EXHIBIT A

2015 WL 5306093
Only the Westlaw citation is currently available.
United States District Court,
N.D. New York.

QUICK RESPONSE COMMERCIAL DIVISION, LLC, as Assignee of Charbonneau Properties, LLC, Plaintiff,
v.
CINCINNATI INSURANCE COMPANY, Defendant.

No. 1:14–cv–779 (GLS/DEP).
|
Signed Sept. 10, 2015.

Attorneys and Law Firms

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Opinion

MEMORANDUM–DECISION AND ORDER

I. *Introduction*

GARY L. SHARPE, Chief Judge.

***1** Plaintiff Quick Response Commercial Division, LLC, as assignee of Charbonneau Properties, LLC, the insured, commenced this diversity action against defendant Cincinnati Insurance Company, the insurer, alleging breach of contract and breach of the implied covenant of good faith and fair dealing. (*See generally* Compl., Dkt. No. 1, Attach. 1 at 414.) Pending is Cincinnati's motion for summary judgment. (Dkt. No. 18.) For the reasons that follow, the motion is granted in part and denied in part and the case is stayed pending completion of the appraisal process.

II. *Background*

A. Facts [1]

Cincinnati issued a commercial property insurance policy to Charbonneau Properties, LLC which was effective from February 28, 2012 to February 28, 2013. (Dkt. No. 18, Attach 5 at 25–72; Def.'s Statement of Material Facts (SMF) ¶ 1, Dkt. No. 18, Attach. 1 at 2–6.) On August 9, 2012, Charbonneau sustained fire, smoke, and other damage to its property located at 2831 Route 9, Malta, Saratoga County, New York. (Def.'s SMF ¶¶ 2–3.) Shortly thereafter, Charbonneau entered into a contract with Quick Response for Quick Response "to proceed with its recommended procedures to preserve, protect and secure the property." (*Id.* ¶ 4.) The contract between Charbonneau and Quick Response provided that 18% annual interest would be assessed against Charbonneau on unpaid invoices, and that Charbonneau would be responsible for attorney's fees expended in pursuing the payment of invoices. (Pl.'s SMF ¶ 37, Dkt. No. 25 at 6–12; Dkt. No. 18, Attach 10 at 2.)

After meeting on September 13, 2012 with Charbonneau and Quick Response to discuss the loss suffered by Charbonneau, Cincinnati made several requests to Quick Response for estimates of the damage. (Def.'s SMF ¶¶ 6–7; Pl.'s SMF ¶ 6.) In March 2013, seven months after Charbonneau sustained the loss at its property, Quick Response provided an invoice to Cincinnati for $1,761,857.87. (Def.'s SMF ¶ 7.) According to Cincinnati, because this estimate included work outside of the scope of damage that the parties agreed to at their September 13, 2012 meeting, as well as work done for another tenant at the building, it retained a restoration remediation company to review and audit the claim. (*Id.* ¶ 8.) Subsequently, this restoration remediation company provided an audited invoice of $860,036.81, and Cincinnati paid at least $859,036.81 to Quick Response. [2] (*Id.* ¶¶ 9–10; Pl.'s SMF ¶ 10.)

When the parties failed to reach agreement on an amount to settle the claim, Cincinnati issued a "demand for appraisal" pursuant to the policy.

(Def.'s SMF ¶¶ 11–13, Pl.'s SMF ¶ 12.) Under the policy, if Cincinnati and the insured disagree on the value of the property, the amount of net income and operating expense, or the amount of the loss,

> either may make written demand for an appraisal of the 'loss'. In this event, each party will select a competent and impartial appraiser and notify the other of the appraiser selected within [twenty] days of such demand.... The two appraisers will select an umpire.... The appraisers will state separately the value of the property, the amount of [n]et [i]ncome and operating expense, and the amount of 'loss'. If they fail to agree, they will submit their differences to the umpire. A decision agreed to by any two will be binding.

***2** (Def.'s SMF ¶ 17; Dkt. No. 18, Attach. 6 at 18–19.) Quick Response rejected Cincinnati's demand for appraisal on several occasions, despite Cincinnati's follow-up letter denoting May 30, 2014 as the deadline, under the terms of the policy, for Quick Response to name its appraiser. (*Id.* ¶¶ 14–15; Pl.'s SMF ¶ 14.)

B. ***Procedural History***

On June 12, 2014, Quick Response commenced this action in New York State Supreme Court, Saratoga County, alleging (1) breach of contract for failure to cover the cost of repairs, and (2) breach of the implied covenant of good faith and fair dealing for failure to "fairly, timely and accurately adjust the claim." (Compl.¶¶ 49–79.) Quick Response seeks recovery of the amount owed on the invoice, the 18% interest accruing on that amount under the Charbonneau–Quick Response contract, and any attorney's fees and costs associated with litigating the matter. (*Id.* at 13–14.) Cincinnati removed the action to this court, (Dkt. No. 1), and filed an answer with a counterclaim seeking an order compelling appraisal pursuant to the terms of the policy, (Dkt. No. 7). Despite a February 2015 discovery deadline, Cincinnati filed its now-pending motion for summary judgment in September 2014.[3] (Dkt. No. 18.)

III. *Standard of Review*

The standard of review pursuant to Fed.R.Civ.P. 56 is well established and will not be repeated here. For a full discussion of the standard, the court refers the parties to its decision in *Wagner v. Swarts,* 827 F.Supp.2d 85, 92 (N.D.N.Y.2011), *aff'd sub nom. Wagner v. Sprague,* 489 F. App'x 500 (2d Cir.2012).

IV. *Discussion*

A. ***Demand for Appraisal***

First, Cincinnati argues that, because Quick Response failed to comply with the policy provisions with respect to the demand for appraisal, its claims must be dismissed. (Dkt. No. 18, Attach. 1 at 7–9.) Further, Cincinnati contends that, under New York Insurance Law, it is entitled to an order compelling appraisal. (*Id.* at 9–10.) On the other hand, Quick Response asserts that because there are issues of fact concerning the scope of the work it performed, Cincinnati is not entitled to an order directing appraisal. (Dkt. No. 25 at 13–16.) The court agrees with Cincinnati that the parties' dispute is subject to appraisal.

" 'New York public policy favors an appraisal proceeding over a trial on damages.' " *Amerex Grp., Inc. v. Lexington Ins. Co.,* 678 F.3d 193, 199 (2d Cir.2012) (quoting *SR Int'l Bus. Ins. Co. v. World Trade Ctr. Props., LLC,* No. 01 Civ. 9291, 2004 WL 2979790, at *3 (S.D.N.Y. Dec.1, 2004)). "This pro-appraisal policy is reflected in the November 2014 amendment to Section 3408(c) of the New York Insurance Law," *Zarour v. Pac. Indem. Co.,* No. 15–CV–2663, 2015 WL 4385758, at *3 (S.D.N.Y. July 6, 2015), which provides that

> [a]n appraisal shall determine the actual cash value, the replacement cost, the extent of the loss or damage and the amount of the loss or damage which shall be determined as specified in

the policy and shall proceed pursuant to the terms of the applicable appraisal clause of the insurance policy.

***3** N.Y. Ins. Law § 3408(c) (McKinney 2014). However, "an appraisal shall not determine whether the policy actually provides coverage for any portion of the claimed loss or damage." *Id.* This is because "the scope of coverage provided by an insurance policy is a purely legal issue that cannot be determined by an appraisal, which is limited to factual disputes over the amount of loss for which an insurer is liable." *Duane Reade Inc. v. St. Paul Fire & Marine Ins. Co.*, 411 F.3d 384, 389 (2d Cir.2005).

Here, the dispute between the parties concerns Quick Response's performance of work which exceeded the original scope of damage that the parties agreed to at their September 13, 2012 meeting. (Def.'s SMF ¶ 8; Dkt. No. 18, Attach. 6 at 60–61.) According to Quick Response, the agreed scope of damage was incomplete because it was determined only upon what was visible to the naked eye at that time, without the benefit of a professional consultant concerning necessary code upgrades and structural repairs. (Pl.'s SMF ¶¶ 6, 28.) Quick Response contends that electrical and HVAC work it performed on the property, as well as work it performed in the kitchen and bathrooms, was "reasonable, necessary and required to remediate the property and allow for a Certificate of Occupancy," contrary to Cincinnati's contention that such work was not required and not within the agreed upon scope of damage. (*Id.* ¶¶ 25–27.) Further, Quick Response contests Cincinnati's exclusion of the length of time that Quick Response's equipment was on site during the arson investigation conducted after the August 9, 2012 fire, and work Quick Response performed "to stabilize the building" from Cincinnati's estimate, due to Cincinnati's assertion that these were outside the agreed scope of loss. (*Id.* ¶¶ 20–22.) Quick Response also complains that the "means and methods for the dry out of the building" contemplated in Cincinnati's estimate differs from the work Quick Response actually performed. (*Id.* ¶ 35.)

Ultimately, there is no contention that Cincinnati has denied its liability for damages related to the August 9, 2012 fire, and Quick Response does not point to any policy provisions that need to be interpreted by the court. *See Amerex Grp.*, 678 F.3d at 205 ("[A]n appraiser may not resolve coverage disputes or legal questions regarding the interpretation of the policy."). Rather, the parties dispute the extent of work required to repair the damage caused by the fire and the necessary methods of such repair. These disputes, related to the extent and amount of the damage to the insured property, are factual questions that fall squarely within the scope of the policy's appraisal clause. *See Zarour,* 2015 WL 4385758, at *3; *see also Amerex Grp.*, 678 F.3d at 206 (explaining that apportioning damage causation is an issue properly subject to appraisal, because it is essentially a factual question to be resolved by making factual judgments about events in the world, not legal analyses of the meaning of the insurance contract); *UrbCamCom/WSU I, LLC v. Lexington Ins. Co.*, No. 12–CV–15686, 2014 WL 1652201, at *5–6 (E.D.Mich. Apr.23, 2014) (approvingly citing *Amerex Grp.*, and holding that a dispute regarding the necessary repairs to reopen a building and length of time it should have taken to make those repairs goes to the amount of loss, which falls squarely within the ambit of an appraisal); *Williamson v. Chubb Indem. Ins. Co.*, No. 11–cv–6476, 2012 WL 760838, at *4 (E.D.Pa. Mar.8, 2012) (after noting the "well-established public policy of Pennsylvania encourag[ing] the settlement of disputes about the amount of loss by appraisal," concluding that a disagreement over the necessary repairs and methods of repair from a covered loss are subject to appraisal because they represent a dispute as to amount of loss, not as to coverage).

