

12-Person Jury

Return Date: No return date scheduled
Hearing Date: 5/17/2021 9:30 AM - 9:30 AM
Courtroom Number: 2502
Location: District 1 Court
Cook County, IL

FILED
1/15/2021 4:26 PM
IRIS Y. MARTINEZ
CIRCUIT CLERK
COOK COUNTY, IL
2021CH00228

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

DANSHIR, LLC and DANSHIR)
PROPERTY MANAGEMENT,)
LLC, individually, and on behalf of all others)
similarly situated,)
)
Plaintiffs,)
)
v.)
)
GREATER NEW YORK MUTUAL)
INSURANCE COMPANY,)
)
Defendant.)

11858927

Case No.:

DEMAND FOR JURY TRIAL

CLASS ACTION COMPLAINT FOR DAMAGES AND DECLARATORY RELIEF

COMES NOW Plaintiffs, Danshir, LLC and Danshir Property Management, LLC (“Danshir” or “Plaintiffs”), individually and on behalf of others similarly situated, and for its Complaint against Defendant Greater New York Mutual Insurance Company (“GNY” or “Defendant”), state and allege the following:

PARTIES AND RESIDENCY

1. Plaintiffs own a property at 1052 West Thorndale Avenue, Chicago, Illinois, located in Cook County, Illinois.
2. GNY is organized under the laws of the State of New York and is headquartered in New York, New York.
3. GNY does business in Cook County, Illinois.

FACTUAL BACKGROUND

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4. Plaintiffs contracted with GNY for an insurance policy providing for coverage for certain losses to a structure owned by Plaintiffs located at 1052 West Thorndale Avenue, Chicago, Illinois (“the Property”).

5. At all times relevant to this action, the Property was insured by GNY Policy No. 1112M29014 (“the Policy”). A copy of the Policy is attached as Exhibit 1. The Policy was in effect from July 5, 2018 to July 5, 2019. Plaintiffs paid GNY premiums in exchange for insurance coverage. The required premiums were paid at all times relevant to this pleading.

6. GNY sells insurance covering properties in Illinois, including properties in Cook County, Illinois, and properties in the States of Maine, Maryland, Ohio, Virginia and Wisconsin.

7. This lawsuit does not concern property insurance coverage under GNY’s policies of insurance for personal property, such as furniture and clothes. This lawsuit only concerns property coverage for dwellings, homes, buildings and other structures, *i.e.*, structural claims.

8. On or about January 30, 2019, the Property suffered damage covered by the Policy. The damage to the Property requires replacement and/or repair.

9. Plaintiffs immediately submitted a claim to GNY, and GNY, through their employees or agents, determined the loss to the Property was covered by the terms of the Policy.

10. GNY calculated its actual cash value (“ACV”) payment obligations to Plaintiffs by first estimating the cost to repair or replace the damage with new materials (replacement cost value, or “RCV”), and then GNY subtracted the estimated depreciation. This is the methodology used by GNY to calculate its ACV payment obligations to its policyholders, and is referred to as the “replacement cost less depreciation” methodology.

11. GNY did not use any other methodology to calculate its ACV obligation to the Plaintiffs.

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12. More specifically, GNY sent an adjuster to inspect the Property and estimate the ACV.

13. GNY's adjuster used commercially-available computer software program to estimate RCV, depreciation, and ACV. The software used to calculate the payment to the Plaintiffs is called Xactimate®.

14. As set forth in a written Xactimate® estimate provided to Plaintiffs and dated April 29, 2019, GNY's adjuster determined that Plaintiffs have suffered a covered loss in the amount of \$259,081.02 (the estimated RCV) to the Property. The estimate included the cost of materials and labor required to complete the repairs.

15. In calculating its ACV payment obligations to Plaintiffs, GNY subtracted from the RCV estimate \$44,200.41 for estimated depreciation. This resulted in an ACV of \$214,880.61. Plaintiffs were underpaid on its ACV claim as more fully described below.

16. When calculating Plaintiffs' ACV benefits, GNY withheld costs for both the materials and labor required to repair or replace buildings and structures as depreciation, even though labor does not depreciate in value over time. GNY withheld labor costs throughout its ACV calculations as depreciation.

