Thomas Fatato Realty Corp. v Certain Underwriters at Lloyd's London
2017 NY Slip Op 31664(U)
August 7, 2017
Supreme Court, Kings County
Docket Number: 504419/12
Judge: Lawrence S. Knipel

At an IAS Term, Part Commercial 4 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 7th day of August, 2017.

PRESENT:

HON. LAWRENCE KNIPEL,
Justice.

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THOMAS FATATO REALTY CORP.,

Plaintiff,

- against -

Index No. 504419/12

CERTAIN UNDERWRITERS AT LLOYD'S LONDON D/B/A LLOYD'S OF LONDON AND METRO INSURANCE SERVICES, INC.,

Defendants.

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The following e-filed papers read herein:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	127-186 190-198
Opposing Affidavits (Affirmations)	
Reply Affidavits (Affirmations)	202-210
Affidavit (Affirmation)	
Memoranda of Law	188 201 199 212

Upon the foregoing papers, in this action by plaintiff Thomas Fatato Realty Corp. (plaintiff) against defendants Certain Underwriters at Lloyd's London d/b/a Lloyd's of London (Underwriters) and Metro Insurance Company (Metro) (collectively, defendants) seeking damages for breach of an insurance contract, a declaratory judgment that defendants

sought by it, and the recovery of its costs and attorney's fees incurred in connection with the prosecution of this action, defendants move, under motion sequence number five, for an order: (1) pursuant to CPLR 3212, granting them summary judgment in the form of a declaration that the applicable period of restoration under the insurance policy at issue is eight months, and that plaintiff has been fully compensated under the insurance policy, and (2) granting Metro summary judgment in its favor. Plaintiff cross-moves, under motion sequence number six, for an order, pursuant to CPLR 3212, granting it summary judgment in its favor.

FACTS AND PROCEDURAL BACKGROUND

On August 18, 2010, an insurance policy (the policy) was issued to plaintiff, as the named insured, by Underwriters, as the insurer, for the policy period from July 21, 2010 to July 21, 2011. The policy had a specific coverage form regarding the loss of business income (CP 00 32 06 07), entitled "Business Income (Without Extra Expense) Coverage Form" (the Business Income Coverage Form). Under section A, of the Business Income Coverage Form, entitled "Coverage," the policy provided that Underwriters would "pay for the actual loss of [b]usiness [i]ncome [that plaintiff] sustain[ed] due to the necessary 'suspension' of 'operations' during the 'period of restoration.'" The suspension of operations was required to be caused by direct physical loss of or damage to a covered property and for which a business income limit of insurance was shown in the Declarations. The Schedule of Locations listed 283-301 4th Avenue, in Brooklyn, New York, (the property), which is a warehouse building owned by plaintiff, as a covered property under the policy. The limit of insurance applicable to that location, as listed in Schedule A of the Supplemental Declarations of the policy, was $450,000.

Section A (1) of the Business Income Coverage Form provided that business income meant "[n]et income ([n]et [p]rofit or [l]oss before income taxes) that would have been earned or incurred" and "[c]ontinuing normal operating expenses incurred." Section F (3) of the Business Income Coverage Form, entitled "Definitions," defined "period of restoration" as "the period of time that [b]egins 72 hours after the time of direct physical loss or damage caused by or resulting from any Covered Cause of Loss at the described premises," and that "[e]nds on the earlier of (1) [t]he date when the property at the described premises should be repaired, rebuilt or replaced with reasonable speed and similar quality; or (2) [t]he date when business is resumed at a new permanent location."

Section C of the Business Income Coverage Form, entitled "Loss Conditions," in subdivision (1), entitled "Appraisal," provided a procedure for determining the amount of lost business income, i.e., the amount of net income and operating expense or the amount of loss. Specifically, this section provided that if plaintiff and Underwriters "disagree[d] on the amount of [the n]et [i]ncome or operating expense or the amount of loss, either [of them] may make [a] written demand for an appraisal of the loss." It further provided that in the event that plaintiff or Underwriters made such a written demand for an appraisal of the loss, plaintiff and Underwriters were then required to each select a competent and impartial appraiser, and the two appraisers would then select an umpire. It set forth that if the appraisers failed to agree, they were required to submit their differences to the umpire, and a decision agreed to by any two of them would be binding. It also set forth that Underwriters "retained [its] right to deny the claim" even if there was an appraisal.