***4** Accordingly, because the parties dispute the extent and dollar value of the loss, and not the scope of coverage provided by the policy, Quick Response was required to comply with the policy's appraisal provisions. *See* N.Y. Ins. Law § 3408(c). As such, Cincinnati's motion for summary judgment is granted to the extent that it seeks to compel appraisal.[4] However, because Quick Response's claim for consequential damages, discussed below,

is not subject to appraisal, this case is stayed pending completion of the appraisal process.

B. *Consequential Damages*

Cincinnati next argues that Quick Response cannot maintain its claim for consequential damages because such damages were not contemplated by the parties at the time the policy was issued. (Dkt. No. 18, Attach. 1 at 10–15.) Quick Response counters that because it was reasonable and foreseeable at the time Cincinnati issued the insurance policy to Charbonneau that Charbonneau might hire a contractor to remediate and repair a covered loss and would enter into a contract requiring it to pay interest and attorney's fees if the contractor was not timely paid, Quick Response is entitled to recover consequential damages consisting of 18% interest on the unpaid balance owed to it and reasonable attorney's fees, as provided in the Quick Response–Charbonneau contract. (Dkt. No. 25 at 16–21.) Further, Quick Response requests that, if the court issues an order compelling appraisal, the court also issue an order to stay this action pending completion of the appraisal process because the issues of attorney's fees and interest are not subject to appraisal. (Dkt. No. 25 at 16.)

Under New York law, consequential damages resulting from a breach of the covenant of good faith and fair dealing may be asserted in an insurance contract context. *See Zarour,* 2015 WL 4385758, at *5; *Gauthier v. Countryway Ins. Co.,* 100 A.D.3d 1062, 1063, 953 N.Y.S.2d 346 (3d Dep't 2012). Consequential damages "are in addition to the losses caused by a calamitous event (i.e., fire or rain) and include those additional damages caused by [an insurer]'s injurious conduct[-]in this case, the insurer's failure to timely investigate, adjust and pay the claim." *Connolly v. Peerless Ins. Co.,* 873 F.Supp.2d 493, 506 (E.D.N.Y.2012). In order to be recoverable, the damages must have been "within the contemplation of the parties as the probable result of a breach at the time of or prior to contracting." *Panasia Estates, Inc. v. Hudson Ins. Co.,* 10 N.Y.3d 200, 203, 856 N.Y.S.2d 513, 886 N.E.2d 135 (2008) (internal quotation marks and citations omitted). "To determine whether consequential damages were reasonably contemplated by the parties, courts look to 'the nature, purpose and particular circumstances of the contract known by the parties.' " *Sikarevich Family L.P. v. Nationwide Mut. Ins. Co.,* 30 F.Supp.3d 166, 173 (E.D.N.Y.2014) (quoting *Bi–Economy Mkt., Inc. v. Harleysville Ins. Co. of N.Y.,* 10 N.Y.3d 187, 192, 856 N.Y.S.2d 505, 886 N.E.2d 127 (2008)). Courts also look at " 'what liability the [insurer] fairly may be supposed to have assumed consciously, or to have warranted the [insured] reasonably to suppose that it assumed, when the contract was made.' " *Id.* (quoting *Bi–Economy,* 10 N.Y.3d at 193, 856 N.Y.S.2d 505, 886 N.E.2d 127). Consequential damages "must be proximately caused by the breach and must be proven by the party seeking them." *Bi–Economy,* 10 N.Y.3d at 192–93, 856 N.Y.S.2d 505, 886 N.E.2d 127 (internal quotation marks and citation omitted).

***5** Cincinnati contends that, because it was not a party to the Quick Response–Charbonneau contract, and the claim for consequential damages is not supported by any of the provisions of the policy, it did not contemplate such damages as the probable result of a breach at the time it issued Charbonneau the policy. (Dkt. No. 18, Attach. 1 at 10–15.) In response, Quick Response submits the affidavit of Robert Serafini, a current employee of Quick Response, and a former claims adjuster with Fort Orange Claims Service. (Dkt. No. 25, Attach.2.) According to Serafini, "[t]he majority of times when a ... property owner suffers a covered loss under an insurance policy they will hire adjusters or contractors to assist with the claim and to remediate and repair damage to the property they own." (*Id.* ¶ 6.) Further, in his experience as a claims adjuster, Serafini was aware that "[these c]ontractors and vendors will require the insured to sign contracts[, which] include provisions for the payment of attorney fees and interest on unpaid balances for the work ... performed," typically in the range of 12–18% per year. (*Id.* ¶¶ 7, 9.) Moreover, Quick Response contends that depositions of Cincinnati's claims adjusters, including Christine Snyder, Cincinnati's claims adjuster for the loss at issue here, will show that these damages were foreseen by Cincinnati at the time it issued Charbonneau the policy. (Dkt. No. 25 at 18–19.)

Ultimately, it cannot be said as a matter of law that Cincinnati did not foresee and contemplate the consequential damages sought by Quick Response. *See Whiteface Real Estate Dev. & Constr., LLC v. Selective Ins. Co. of Am.*, No. 08–cv–24, 2010 WL 2521794, at *5 (N.D.N.Y. June 16, 2010) (holding that a reasonable factfinder could conclude that the interest paid on a loan an insured took out to cover reconstruction costs, as well as attorney's fees and costs, were reasonably contemplated by the parties and necessary to return the insured to where it would have been had coverage been provided). Thus, the court denies Cincinnati's motion for summary judgment on this ground, and the court will stay the action pending completion of the appraisal process.

V. *Conclusion*

WHEREFORE, for the foregoing reasons, it is hereby

ORDERED that Cincinnati's motion for summary judgment (Dkt. No. 18) is **GRANTED IN PART** and **DENIED IN PART** as follows:

GRANTED to the extent that Quick Response is ordered to comply with the appraisal provision of the policy; and

DENIED in all other respects; and it is further

ORDERED that this action is **STAYED** pending completion of the appraisal process; and it is further

ORDERED that the Clerk provide a copy of this Memorandum–Decision and Order to the parties.

IT IS SO ORDERED.

All Citations

Not Reported in F.Supp.3d, 2015 WL 5306093

Footnotes

1 Unless otherwise noted, the facts are not in dispute.

2 The parties dispute the total amount Cincinnati has paid Quick Response on this claim. (Def.'s SMF ¶ 10; Pl.'s SMF ¶ 10.)

3 Subsequently, discovery in this action was stayed pending a decision from the court concerning Cincinnati's motion for summary judgment. (Dkt. No. 22.)

4 Although Cincinnati did not seek summary judgment on its counterclaim, it follows that the counterclaim is granted to the extent that it seeks to compel appraisal. (Dkt. No. 7 at 13–19.)

EXHIBIT B

2016 WL 5630716 (N.Y.Sup.), 2016 N.Y. Slip Op. 32700(U) (Trial Order)
Supreme Court of New York.
Part 42
New York County

**1 Sydney HYMAN,

v.

STATE FARM FIRE AND CASUALTY COMPANY.

No. 651791/2015.
September 28, 2016.

Trial Order

Hon. Nancy Bannon, JSC.

*1 INDEX NO. *651791/2015*

MOTION DATE *6/22/2016*

MOTION SEQ. NO. *001*

The following papers were read on this motion to compel an appraisal in lieu of trial to assess damages

Notice of Motion/ Order to Show Cause — Affirmation — Affidavit(s) —	**No(s). *1***
Answering Affirmation(s) — Affidavit(s) — Exhibits	**No(s). *2***
Replying Affirmation — Affidavit(s) — Exhibits	**No(s). *3***

In this action to recover benefits under a policy of casualty insurance, plaintiff moves pursuant to Insurance Law § 3408(c) to compel the court to direct an appraisal in lieu of trial to assess the value of plaintiff's losses arising from water damage to real and personal property. Defendant, State Farm Fire and Casualty Company (State Farm), opposes the motion. The motion is granted.

Plaintiff owns real property located at 51 Greene Street in Manhattan. State Farm issued a policy of fire and casualty insurance to plaintiff covering loss to the subject premises and plaintiff's personal property arising from certain enumerated perils, including water damage. On May 23, 2013, while the policy was in effect, the premises and plaintiff's personal property were damaged by flood. Plaintiff made claim upon State Farm in the sum of $635,178.42 for combined losses arising from expenses she incurred for structural repairs, damage to personal property, and additional living expenses that were necessitated when she temporarily vacated the premises. State Farm paid plaintiff the sum of $350,501.62. On May 21, 2015, plaintiff commenced this action against State Farm, seeking to recover $239,625.39, representing the difference between her claim and the amount paid. According to plaintiff, the sum she seeks represents $149,186.54 in unpaid

expenses for structural repairs, $54,663.94 in unpaid damages to personal property, and $35,774.91 in unpaid reimbursements for temporary living expenses.

As relevant here, the subject policy, at Section I Conditions Number 5, provides that if the parties fail to agree on the amount of loss, "either one can demand that the amount of the loss be set by appraisal." Although that provision does not fix a deadline by which a demand for appraisal must be made, it recites that "[e]ach shall notify the other of the appraiser's identity within 20 days of receipt of the written demand. The two appraisers shall then select a competent, impartial umpire. If the two appraisers are unable to agree upon an umpire within 15 days, [the parties] can ask a judge of a court **2 of record in the state where the residence premises is [sic] located to select an umpire." If the two appraisers agree on the amount of loss, State Farm is obligated to pay that amount. If they do not, they must submit their reports to the umpire. Thereafter, a written agreement between two of the three appointed persons fixes the amount of loss. On January 29, 2016, plaintiff made a written demand to State Farm that the loss be assessed by means of appraisal. In a letter dated February 17, 2016, State Farm objected to the employment of the appraisal procedure on the grounds that plaintiff's letter "fail[ed] to identify the specific items or areas of damage which form the basis of Plaintiff's disagreement with State Farm," and that the "belated demand for appraisal was made nearly three years after the loss occurred."

*2 Plaintiff moves pursuant to Insurance Law § 3408(c) to enforce the terms of the policy so as to compel State Farm to accede to the appraisal procedure in the assessment of the loss. Insurance Law § 3408(c) provides that "[i]n the event of a covered loss, whenever an insured or insurer fails to proceed with an appraisal upon demand of the other, either party may apply to the court in the manner provided in subsection (a) of this section for an order directing the other to comply with such demand. An appraisal shall determine the actual cash value, the replacement cost, the extent of the loss or damage and the amount of the loss or damage which shall be determined as specified in the policy and shall proceed pursuant to the terms of the applicable appraisal clause of the insurance policy and not as an arbitration. Notwithstanding the provisions of this subsection, an appraisal shall not determine whether the policy actually provides coverage for any portion of the claimed loss or damage."

Contrary to State Farm's contentions, there is no deadline fixed by the statute or the policy for demanding an appraisal, and neither the statute nor the policy obligates plaintiff to identify the specific items or areas of damage which form the basis of her disagreement with State Farm. In any event, the disclosure exchanged in the instant action has provided State Farm with detailed information concerning the items of loss claimed by plaintiff.