17. Like all property insurance claims estimating software, the specific commercial claims estimating software used by GNY allows for the depreciation of materials only or the depreciation of both material and labor in its depreciation option setting preferences.

18. Xactimate®'s option to withhold or not withhold labor as depreciation results in a tremendous difference between the amount a property insurer will pay for the ACV of identical claims. Assuming hypothetically, a simple property claim in East St. Louis, Illinois where a policyholder's laminate wood floor, totaling 1500 square feet, was destroyed in December 2020.

The property adjuster determines that the laminate floor had depreciated by one-third of its useful life at the time of loss.

19. If the insurance company adjusts the claim under the traditional, “materials-only” approach using Xactimate® software (and using Xactimate®’s December 2020 price list for East St. Louis, Illinois), the flooring would be depreciated by \$1,485.00, and the company would issue an ACV payment for \$8,862.00, as reflected by the Xactimate® screen shot below:

Dwelling - Raw Sewage Example						
DESCRIPTION	QUANTITY	UNIT PRICE	TAX	RCV	DEPREC.	ACV
1a. Remove Snaplock Laminate - simulated wood flooring	1,500.00 SF	1.30	0.00	1,950.00	<0.00>	1,950.00
1b. Replace Snaplock Laminate - simulated wood flooring	1,500.00 SF	5.40	297.00	8,397.00	<1,485.00>	6,912.00
Totals: Dwelling - Raw Sewage Example			297.00	10,347.00	1,485.00	8,862.00

20. However, if the same insurance company, using the identical measurements and condition conclusions, toggles on the “depreciate removal” and “depreciate non-material” option settings within Xactimate®’s software (which now withholds portions of the labor necessary to both remove and then reinstall replacement flooring), the flooring is now depreciated by \$3,316.50, resulting in an ACV payment for only \$7,030.50, as reflected by the Xactimate® screen shot below:

Dwelling - Raw Sewage Example						
DESCRIPTION	QUANTITY	UNIT PRICE	TAX	RCV	DEPREC.	ACV
1. R&R Snaplock Laminate - simulated wood flooring	1,500.00 SF	6.70	297.00	10,347.00	<3,316.50>	7,030.50
Totals: Dwelling - Raw Sewage Example			297.00	10,347.00	3,316.50	7,030.50

21. In this pleading, whenever reference is made to withholding “labor” as depreciation, “labor” means intangible non-materials, specifically including both the labor costs and the laborers’ equipment costs and contractors/laborers’ overhead and profit necessary to

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restore property to its condition *status quo ante*, as well as removal costs to remove damaged property, under commercial claims estimating software.

22. The Policy, and the other property forms at issue in this pleading, do not permit the withholding of labor as depreciation. Certain policies of insurance expressly allow for the depreciation of “labor.” This type of form or endorsement is referred to as a “labor depreciation permissive form.”

23. The Policy does not contain a labor depreciation permissive form.

24. GNY’s withholding of labor costs as depreciation, under a policy of insurance that does not allow the same, resulted in Plaintiffs receiving payment for their loss in an amount less than it was entitled to receive. GNY breached its obligations under the Policy by improperly withholding the cost of labor as depreciation.

25. To determine the precise amount of labor withheld, it is necessary to have access to the commercial property estimating program at issue (Xactimate®), as well as the electronic file associated with the estimate.

26. While a property insurer may lawfully depreciate material costs when calculating the amount of an ACV payment owed to an insured, it may not lawfully withhold repair labor as depreciation under the policy forms at issue when the carrier chooses to use a replacement cost less depreciation methodology.

27. Defendant breached the policy by failing to pay the full cost of the labor necessary to return the Property to the *status quo ante*.

28. Plaintiffs dispute whether portions of the labor, as determined by GNY itself, may be withheld by GNY as “depreciation” from GNY’s ACV payment under the terms and conditions of the Policy.

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29. GNY materially breached its duty to indemnify Plaintiffs by withholding labor costs from its ACV payment as depreciation, thereby paying less than Plaintiffs were entitled to receive under the terms of the Policy, including but not limited to depriving Plaintiffs of the time use of money resulting from the time periods of labor withholdings in the form of prejudgment interest.

