DISTRICT COURT, DENVER COUNTY, COLORADO 1437 Bannock Street Denver, CO 80202	DATE FILED: October 23, 2020 11:24 PM FILING ID: 41C8AAA4D0D90 CASE NUMBER: 2020CV33619
Plaintiff: EVANS REALTY & PROPERTY MANAGEMENT LLC v. Defendant: OWNERS INSURANCE COMPANY	**▲COURT USE ONLY ▲**
Attorneys for Plaintiff: Sean B. Leventhal, #42371 Jonathan S. Sar, #44355 Richard Daly, # 51941 John Scott Black, # 50440 Daly & Black, P.C. 2211 Norfolk Street, Suite 800 Houston, TX 77098 Phone: (713) 655-1405 Fax: (713) 655-1587 Email: sleventhal@dalyblack.com jsar@dalyblack.com rdaly@dalyblack.com jblack@dalyblack.com	Case Number: Division: Courtroom:
COMPLAINT AND JURY DEMAND	

Plaintiff Evans Realty & Property Management LLC ("Plaintiff"), through its attorneys, Daly & Black, P.C., for its complaint against Owners Insurance Company ("Owners" or "Defendant"), states and alleges as follows:

PARTIES, JURISDICTION AND VENUE

1. Plaintiff is a Colorado limited liability company with a principal office street address of 6349 South Netherland Circle, Centennial, CO 80016.

2. Plaintiff is the owner of the property that is the subject of this lawsuit, a commercial-industrial complex located at 8221 East 96th Avenue, Henderson, CO 80640 (the "Property").

3. At all relevant times, Plaintiff is and was the beneficiary of a commercial property insurance policy covering the Property issued by Owners. The policy number is 094632-74151997-17 (the "Policy").

4. Owners is non-resident, Ohio corporation doing business in Colorado and can be found in Denver County, Colorado, with a registered agent address as follows: The Division of Insurance, 1560 Broadway, Denver, Colorado 80202.

5. Not only can Defendant, a non-resident of the State of Colorado, be found in Denver County, but Plaintiff designates Denver County as the venue for this trial pursuant to C.R.C.P. 98(c)(3)(B)

6. Venue is proper in this Court pursuant to C.R.C.P. 98 because Owners is a nonresident of Colorado, it can be found in Denver County, and Denver County has been designated in this Complaint.

7. All of the relevant acts described in this Complaint occurred in the State of Colorado, under Colorado law, and involve an insurance policy governed by Colorado law.

8. This Court has personal and subject matter jurisdiction over this case pursuant to Colo. Rev. Stat. §§ 13-1-124 1(a), (b), and (c).

GENERAL ALLEGATIONS

9. Plaintiff realleges and incorporates by reference the foregoing allegations of this Complaint as if fully set forth herein.

10. Among other things, the Policy provides coverage for direct physical loss of or damage to the Property caused or resulting from covered losses, including damage resulting from windstorms and hail.

11. The Policy generally provides coverage for damage to the Property on a replacement cost basis, subject to a 90% coinsurance requirement.

12. During the Policy period from September 5, 2017 to September 5, 2018, the limit of such replacement cost coverage was $9,916,500 and the windstorm or hail deductible was $10,000.

13. Pursuant to the replacement cost provision of the Policy, among other things, Owners is required to pay for the cost to repair or replace damage to the Property with other property of like kind and quality, up to the coverage limit, without deduction for depreciation.

14. Additionally, the Policy provides certain coverages relating to enforcement of ordinances or laws, including for increased cost of construction, demolition, and loss in value of the undamaged portion of the Property.

15. The Policy also provides business income coverage for lost business income – including lost rental income – sustained while the damaged property is being restored. The limit of such coverage during the applicable Policy period was $600,000 with no deductible.

16. On or about July 25, 2018, a severe storm struck the Henderson, Colorado area.

17. Meteorological data indicates that the storm produced a period of high-volume large hail, which ranged in size from 0.25 inches to 1.5 inches, as well as winds up to 55 miles per hour.