The court also rejects State Farm's contention that the dispute between the parties implicates the issue of coverage under the policy. Plaintiff, an artist, resides in the subject premises, portions of which she also uses in connection with her profession. State Farm's assertion that wall-to-wall carpeting and a hard floor covering installed in two rooms of the premises were used for "business" purposes and, hence, outside of the ambit of the policy, appears to raise a feigned issue of fact as to whether the dispute is solely over valuation rather than coverage. There is no merit to State Farm's assertion that a determination of whether to repair or replace damaged floor covering implicates issues of coverage. There is no dispute that these and other items of personal property were damaged. Where, as here, the parties "dispute the extent of work required to repair the damage caused by the [covered peril] and the necessary methods of such repair," such disputes are "related to the extent and amount of the damage to the insured property," and "are factual questions that fall squarely within the scope of the policy's appraisal clause." *Quick Response Commercial Div., LLC v Cincinnati Ins Co.*, 2015 US Dist LEXIS 120415, * 8, 2015 WL 5306093, * 3 (ND NY 2015) (construing New York law); *see Zarour v Pacific Indem. Co.*, 113 F Supp 3d 711 (SD NY 2015) (construing New York

law); *see also* **3 *Amerex Group, Inc. v. Lexington Ins. Co.*, 678 F.3d 193, 206 (2nd Cir 2012); *cf. Pilkenton v New York Cent. Mut. Fire Ins. Co.*, 112 AD3d 1327, 1327 (4th Dept 2013).

In light of the strong public policy favoring appraisal as the method of resolving valuation disputes (*see Amerex Group, Inc. v. Lexington Ins. Co.*, supra) and the nature of the claims made by plaintiff, there is no basis on which the court may deny plaintiff's request to compel an appraisal.

Accordingly, it is hereby

ORDERED that plaintiff's motion to compel an appraisal in accordance with the terms of the underlying policy is granted; and it is further,

ORDERED that defendant shall notify plaintiff of the identity of its appraiser within 20 days of service upon it of a copy of this order with notice of entry, and shall proceed with the appraisal process in accordance with the terms of the subject insurance policy.

This constitutes the Decision and Order of the court.

Dated: 9/27/16

<<signature>>,

HON. NANCY M. BANNON

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EXHIBIT C

2012 WL 5488898
Only the Westlaw citation is currently available.
United States District Court, D. Arizona.

HARVEY PROPERTY MANAGEMENT COMPANY, INC., et al., Plaintiffs,
v.
The TRAVELERS INDEMNITY COMPANY, a Connecticut corporation, Defendant.

No. 2:12–CV–01536–SLG.
|
Nov. 6, 2012.

Attorneys and Law Firms

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Amy Michelle Samberg, Melissa Ann Marcus, Snell & Wilmer LLP, Tucson, AZ, for Defendant.

Opinion

ORDER GRANTING MOTION TO COMPEL APPRAISAL AND STAY LITIGATION

SHARON L. GLEASON, District Judge.

***1** Before the Court is a Motion to Compel Appraisal and Stay Litigation filed by Plaintiffs Harvey Property Management Company, Inc., Lynwood Apartments, and Villa del Sol Apartments at Docket 10. Oral argument on the motion was held on September 14, 2012.

FACTUAL AND PROCEDURAL BACKGROUND

The Harvey Property Management Company ("Harvey Property") manages two properties in Phoenix, Arizona: Lynwood Apartments and Villa Del Sol Apartments. Harvey Property entered into an insurance contract with The Travelers Indemnity Company ("Travelers") to provide property coverage for the two properties. On October 5, 2010, while the policy was in effect, the Plaintiffs assert that a storm, which contained severe wind and hail, damaged the exterior of the buildings including the concrete tile roofs, screens, and siding. Harvey Property submitted a claim for the loss to Travelers.

After the claim was submitted, each side prepared an estimate of the amount of loss. Harvey Property presented a Sworn Statement in Proof of Loss totaling approximately $3.5 million.[1] Travelers produced two engineering reports before arriving at a final estimate of approximately $312,000 for damages attributable to the storm.[2] It appears that the primary difference between the two loss estimates is due to the conclusions of Travelers' engineers that much of the damage to the roof tiles had not been caused by hail or wind. Travelers' engineers concluded that although "[t]he properties had been struck by hail .... [c]oncrete tile roofs had not been damaged by hail. Many concrete tiles on the roofs were fractured. Fractures in tiles were due to handling-, installation-, and servicing-related activities, imperfections on the tiles, and impacts from rocks thrown onto the roofs."[3] Travelers asserted that these causes of loss are all specifically excluded from coverage under the terms of the policy.[4]

Travelers has paid Harvey Property approximately $255,000, which it indicates is the undisputed portion of the claim.[5]

On April 13, 2012, Harvey Property sent Travelers a demand letter seeking an appraisal to resolve the dispute.[6] In that letter, Harvey Property stated "[i]t is apparent that we disagree over the amount of loss sustained and therefore, the insured has elected pursue resolution of their claim through Appraisal. Please accept this writing as the insured's demand for appraisal."[7] On May 7, 2012, Travelers responded and rejected Harvey Property's demand for appraisal based on its interpretation of the policy.[8] Harvey Property then filed the Complaint that initiated this action in state court on June 12, 2012. Travelers removed the case to federal court on the basis of diversity on July 16, 2012. The Plaintiffs' current motion seeks an order compelling

Travelers to participate in the appraisal process and staying this litigation until the appraisal process is concluded.

DISCUSSION

I. Jurisdiction.

***2** This Court has subject-matter jurisdiction over this action pursuant to 28 U.S.C. § 1332(a).

II. Aalysis.

As this is a diversity action, this Court applies federal law to procedural issues and Arizona law to substantive legal issues.[9] When there is no controlling decision of a state's highest court, this Court is to consider the decisions of the state's intermediate appellate courts:

> When interpreting state law, federal courts are bound by decisions of the state's highest court. In the absence of such a decision, a federal court must predict how the highest state court would decide the issue using intermediate appellate court decisions, decisions from other jurisdictions, statutes, treatises, and restatements as guidance. However, where there is no convincing evidence that the state supreme court would decide differently, a federal court is obligated to follow the decisions of the state's intermediate appellate courts.[10]

The parties agree that the properties were covered by the insurance policy which includes the following appraisal clause:

> If we and you disagree on the value of the property or the amount of loss, either may make written demand for an appraisal of the loss. In this event, each party will select a competent and impartial appraiser. The two appraisers will select an umpire. If they cannot agree, either may request that selection be made by a judge of a court having jurisdiction. The appraisers will state separately the value of the property and amount of loss. If they fail to agree, they will submit their differences to the umpire. A decision agreed to by any two will be binding. Each party will:
>
> a. Pay its chosen appraiser; and
>
> b. Bear the other expenses of the appraisal and umpire equally.
>
> If there is an appraisal, we will still retain our right to deny the claim.[11]

The Plaintiffs filed this Motion to Compel Appraisal and Stay Litigation arguing that the parties' disagreement is over "the amount of loss" attributable to the storm, and therefore, Harvey Property may invoke the appraisal clause to resolve the dispute. Travelers asserts the disagreement between the parties is not a dispute about the amount of loss; rather, it is a coverage dispute, and thus lies outside the scope of the policy's appraisal clause.

Under Arizona law, "a court has limited discretion when deciding a motion to compel appraisal ... [and] should consider whether the parties entered into a valid agreement to submit to appraisal, whether the assertion of a right to compel appraisal falls within the scope of the parties' agreement, and whether the party seeking appraisal has waived that right."[12] Here, the parties do not dispute that the insurance contract is a valid agreement. There is also no assertion that Harvey Property waived its right to an appraisal. Rather, the parties dispute whether the right to compel appraisal in these circumstances falls within the terms of the policy's appraisal clause.

***3** The determination of whether an insurance policy's appraisal provision applies to a particular dispute is a "straightforward question of contract interpretation."[13] Under Arizona law, a court's "purpose in interpreting a contract is to ascertain and enforce the parties' intent."[14] In order to discern this intent, a court must "look to the plain meaning of the words as viewed in the context of the contract as a whole."[15] "When the terms of a contract are plain and unambiguous, its interpretation is a question of law for the court."[16] The contract terms "must be applied as written,

and the court will not pervert or do violence to the language used, or expand it beyond its plain and ordinary meaning or add something to the contract which the parties have not put there." [17] But "where there is any ambiguity, or more than one possible construction of the provisions thereof, it is to be construed most strongly against the insurer and in favor of the insured." [18]

Arizona courts have articulated a strong policy favoring alternative dispute resolution. [19] They have also held that appraisal clauses should be interpreted using arbitration principles, based on the determination that "appraisal is analogous to arbitration." [20] Thus, this Court is to apply "principles of arbitration law" to this dispute regarding an insurance policy appraisal clause. [21] Since "public policy favors arbitration," it also favors liberally construing a policy's appraisal clause and resolving any doubts in favor of the appraisal process. [22]

In *Ori v. Am. Family Mut. Ins. Co.,* [23] a case involving fire damage, the District Court of Arizona considered an appraisal clause quite similar to the one at issue in this case and granted a motion to compel an appraisal. There, the District Court characterized the difference between the parties' loss estimates as a "disagreement about the repairs necessary to restore the home to its pre-fire state." [24] In its analysis, the District Court determined that "[t]he term 'amount of loss' necessarily includes the amount it would cost to repair that which was lost." [25] Of note, one component of the parties' dispute in *Ori* included what could be termed a coverage issue, as the insurer asserted that some of the claimed losses were not caused by an insured loss. But the District Court concluded that the appraisal process would adequately resolve this issue as "[a]n appraisal will determine the amount of loss due to the covered event (the fire); any loss not due to that event should not be included in the appraisal." [26]

The Plaintiffs here assert that this dispute falls within the appraisal clause because the parties' disagreement is over the "amount of loss" attributable to the storm. They maintain that Travelers "had admitted coverage for part of the damage caused by the October 5, 2010 storm, and only disputes the cause of the damage to the concrete roof tiles." [27] The Plaintiffs cite to *Ori* and maintain that "an appraisal can determine the amount of loss due to the covered event (storm), and exclude damages not covered by that event." [28] Consequently, the Plaintiffs assert that in determining the amount of loss, "the appraisal panel can determine the cause of the damage to the concrete roof tiles." [29]

***4** Travelers reads the term "amount of loss" in the appraisal clause more narrowly. It maintains that it "has paid the actual cash value for the reasonable cost to repair or replace the portions of claimed damage that were determined to have been caused by a Covered Cause of Loss (wind or hail) ... [so] the parties' primary dispute is whether any of the other claimed damage ... was caused by a Covered Cause of Loss or by an excluded cause." [30] Travelers asserts that "[d]isagreements regarding the cause of damage simply are not with[in] the limited authority of an appraisal panel." [31] It notes that "the policy's appraisal provision expressly and unambiguously authorizes an appraisal panel to decide only two issues: (1) the value of the property; and (2) the amount of loss[.]" [32] Travelers maintains that "[u]nlike the parties in *Ori,* the parties in this case do not agree on the cause of the Remaining Damage ... [as it] contends that the roof damage resulted from wear and tear, faulty workmanship, and defective tiles ... and the Plaintiffs contend that the roof damage at issue was caused exclusively by wind or hail[.]" [33] Therefore, it maintains the appraisal provision does not apply.