On December 27, 2010, a section of the roof of the building located at the property collapsed from the weight of ice and snow accumulating on it during a severe snowstorm. On December 28, 2010, plaintiff made a claim for insurance coverage, and an investigation into the claim began.

Plaintiff's claim consisted of two parts, namely, a claim for property damage to the building itself and a claim for loss of business income. On December 30, 2010, the New York City Department of Buildings issued an immediate emergency declaration, and many of the tenants of the building at the property vacated it.

On January 6, 2011, Derrick Bartlett (Bartlett), the executive general adjuster for U.S. Adjustment Corp., which is the independent adjuster for Underwriter, requested copies of all lease agreements that plaintiff had with each of its tenants in the building, a copy of building plans and drawings, a copy of the repair estimate for roof-related damages, a copy of a repair estimate for the sprinkler system, bills or invoices for any emergency repairs, and copies of any directives from the New York City Department of Buildings with regard to the repairs to the building. He stated that upon the receipt of these documents, U.S Adjustment Corp. would evaluate and supply such evaluation to Underwriters.

On March 3, 2011, plaintiff, through its public adjuster, Jeffrey Catanzaro (Catanzaro), in an invoice by him annexed to a fax, listed the costs of its architectural and engineering fees, the temporary repairs as required by the New York City Department of Buildings, its building claim, and its rent loss claim. Catanzaro, in this invoice, set forth that plaintiff's rent loss claim was $199,950, and that the total claim was $1,236,169. By a letter to Bartlett dated April 26, 2011, Catanzaro, on behalf of plaintiff, formally rejected an offer made by Bartlett, and demanded an "appraisal of the Coverage A portion of this claim." In that demand, Catanzaro stated that plaintiff's appraiser was Al Casella (Casella) and directed Bartlett to appoint an appraiser.

In his Sixth Report to Underwriters, Bartlett stated that he was unable to reach an amicable conclusion with regard to the building damage settlement with Catanzaro and that, as a result,

Catanzaro demanded an appraisal. Bartlett requested authorization to retain Angelo Mustich (Mustich) as the appraiser for Underwriters, and Underwriters, in response, retained Mustich as its appraiser.

An Agreement for Submission to Appraisers provided that plaintiff selected Casella as its appraiser, and Underwriters selected Mustich as its appraiser. It further provided that these appraisers would first select an umpire and then estimate and appraise the loss to the property and state in writing: (1) the replacement cost of the loss, (2) the actual cash value of the loss, (3) the value of the emergency repairs, and (4) the period of restoration. It set forth that if the two appraisers failed to agree, they would submit their differences to the umpire, and the award of any two of them would determine these matters which were submitted for appraisal.

On July 15, 2011, Casella and Mustich appeared at a site inspection. On July 18, 2011, the appraisers selected Peter MacDonald (MacDonald) as the umpire. Casella and Mustich each signed a Declaration of Appraiser form. MacDonald signed a Qualification of Umpire form. On October 15, 2011, Casella and Mustich appeared at a site inspection with MacDonald.

On October 19, 2011, Catanzaro, on behalf of plaintiff, submitted to Bartlett an updated loss of rents claim under the policy covering January 1, 2011 to October 14, 2011, seeking the recovery of lost rent in the total amount of $213,250. On November 6, 2011, Casella, Mustich, and MacDonald, again, appeared at a site inspection.

On December 19, 2011, the Appraisal Award, which was signed by MacDonald and Mustich, was issued. The Appraisal Award set forth that pursuant to their appointment, as appraisers and umpire in the appraisal of the loss of the building and the period of restoration, they had heard all of the evidence offered by plaintiff and Underwriters, and had rendered the appraisal award. The

Appraisal Award provided that the replacement cost of loss was $624,660, the actual cash value of loss was $499,728, the value of emergency repairs was $87,000, and the period of restoration was six months. Thereafter, plaintiff disputed the Appraisal Award because the period of restoration did not include enough time to obtain plans and permits needed to complete the restoration of the property. Plaintiff, through Catanzaro, requested that the period of restoration be increased to eight months. On May 21, 2012, an Amended Appraisal Award, which was signed by MacDonald and Muslich, was issued, which changed the period of restoration to eight months.