18. During the course of the storm, the Property was severely damaged by hail and wind. The damage included, without limitation, damage to the Property's metal roof system and metal exterior walls.

19. The roof needs to be replaced, and the project is significant. It will require extensive asbestos abatement work and will likely take months to perform. This will likely cause a serious disruption to Plaintiff's tenants and make all or portions of the Property uninhabitable for periods of time.

20. In November 2018, Plaintiff – through its public adjuster, Pivot Adjusters ("Pivot") – timely filed a claim with Owners.

21. The claim was assigned claim number 300-0364198-2018 (the "Claim").

22. On or about November 16, 2018, Owners inspected the Property along with representatives of Pivot.

23. Based on the inspection, Owners determined that the damage warranted replacement of the Property's roof; Owners also observed hail damage to the north and west elevations of the Property.

24. Owners prepared an estimate dated December 19, 2018. The estimate totaled $1,328,728.06 in replacement cost value and $908,826.25 in actual cash value.

25. On December 20, 2018, Owners issued a check to Plaintiff for $898,826,25, equal to the actual cash value of its estimate less the $10,000 deductible.

26. On or about January 11, 2019, Pivot provided an estimate for $2,561,049.67 to repair the hail damage to the Property, together with a Sworn Statement in Proof of Loss dated January 8, 2019. The Proof of Loss indicated a full cost of repair or replacement of $3,336,101.06 and included an estimated 6 months of lost commercial rental income at $122,168.36 per month. Additionally, at this time, Plaintiff – through Pivot – made a demand for appraisal under the Policy.

27. Owners mailed a letter to Plaintiff dated January 25, 2019. The letter identified several categories of items on Pivot's estimate with which Owners disagreed or for which Owners requested additional information; the value of such items was approximately $713,000. Owners also requested "detailed reasoning to substantiate why Overhead & Profit is necessary on this job," as well as documentation to support Plaintiff's claim for business income coverage. Owners also rejected Plaintiff's appraisal demand and concluded:

> In summary, appraisal is not appropriate at this time, and we do not agree to go to appraisal at this time. We are reviewing your initial estimate and we have asked for supporting documentation on several items. We will continue to review our estimate and amend and issue additional Actual Cash Value Payments as appropriate. We are rejecting your submitted Sworn Statement in Proof of Loss and ask you complete the attached Proof of Loss and resubmit it to us with the proper documentation by March 1, 2019.

28. Owners mailed a letter to Plaintiff dated March 20, 2019. The letter stated, among other things:

> we have finished our review of the estimate of damages provided to us by Chris Wilson. We now determine the Replacement Cost Value of the damages caused by hail to be $1,782,651.95. We have applied recoverable depreciation to this replacement cost calculated using the age of the roof as 27 years old according to our underwriting inspection report. The amount of depreciation that is recoverable to our insured under the policy is $445,336.67. Considering your $10,000 Deductible and our prior payment of $898,826.25 we are issuing a supplemental Actual Cash Value payment of $428,489.03.
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> Please note we have not yet received a completed Sworn Statement in Proof of Loss from your Public Adjuster. They have asked for extensions due to the possibility of asbestos at the loss site. We received a preliminary asbestos report from Pivot Adjusters on March 19, 2019 that we are reviewing.

29. On or about March 20, 2019, Owners issued a check to Plaintiff in the amount of $428,489.03 as a "supplemental Actual Cash Value payment."

30. On March 21, 2019, Owners extended the "due date" for a revised Proof of Loss to March 29, 2020.

31. On March 29, 2019, Pivot sent to Owners a revised estimate, dated March 29, 2019. The estimate was for $4,092,965.21 in replacement cost value and included $1,164,954.00 for asbestos abatement based on a $952,254.00 bid from Environmental Demolition Insight, Inc. ("EDI"). Plaintiff – through Pivot – also provided a revised Sworn Statement in Proof of Loss dated March 29, 2019, which listed the full cost of repair or replacement of $4,835,168.87, as well as supporting documentation.

