IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MARY LOU DOHERTY, et al.	:	CIVIL ACTION
	:	
v.	:	
	:	
NATIONWIDE MUTUAL INSURANCE COMPANY	:	NO. 05-6222

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Bartle, C.J. August 23, 2006

Plaintiffs Mary Lou Doherty and James Doherty, individually and as trustees for John H. Doherty and James Moore Doherty, filed this breach of contract and bad faith action against defendant Nationwide Mutual Insurance Company ("Nationwide"). Plaintiffs claim that they are owed $136,984.62 in "extra expenses" and $20,000 in "additional rent" under a Business Provider Insurance Policy issued by Nationwide. We have subject matter jurisdiction based on diversity of citizenship. See 28 U.S.C. § 1332. Pursuant to agreement of the parties, this court held a bench trial on plaintiffs' contract claim for "extra expenses" and "additional rent" and now makes the following findings of fact and conclusions of law.[1]

Plaintiffs own a multiple-unit apartment building located at 256 West Montgomery Avenue in Haverford, Pennsylvania. The three-story building in Lower Merion Township consists of

1. The court did not try plaintiffs' bad faith claim, which remains pending.

thirteen separate one- and two-bedroom apartments. Six apartments are located on each of the top two floors of the building, while the ground floor consists of just one apartment in addition to garage parking, a foyer, and certain other building facilities. There is no dispute that the property was insured by Nationwide under the Business Provider Insurance Policy (the "Policy") in question.

In the early evening of Sunday, August 31, 2003, a fire started in Apartment #11 on the top floor of the building when the tenants failed to turn off the kitchen stove before leaving the apartment. The fire quickly spread throughout the building and caused severe structural and superficial damage before it was extinguished by the Lower Merion Fire Department. In their efforts to put out the fire and ensure the building had been evacuated, the Fire Department broke down the doors to each apartment and broke many of the building's windows. In addition, the building's ground floor suffered water damage and the building's roof above Apartment #11 was left charred and with holes.

On the day after the fire, September 1, 2003, plaintiffs began clean-up and repair efforts on the building. They engaged John Rush ("Rush") of John Rush Home Improvements to assist them with this effort. He is a general contractor they had frequently employed over the years to make certain improvements and repairs at the apartment building. At that time and in the weeks that followed, plaintiffs worked on their own

and with Rush to pump out the flood water in the building's ground floor, remove smoke-damaged personal items abandoned by tenants, repair the holes in the roof, and return the building to a generally safe and livable condition. While seven of the building's thirteen apartments were immediately vacated in the fire's aftermath, six tenants remained in the building and continued to pay plaintiffs rent throughout the period of restoration. The building did not reach full-occupancy again until approximately one year after the fire.

In early September 2003, plaintiffs notified Nationwide of the loss. After several months, while repairs were ongoing, plaintiffs and Nationwide continued to dispute the proper amount of the claim for the physical damage to the building. Under Section E.2 of the Policy, either party could make a "written demand for an appraisal of the loss" in the event the parties disagreed on the loss amount. After Nationwide made such a demand, plaintiffs and Nationwide each hired and paid their own professional appraisers to submit appraisals of the loss. Pursuant to the Policy, the parties' appraisers then selected an Umpire, Joel B. Kipphut, to resolve any differences between the two appraisals. After meeting with the parties' appraisers and reviewing the submissions before him, Umpire Kipphut determined that the value of the loss with respect to the damage to the building was $456,188.07. Because there was a $1,000 deductible under the Policy, Nationwide paid $455,188.07 to plaintiffs. The propriety of this award is not disputed.

In their claims at trial, plaintiffs first seek approximately $136,984.62 in "extra expenses" under the Policy.[2] Section A.5.g provides that Nationwide will pay plaintiffs for the "necessary Extra Expense [that plaintiffs] incur during the 'period of restoration' that [they] would not have incurred if there had been no direct physical loss or damage to property at the described premises." The Policy further states that "extra expense" means expenses incurred "to avoid or minimize the suspension of business and to continue 'operations.'" Here, the building's "operations" in question, which are defined as "the business activities occurring at the described premises," consist of operating the building as a thirteen-unit residential apartment building. Unlike, for example, a building that is used as a factory for making products that are then sold for profit, the apartment building is itself the revenue-generating product. Thus, the ability of plaintiffs to keep the building inhabited while permanent repairs could be completed is a basic necessity in order to "continue operations."