Travelers cites to many cases from outside of Arizona in support of its position." [34] It cites to a California ruling that an appraisal panel exceeded its authority when it made coverage determinations. [35] Similarly, it cites to a Tennessee court that concluded that based on "other courts' interpretation of similar language, ... [the appraisers] did not have the prerogative to determine whether any particular loss claimed by

[the insured] was caused by the tornado or whether [the insurer] was ultimately liable under its policy for the loss."[36] Likewise, Travelers cites to a Mississippi court that held:

> although the parties disagree about the value of various items of damage, they also disagree about a number of issues relating to coverage and causation—including whether certain items of damage were actually caused by Hurricane Katrina, as opposed to being preexisting damage, and whether certain allegedly damaged items (such as roofing) actually existed prior to Hurricane Katrina. This court must first determine the Policy's coverage of the losses and Defendant's liability for those losses, before the matter can be submitted for appraisal of the value of those losses.[37]

According to these cases, a court must decide issues of liability and causation before an appraisal occurs.

The Plaintiffs cite to cases from other states which indicate an appraisal would be proper in this case. As one Florida court explained:

> although there is a large discrepancy between the insured's and insurance carrier's estimate of the loss, because the insurer has not wholly denied that there is a covered loss, causation is an amountof-loss question for the appraisal panel, not a coverage question that can only be decided by the trial court.[38]

***5** Consequently, the Florida court held that once the insurer has admitted the existence of a covered loss, any valuation must necessarily include a determination of what portion of the loss was caused by the covered event. "[I]n the insurance context, an appraiser's assessment of the 'amount of loss' necessarily includes a determination of the cause of the loss, as well as the amount it would cost to repair that which was lost."[39] Other jurisdictions have also held that an appraiser must have the authority to decide the cause of certain damage in order to determine the amount of loss that is attributable to the covered event as opposed to the damage resulting from other conditions that are not covered by the policy.[40]

The disputed language of the policy at issue here is not without ambiguity. But given Arizona's strong policy in favor of alternative dispute resolution and its policy of construing ambiguities in insurance policies in favor of the insured, this Court finds that either party may invoke the appraisal clause to resolve the parties' current dispute. Travelers is not asserting that the storm did not cause any damage to the properties, nor is it asserting that the storm is not a covered event under the policy. Rather, the parties disagree over the amount of loss caused by the storm that is recoverable by the Plaintiffs from Travelers under the terms of the policy.[41] This disagreement focuses on the extent of the insurer's liability, not over the meaning of the insurance policy itself.[42] The parties agree that wind and hail are covered events, but the policy excludes coverage for damage caused by improper handling and installation, inadequate maintenance, imperfections on the tiles, and rocks being thrown onto the roof.[43] Thus, the fundamental dispute here centers on a question of fact—what is the amount of the claimed loss that covered under the policy's coverage for wind and hail. This question may be properly resolved in the appraisal process.

CONCLUSION

For the foregoing reasons, the Plaintiffs' Motion to Compel Appraisal and Stay Litigation at Docket 10 is GRANTED. Accordingly, the Court orders as follows:

1. Defendant The Travelers Indemnity Company shall participate in the appraisal process;

2. Each party will select a competent and impartial appraiser on or before ten days from the date of this order;

3. Litigation is stayed until the appraisal is complete, with the exception of matters relating to the appraisal;

4. The appraisal shall be limited solely to an itemized determination of the amount of loss to the subject properties that is attributable to the October 5, 2010 storm; and

5. The Court will not address fees and costs at this time.

All Citations

Not Reported in F.Supp.2d, 2012 WL 5488898

Footnotes

1 Docket 10–16 at 2.
2 Docket 17–2 at 47.
3 Docket 10–12 at 7–8 (HAAG Engineering Roof Evaluations).
4 Docket 10–18 at 3.
5 Docket 17 at 3.
6 Docket 10–17 at 2–3.
7 *Id.*
8 Docket 10–18 at 2.
9 *See Snead v. Metropolitan Prop. & Cas. Ins. Co.,* 237 F.3d 1080, 1090 (9th Cir.2001) ("Under the *Erie* doctrine, federal courts sitting in diversity apply state substantive law and federal procedural law." (quoting *Gasperini v. Center for Humanities, Inc. .,* 518 U.S. 415, 427, 116 S.Ct. 2211, 135 L.Ed.2d 659 (1996))).
10 In re Bartoni–Corsi Produce, Inc., 130 F.3d 857, 861 (9th Cir.1997) (quoting *Lewis v. Tel. Emp. Credit Union,* 87 F.3d 1537, 1545 (9th Cir.1996)).
11 Dcket 1–1 at 60.
12 *Smith v. Civil Serv. Employees Ins. Co.,* No. 04–cv–02013–PHX, 2005 WL 2620537 at *3 (D.Ariz. Oct.13, 2005) (internal citations omitted). *See also Palozie v. State Farm Mut. Auto. Ins. Co.,* No. 96–cv–00210PHX, 1996 WL 814533 at *3 (D.Ariz. Dec.2, 1996).
13 *Enger v. Allstate Ins. Co.,* 407 Fed. Appx. 191, 193 (9th Cir.2010). *See also Hanson v. Commercial. Union Ins. Co.,* 150 Ariz. 283, 723 P.2d 101, 104 (Ariz.App.1986) (appraisal panel's authority defined by appraisal provision of insurance policy).
14 *ELM Retirement Center, LP v. Callaway,* 226 Ariz. 287, 246 P.3d 938, 941 (Ariz.App.2010) (citing *U.S. West Commc'ns, Inc. v. Ariz. Corp. Comm'n,* 185 Ariz. 277, 915 P.2d 1232, 1235 (Ariz.App.1996)).
15 *Id.* at 941–42 (quoting *United Cal. Bank v. Prudential Ins. Co.,* 140 Ariz. 238, 681 P.2d 390, 411 (Ariz.App.1983)).
16 *Id.* at 942 (citing *Chandler Med. Bldg. Partners v. Chandler Dental Grp.,* 175 Ariz. 273, 855 P.2d 787, 791 (Ariz.App.1983)).
17 *Heard v. Farmers Ins. Exch. Co.,* 17 Ariz.App. 193, 496 P.2d 619, 621–22 (Ariz.App. 1st Div.1972) (internal citations and italics omitted).
18 *Id.* at 621.
19 *See, e.g., Medina v. Ocotillo Desert Sales, LLC,* No. 1–CV–09–0650, 2010 WL 2541058 at *6 (Ariz.App.2010) ("... the waiver of an arbitration clause is generally not favored and the facts of each case must be considered in light of the strong policy favoring arbitration."); *Aerisa, Inc. v. Plasma–Air Intern.,* No. CV 08–227, 2008 WL 5210842 at *1 (D.Ariz., Dec. 11, 2008); *Foy v. Thorp,* 186 Ariz. 151, 920 P.2d 31, 33 (Ariz.App.Ct.1996) ("Arizona law favors arbitration, both statutorily ... and by the courts as a matter of public policy."); *Rancho Pescado, Inc. v. Northwestern Mut. Life Ins. Co.,* 140 Ariz. 174, 680 P.2d 1235, 1242 (Ariz.App.Ct.1984).
20 *Meineke v. Twin City Fire Ins. Co.,* 181 Ariz. 576, 892 P.2d 1365, 1369 (Ariz.Ct.App.1994) (citing *Aetna Casualty & Sur. Co. v. Ins. Comm'r,* 293 Md. 409, 445 A.2d 14, 20 (Md.1982)); *Hirt v. Hervey,* 118 Ariz. 543, 578 P.2d 624, 626 (Ariz.Ct.App.1978); *Hanson,* 723 P.2d at 103. *Cf.* Docket 17 at 11–12 (Opp.) (arguing arbitration principles should not apply in this case). *See also Ori v. Am. Family Mut. Ins. Co.,* No.2005–cv–697–PHX, 2005 WL 3079044 at *2 (D.Ariz. Nov.15, 2005).

21 *Meineke,* 892 P.2d at 1369 (citing *Hanson,* 723 P.2d at 103).

22 *Id.* at 1370, 723 P.2d 101 (citing A.R.S. section 12–1501). *See also U .S. Insulation, Inc. v. Hilro Constr. Co., Inc.,* 146 Ariz. 250, 705 P.2d 490, 498 (Ariz.App.Ct.1985) ("[I]t is also well established that, due to the public policy favoring arbitration, arbitration clauses should be construed liberally and any doubts as to whether or not the matter in question is subject to arbitration should be resolved in favor of arbitration." (citing *New Pueblo Constr., Inc. v. Lake Patagonia Recreation Ass'n,* 12 Ariz.App. 13, 467 P.2d 88, 91 (Ariz.App.Ct.1970)); *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.,* 460 U.S. 1, 24–25, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983) ("any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration ...").

23 2005 WL 3079044. In *Ori,* the District Court noted that Arizona courts have "concluded that appraisal is analogous to arbitration, and that principles of arbitration law should be applied to proceedings involving appraisals. As a result, the District Court concluded that the Federal Arbitration Act (FAA) applied to the appraisal clause at issue in that case. *Id.* at *2. Although Arizona courts have determined that principles of arbitration law should apply to the analysis of appraisal clauses, they have not used the FAA to resolve appraisal disputes, and this Court declines to do so in the absence of such an indication. *See* discussion, *supra* note 20; *Portland Gen. Elec. Co. v. U.S. Bank Trust Nat'l Ass'n as Tr. for Trust No. 1,* 218 F.3d 1085, 1089–90 (9th Cir.2000) (because FAA does not define "arbitration," court must look to state law to determine if FAA applies to appraisal provision in dispute).

24 *Ori,* 2005 WL 3079044 at *2.

25 *Id.* at *4 (citing *Cigna Ins. Co. v. Daimio Prop. Holdings, NAVE,* 110 F.Supp.2d 259, 264 (D.Del.2000) (internal citation marks omitted)).

26 *Id.* at *4 n. 4.

27 Docket 10 at 6 (Mot.).

28 *Id.*

29 *Id.*

30 Docket 17 at 5 (Opp.).

31 *Id.*

32 *Id.* at 7 (Opp.).