32. On or about April 3, 2019, Owners performed a "second walkthrough" (as described by Owners) of the Property along with Pivot.

33. Following the walkthrough, Owners mailed a letter to Plaintiff dated April 15, 2019, along with an estimate dated April 8, 2019. This estimate totaled $2,123,538.82 in replacement cost value and $1,610,024.77 in actual cash value. In its letter, Owners acknowledged that it reviewed the

estimate from Pivot "and found several items to be warranted." Owners indicated that it was investigating the "possibility of asbestos in the roofing mastic and tar and the implications this may have on potential repairs," and requested further documentation and clarification on several other items in Pivot's estimate.

34. Based on its April 8, 2019 estimate, Owners issued another supplemental actual cash value check to Plaintiff for $272,709.49 "for Vinyl-Backed Insulation."

35. In early July 2020, Pivot notified Owners that the Property had started leaking and inquired as to whether Owners would cover the cost of mitigating the leaking by coating the Property's roof.

36. Owners mailed a letter to Plaintiff dated July 24, 2019. In this letter, among other things:

a. Owners made a broad, vague demand for "information that verifies where the leaks in the roof are located, exactly when the roof started leaking, and how this leaking is related to the hail storm that occurred over a year ago."

b. Owners appeared to reverse its determination that the Property's siding sustained hail damage based on its April 2019 "re-inspection," which purportedly revealed "an absence of hail damage to the fiberglass siding on the elevations" and the "lack of identified widespread damage throughout the elevations." These conditions would have been easily observable during Owners' initial inspection in which it determined that the siding was in fact damaged by hail.

c. Owners informed Plaintiff that it hired HAAG Engineering to inspect the siding. Based on HAAG Engineering's findings of no hail damage to the siding, Owners revised its estimate to remove replacement of the siding.

d. Owners wrote that it was changing the date of loss to June 18, 2018 based on HAAG Engineering's findings. Nevertheless, Owners continued to refer to July 25, 2018 as the date of loss throughout the remainder of the Claim handling.

e. Regarding the asbestos abatement plan, Owners acknowledged that "Overall the plan looks appropriate" and that it was "in agreement with the EDI proposal and the EDI cost to abate the roof that has been damaged by hail." Without providing an explanation, Owners stated that the cost of asbestos abatement would be paid as incurred.

f. Owners included additional requests for information and clarification regarding various aspects of Pivot's proposed scope of work.

37. Owners prepared another estimate dated July 24, 2019. The estimate totaled $2,877,562.50 in replacement cost value and $1,230,614.58 in actual cash value.

38. Upon information and belief, based on its estimate dated July 24, 2019, Owners issued another supplemental actual cash value check to Plaintiff for $36,376.81. This check was dated June 26, 2019.

39. On July 24, 2019, Owners' adjuster sent an email to Pivot in which he wrote, among other things: "Ultimately, after thinking it over, the best next step would be for you and the insured to choose and contract with whomever you choose and then I will work with that person to get all of the information I need to verify the last remaining items (The crane being the biggest item). Let me know when you have a contracted roofer and I will contact them to get the information I need."

40. On August 12, 2019, Pivot emailed Owners' adjuster to address Owners' requests for information and clarification on a number of items related to the project. Pivot pointed out that "asbestos abatement cannot commence until an ACV payment for the same has been received."

41. Owners prepared another estimate dated on or about August 19, 2019. The estimate totaled $2,894,801.58 in replacement cost value and $2,390,558.46 in actual cash value.

42. Owners mailed a letter to Plaintiff dated August 22, 2019. Among other things, Owners stated that it had "determined that [asbestos abatement] is related to the Building Damage Coverage, which is why our current estimate reflects no depreciation on the asbestos abatement line item. Therefore, enclosed is payment for the additional Actual Cash Value of $744,156.88 at this time."

