

2019 WL 3207539 (N.Y.Sup.), 2019 N.Y. Slip Op. 31945(U) (Trial Order)
Supreme Court of New York.
Queens County

****1** 200 COURT STREET LLC, Plaintiff,
v.
WESCO INSURANCE COMPANY, Defendant.

No. 714758/2017.
May 20, 2019.

Short Form Order

Present: Honorable [Darrell L. Gavrin](#), Justice.

***1** [This opinion is uncorrected and not selected for official publication.]

IA Part 27

Motion Date: January 29, 2019

Motion Seq. No. 2

Cal No. 37

The following papers numbered EF21 to *EF43* read on this motion by Wesco Insurance Company (“Wesco”), for summary judgment in its favor pursuant to [CPLR 3212](#).

Papers Numbered

Notice of Motion - Affidavits - Exhibits.....	EF21-EF34
Answering Affidavits - Exhibits.....	EF36-EF37
Reply Affidavits.....	EF38-EF43

Upon the foregoing papers it is ordered that the motion is determined as follows:

In this breach of contract action, seeks damages based upon defendant's failure to pay an insurance claim. Plaintiff alleged that the parapet walls of the premises were damaged by wind on January 23, 2017. Upon receipt of the claim, defendant assigned the independent adjustment firm of Edward R. Reilly & Co., Inc., and Edward R. Reilly, IV, inspected and photographed the premises on February 8, 2017. Defendants submit that the photographs do not devoid of any evidence of sudden or accidental wind damage.

At Reilly's recommendation, defendant also retained the engineering firm of Paul J. Angelides, P.E., P.C. Adam Cassel, PA inspected the premises on February 24, 2017 to ****2** determine the cause of the alleged damage. Cassel's investigation revealed

that the sheet metal cornice atop the front facade was in poor condition as a result of normal wear and tear caused by long term rust and corrosion of the sheet metal. Cassel, avers that the advanced rust and corrosion he observed takes decades to manifest from prolonged exposure to weather.

Defendant alleges that Cassel's findings are supported by historical images of the premises from October 2013, which demonstrate that similar rusted and corroded conditions were present at that time. Cassel further observed multiple patches during his inspection, which is evidence of the long-term, ongoing nature of the damage. Significantly, the maximum wind speed in the area on the date of the alleged loss was 47 mph which, according to Cassel, is not strong enough to damage the facade of the premises. Cassel found no evidence that the alleged damage was caused by a sudden or accidental event, as a one-time exposure to wind.

On March 27, 2017, defendant denied plaintiff's claim because the loss was caused by wear and tear, rust, corrosion and faulty maintenance, all of which are specifically excluded by the terms of the "Policy". Plaintiff commenced this instant action to recover on the claim. This complaint contains one cause of action alleging that Wesco breached the Policy by denying their claim, and seeking damages of approximately \$50,000. Wesco timely answered the complaint on November 30, 2017. Defendant now moves for summary dismissal of this complaint on the grounds that plaintiff cannot establish a fortuitous loss occurred.

Discussion

Summary judgment is "a drastic remedy which should only be employed when there is no doubt as to the absence of triable issues" (*Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). Not only does summary judgment accelerate the litigation process, but it also precludes litigants from having their day in court (*Id.*).

*2 "[A]s a matter of law, insurance coverage, even under an all risk policy, extends only to fortuitous losses" and "[w]hether or not a loss is fortuitous is a legal question to be resolved by the Court" (*Renaissance Art Inv'rs, LLC v AXA Art Ins. Corp.*, 102 AD3d 604, 605 [1st Dept 2013], quoting *Redna Marine Corp. v Poland*, 46 F.R.D. 81, 86 [S.D.N.Y. 1969]). A fortuitous event is one "which happens by chance ... unexpectedly and without known cause, [one which is] undesigned or unplanned" (*Standard Structural Steel Co. v Bethlehem Steel Corp.*, 597 F Supp 164, 183 [D. Conn. 1984]).

**3 Under the terms of the policy in question, damages derived from wear and tear, decay, deterioration and/or faulty maintenance are excluded from coverage. In denying plaintiff's insurance claim, defendant relies, in part, on the report of independent adjuster Edward R. Reilly, IV, who inspected and photographed the premises on February 8, 2017. Photographs taken of the alleged damage do not support plaintiff's claim of sudden or accidental wind damage. At Reilly's recommendation, defendant also retained the engineering firm of Paul J. Angelides, P.E., P.C., and engineer Adam Cassel inspected the premises on February 24, 2017 to determine the cause of the alleged damage. Cassel's investigation revealed that the sheet metal cornice atop the front facade was in poor condition as a result of normal wear and tear caused by long term rust and corrosion of the sheet metal. In some areas, the deterioration was so advanced that the sheet metal had completely disintegrated and could easily be pulled apart by hand. According to Cassel, the advanced rust and corrosion that he observed takes decades to manifest from prolonged exposure to weather. Furthermore, historical images show that the complained-of conditions existed as of October, 2013, well before the Policy incepted.

Defendant presented sufficient proof in admissible form to make a prima facie showing for summary judgment (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). As a result, the burden shifts to plaintiff "to [also] produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial" (*Id.*). However, in opposition, plaintiff did not provide any evidence to rebut the undisputed facts or an affidavit from an engineer or other causal expert to refute the findings of defendant's retained engineer.

Furthermore, plaintiff's dependence on completing discovery is misplaced, especially when the record reflects that plaintiff hasn't complied with defendant's discovery requests (*Pancake v Franzoni*, 149 AD2d 575, 575-576 [2d Dept 1989]) ("mere

chance or hope that something will be uncovered if the plaintiff is provided with an opportunity to complete discovery[,] does not warrant the deferral of a ruling on a motion for summary judgment”). Therefore, the court grants Defendant's motion for summary judgment.

ORDERED and ADJUDGED that defendant's motion dismissing this action is granted.

Dated: May 20, 2019

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DARRELL L. GAVRIN, J.S.C.

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