U.S. Adjustment Corp.'s accountant, Mark Perlmutter, of the forensic accounting firm, TD Davidson & Co., using the eight-month period of restoration, as awarded by the umpire in the appraisal process, then calculated the loss of rents as $174,900. Bartlett, in his Seventeenth Report to Underwriters, dated August 1, 2012, therefore, recommended that Underwriters pay for the loss of rents in the amount of $174,900, with $157,410 payable to plaintiff and $17,490 payable to Catanzaro, as plaintiff's public adjuster. On August 28, 2012, Underwriters paid plaintiff $157,410.

On September 13, 2012, following the payment of $157,410 to plaintiff, Catanzaro, on behalf of plaintiff, sent a fax to Bartlett, stating that his calculations of lost rents were higher than those of Bartlett's forensic accounting firm, TD Davidson & Co. Catanzaro, in this fax, calculated the amount that plaintiff was owed for eight months of lost rent as $221,500, thereby requesting an additional payment of $46,600 above the $174,900 paid to him and plaintiff. By a letter dated December 20, 2012, Bartlett informed Catanzaro that his accountant had disagreed with Catanzaro's claim for an additional $46,600, and that no additional payments would be made to plaintiff for its lost business income. On December 24, 2012, plaintiff commenced this action

against defendants by filing a summons with notice. On January 16, 2013, defendants filed a notice of appearance and a demand for the complaint. On March 5, 2013, plaintiff filed its complaint. Plaintiff's complaint contains three causes of action. Plaintiff's first cause of action alleges that it was entitled to full coverage under the policy in the amount of $409,200 for its loss of rents that were directly attributable to the roof collapse, and that defendants only paid it $157,410. It seeks, in its first cause of action, a declaratory judgment that defendants are obligated to pay it $251,790, the difference between the amount claimed and the amount paid. Plaintiff's second cause of action alleges that defendants breached the insurance contract by failing to cover the entirety of its claim. Plaintiff's third cause of action seeks the recovery of the counsel fees which it has incurred by having to retain counsel in order to obtain the entirety of its coverage under the policy. It claims that it was forced to bring this action because of defendants' breach of the insurance contract and their failure to comply with the terms of the policy.

On May 9, 2013, defendants filed and served their answer. Discovery has been completed, including voluminous document production and the taking of depositions. On January 6, 2017, defendants filed their instant motion, and on February 10, 2017, plaintiff filed its instant cross motion.

DISCUSSION

Defendants, in seeking summary judgment dismissing plaintiff's complaint as against Metro, argue that Metro is entitled to summary judgment as a matter of law because it was not a party to any contract with plaintiff and was a mere coverholder. Defendants have submitted the affidavit of Steven R. Gross (Gross), who was Metro's CEO at the relevant time. Gross attests that on January 14, 2010, Metro had entered into a Binding Authority Agreement with Underwriters, which set out

its rights and responsibilities, as a coverholder, with respect to Metro's participation in a commercial property insurance program with Underwriters. Gross explains that as part of the Binding Authority Agreement, Metro was authorized to underwrite certain insurance policies and had the authority to handle claims under $100,000 for Underwriters, but was required to refer any claims that it received over $100,000 directly to Underwriters. Gross sets forth that since plaintiff's claim was for over $100,000, Metro forwarded plaintiff's claim to Underwriters' designated claims broker, and that Metro was not otherwise involved with plaintiff's claim.

In addition, defendants point to the fact that the first page of the policy jacket, which is specifically incorporated into plaintiff's policy on the Schedule of Forms and Endorsements, names Metro as the Correspondent. This first page of the policy jacket sets forth that this Certificate of insurance "is issued in accordance with the limited authorization granted to the Correspondent by . . . Underwriters," and that the insurance "is effected with . . . Underwriters." It specifies that it is Underwriters, which, in consideration of the premium specified therein, binds itself under the policy. The second page of the policy jacket provides, under section 2 of the Certificate Provisions, as follows:

> "Correspondent Not Insurer. The Correspondent is not an Insurer hereunder and neither is nor shall be liable for any loss or claim whatsoever. The Insurer[] hereunder [is Underwriters] . . ."