33 *Id.* at 11 (Opp.). *But see* discussion, *supra* page 7.

34 Docket 17 at 8(Opp). *See alsoid.* at 9–10 (Opp.) (collecting additional cases).

35 *Kasha v. Allstate Ins. Co.,* 140 Cal.App.4th 1023, 45 Cal.Rptr.3d 92, 98–99 (Cal.Ct.App.2006) (citing *Safeco Ins. Co. v. Sharma,* 160 Cal.App.3d 1060, 207 Cal.Rptr. 104, 107 (Cal.Ct.App.1984) and noting that under California law, appraisers have more limited powers than arbitrators.)

36 *Merrimack Mut. Fire Ins. Co. v. Batts,* 59 S.W.3d 142, 153 (Tenn.Ct.App.2001).

37 *Jefferson Davis Cnty. Sch. Dist. v. RSUI Indem. Co.,* No. 08–cv–190–KS, 2009 WL 367688 at *2 (S.D.Miss. Feb.11, 2009) (*citing Rogers v. State Farm Fire & Cas. Co.,* 984 So.2d 382, 392 (Ala.2007) (where parties disagreed as to cause of foundation damage, trial court erred in ordering parties to submit to appraisal); *Wells v. Amer. States Preferred Ins. Co.,* 919 S.W.2d 679, 685 (Tex.App.1996) (appraiser not authorized to determine damage to home not caused by a plumbing leak and therefore not covered under policy)). *See also Mauna Kea Beach Hotel Corp. v. Affiliated FM Ins. Co.,* No. CV 07–00605, 2008 U.S. Dist. LEXIS 109962 at *16 (D.Haw. Mar. 7, 2008) (scope of appraisal agreement does not contain an agreement to submit causation and mitigation issues to the appraisal panel, specifically whether cracks were pre-existing and issues regarding closure of hotel); *Duane Reade, Inc. v. St. Paul Fire & Marine Ins. Co.,* 261 F.Supp.2d 293 (S.D.N.Y.2003) (dispute between the parties that goes to coverage under the policy, which can only be resolved by analysis and application of the policy, must be resolved before appraisal occurs).

38 *Kendall Lakes Townhomes Developers, Inc. v. Agricultural Excess & Surplus Lines Ins. Co.,* 916 S.2d 12, 16 (Fla.Dist.Ct.App.2005) (citing *Johnson v. Nationwide Mut. Ins. Co.,* 828 So.2d 1021, 1022 (Fla.2002) (internal quotation marks omitted)).

39 *CIGNA Ins. Co. v. Didimoi Prop. Holdings, N.V.,* 110 F.Supp.2 d 259, 264 (D.Del.2000).

40 *See State Farm Lloyds v. Johnson,* 290 S.W.3d 886, 892 (Tex.2009) (appraisers may decide causation when the question involves separating loss due to a covered event from a property's preexisting condition).

See also Docket 19 at 5 (Reply) (discussing *201 N. Wells, LLC v. Fidelity & Guaranty Ins. Co.,* No. 1:00–cv–03855 (N.D.Ill. Feb. 2, 2001) (determination of causation is "inherent" in the duties of an appraiser)).

41 As noted above, the appraisal clause of the policy contains the following statement: "If there is an appraisal, we will still retain our right to deny the claim." This last sentence may indicate an intention to allow a challenge to coverage after an appraisal occurs or it may mean something entirely different, but neither party has focused on this sentence, and it is not determinative of the current dispute. After the appraisal, the parties may seek to return to the interpretation of this last sentence as warranted. *Cf. Mauna Kea Beach Hotel Corp. v. Affiliated FM Ins. Co.,* No. CV 07–00605, 2008 U.S. Dist. LEXIS 109962 at *19 (D.Haw. Mar. 7, 2008) (preferable for court to determine causation and mitigation issues prior to appraisal of amount of loss where $30 million threshold in insurance policy); *LeBlanc v. Travelers Home & Marine Ins. Co.,* 2011 WL 1107126 at *5 (W.D.Okla.2011) (plaintiff can only rely on appraisal estimate to establish the cost to repair the house to its pre-tornado state, not to establish whether damages were due to tornado or some other excluded condition).

42 *See Johnson v. State Farm,* 204 S.W.3d 897, 903 (Tex.App.2006) ("If the parties had to first agree on which specific shingles were damaged and approach every disagreement on extent of damage as a causation, coverage or liability issue, either party could defeat the other party's request for an appraisal by labeling a disagreement as a coverage dispute. Instead, as the process is designed, once it is determined that there is a covered loss and a dispute about the amount of that loss, the appraisal process determines the amount that should be paid because of loss from a covered peril.").

43 *See Underwriters at Lloyd's of London, Syndicate 4242, Greg Butler, Active Underwriter v. Tarantino Props., Inc.,* No. 4:12–DV–00167–DGK, 2012 WL 3835385 at *5 (W.D.Mo. Sept.4, 2012).

End of Document

EXHIBIT D

NEW YORK STATE ASSEMBLY
MEMORANDUM IN SUPPORT OF LEGISLATION
submitted in accordance with Assembly Rule III, Sec 1(f)

BILL NUMBER: A9346A

SPONSOR: Morelle (MS)

TITLE OF BILL: An act to amend the insurance law, in relation to court ordered appraisals under fire insurance policies

PURPOSE: This bill relates to court ordered appraisals under fire insurance policies

SUMMARY OF PROVISIONS:

Section 1 - Amends subsection (c) of Section 3408 of the insurance law, as added by Chapter 25 of the Laws of 2010.

Section 2 - Effective Date

JUSTIFICATION: One manner of resolving disputes under certain insurance policies is the appraisal process, which is similar to arbitration. When an insured requests an appraisal, and the insurer refuses, the insured can seek a Court Order requiring the insured to participate in the appraisal process. Unfortunately, the Courts have taken a limited view as to what issues are subject to appraisal. This bill would clarify that the amount of the loss is a proper subject of arbitration. This change will result in substantial savings in litigation costs to both sides of a dispute.

LEGISLATIVE HISTORY: New bill

FISCAL IMPLICATIONS: None

EFFECTIVE DATE: This act shall take effect immediately.

EXHIBIT E

DIVISION OF THE BUDGET BILL MEMORANDUM

Session Year 2014

SENATE:
No.

ASSEMBLY:
No. 9346-A

Primary Sponsor: Morelle

Law: Insurance **Sections: 3408**

Division of the Budget recommendation on the above bill

APPROVE: __ **NO OBJECTION: _x_**

1. Subject and Purpose:

This bill amends the Insurance Law to clarify what should be legally eligible for arbitration in an insurance dispute. The original legislation was intended to foster faster settlements of disputed fire insurance claims by authorizing courts to compel insurance companies and policyholders to proceed with property appraisals to assist in settling these disputes. Empowering the courts to compel either party helps avoid costly litigation and alleviates the courts from hearing cases that can be more efficiently resolved through other legal mechanisms. This bill removes ambiguity by amending the law to explicitly state that the appraisal include the actual cash value, replacement cost and the extent and amount of the damage or loss of the property.

This bill shall take effect immediately after it is signed into law.

2. Budget Implications:

This bill would have no fiscal impact to the State.

3. Recommendation:

This bill would have no fiscal or programmatic impacts upon the State. The Department of Financial Services preliminarily has no objection to the bill's enactment. The Division of the Budget has no objection to the bill's enactment.

Validation: Document ID: 1188681-0
Robert L. Megna, Director of the Budget
By George Westervelt
Date: 8/4/2014 2:26:00 PM

EXHIBIT F

NFA® SINCE 1922

NATIONAL FIRE ADJUSTMENT CO., INC.

FRANK R. PAPA, J.D., CHAIRMAN
RONALD J. PAPA, SPPA, PRESIDENT
ANGELO I. PUCCIO, MANAGER

November 13, 2014

VIA E-MAIL (legislative.secretary@exec.ny.us)
Seth Agata, Esq.
Acting Counsel
Executive Chamber
State Capitol
Albany, NY 12224

RE: A. 9346-A

Dear Mr. Agata:

I write you as a third generation licensed public insurance adjuster in the State of New York, as I am the president of the largest licensed public adjusting firm in New York State. I am also a past president of the National Association of Public Insurance Adjusters (NAPIA), and currently a director of New York Public Adjusters Association (NYPAA).

I am very much in favor of Assembly Bill 9346A and Senate Bill 4756A, which I understand is now on Governor Cuomo's desk. This important legislation would make it more effective for the policyholders, as well as insurance carriers, to invoke the appraisal provision, which is standard and required by law in all fire insurance policies in New York State. Some have recently argued that the extent of damage is not appraisable - merely the amount. In other words, they would be willing to appraise the cost of 2"x4"s, but not how many 2"x4"s, would have to be replaced as a result of a fire. For the appraisal panel to not be able to address the **extent** of damage makes the appraisal process virtually a nullity.

This bill passed the Senate and the Assembly, both unanimously, and we are looking for the Governor's pen to make this bill law, which will help consumers throughout New York State. Appraisal is an efficient and expeditious way of determining the amount of loss. If they could utilize the appraisal provision, their only recourse is litigation or accept whatever the insurance company offers. Appraisal has been a provision in the insurance policies for more than 100 years, and this legislation will clarify the issue that extent of damage is appraisable.

Please call if you have any thoughts or questions. Thank you for your consideration.

Very truly yours,

NATIONAL FIRE ADJUSTMENT CO., INC.

Ronald J. Papa, SPPA
President

RJP/sp/APPRAISALBILL-111314

EXHIBIT G

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November 10, 2014

Seth Agata, Esq.
Acting Counsel
Executive Chamber
State Capitol
Albany, New York 12224

RE: Assembly Bill 9346-A (Morelle)/Senate Bill 4756-A (DeFrancisco)

Dear Mr. Agata:

On behalf of the New York Public Adjusters Association (NYPAA) and New York insurance consumers, I am writing in support of Assembly Bill 9346-A and Senate Bill 4756-A.

The appraisal provision, which is contained in every property insurance policy issued in the state, is one of the only consumer friendly provisions in a homeowners' or commercial policy. It applies when a loss occurs and the parties do not agree on the amount of loss or damage or the value of the insured property. In that common event, the provision provides that upon demand of the insured or insurer, each party appoints an appraiser and the two appraisers appoint an independent umpire whereupon an agreement signed by at least two of the three appraisal panelists determines the loss. When used properly, the process is an efficient, fair and affordable method of claim resolution. The process does not apply to coverage issues. It enables the parties to resolve their damage issues without resort to litigation.

Insurers have been using the provision's inapplicability to coverage issues as a scheme to avoid appraisal altogether. This bill would clarify that issues regarding the "extent of the loss or

damage" or scope of loss are appraisable issues.