Plaintiff Mary Lou Doherty ("Mrs. Doherty") testified at trial that the $136,984.62 in alleged "extra expenses" were incurred for work done mostly in the months immediately following

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2. Plaintiffs' pre-trial memorandum originally specified a claim for "extra expenses" in the amount of $140,371.62. That total, however, relied on a duplicate invoice in the amount of $1,540, a claim for building permits in the amount of $1,850 that has since been withdrawn, and a typographic error understating one of the Rush invoices by $3. Thus, plaintiffs' actual "extra expense" claim is for $136,984.62.

the fire to keep the building habitable and safe before permanent repairs could be made. The bulk of the "extra expense" claim is described in seven separate "invoices"[3] totaling $131,303.77 of services, all dated October 29, 2003, from John Rush Home Improvements. In brief summary, the invoices detail charges for dumpsters, interior and exterior debris removal, interior roof supports, exterior building bracing, temporary replacement locks for the building as well as each apartment, and the removal of hazardous materials. We find that this work meets the definition of "extra expense" under the Policy in that it was necessary to continue operations as a residential apartment building during the period of restoration.

Rush testified that to the best of his knowledge all of the work contained in the invoices was performed as specified, with one notable exception: an invoice in the amount of $70,780.52 describing certain temporary exterior and interior building supports. Neither Rush nor Mrs. Doherty could recall what percentage of the work detailed on that invoice was actually performed. As a result, we are left with no reliable basis on which to determine what portion of the work described in the $70,780.52 invoice was actually performed. Thus, while we find the testimony of Mrs. Doherty and Rush to be credible, plaintiffs

3. The parties both referred to the Rush documents as "invoices," though they appear to have functioned largely as estimates or proposals.

have only established that $60,523.25 of work on the Rush invoices is compensable as part of their "extra expense" claim.

The remainder of plaintiffs' "extra expense" claim is comprised of smaller items totaling $5,680.85. Mrs. Doherty testified that these various expenditures were necessary to keep the building in suitable condition for the remaining tenants during the duration of the permanent repairs to the building. In brief summary, these expenditures were for sewer services for the building, outdoor lighting, and landscaping to restore the grounds and shrubbery that had been damaged by the fire and debris thrown from the building. We find Mrs. Doherty's testimony about these additional expenditures to be credible and find that they occurred as specified on the submitted paperwork. We further find that these expenditures "avoid[ed] or minimize[d] the suspension of business" operations as a residential apartment building during the period of restoration and thus qualify as "extra expenses" under the Policy.

Adding these $5,680.85 of costs to the $60,523.25 explained above, we find and conclude that plaintiffs have proven $66,204.10 in "extra expenses" as defined under the Policy.

Nationwide argues that plaintiffs' "extra expense" claim covers either (1) items that were included in the Umpire's award of $455,188.07, or (2) expenses that plaintiffs would have incurred regardless of the fire. We disagree. First, Umpire Kipphut, called to testify by Nationwide, testified on cross-examination that none of the items included in plaintiffs' "extra

expense" claim were covered by the award he approved.[4] As a result, the "extra expense" claim submitted by plaintiffs is clearly outside the contemplation of the award by the Umpire.

Second, we reject Nationwide's contention that plaintiffs' claimed "extra expenses" would have been incurred regardless of the fire. Mrs. Doherty and Rush both testified that the work done on the apartment building, as evidenced by the submitted invoices and receipts, was a direct result of the fire and was necessary to keep the building in operating condition for the tenants who remained. Keeping six apartments tenant-inhabited throughout the permanent repairs to the building was a crucial component of resuming partial operations and ultimately reducing plaintiffs' lost business income. As noted above, we found plaintiffs' evidence convincing and credible, and Nationwide presented nothing that undermines our conclusion. Judgment shall be entered in favor of plaintiffs on the "extra expense" claim in the total amount of $66,204.10.