This policy language is plain and unambiguous. Pursuant to this policy language, Metro's role in issuing the policy was as a correspondent, and it was not an insurer of the risk. Although Metro issued the physical policy, it did so solely on behalf of Underwriters. Metro had no authority to make any decisions whether or how much to pay plaintiff for its claim. Thus, Metro cannot be held liable to plaintiff for breach of contract with respect to the amount paid to it under the policy

(*see Hess v Fid. Nat. Prop. & Cas. Ins. Co.*, 2007 WL 496475, *1 [ND Fla Feb. 12, 2007] [interpreting the identical policy provision and finding no liability on the part of the correspondent]).

Plaintiff has failed to respond to Metro's argument regarding Metro's role solely as a coverholder and correspondent, Metro's lack of authority to make any decisions regarding how much to pay it for its claim, and Metro's lack of any contract with it. Therefore, summary judgment dismissing plaintiff's complaint as against Metro must be granted (*see* CPLR 3212 [b]).

In support of defendants' motion for summary judgment with respect to Underwriters, Underwriters contends that MacDonald's Amended Appraisal Award was proper and binding, that the amount of plaintiff's loss of business income was determined by the period of restoration, and that the period of restoration was established as being eight months in the Amended Appraisal Award. It maintains that it is, therefore, entitled to summary judgment declaring that the period of restoration is eight months and that plaintiff has been fully compensated under the policy.

Plaintiff, in opposition to defendants' motion and in support of its cross motion, argues that its loss of business income claim was never submitted to the appraisal process. Catanzaro asserts that as plaintiff's public adjuster, he submitted two separate insurance claims under the policy. He states that one of these claims was for loss of rents in the amount of $409,200, and the other claim was for property damage in the amount of over one million dollars. He claims that only plaintiff's distinct claim for property damage was submitted to MacDonald, but plaintiff's claim for lost business income was never submitted to MacDonald.

While plaintiff claims that its loss of business income claim was never submitted to the appraisal process, plaintiff demanded an appraisal under Coverage A of the policy. Under section

A (1) of the Business Income Coverage Form of the policy, loss of business income was to be determined by the period of restoration, as defined in section F (3). Section C (1) of the Business Income Coverage Form provided for an appraisal procedure where the plaintiff or Underwriters made a written demand for it. In addition to these policy terms, it has been recognized that determining a period of restoration is within the purview of appraisal (*see Duane Reade, Inc. v St. Paul Fire & Mar. Ins. Co.*, 279 F Supp 2d 235, 241-242 [SD NY 2003], *affd as mod on other grounds* 411 F3d 384 [2d Cir 2005]; *Sr International Bus. Ins. Co., Ltd. v World Trade Ctr. Properties, LLC*, 2007 WL 519245, *1 [SD NY Feb. 16, 2007]).

Plaintiff asserts, however, that section E (2) of the Building and Personal Property Coverage Form provided a similar appraisal provision as section C (1) of the Business Income Coverage Form. It argues that this shows that the Agreement for Submission to Appraisers was only an agreement to submit to the umpire the amount of the damages flowing from the property damage, and not from the loss of rent. Plaintiff points out that section C (1) of the Business Income Coverage referred to a disagreement "in the amount of [n]et income and operating expense or the amount of loss," whereas section E (2) of the Building and Personal Property Coverage Form referred to a disagreement "on the value of the property or the amount of loss." It argues that since the Agreement for Submission to Appraisers contained the same language referring to a disagreement "on the value of the property or the amount of loss," this shows that this agreement only pertained to an appraisal regarding the property damage.

Plaintiff contends that it was under section E (2) of the Building and Personal Property Coverage Form that the appraisal took place, and that it, therefore, determined only its loss from property damage. Plaintiff asserts that the claim for lost business income was never sent to an

umpire. Plaintiff argues that the Agreement for Submission to Appraisers merely contemplated and sought an appraisal as to the value of the property loss with respect to the structure of the building, and that the amount of loss determined by the umpire solely related to the property damage portion of the policy.