CLASS ACTION ALLEGATIONS

30. Pursuant to Illinois Code of Civil Procedure 5/2-802(a), Plaintiffs bring this lawsuit as a class action on behalf of themselves and on behalf of others similarly situated. This action satisfies the requirements of numerosity, commonality, adequacy of representation and predominance. Only to the extent it is a requirement under applicable law, the proposed class satisfies the elements of ascertainability and typicality.

31. The proposed class that Plaintiffs seek to represent is tentatively defined as follows:

All GNY policyholders (or their lawful assignees) who made: (1) a structural damage claim for property located in Maine, Maryland, Ohio, Virginia and Wisconsin; and (2) for which GNY accepted coverage and then chose to calculate actual cash value exclusively pursuant to the replacement cost less depreciation methodology and not any other methodology, such as fair market value; and, (3) which resulted in an actual cash value payment during the class period from which non-material depreciation was withheld from the policyholder; or which should have resulted in an actual cash value payment but for the withholding of non-material depreciation causing the loss to drop below the applicable deductible, for the maximum limitations period as may be allowed by law and arguments of counsel.

In this definition, “non-material depreciation” means application of either the “depreciate removal,” “depreciate non-material” and/or “depreciate O&P” option settings within Xactimate® software or similar depreciation option settings in competing commercial software programs.

The class excludes any claims for which the applicable limits of insurance was exhausted by the initial actual cash value payment.

The class also excludes any claims arising under labor depreciation permissive policy forms, *i.e.*, those forms and endorsements expressly permitting the

“depreciation” of “labor” within the text of the policy form, unless the use of those forms are not permitted.

32. Plaintiffs reserve the right to add administrative subclasses, or to amend the definition of the proposed class, during the lawsuit proceedings.

33. The members of the proposed class are so numerous that joinder of all members is impracticable. Plaintiffs reasonably believe that hundreds of persons and entities have been damaged by GNY’s actions. The names and addresses of the members of the proposed class are readily identifiable through records available to GNY.

34. Most members of the proposed class have suffered damages in an amount such that it would make filing separate lawsuits by individual members economically infeasible.

35. GNY has routinely withheld labor costs as described herein in its adjustment of property damage claims under its policies of insurance. It is reasonable to expect that GNY will continue to withhold labor to reduce the amount it pays to its insureds under these policies absent this lawsuit.

36. Common questions of law and fact exist as to all members of the proposed class and predominate over any questions affecting only individual members. The questions of law and fact common to the proposed class include, but are not limited to whether GNY’s policy forms permit or prohibit the withholding of labor in the calculation of ACV payments under the replacement cost less depreciation methodology and if it is unclear, whether GNY’s policy language is ambiguous.

37. Only to the extent required by law, GNY’s claim is typical of the claims of the proposed class members because Plaintiffs’ claim arose from the same practice that give rise to the claims of the members of the proposed class and is based on the same legal theories. Plaintiffs are not different in any relevant matter from members of the proposed class.

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38. Plaintiffs and their counsel will fairly and adequately protect the interests of the members of the proposed class. Plaintiffs' interests do not conflict with the interests of the proposed class they seek to represent. Plaintiffs have retained lawyers who are competent and experienced in class action and insurance litigation. Plaintiffs and Plaintiffs' counsel have the resources to litigate this class action, and Plaintiffs and counsel are aware of their responsibilities to the putative members of the class and will discharge those duties. Plaintiffs reserve the right to join other unnamed class members into this lawsuit.

39. A class action is superior to all individual lawsuits for this controversy. Joinder of all proposed members of the proposed class in one action is impracticable if not impossible and prosecuting hundreds or thousands of individual actions is not feasible. The size of the individual claims is likely not large enough to justify filing a separate action for each claim. For many, if not most, members of the proposed class, a class action is the only procedural mechanism that will allow recovery. Even if members of the proposed class had the resources to pursue individual litigation, that method would be unduly burdensome to the courts. Individual litigation could also result in inconsistent adjudications.

40. In contrast, a class action is superior in that it will benefit the court and litigating parties through efficiency, economy of scale and unitary adjudication resulting from supervision of the litigation by a single court.

41. Questions of law and fact, particularly the propriety of withholding labor from ACV payments under a replacement cost less depreciation methodology, predominate over questions affecting only individual members.