In addition to their "extra expense" claim, plaintiffs have submitted a claim for $20,000 in lost business income as "additional rent." This sum is based on plaintiffs' $1,000 deductible under the Policy, in addition to their costs from the appraisal process, that is, $17,500 paid to their appraiser and $1,500 paid to Umpire Kipphut. Nationwide does not dispute the

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4. While Umpire Kipphut did explain that the $1,850 of Lower Merion Township building permits were included in the award, plaintiffs have since withdrawn that portion of their "extra expense" claim.

amount of this claim, instead arguing that the funds demanded by plaintiffs are not covered by the Policy. Plaintiffs submit that they are owed this $20,000 in "additional rent" under the Policy's provision providing payment for their "Business Income" loses. Section A.5.f of the Policy states that Nationwide will pay plaintiffs "for the actual loss of Business Income" sustained "due to the necessary suspension of [plaintiffs'] 'operations' during the 'period of restoration.'" Business Income is further defined to mean the "Net Income (Net Profit or Loss before income taxes) that would have been earned or incurred." There is no dispute that the collection of rent from tenants is how plaintiffs derive income from the operation of the apartment building.

Plaintiffs further rely on the lease signed by the tenants of Apartment #11, where the fire originated. Section 7(c) of the lease states that tenants would owe as "added rent" any amount "resulting from Tenants' own negligence." Plaintiffs and Nationwide maintain that the fire resulted from the negligence of Apartment #11's tenants, who are not parties to this action. Plaintiffs contend, however, that because they have not collected this "added rent" from the tenants, Nationwide must step in and pay the amount as lost business income. We disagree.

It is a basic rule of contract interpretation that we must follow what the parties have "clearly expressed" in the plain language of a contract. PBS Coals, Inc. v. Barnham Coal Co., 558 A.2d 562, 564 (Pa. Super. Ct. 1989). A contract must be

construed as a whole and, if possible, to give effect to all of its terms. Second Federal Sav. and Loan Ass'n. v. Brennan, 598 A.2d 997, 1000 (Pa. Super. Ct. 1991).

Turning to the Policy, we find explicit prohibitions against the items plaintiffs claim as "additional rent." Section E.2 clearly states that in the event the parties dispute the amount of plaintiffs' claim, each party must "pay its chosen appraiser" and "bear the other expenses of the appraisal and umpire equally." The Policy further states in section D.1 that Nationwide will only pay "the amount of loss or damage in excess of the Deductible" of $1,000. In spite of this clear contractual language, plaintiffs' "additional rent" claim specifically seeks to recover the sums paid to plaintiffs' appraiser, Umpire Kipphut, and the Policy's deductible. Whatever cost-shifting plaintiffs may have elected to include in their lease with the tenants of Apartment #11, such language cannot vitiate the clear terms of the Policy. Accordingly, we find as a matter of law that the plaintiffs' claim for "additional rent" in the form of $20,000 of lost business income is not reimbursable.

Finally, under Pennsylvania law, plaintiffs are entitled to pre-judgment interest on their "extra expense" claim of $66,204.10 in the amount of 6% simple interest per annum. See Pa. Cons. Stat. Ann. § 202. The interest is calculated from "the time the money becomes due or payable" until the date of the judgment. See, e.g., American Enka Co. v. Wicaco Mach. Corp., 686 F.2d 1050, 1056 (3d Cir. 1982); Alberici v. Safeguard Mut.

Ins. Co., 664 A.2d 110 (Pa. Super. Ct. 1995). Here, we find the date that plaintiffs' "extra expense" claim became "due or payable" was the date Mrs. Doherty first notified Nationwide that plaintiffs sought payment from Nationwide for these expenditures. The evidence introduced at trial shows this first occurred in a letter authored by Mrs. Doherty to Nationwide that was dated August 22, 2005. From that date until the date this judgment is entered, the interest due is $3,972.25.

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JUDGMENT

AND NOW, this 23rd day of August, 2006, based on the accompanying Findings of Fact and Conclusions of Law, judgment is entered in favor of plaintiffs Mary Lou Doherty and James Doherty, individually and as trustees for John H. Doherty and James Moore Doherty, and against defendant Nationwide Mutual Insurance Company, on plaintiffs' contract claim in the amount of $66,204.10 plus pre-judgment interest in the amount of $3,972.25, for a total of $70,176.35.

BY THE COURT:

/s/ Harvey Bartle III
C.J.