43. Based on its August 2019 estimate, Owners issued another supplemental actual cash value check to Plaintiff for $744,156.88.

44. Owners mailed a "coverage position letter" to Plaintiff dated October 28, 2019 in which Owners denied coverage for the Property's leaking roof. Based on Owners' review of photos taken by Plaintiff's restoration contractor, Owners concluded that the leaking was a result of wear and tear, not hail damage.

45. On January 21, 2020, Pivot provided a claim packet to Owners that included a project timeline, guidance from the State of Colorado indicating that John Evans had the right to act as his own general contractor, and an updated estimate with supporting documentation. Additionally, Pivot cited certain building codes that applied to the roof repair project.

46. On February 19, 2020, Owners' attorneys requested Plaintiff's examination under oath.

47. On February 28, 2020, Owners' attorneys followed up on their request for examination under oath with a list of fifteen categories of information and documents that had to be provided to Owners' in advance of the examination under oath, and which would constitute the topics of examination.

48. On March 25, 2020, Pivot provided nearly 300 pages of documentation to Owners in response to Owners' requests for documents and information.

49. On March 26, 2020, Owners' attorneys emailed Plaintiff that the documentation provided "does not fully satisfy [Owners'] requests."

50. On April 2, 2020, Pivot emailed Owners' attorneys that it had provided all responsive digital documents in its control, and indicated that scheduling the examination under oath would need to be postponed due to the COVID-19 pandemic, including Denver's "stay at home" order, which made it difficult to obtain and provide hard copies of responsive documents.

51. In early May 2020, Pivot provided a 107-page "Proof of Loss Packet" to Owners. Included in the packet were, among other things, an updated Sworn Statement in Proof of Loss dated May 19, 2020 indicating an amount claimed under the Policy of $6,396,507.46; a revised estimate for $6,336,256.06 in replacement cost value; contractor bids; building measurements; an asbestos bid and related information; a crane bid; photos; and weather data.

52. On June 12, 2020, Plaintiff's representative John Evans submitted to an examination under oath by Owners' attorney. The examination ran from 10:00 a.m. to 5:08 p.m., and the transcript of the examination is approximately 250 pages.

53. On June 25, 2020, Christopher Wilson, a representative of Plaintiff's public adjuster, submitted to an examination under oath by Owners' attorney. The examination ran from 10:00 a.m. to 4:46 p.m., and transcript of the examination is approximately 230 pages.

54. On June 29, 2020, Plaintiff – through Pivot – again provided written notice to Owners that Plaintiff was in disagreement with the amount of loss Owners determined on the Claim and made another written demand for appraisal under the Policy.

55. Owners retained MF Group Inc. ("MFG") to provide analysis and cost opinions regarding the Claim. Bruce Mardick, President and Director of Operations of MRG, prepared a "Cost

and Analysis Report" and provided it to Owners on August 28, 2020. In the report, among other things:

a. Mr. Mardick included weather data "indicating July 25th, 2018 as the DOL."

b. Mr. Mardick identified two undisputed aspects of the Claim: first, that the Property's main roof required replacement due to hail damage; and second, that re-roofing the main roof would require asbestos abatement.

c. Mr. Mardick identified twenty-two areas of dispute between Owners and Plaintiff.

d. Mr. Mardick concluded that John Evans, Plaintiff's owner, could not act as general contractor on the project.

e. Mr. Mardick indicated that any business interruption/disruption costs "should be determined by experts in the field of accounting."

f. Mr. Mardick prepared cost of repair estimates for two repair "scenarios," one for $3,520,635.95 in replacement cost value, the other for $2,792,130.86 in replacement cost value.

g. Mr. Mardick estimated the replacement cost value for the "satellite buildings" (which Owners determined were not covered under the Policy) was $249,795.01 in replacement cost value.