This argument must be rejected. While the Agreement for Submission to Appraisers addressed the replacement cost of the loss, the actual cash value of the loss, and the value of the emergency repairs, thereby relating to property damage, it also expressly set forth that one of the issues to be determined was the period of restoration. The period of restoration was not relevant at all to the property damage portion of plaintiff's claim (Bartlett's deposition tr at 87), and the Building and Personal Property Coverage Form, unlike the Business Income Coverage Form, does not contain any section regarding the period of restoration.

Moreover, after plaintiff demanded an appraisal and the parties proceeded under the Agreement for Submission to Appraisers, each party submitted arguments to MacDonald, as the umpire, with respect to the period of restoration. After MacDonald initially concluded that the period of restoration was six months, plaintiff asked the umpire to reconsider his decision on the basis that six months did not provide enough time for it to obtain plans and permits to complete the restoration of the property, thereby acknowledging that this issue was being determined. In response, MacDonald issued the Amended Appraisal Award stating that the period of restoration was eight months. Bartlett testified, at his deposition, that following the Amended Appraisal Award, plaintiff did not raise any dispute regarding the eight-month period of restoration (Bartlett's deposition tr at 285). In fact, Catanzaro, in his September 13, 2012 fax to Bartlett, calculated plaintiff's loss of rents claim, based on an eight-month period of restoration, at $221,500.

Additionally, in a May 10, 2011 email from Catanzaro to Amy Bryan (Bryan) of Bryan Insurance Agency, who was plaintiff's broker, Catanzaro stated that he had discussed the rent loss claim with Bartlett several times, and that he was in the process of verifying coverage when the claim went to appraisal. He then stated, in this email, that "the period of restoration is handled within the appraisal process and once that is determined then the #s fall in line for each tenant," and that the policy covered "the shortest reasonable period of restoration or when the tenant moves back in whichever comes first." This email confirms Catanzaro's understanding that the period of restoration for determining the loss of rents would be determined in the Appraisal Award.

Furthermore, in a July 20, 2011 email, Bryan provided Anthony Quaranta (Quaranta), plaintiff's controller, with an email that Bartlett had sent her in response to the loss of rents coverage claim. In this email from Bartlett, Bartlett stated that in order to calculate a loss of rents claim, they needed to establish a period of restoration, and that "[t]he Period of Restoration for this loss is part of the Appraisal." He further stated that "[u]pon receipt of the Appraisal Award, we will calculate a Loss of Rents Claim based on the Period of Restoration coupled with terms and condition[s] of [the] policy of insurance." Bryan also informed Quaranta, in this email to him, that "[i]n speaking with the company and with [Catanzaro], it [w]as [her] understanding that the company is including this in the Appraisal process, which means that this will be paid out after the Appraisal process has gone through and [has been] decided upon." This email demonstrates that plaintiff was made aware that the loss of rents claims would be based on the period of restoration, which was being submitted for appraisal and was to be determined in the Appraisal Award.

In addition, in a May 22, 2012 email to Peter Creedon and Quaranta, Catanzaro stated that he had been successful in getting the Appraisal Award changed to include an additional two months,

which should produce approximately another $54,000 of lost rental income. This further demonstrates that the Appraisal Award determined the period of restoration with respect to lost business income.

Plaintiff argues that these emails are hearsay, and that they must be disregarded by the court. However, plaintiff produced Catanzaro's emails in response to defendants' notice for discovery and inspection, and Bryan Insurance Agency produced Bryan's email in response to a subpoena by defendants. Thus, plaintiff acknowledged the authenticity of Catanzaro's emails by producing them. Furthermore, Catanzaro does not deny that he sent these emails, and Quaranta does not deny that he received Bryan's email. Defendants have shown that plaintiff was fully aware of the appraisal process and that the dispute as to the period of restoration to be applied in calculating lost business income was to be resolved therein (*see Hemingway v State Farm Fire & Cas. Co.*, 187 AD2d 814, 815 [3d Dept 1992]).

Catanzaro points out that MacDonald is an engineer, and states that, therefore, MacDonald's expertise ran only to property damage, and that MacDonald had no expertise in assessing plaintiff's insurance claim for lost rental income. He argues that this shows that plaintiff's loss of business income claim could not have been submitted to MacDonald. This argument, however, is unavailing since the period of restoration was the amount of time needed to repair the damage to the property, which fell within MacDonald's expertise.