This change will reduce needless and expensive litigation and avoid the significant delays and acrimony that results when the carrier seeks to avoid appraisal by wrongfully asserting that issues concerning the extent of the loss are coverage issues. They are not.

A reference in the bill memo (Chapter 25 of the Laws of 2010) when the current §3408(c) was adopted to the effect that appraisal may be ordered "regardless of issues of scope of loss or scope of coverage" has proven insufficient to clarify the issue. The term "scope of loss" does not appear in the appraisal provision nor is it defined by any policy. It is therefore inappropriate to use the broad term as insurers commonly have without more precise analysis to make a proper determination and avoid confusion.

For example, it is universally accepted that the cost of replacing charred wooden beams is appraisable. However, it has been claimed by some that the scope of loss or how many beams require replacement (as opposed to repair or sealing and deodorizing or needing no repair) is an issue of coverage and thus not appraisable. Other examples occur where the insured's list of damaged items contains items not on the insurer's list. Similar issues arise in almost every claim. These types of disputes constitute the majority of cases wrongly claimed to be unappraisable as implicating coverage issues.

Claims where the carrier has acknowledged some significant covered loss but asserts that portions of damage were caused by non-covered perils, like wear and tear, are now regularly refused for appraisal. This important legislation would clarify that these issues are appraisable once demanded.

The argument is that appraisal is inappropriate in these cases as the determination of "scope of loss" or "extent of loss" raises coverage issues of causation. "Scope of loss" should never be the basis for denial of appraisal as it simply is not the measure of what is appraisable or not. The salient issues in these situations for determining whether a loss is appraisable are (a) whether the carrier has accepted liability for a covered loss, (b) whether the predominant dispute is a matter of the amount or extent of loss or value and (c) whether the issues have ripened into a disagreement. Any claim that satisfies these policy defined factors is appraisable.

This legislation will clarify once and for all, that issues regarding the extent or scope of the damage are appraisable. It

also reminds us that coverage issues are not appraisable.

As author of the leading legal treatise on the topic nationwide, I can confirm the need for this language is critical. Adoption will save consumers, insurers and the courts much time and expense and avoid needless litigation while providing an efficient mechanism to resolve issues of loss, damage, value and the scope of these covered losses.

The New York State Public Adjusters Association respectfully urges the Governor's signing of Assembly Bill 9346-A and Senate Bill 4756-A. Adoption will positively impact insurance consumers' lives for generations to come.

Sincerely,

By: _____

JONATHAN J. WILKOFSKY
General Counsel and Executive Director
New York Public Adjusters Association

JJW:ajd
19943/94J254.791

EXHIBIT H

United Policyholders™

United Policyholders
381 Bush Street, 8th Floor
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April 22, 2014

Hon. James L. Seward, Chair
New York State Senate Insurance Committee
172 State Street, Room 430, Capitol
Albany, NY 12247

Re: Support for SB 4756

Dear Senator Seward:

We are writing to share relevant information and voice our support for SB 4756 (DeFrancisco). The purpose of this bill is to improve our current system for efficiently and inexpensively resolving property insurance claim disputes through the "Appraisal" process and without undue use of judicial resources.

Unlike in the real estate context, an appraisal in the insurance claim context is a process designed to resolve disputes over the extent and value of damage or destruction to real property. An example of a dispute suitable for appraisal would be a kitchen fire where the home owner and insurer are in disagreement on whether an adjacent bathroom needs to be repaired, including ceiling tiles containing asbestos and an older, moldy window frame that was exposed to fire suppression water. The goal of the appraisal would be to calculate the damage caused by the fire, the work that needs to be done to properly repair the home and how much that work and related materials will cost.

Appraisal is an efficient way of doing that calculation because it involves construction materials, repair and mold abatement methods, building components and other technical matters. The property owner and insurer submit evidence and a panel of appraisers makes a determination on the amount of damage and the cost of restoring the property to its pre-loss condition. If there is a *coverage* dispute, it gets resolved after the appraisal by the parties or a court, but the scope (extent and cost) of damage has already been (efficiently) established by technical experts outside of court.

The purpose of this bill is to clarify that an insurance appraisal should calculate the entire extent of damage and cost of necessary repairs – regardless of coverage. Using our kitchen example – if the insurer wanted to dispute *coverage* for the mold abatement- that issue would not be resolved in an appraisal. But the cost of

necessary repairs – *including the mold* abatement should be appraised – and if the insurer wants to dispute coverage it can do so after the appraisal. An appraisal that does not include the full scope of damage and cost of repairs is a waste of time and money and parties would be better off using the judicial system to resolve the entire matter.

Policyholders in New York currently have the right to petition a court for help where their insurer refuses their request to appraise a claim dispute. However, New York Courts have been reluctant to compel complete appraisals. SB 4756 will serve the interests of law and equity, as well as those of judicial economy by preventing re-litigating the amount of loss or damage after a coverage dispute arises. Both policyholders and insurers should support SB 4756.

"We" are United Policyholders ("UP"), a non-profit that speaks for people and businesses in New York and across the nation who buy insurance and rely on their coverage to be a critical financial safety net in time of adversity. Through "Roadmap to Preparedness" and "Roadmap to Recovery" Programs, UP is engaged in communities throughout the state with a focus on areas hit hard by Hurricane Irene and Superstorm Sandy. UP hosts a library of materials on that includes guidance on insurance appraisals (*See, e.g.,* http://www.uphelp.org/library/resource/insurance-appraisal-simplified).

UP is a voice and information resource for insurance consumers in all 50 states. Donations, foundation grants and volunteer attorneys support the organization's work. UP does not sell insurance or accept funding from insurance companies.

Thank you for your consideration of both SB 4756 and this letter in support.

Sincerely,

Amy Bach, Esq.
Executive Director

EXHIBIT I

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In the Matter of CHARLES ALLEN HENSLER,

Petitioner,

-against-

DRYDEN MUTUAL INSURANCE COMPANY,

Respondent.

DECISION, ORDER & JUDGMENT
Index No. 7864-16
RJI No.: 01-16-123221

DATE STAMP & RETURN

(Supreme Court, Albany County, All-Purpose Term)

APPEARANCES: Jason L. Shaw, Esq.
Whiteman, Osterman & Hanna LLP
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One Commerce Plaza
Albany, New York 12260

Marco Cercone, Esq.
Rupp Baase Pfalzgraf Cunningham LLC
Attorneys for Respondent
1600 Liberty Building
Buffalo, New York 14202

HON. JAMES H. FERREIRA, Acting Justice:

In this special proceeding pursuant to Insurance Law § 3408 and CPLR 7601, petitioner seeks an order directing respondent to proceed to an appraisal of petitioner's property in connection with a May 29, 2016 fire loss and to select an appraiser as required under the law and under the insurance policy at issue. Petitioner commenced this proceeding by Order to Show Cause signed December 29, 2016. Respondent has filed an answer opposing the petition and petitioner has submitted a reply.

The petition and supporting documents reflect the following undisputed facts. Petitioner is the owner of property located at 323 Clinton Avenue, Albany, New York. On May 29, 2016, the

property sustained damage as a result of a fire. The fire originated in the building next door and the bulk of the damage to petitioner's property was water damage caused by firefighting efforts. At the time of the fire, the property was insured by respondent pursuant to an insurance policy which was effective for the period of February 25, 2016 through February 25, 2017. Petitioner submitted a claim under the policy, and respondent paid petitioner $10,000.00, representing an advance on policy proceeds. Between June 2, 2016 through July 26, 2016, Professional Fire Restoration used equipment to dry out the building and performed extensive demolition and debris removal. Petitioner was charged $77,089.93 for this work; respondent reimbursed petitioner in full for these charges. Both petitioner's public adjuster and respondent's adjuster inspected the property before any demolition took place.

In June 2016, petitioner's public adjuster provided respondent with an estimate of $310,958.24 for repair and replacement costs. This estimate included demolition, debris removal and removal and replacement of all ceilings, walls, insulation and flooring. Respondent's estimate in response asserted that the actual cash value of the loss was $172,926.03 and that the replacement cost of the loss was $209,586.00. By letter dated October 13, 2016, petitioner advised that he would be making a replacement cost claim under the policy and demanded that the parties' dispute over the value and scope of damage to petitioner's property be submitted to appraisal under the terms of the policy and identified his selected appraiser. By letter dated October 28, 2016, respondent rejected the request on the ground that "there is an ongoing dispute over insurance coverage" with respect to petitioner's claim inasmuch as several items claimed by petitioner "did not sustain a direct physical loss" and are not subject to coverage (Petition, Exhibit C, at 2). Respondent also asserted that "the loss scene has been torn out, gutted" making an appraisal impossible or impracticable (id.). Respondent tendered a check to petitioner for $76,802.58, representing "the undisputed actual cash

value of the building's value less [petitioner's] deductible and less the advance payment of $10,000.00" (id. at 1). Petitioner thereafter commenced the instant proceeding seeking an order compelling respondent to proceed with appraisals.

The insurance policy at issue in this proceeding contains a provision with respect to appraisal which states, in part, that, if the parties "do not agree on the cost to repair or replace, actual cash value of or amount of loss to covered property when the loss occurs, either party may demand that these amounts be determined by appraisal" (Petition, Exhibit A, Agreement, at 9). Insurance Law § 3408 provides: "In the event of a covered loss, whenever an insured or insurer fails to proceed with an appraisal upon demand of the other, either party may apply to the court in the manner provided in [Insurance Law § 3408 (a)] for an order directing the other to comply with such demand" (Insurance Law § 3408 [c]). Insurance Law § 3408 (c) further states:

> "An appraisal shall determine the actual cash value, the replacement cost, the extent of the loss or damage and the amount of the loss or damage which shall be determined as specified in the policy and shall proceed pursuant to the terms of the applicable appraisal clause of the insurance policy and not as an arbitration. Notwithstanding the provisions of this subsection, an appraisal shall not determine whether the policy actually provides coverage for any portion of the claimed loss or damage" (id.).

The existence of an "insurance coverage dispute precludes the application of the appraisal process set forth in the policy" (Pilkenton v New York Cent. Mut. Fire Ins. Co., 112 AD3d 1327, 1327 [4th Dept 2013]).

Respondent opposes the petition on the grounds that: (1) the Court lacks personal jurisdiction over respondent; (2) the proceeding was not commenced within a reasonable period and is untimely; and (3) there are issue of insurance coverage that preclude the use of the appraisal process. As an initial matter, the Court rejects respondent's argument that the Court lacks personal jurisdiction over it. The parties agree that the procedures set forth in CPLR article 4 govern this special proceeding

(see Vincent C. Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 7601). Pursuant to CPLR 403 (d), a Court may "grant an order to show cause to be served, in lieu of a notice of petition at a time and in a manner specified therein" (CPLR 403 [d]). Here, the Order to Show Cause directed that the Order to Show Cause and the papers upon which it was granted "shall be made by overnight courier on or before January 4, 2017" upon respondent at 12 Ellis Drive, Dryden, New York 13053 (Order to Show Cause).