56. According to Mr. Mardick's report, he "independently investigated the appropriate scopes of work and pursued pricing necessary to address the issues associated with the alleged damages." That is, Mr. Mardick was explicitly not "agreeing with PA or AOI repair recommendations nor with PA and AOI quantities and pricing."

57. Contrary to Mr. Mardick's recommendation, Owners did not engage an accountant to evaluated Plaintiff's claim for business income/interruption coverage.

58. Owners sent a 36-page letter to Plaintiff's counsel dated September 14, 2020. In the letter, among other things, Owners identified 22 "Claimed items within the [May 20, 2020 Proof of Loss] that are Inflated or Unsupported."

59. Owners concluded its September 14, 2020 letter as follows:

> Owners' has already paid sufficient funds to cover the ACV for damages caused by the hailstorm of July 25, 2018. In reviewing all the documentation submitted in the Insured's presentation of this Claim as well performing the EUOs of the Insured's designated representatives and reviewing the expert report of Mr. Mardick, Owners concludes that the estimates contained within the report of Mr. Mardick are reasonable to cover at least the ACV damages caused by the alleged loss, which is all that is owed until the Insured performs repairs at the subject property. **After a full evaluation of the expert report of Mr. Mardick, Owners adopts the numbers, rationale, and conclusions contained therein as it pertains to the scope of repairs for the Insured's property.** Because it is Owners' position that its prior payments more than compensate the Insured sufficiently to commence repairs of its property, Owners is not in agreement to move forward with appraisal. As set forth in the Policy, "If we and you disagree on the amount of Net Income and operating expense or the amount of the loss, the matter may be appraised, provided that both parties agree to do so." *See* EV ANS REAL TY (AO) 000180. Owners does not agree to appraisal in this circumstance where it has already paid more than sufficient ACV to repair the Insured's property pursuant to multiple repair methods.
>
> Owners acknowledges that Mr. Mardick includes line items in his estimate that are not included within items previously paid for by Owners and Owners is willing to issue payment for these additional line items as set forth in the estimates of Mr. Mardick. *See generally* **Mardick Report.** However, to-date, Owners has issued ACV payment of $2,380,558.46. The removal and replacement estimate prepared by Mr. Mardick totals $2,328,974.24 (ACV). The roof-over estimate of Mr. Mardick totals $1,765,825.76 (ACY). Accordingly, either repair method has a lower ACV than what Owners has already issued to the Insured. Therefore, despite additional line items contained within Mr. Mardick's estimates, it is Owners' position that no further payment is owed at this time.

60. After nearly twenty-one months of adjusting the Claim – which resulted in the generation of multiple estimates and sworn proofs of loss, hundreds of pages of correspondence, countless requests for items of information and hours spent responding, and two full days of examination under oath – Owners simply rubber-stamped Mr. Mardick's August 2020 "independent" investigation and repair estimates, and refused to issue any additional payment on the Claim.

PLAINTIFF'S FIRST CLAIM FOR RELIEF
(BREACH OF CONTRACT)

61. Plaintiff realleges and incorporates by reference the foregoing allegations of this Complaint as if fully set forth herein.

62. A contract of insurance existed between Owners and Plaintiff; namely, the Policy.

63. The Policy provides replacement cost coverage, which pays the cost of repair or replacement to covered damage, without a deduction for deprecation, subject to the Policy's limit of coverage.

64. The Policy requires Owners to pay replacement cost benefits for covered losses.

65. The Policy requires Plaintiff to pay insurance premiums in exchange for replacement cost coverage, which Plaintiff did.

66. Hail damage is a covered loss under the Policy.

67. The weather event and the damage caused by such weather event, both of which are described above, constitute a covered loss under the Policy.

68. Owners' estimates, which indicated the amount of replacement cost benefits Owners believed it owed did not reflect the actual, necessary, and reasonable cost of repair or replacement to the Property for covered losses. Owners' estimates were unreasonable.

69. Without limitation, Owners' estimates unreasonably failed to provide sufficient funds to replace the Property's roof system and the siding, perform asbestos abatement, comply with applicable code, and provide coverage for loss of business income.