Plaintiff further contends that the Appraisal Award was not binding. Plaintiff's contention is devoid of merit. Section C (1) of the Business Income Coverage Form expressly provided that "[a] decision agreed to by any two [i.e., the decision of the umpire and another appraiser] *will be binding*" (emphasis added).

Plaintiff, however, relies upon the language in section C (1) of the Business Income Coverage Form which provided that "[i]f there is an appraisal, we will still retain our right to deny the claim." Plaintiff argues that since Underwriters specifically retained the right to deny its claim, the determination of the umpire could not be binding. Plaintiff's reliance upon this language is misplaced. Provisions relating to appraisals, similar to the one at issue here, are contained in the standard fire insurance policy in New York (*see* Insurance Law § 3404; CPLR 7601). With respect to such provisions in fire insurance policies, Insurance Law § 3408 provides that "an appraisal shall not determine whether the policy actually provides coverage for any portion of the claimed loss or damage." Similarly, here, this language in section C (1) of the Business Income Coverage Form refers to the denial of the existence of coverage, and not to the valuation of a covered loss. This language merely reflects that "[i]ssues that raise questions as to scope of coverage provided by an insurance policy . . . cannot be determined in an appraisal," and, therefore, if there was no coverage, Underwriters would retain the right to deny the claim (*Taunus Corp. v Allianz Ins. Co.*, 2006 WL 6855161 [Sup Ct, NY County 2006]; *see also Kawa v Nationwide Mut. Fire Ins. Co.*, 174 Misc 2d 407, 408-410 [Sup Ct, Erie County 1997]). Thus, the Amended Appraisal Award is binding.

Consequently, defendants have established, as a matter of law, that the issue of the period of restoration pertaining to plaintiff's loss of business claim was submitted to binding appraisal, and was determined to be eight months. Plaintiff has failed to raise a triable issue of fact in this regard. Therefore, Underwriters is entitled to a declaratory judgment that the applicable period of restoration under the policy is eight months, as determined in the Amended Appraisal Award (*see* CPLR 3001).

Defendants also seek a declaration that plaintiff has been fully compensated under the insurance policy. The appraisers, however, dealt with the business income portion of plaintiff's

claim only from the standpoint of the period of restoration, i.e., the time period upon which the amount of lost business income was to be calculated (Bartlett's deposition tr at 87). The period of restoration determined by the Amended Appraisal Award did not include a monetary calculation of the loss of business income over the eight-month time period. While plaintiff specifically submitted the issue of the period of restoration to the umpire, the umpire never made a determination as to the amount of lost business income, which required the calculation of net income and operating expenses (*id.* at at 69). The net income and operating expenses for this eight-month time period is required to be calculated to determine the amount of the loss of business income.

Instead of being determined by the appraisers and the umpire, the amount of lost business income was based on the forensic accounting report of TD Davidson & Co. (*id.* at 69-70). Bartlett retained forensic accounting firm, TD Davidson & Co., who, with Bartlett, ultimately determined the calculation of the business income loss claim as being in the amount of $174,900 (*id.* at 61-62). As discussed above, Bartlett recommended that Underwriters pay $157,410 to plaintiff and $17,490 to Catanzaro, totaling $174,900. Bartlett explained that the monthly rent and the operating expenses were calculated by the forensic accountant (*id.* at 63-64).

Plaintiff argues that even if the period of restoration was meant to cover the number of months which the loss of rental income would span, Underwriting, through Bartlett and its forensic accountant, issued its own monetary calculation of the ensuing damages. Plaintiff contends that this was in breach of section C (1) of the Business Income Coverage section of the policy, which required any disputes as to business income to be submitted to the appraisers and ultimately determined by an impartial umpire, and that this entitles it to summary judgment on its breach of contract claim.

This contention is devoid of merit. Section C (1) of the Business Income Coverage Form of the policy provided that if plaintiff disagreed with Underwriters on the amount of net income or operating expense or the amount of loss, it could make a written demand for an appraisal of the loss, and only in the event that it made such a written demand for an appraisal was the issue required to be submitted to appraisers, who would then select an umpire. "[T]he unambiguous provisions of an insurance policy, as with any written contract, must be afforded their plain and ordinary meaning, and . . . the interpretation of such provisions is a question of law for the court" (*Broad St., LLC v Gulf Ins. Co.*, 37 AD3d 126, 130-131 [1st Dept 2006]). This unambiguous provision of the policy did not mandate that Underwriters refer the issue of net income and operating expenses to the appraisers, but permitted either party to demand an appraisal as to such issue.