Here, petitioner has submitted an affidavit of service demonstrating that it served the Order to Show Cause and supporting documents upon respondent on December 30, 2016 by mailing the documents to respondent at the Dryden, New York address by overnight mail. Respondent does not dispute the assertions in the affidavit of service, and the Court finds that such service was proper pursuant to the terms set forth in the Order to Show Cause. The Court is unpersuaded by respondent's argument that the Court was not authorized to direct service by overnight mail in the absence of an allegation by petitioner justifying this alternate form of service. CPLR 403 (d), on its face, authorizes the Court to specify the time and manner of service and does not require any allegations by petitioner in that respect. Respondent has not identified any statute requiring that service be made in a specific manner in a special proceeding such as this one (compare Matter of Stephens v New York State Exec. Bd. of Parole Appeals Unit, 297 AD2d 408, 409-410 [3d Dept 2002]).[1] The Court is likewise unpersuaded by respondent's argument that service was improper because petitioner mailed the papers to respondent without ensuring that an authorized representative of respondent received them. Nothing in the Court's Order to Show Cause required such. Accordingly, the Court declines to dismiss the proceeding on the ground that it lacks personal

[1] The Court notes that neither Insurance Law § 3408 nor CPLR 7601 address the manner of service required in a special proceeding to compel appraisals.

jurisdiction over respondent.

Respondent also contends that this proceeding should be dismissed as untimely because it was not commenced "within a reasonable period" (Memorandum of Law in Opposition, at 8). Respondent argues that, in the seven months that elapsed between the fire and petitioner's commencement of this proceeding, the subject property was "torn out and gutted," making the appraisal process "impractical, if not impossible" (Memorandum of Law in Opposition, at 7). Respondent's position is that petitioner "should have preserved the property for further assessment" if he wanted to proceed with the appraisal process rather than proceed with repairs (id.).

Upon review, the Court rejects this argument. As petitioner points out, Insurance Law § 3408 does not set forth a time period for a party to make an application for an order to proceed with appraisals. The insurance policy is likewise silent on this point. While the Court of Appeals has stated that "the right to require an appraisal when there is a disagreement as to the amount of loss . . . is not indefinite as to time, but must be exercised within a reasonable period, depending upon the facts of the particular case" (Chainless Cycle Mfg. Co. v Security Ins. Co., 169 NY 304, 310 [1901]), the Court does not find that the facts before it justify dismissal of the proceeding on timeliness grounds. The record reflects that petitioner demanded that the parties proceed with appraisals within several weeks of receiving the estimate of respondent's adjuster and commenced this proceeding approximately two months after respondent's refusal to proceed with appraisals. As a practical matter, petitioner cannot be faulted for not demanding an appraisal before he was aware of the disparity in the parties' estimates. Moreover, although the record confirms that substantial demolition work has been done with respect to the property since the fire, respondent has not provided any support for its assertion that, as a result, appraisals are now impossible or impractical. Importantly, the record reflects that respondent performed a property inspection just days after the

fire and took photographs and mapped out the property for purposes of preparing an estimate (see Appel Affidavit in Opposition ¶ 8). Respondent also re-inspected the property in June 2016 after petitioner's mitigation efforts and tear out were performed and was able to complete its estimate after that time. As such, the Court declines to dismiss the proceeding on the ground that it is untimely (see Matter of Pottenburgh v Dryden Mut. Ins. Co., 55 Misc 3d 775, 779 [Sup Ct, Tompkins County 2017]).

Respondent's third contention in opposition to the petition is that the petition should be dismissed because there are issues of insurance coverage which preclude the application of the appraisal process. On this point, respondent has submitted the affidavit of Michael Appel, a property supervisor employed by respondent. Therein, Mr. Appel states, in relevant part, that respondent has taken the position that "petitioner's mitigation and tear out of the property was far more extensive than necessary. Among other things, petitioner gutted all of the walls on the second floor, oak moldings, trims, and solid-core doors that were not damaged by the underlying fire" (Appel Affidavit ¶ 14). He further states that respondent has taken the position that "petitioner did not address necessary mitigation quickly enough, . . . which allowed mold to develop and contribute to the excessive demolition" (id. ¶ 15). Mr. Appel notes that the policy only covers property that sustains "direct physical loss" and that respondent disputes petitioner's damage estimate inasmuch as it includes claims for replacement of sinks ($3,000.00), faucets ($2,500.00) and fixtures ($12,000.00) that did not sustain any direct physical loss by fire or water (id. ¶ 18). Mr. Appel further asserts that petitioner's estimate "is predicated on incorrect measurements of the property without deductions for openings, such as doorways, windows, and closets" (id. at 22). Respondent argues that, because it disputes coverage for a portion of petitioner's claim, the matter cannot be resolved by appraisers and the proceeding must be dismissed. Respondent also argues that the proceeding is premature

inasmuch as petitioner is seeking appraisals with respect to replacement cost coverage because the property has not yet been repaired.

In reply, petitioner has submitted the affidavit of Kevin R. Allen, petitioner's public adjuster. Therein, Mr. Allen states, in relevant part, that "many times removing undamaged items is necessary to repair damaged items. The cost of removing, restoring, and reinstalling the undamaged property can be more than the cost of simply replacing it. This is not an issue of coverage but of what should be included in the loss calculation" (Allen Affidavit ¶ 6). Mr. Allen further states that, although an appraisal would determine the replacement cost value, respondent would not have to pay the replacement cost unless petitioner replaced the property. Petitioner argues that the extent of physical damage caused to the property by a covered loss – here a fire – is not a coverage issue but an adjustment issue which is subject to the appraisal process.

Upon due consideration, the Court agrees with petitioner that the dispute between the parties is a proper subject for appraisals. Importantly, respondent has not claimed that the property is not covered by the policy or that fire damage is not a covered cause of loss under the policy. In fact, the record reflects that respondent has made several payments to petitioner under the policy, including a payment representing the undisputed actual cash value of the building. Moreover, respondent has not submitted any documentation demonstrating that it has made any specific denial of coverage under any provision of the policy with respect to this claim. The Court is not persuaded by respondent's argument that the policy provision which it cites authorizes the piecemeal denial of coverage for specific items.[2] Although respondent characterizes the dispute as one involving

[2] The provision of the policy upon which respondent relies states: "We insure the described Residence and Related Private Structures on Premises against covered causes of loss. Covered causes of loss means risks of direct physical loss except as excluded or limited by your policy" (Appel Affidavit, Exhibit A, Causes of Loss [emphasis omitted]).

insurance coverage, the Court finds that the papers before it reflect that, in actuality, the dispute is over the value and extent of the loss. Specifically, the dispute, as outlined in Mr. Appel's affidavit, is whether the mitigation efforts taken by petitioner were necessary, whether petitioner contributed to the damage by not addressing mitigation quickly enough and whether it is necessary to replace certain fixtures which did not sustain any fire or water damage. In the Court's view, these disputes are factual questions which fall within the scope of the appraisal clause of the policy, which applies to disagreements as to "the cost to repair or replace [and the] amount of loss to covered property when the loss occurs" (Petition, Exhibit A, Agreement, at 9) (see Matter of Pottenburgh v Dryden Mut. Ins. Co., 55 Misc 3d at 777-778). The Court disagrees with respondent's assertion that the proceeding is premature.

Based upon the foregoing, the petition is granted in its entirety. Respondent will be ordered to select an appraiser and participate in the appraisal process in accordance with the insurance policy. Respondent shall identify its appraiser within twenty days from service upon it of this Decision, Order and Judgment.

Accordingly, it is hereby

ORDERED AND ADJUDGED the petition is granted in its entirety; and it is further

ORDERED AND ADJUDGED that respondent shall select an appraiser and participate in the appraisal process in accordance with the insurance policy. Respondent shall identify its appraiser within twenty days from service upon it of this Decision, Order and Judgment.

The foregoing constitutes the Decision, Order and Judgment of the Court. The original Decision, Order and Judgment is being returned to counsel for petitioner. A copy of the Decision, Order and Judgment and the supporting papers have been delivered to the County Clerk for placement in the file. The signing of this Decision, Order and Judgment and delivery of a copy shall

not constitute entry or filing under CPLR 2220. Counsel is not relieved from the applicable provisions of that rule respecting filing, entry and notice of entry.

SO ORDERED AND ADJUDGED

ENTER.

Dated: Albany, New York
June 14, 2017

James H. Ferreira
Acting Justice of the Supreme Court

Papers Considered:

1. Order to Show Cause, dated December 29, 2016;
2. Verified Petition, dated December 28, 2016, with attached exhibits;
3. Affidavit in Support by Charles Allen Hensler, sworn to December 15, 2016, with attached exhibits;
4. Affidavit in Support by Kevin R. Allen, sworn to December 19, 2016, with attached exhibits;
5. Memorandum of Law in Support by Jason L. Shaw, Esq., dated December 19, 2016, with attached exhibits;
6. Answer, dated January 24, 2017;
7. Affidavit in Opposition to Petition by Michael Appel, sworn to January 24, 2017, with attached exhibit;
8. Affidavit in Opposition to Petition by Marco Cercone, Esq., sworn to January 24, 2017, with attached exhibit;
9. Memorandum of Law in Opposition by Marco Cercone, Esq., dated January 24, 2017;
10. Affidavit in Reply by Jason L. Shaw, Esq., sworn to January 30, 2017, with attached exhibit;
11. Affidavit in Reply by Kevin R. Allen, sworn to January 28, 2017;
12. Affidavit in Reply by Ronald J. Papa, sworn to January 30, 2017; and
13. Memorandum of Law in Reply by Jason L. Shaw, Esq., dated January 31, 2017, with attached exhibits.

EXHIBIT J

79 Va. Cir. 440
Circuit Court of Virginia,
Fairfax County.

Robert COATES, III and Melanie D. Coates
v.
ERIE INSURANCE EXCHANGE, et al.

No. CL–2009–1456.
|
Nov. 4, 2009.

Attorneys and Law Firms

C. Thomas Brown, Esquire, Silver & Brown, P.C., Fairfax, Virginia.

Stephen A. Horvath, Esquire, Trichilo, Bancroft, McGavin, Horvath & Judkins, P.C., Fairfax, Virginia.

Opinion

MICHAEL P. McWEENY, J.

***1** Dear Counsel:
This matter came before the Court on the parties' Cross Motions for Summary Judgment. The Court heard argument on October 16, 2009. At the conclusion of oral argument, the Court took this matter under advisement.