70. Owners' actual cash value payments to Plaintiff were based, among other things, on these inadequate and unreasonable estimates.

71. Owners did not pay what the Policy required, including because Owners determined, without a reasonable basis, that there was no hail damage to certain parts of the Property and that certain parts of the property (namely, the satellite buildings) were not covered property. For the areas

that Owners acknowledged were damaged, its estimates failed to include a reasonable replacement cost amount that would allow reasonable repair or replacement, as necessary, related to such damage.

72. Such failures, among others, constitute a breach of contract.

73. As a result of Owners' actions and/or inactions equating to a breach of contract, Plaintiff sustained damages in an amount to be proved at trial.

PLAINTIFF'S SECOND CLAIM FOR RELIEF
(VIOLATION OF C.R.S. 10-3-1115 AND 1116)

74. Plaintiff realleges and incorporates by reference the foregoing allegations of this Complaint as if fully set forth herein.

75. At all times pertinent hereto, the following statute of the state of Colorado was in effect:

10-3-1115. Improper denial of claims – prohibited – definitions – severability.

(1) (a) A person engaged in the business of insurance shall not unreasonably delay or deny payment of a claim for benefits owed to or on behalf of any first-party claimant.

76. C.R.S. §10-3-1116 provides a remedy for such denial or delay of payments in the form of "reasonable attorney fees, court costs, and two times the covered benefit."

77. Among other things, Owners unreasonably delayed or denied payment of insurance benefits owed to Plaintiff by including, but not limited to:

a. failing to include in its estimates the actual, necessary, and reasonable funds to repair and/or replace damaged portions of the Property caused by the weather event described above;

b. denying Plaintiff's claim for business income benefits despite being provided with supporting documentation that Plaintiff would incur a loss of rental income due to the lengthy restoration period;

c. failing to make an actual cash value payment for asbestos abatement on the basis that such costs were paid as incurred, a position that Owners later reversed;

d. delaying payment of benefits by adjusting the Claim on a piecemeal basis, including by preparing an initial estimate from November 2018 that was less than half of its final estimate from August 2019, which should have been its first estimate;

e. preparing "lowball" initial estimates;

f. conducting an unreasonable, self-serving investigation, including by officially rubber-stamping Mr. Mardick's August 2020 independent investigation, which seriously calls into question the purpose of the initial 21 months of Owners' adjustment of the claim and Plaintiff's efforts to cooperate therewith;

g. conducting an unreasonable investigation that resulted in the unreasonable estimates described above;

h. conducting and unreasonable investigation that effectively put the burden on Plaintiff and its public adjuster to adjust Plaintiff's own claim, including by burdensome, vague demands for information that Owners could have and should have taken the lead to investigate;

i. and other conduct to be discovered in the course of these proceedings.

78. Owners unreasonably denied and delayed payment to Plaintiff in violation of C.R.S. §10-3-1115.

79. Owners is subject to the provisions of C.R.S. §10-3-1116 for double damages, court costs, and attorney fees in addition to those claimed elsewhere in this Complaint.

PRAYERS FOR RELIEF

WHEREFORE, Plaintiff prays for damages against Owners as follows:

a. Damages for breach of contract, including the value of benefits Plaintiff was entitled to receive under the Policy that were not provided; damages for delayed payment; consequential damages; and reasonable interest on delayed payment;

b. Compensatory damages against Owners including economic and noneconomic damages;

c. Double damages, costs, and attorney fees incurred in prosecuting this action pursuant to C.R.S. §10-3-1116;

d. An award of pre- and post-judgment interest;

e. All costs and expenses related to prosecuting this action; and

f. Such other and further relief as this Court may deem just, equitable or proper.

A JURY IS DEMANDED AS TO ALL ISSUES HEREIN.

Respectfully submitted October 23, 2020.

By: */s/ Sean B. Leventhal*
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