Insurance Company represented by Brock Hubert (Bar Number: 25775) service method: Electronic Service to bhubert@ekoklaw.com

Le Mars Insurance Company represented by Engles,Albert,M (Bar Number: 11194) service method: Electronic Service to dstoll@ekoklaw.com

Signature: /s/ Michael L. Moran (Bar Number: 24042)