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42. GNY has acted or refused to act on grounds that apply generally to the class, so final injunctive relief or corresponding declaratory relief is appropriate with respect to the class as a whole.

43. Plaintiffs may seek, in the alternative, certification of an issues class or classes.

COUNT I - BREACH OF CONTRACT

44. Plaintiffs reallege the foregoing paragraphs as if incorporated into this Count.

45. GNY entered into policies of insurance with Plaintiffs and members of the proposed class. These insurance policies govern the relationship between GNY and Plaintiffs, and members of the proposed class, as well as the manner in which claims for covered losses are handled.

46. These policies of insurance are binding contracts under Maine, Maryland, Ohio, Virginia and Wisconsin, supported by valid consideration in the form of premium payments in exchange for insurance coverage.

47. GNY drafted the insurance policies at issue, which are essentially identical as relevant to this litigation when GNY is calculating ACV under a replacement cost less depreciation methodology for claims GNY itself has determined are covered.

48. In order to receive or be eligible to receive ACV claim payments in the first instance, Plaintiffs and the putative class members complied with all material provisions and performed all of their respective duties with regard to their insurance policy, as determined by GNY itself.

49. GNY breached its respective contractual duties to pay Plaintiffs and members of the proposed class the ACV of their claims by unlawfully withholding labor costs.

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50. GNY's actions in breaching its contractual obligations to Plaintiffs and members of the proposed class benefitted and continue to benefit GNY. GNY's actions damaged and continue to damage Plaintiffs and members of the proposed class.

51. GNY's actions in breaching its contractual obligations caused damages to Plaintiffs and members of the proposed class.

52. Plaintiffs and members of the proposed class are entitled to recover damages sufficient to make them whole for all amounts unlawfully withheld from their ACV payments, including prejudgment interest as may be allowed by law.

53. Plaintiffs and other putative class members seek any equitable relief, as they may be permitted by applicable law, to remedy the ongoing breaches of contract.

COUNT II - DECLARATORY JUDGMENT AND RELIEF

54. Plaintiffs reallege the foregoing paragraphs as if set forth in full here.

55. This Court is empowered by Illinois law to declare the rights and legal relations of parties regardless of whether further relief is or could be claimed.

56. A party may seek to have insurance contracts, before or after a breach, construed to obtain a declaration of rights, status, and other legal relations thereunder adjudicated.

57. Plaintiffs and members of the proposed class have all complied with all relevant conditions precedent in their contracts.

58. Plaintiffs seek, individually and on behalf of the proposed class, a declaration that GNY's property insurance contracts prohibit the withholding of labor costs as described herein when adjusting losses under the methodology employed herein.

59. Plaintiffs further seek, individually and on behalf of the proposed class, any and all other relief available under the law arising out of a favorable declaration.

60. Plaintiffs and members of the proposed class have and will continue to suffer injuries.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs, on behalf of themselves and all others similarly situated, respectfully request that this Court:

1. Certify the class identified here or as amended during litigation;
2. Enter a declaratory judgment as requested herein;
3. Enter a declaration, and any preliminary and permanent injunction and equitable relief against GNY and their officers, agents, successors, employees, representatives, and any and all persons acting in concert with them, from engaging in each of the policies, practices, customs, and usages complained of herein, as may be allowed by law;
4. Enter an order that GNY specifically perform and carry out policies, practices, and programs that remediate and eradicate the effects of their past and present practices complained of herein;
5. Award compensatory damages for all sums withheld as labor costs under the policy, plus prejudgment interest on all such sums, to Plaintiffs and members of the proposed class;
6. Award compensatory damages to Plaintiffs for all amounts to which it is entitled;
7. Award costs, expenses, and disbursements incurred herein by Plaintiffs and members of the proposed class as may be allowed by law, including but not limited to amounts available under the common fund doctrine;
8. Award Pre- and Post-Judgment interest; and
9. Grant such further and additional relief as the Court deems necessary and proper.