Either party had the right to require an appraisal since there was a disagreement as to the amount of loss (*see Chainless Cycle Mfg. Co. v Security Ins. Co., of New Haven*, 169 NY 304, 310 [1901]). A party may waive that right where it fails to make any demand in this regard (*id.*). Plaintiff concedes that it never made a demand to submit the issue of the amount of net income or operating expense to the appraisers or the umpire. In addition, Bartlett testified that no demand for an appraisal over the amount of net income and operating expenses and the amount of loss with respect to business income was ever requested by plaintiff (Bartlett's deposition tr at 284). Thus, plaintiff's claim that Underwriters breached the insurance contract with it by failing to demand that the calculation of net income and operating expenses be submitted to the appraisal process is rejected. Consequently, plaintiff's cross motion for summary judgment with respect to its breach of contract claim must be denied.

Where the disputed amount of lost rent was not the subject of an appraisal award, the court may make such determination (*see generally 30-40 E. Main St. Bayshore, Inc. v Republic Franklin Ins. Co.*, 74 AD3d 1330, 1332 [2d Dept 2010]). Here, it is undisputed that MacDonald never rendered a decision regarding the amount of net income and operating expenses, and that Bartlett's conclusion that the amount due to plaintiff for eight months of lost rental income was $174,500 was based on the forensic accountant hired by Underwriters. Neither plaintiff nor Underwriters seek to submit this issue to the appraisal process at this juncture. Thus, this issue must be determined by the court.

Plaintiff claims that its gross loss of business income claim totals $409,200, which it claims to be the total amount of lost rents resulting from the roof collapse. Plaintiff acknowledges that it has received a payment from Underwriters in the amount of $157,410, and claims that its total claim is, therefore, $251,790. Quaranta states that the breakdown of this $409,200 lost business income calculation is as follows: lost rent from tenant Cheng Dong Trading, Inc. in the amount of $7,500, lost rent from tenant A to Z Mannequins, Inc. in the amount of $39,850, lost rent from tenant Bay Park Medical Management in the amount of $44,000, lost rent from tenant Projeki records in the amount of $35,200, lost rent from Parking Tenants in the amount of $197,850, and $84,800 from the vacant premises at the time of the loss. He has annexed documents showing this loss of rental income, including invoices (plaintiff's exhibit 5, doc #198). However, these documents reflect that the rents charged are not limited to an eight-month period, but span from January 2011 to as late as April 2012 and include late fees. Therefore, this calculation of lost business income cannot be correct.

Underwriting calculated the amount for lost business income as $174,900 based on the eight-month period of restoration, and paid $17,490 of this amount to Catanzaro as his fee. Quaranta acknowledged Catanzaro's fee of ten percent during his deposition (Quaranta's deposition tr at 58). Catanzaro, in his September 13, 2012 fax to Bartlett, calculated plaintiff's loss of rents claim, based on an eight-month period, at $221,500. Thus, subtracting the $174,900 paid to plaintiff and Catanzaro from Catanzaro's $221,500 calculation equals a difference of $46,600, which is in dispute. Catanzaro, in his September 13, 2012 fax to Bartlett, using the eight-month period of restoration, stated that his calculation of $221,500, which was higher than Bartlett's accountant's calculation, was based on "the rental income" provided by plaintiff. He did not state that he considered operating expenses in his calculation of lost business income. Therefore, plaintiff has not shown that this calculation by Catanzaro was correct.

Section C (3) of the Business Income Coverage Form provides that the amount of business income loss will be determined based on "[t]he [n]et [i]ncome of the business before the direct physical loss or damage occurred, "the likely [n]et [i]ncome of the business if no physical loss or damage had occurred," "the operating expenses, including payroll expenses, necessary to resume 'operations' with the same quality of service that existed just before the direct physical loss or damage," and "[o]ther relevant sources of information, including . . . financial records and accounting procedures; bills, invoices and other vouchers; and deeds, liens or contracts." Underwriters has not shown how its accountant calculated the amount of business income loss. No affidavit from its accountant or anyone else explaining this calculation has been submitted to the court. Thus, it cannot be ascertained whether the amount calculated by Underwriters' accountant is correct. Therefore, Underwriters has not made a prima facie showing of its entitlement to

summary judgment declaring that plaintiff has been fully compensated under the insurance policy. Consequently, Underwriters' motion, insofar as it seeks a declaratory judgment to this effect, must be denied.

Since there are issues of fact as to whether plaintiff has received the full amount of business income loss to which it is entitled under the policy, plaintiff's cross motion insofar as it seeks summary judgment with respect to its first and second causes of action must be denied. Underwriters, in its reply memorandum of law (doc #201), requests that to the extent that there is a dispute over the calculation of damages stemming from the established eight-month period of restoration, that the calculation, based on an eight-month period of restoration, be determined at a separate hearing on damages. Since there is no remaining issue except the amount of business loss damages incurred by plaintiff which must be calculated based on the net income and operating expenses during the eight-month period of restoration, an evidentiary hearing must be held to assess the amount of these damages and whether any further amount above the amount already paid to plaintiff and Catanzaro is owed by Underwriters to plaintiff.

Plaintiff also contends that it is entitled to recovery of its attorney's fees because Underwriters did not pay it the full amount of $409,200 on its business income claim, and that this constituted a bad faith denial of such claim. Specifically, it asserts that Underwriters breached the insurance policy because it did not submit the business income claim to the appraiser and umpire, and then made its own determination as to the amount of lost income and did not cover the entire amount of damages claimed by it.

It is well settled that an award of costs and attorney's fees "may not be had in an affirmative action brought by an [insured] to settle its rights" (*Mighty Midgets v Centennial Ins. Co.*, 47 NY2d

12, 21 [1979]). While plaintiff asserts that attorney's fees may be awarded to it on the basis that Underwriters acted in bad faith, an insurer is not liable for bad faith when it makes an arguable case for its coverage position (*see Gordon v Nationwide Mut. Ins. Co.*, 30 NY2d 427, 431 [1972], *rearg denied* 31 NY2d 709 [1972], *cert denied* 410 US 931 [1973]). There is no showing that the determination of the amount of lost rents calculated by Underwriters' accountant was made in bad faith. Furthermore, a plaintiff is not entitled to the recovery of its attorney's fees and costs where it does not allege that it suffered any damages as a consequence of the insurer's alleged bad faith refusal to pay its claims (*see Orman v Geico Gen. Ins. Co.*, 37 Misc 3d 1227[A], 2012 NY Slip Op 52205[U], *10 [Sup Ct, Kings County 2012]). Plaintiff's complaint does not allege a breach of the implied covenant of good faith and fair dealing by Underwriters nor does it allege that it suffered any consequential damages based upon such a breach (*compare Gutierrez v Government Empls. Ins. Co.*, 136 AD3d 975, 977 [2d Dept 2016]).

Thus, plaintiff is not entitled to the recovery of its attorney's fees. Although defendants, in their motion for summary judgment, have not specifically moved for summary judgment dismissing plaintiff's third cause of action seeking the recovery of attorney's fees, costs, and expenses incurred by it in connection with the prosecution of this action, upon a search of the record, summary judgment dismissing plaintiff's third cause of action must be granted (*see* CPLR 3212 [b]).

CONCLUSION

Accordingly, defendants' motion is granted insofar as it seeks summary judgment: (1) declaring that the applicable period of restoration under the policy is eight months, and (2) dismissing plaintiff's complaint as against Metro. Upon a search of the record, summary judgment dismissing plaintiff's third cause of action is also granted. Defendants' motion is denied insofar as

it seeks summary judgment declaring that plaintiff has been fully compensated under the policy. Plaintiff's cross motion for an order granting it summary judgment in its favor is denied. An evidentiary hearing shall be scheduled and held to assess the actual loss of business income that plaintiff sustained, which must be calculated based on the net income and operating expenses during the eight-month period of restoration, and to determine whether any further amount above the amount already paid to plaintiff and Catanzaro is owed by Underwriters to plaintiff.

This constitutes the decision and order of the court.

ENTER,

J. S. C.

HON. LAWRENCE KNIPEL