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Dated: January 15, 2021

DANSHIR, LLC and DANSHIR PROPERTY
MANAGEMENT, LLC, individually and on behalf
of all others similarly situated,

/s/ James X. Bormes

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EXHIBIT 1

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200 MADISON AVENUE NEW YORK, NEW YORK 10016 (212) 683-9700

June 25, 2018

ROSENTHAL BROS., INC.
740 WAUKEGAN ROAD
P O BOX 700
DEERFIELD IL 60015

Letter of Clarification

DANSHIR PROPERTY MANAGEMENT LLC
RE:
POLICY # 1112M29014
EFF. 7/5/2018 - 19

Dear Broker:

This letter clarifies certain of the coverages under the Package Enhanced Coverage Endorsement for Residential Condominiums and Cooperatives (known as Package C, with various edition dates) and the Miscellaneous Water forms (known as WATER 01). If your client has not purchased either of these coverages, then you may ignore this letter. In particular, both the Package C form (Item 3 on the schedule, "Back Up of Sewers, Drains, or Sumps") and the Water 01 form afford coverage for damage or loss caused by a backup or overflow of sewers, drains, or sumps. However, neither of these forms covers you for damage or loss caused by a backup or overflow of sewers, drains, or sumps, if any one or more of these is caused by, results from, or occurs concurrently with, a flood. You will need to go to your flood coverage, if you have it, for coverage for the consequences of flooding.

Sincerely,

Greater New York Mutual Insurance Company
Insurance Company of Greater New York
Strathmore Insurance Company

Greater New York Mutual Insurance Company / Insurance Company of Greater New York (a stock company) Strathmore Insurance Company (a stock company)

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This policy is issued by the following GNY Company:

**The GREATER NEW YORK MUTUAL
INSURANCE COMPANY**

NOTICE OF ANNUAL MEETING

By the virtue of this Policy, the insured is a member of Greater New York Mutual Insurance Company, and is entitled to vote, in person or by proxy, at any meetings of the Company. The Annual Meeting of members is held at the Home Office of the Company on the second Tuesday in March, at 2:30 P.M., Eastern Standard Time.

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This policy jacket with the policy forms, declarations page and endorsements, if any, issued to form a part thereof, completes the policy.

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COMMON POLICY DECLARATIONS

THIS POLICY IS ISSUED BY THE
GREATER NEW YORK MUTUAL INSURANCE COMPANY
 HOME OFFICE
 200 MADISON AVENUE NEW YORK, NY 10016

POLICY TERM **1 Year** ACCOUNT NUMBER **12M2901418** POLICY NUMBER **1112M29014**
 ENDORSEMENT NUMBER

NAMED INSURED AND MAILING ADDRESS	PRODUCER 0040001
DANSHIR PROPERTY MANAGEMENT LLC	ROSENTHAL BROS., INC.
(SEE NAMED INSURED ENDORSEMENT)	740 WAUKEGAN ROAD
8170 MCCORMICK BLVD. #109	P O BOX 700
SKOKIE IL 60076-2961	DEERFIELD IL 60015

POLICY PERIOD: FROM **07-05-2018** TO: **07-05-2019** AT 12:01 A.M. STANDARD TIME AT YOUR MAILING ADDRESS SHOWN.

ENDORSEMENT DATE:
 BUSINESS DESCRIPTION: **LIMITED LIABILITY COMPANY**

IN RETURN FOR THE PAYMENT OF THE PREMIUM, AND SUBJECT TO ALL THE TERMS OF THIS POLICY WE AGREE WITH YOU TO PROVIDE THE INSURANCE AS STATED IN THIS POLICY.

THIS POLICY CONSISTS OF THE FOLLOWING COVERAGE PARTS:

	<u>PREMIUM</u>
COMMERCIAL PROPERTY COVERAGE PART	\$ 14,930.00
COMMERCIAL GENERAL LIABILITY COVERAGE PART	\$ 7,300.00
COMMERCIAL AUTOMOBILE COVERAGE PART	\$ 151.00
TOTAL \$ 22,381.00	

FORMS APPLICABLE TO ALL COVERAGE PARTS:

SEE SCHEDULE OF FORMS AND ENDORSEMENTS

TOTAL PREMIUM \$ 22,381.00

THE POLICY MAY BE SUBJECT TO ADJUSTMENT.

COUNTERSIGNED _____ BY *Darren H. Jacobs*
 DATE _____ AUTHORIZED REPRESENTATIVE