The Court has fully considered the briefs submitted as well as the oral arguments of both parties and, for the reasons set forth below, the Court grants Plaintiffs' Motion for Summary Judgment.

BACKGROUND

This matter arises out of litigation concerning submission of an insurance dispute between Plaintiffs Robert Coates and Melanie Coates (the "Coates"), and Defendant Erie Insurance Exchange ("Erie"), to appraisal. It is undisputed that electrical wiring, circuits, and some other contents of the Coates home were damaged by an electrical power surge (the "Event") on February 21, 2007. The parties have stipulated that the Event was covered under the insurance policy between the Coates and Erie. However, the parties disagree as to the extent of repairs required to correct the damage.

The Coates claim that repairing the damage to the electrical wiring necessitates removal and replacement of the undamaged walls and trim surrounding the wiring. They estimate that the repairs will cost approximately $439,000. Erie claims that the repairs can be made without removing the undamaged walls and trim by feeding new wiring behind the existing structure. Erie estimates that this will cost approximately $60,000.

The insurance policy includes an appraisal clause permitting a dispute as to "amount of loss" to be submitted to an appraisal process upon demand of either party. The Coates claim that this is a dispute over "amount of loss," and demand submission to appraisal pursuant to the policy. Erie refuses to submit to appraisal, claiming that this is a dispute over causation and coverage that is inappropriate for appraisal.

The Coates filed suit on February 3, 2009 seeking a Declaratory Judgment compelling Erie's submission to appraisal. The parties then filed the instant Cross Motions for Summary Judgment

STANDARD OF REVIEW

Summary judgment is a procedure which gives courts the ability to end litigation at an early stage of the proceedings where it "*clearly* appears that one of the parties is entitled to a judgment as made out by the pleadings and the parties' admissions." *Renner v. Stafford,* 245 Va. 351, 353 (1993) (emphasis in original). Summary judgment is proper only when there are no material facts genuinely in dispute. *Carson v. LeBlanc,* 245 Va. 135, 139 (1993); Va. Sup.Ct. Rules 3:18, 3:20. In considering a motion for summary judgment, a court must adopt all inferences most favorable to the non-moving party, "unless the inferences are strained, forced, or contrary to reason." *Bloodworth v. Ellis,* 221 Va. 18, 23 (1980).

ANALYSIS

Va.Code § 38.2–2105 requires that all insurance policies include an appraisal clause which requires that either party, upon written demand, submit a dispute concerning "amount of loss" to the appraisal process. The appraisal clause in the policy at issue reads in pertinent part:

> ***2** APPRAISAL
>
> If you and we fail to agree on the *amount of loss,* on written demand of either, each party will choose a competent appraiser and notify the other of the appraiser's identity within 20 days after the demand is received. The appraisers will select a competent and impartial umpire. If the appraisers are unable to agree upon an umpire within 15 days after both appraisers have been identified, you or we can ask a judge of a court of record in the state where your residence premises is located to select an umpire.

Policy of Insurance, Rights and Duties–Conditions —Section I, (2) Appraisal, P. 12 (emphasis added).

The mandatory language of the appraisal clause recited in Va.Code § 38.2–2105, states in part that:

> In case the insured and this Company shall fail to agree as to *the actual cash value or the amount of loss,* then, on the written demand of either, each shall select a competent and disinterested appraiser and notify the other of the appraiser selected within twenty days of such demand. The appraisers shall first select a competent and disinterested umpire; and failing for fifteen days to agree upon such umpire, then, on request of the insured or this Company, such umpire shall be selected by a judge of a court of record in the state in which the property covered is located. (emphasis added).

As noted by Erie, the language of the policy must contain this language or language no less favorable to the insured, and therefore the policy will be interpreted in that light. It is agreed by the parties that the determining factor in triggering the appraisal clause, therefore, is whether the dispute concerns the "amount of loss."

The Coates argue that there is a bright line test for this determination: Once the insurer admits coverage of the event itself, any dispute over the cost of repair is a disagreement as to "amount of loss" and either party then may compel the appraisal process. Erie argues that "amount of loss" refers to assigning an itemized cash value to each item of the lost property, and therefore a dispute over what must be replaced is a question of coverage, causation and liability under the policy that is inappropriate for appraisal.

The phrase "amount of loss" is not defined in the policy. It is not defined in the Virginia Code, nor has its meaning been construed by a Virginia court. The phrase "amount of loss," however, has been construed by foreign jurisdictions which have adopted appraisal statutes with language nearly identical to Va.Code § 38.2–2105. Thus, while this Court is not bound by precedent on this question, it will look to these decisions for guidance in reaching its conclusion.

The United States District Court for the District of Delaware squarely addressed the meaning of "amount of loss" in *CIGNA v. Didimoi Property Holdings, N.V. et al.,* 110 F.Supp.2d 259 (D.De.2000). In CIGNA, a dispute arose as to the extent of repair necessary to restore a building after a fire covered under the policy had rendered the building untenable. *Id.* at 261. Considering an insurance policy with similar appraisal language as in the case at hand, the Court held that "an appraiser's assessment of the 'amount of loss' necessarily includes a determination of the cause of the loss, as well as the amount it would cost to repair that which was lost." *Id.* at 264. The Court found "amount of loss" to mean, at the very least, more

than assigning an itemized cash value to each item of lost property.

***3** This rationale is further supported by the language of Va.Code § 38.2–2105. The statute states that appraisal may be compelled if the parties disagree as to "the actual cash value **or** the amount of loss." Va.Code § 38.2–2105 (emphasis added). The statute refers to "actual cash value" and "amount of loss" in the disjunctive. "Amount of loss" must therefore have meaning apart from assigning an itemized cash value to damaged property.

In many of the cases that have addressed appraisal, as in *CIGNA,* there is a dispute as to whether the event was the cause of the damage to the claimed items.[1] That was the situation faced by the court in *Wells v. American States Preferred Insurance Company,* 919 S.W.2d 679 (Ct.App.Tex.1996). There, the question was whether a plumbing leak or another event caused or did not cause damage to the foundation. The court found that the appraisal section did not authorize the appraisers to make that type of causation determination. *Id.* at 683. In the case-at-bar it is undisputed that the electrical surge was the sole cause of damage to the Coates' home. The only question that remains is the extent of what must be replaced, or the character of work that must be performed to adequately repair the damage.

This exact question was addressed by the Texas Supreme Court in *State Farm Lloyds v. Johnson,* 290 S.W.3d 886 (Tex.2009). In *Johnson,* a hail storm damaged the policy holder's roof. A dispute arose as to whether appraisal was appropriate to determine which portions of the roof needed to be replaced under the policy. *Id.* at 887. The Supreme Court of Texas held that appraisal was the appropriate process not only for determining which portions of the roof were damaged, but also *whether undamaged portions of the roof would need to be replaced in order to fix the damage caused by the event. Id.* at 891. The court noted that "causation relates to both liability and damages because it is the connection between them." *Id.* at 891–892. It distinguished *Wells* stating that in that case different causes, a plumbing leak (a covered peril) and settling of the foundation (an excluded peril), were questions of causation for liability purposes and thus for the court, as opposed to the extent of damage caused by a covered event which question was appropriate for the appraisal process. *Id.* at 892. The court held that appraisers must necessarily account for causation in determining "amount of loss." *Id.* at 893.

In addition to causation, Erie argues that the case at hand deals with a question of coverage and for that reason appraisal is inappropriate. Erie relies on a number of cases for its proposition that questions of coverage are not suitable for appraisal.[2] While it seems certain that questions of coverage are reserved for the courts, the situation here is more analogous to the facts in *Johnson* and this Court declines to adopt the characterization of facts proposed by Erie. The determination whether a covered loss necessitates replacement of undamaged portions of a roof is of a substantially similar character to whether undamaged walls must be replaced in order to adequately fix an electrical system and return the premises to the pre-damaged condition.

***4** This finding is further supported by the reasoning in *Florida Farm Bureau Casualty Insurance Co. v. Sheaffer,* 687 So.2d 1331 (Ct.App.Fla.1997). In *Sheaffer,* the Court of Appeal of Florida held that "[w]here the amount owed on a claim, arguably within the policy coverage, is dependent on the resolution of disputed issues of fact and the application of policy language to those facts ... the extent of the claim does not constitute a 'coverage' question" and is therefore appropriate for appraisal. *Id.* at 1334 (citations omitted). The Court went on to state that "the insurance company conceded ... that the damage to ... the Sheaffers' home is a covered claim. Thus, the only dispute that can remain in the instant case is the scope of the required repair or replacement and the amount of loss." *Id.* at 1334. While not the bright line test suggested by the Plaintiffs, this analysis is instructive.

This Court finds the reasoning of *Johnson* and *Sheaffer* persuasive. I find the question of what must be replaced in order to adequately repair the damage caused by the admittedly covered Event in

this case is not a question of coverage. Rather, it is a question of the extent or "amount of loss," and is therefore appropriate for appraisal.

Erie argues in its Reply Brief that the extent of repair required in this case hinges on the Law and Ordinance section of the policy, and that a court is the appropriate forum for interpreting that section. While that section could have application to the case-at-bar, the facts necessary for consideration of this question are not before the Court and thus not an appropriate area for summary judgment. Further, the application of the section is not essential to a decision on the cross-motions. The Court therefore will restrict the ruling to the stipulated facts and declines to interpret the Law and Ordinance section of the policy at this time.

CONCLUSION

For the reasons stated above, the Plaintiffs' Motion for Summary Judgment is granted and the Defendants' Motion for Summary Judgment is denied. In so doing, the Court grants Declaratory Judgment requiring the Defendants to participate in the Appraisal process in accordance with the policy.

Mr. Brown is instructed to prepare an appropriate Order. This case will be placed on my 10:00 a.m. docket on Friday, November 20, 2009, for entry of the Order if not earlier submitted.

Very truly yours,

Michael P. McWeeny

All Citations

Not Reported in S.E.2d, 79 Va. Cir. 440, 2009 WL 7416039

Footnotes

1 In *Kawa v. Nationwide Mutual Fire Insurance Company,* 664 N.Y.S.2d 430 (E.C.1997), the Supreme Court of New York for Erie County held that an appraisal clause "only applies to a case with a disagreement as to amount of loss or damage, and not where the insurer denies liability." *Id.* at 430 (quotations omitted). However, in *Kawa* the insurer denied liability on the basis that the damage was caused by ordinary wear and tear, as opposed to the covered event. *Id.* This is in marked contrast to the case at hand where the insurer admits that the damage was caused entirely by a covered event.

2 The United States District Court for Eastern District of Virginia examined appraisal in *HHC Associates v. Assurance Company of America,* 256 F.Supp.2d 505 (E.D.Va.2003). The court held that appraisal is triggered only when parties disagree as to the amount of loss, not the existence of coverage. See also *Kawa v. Nationwide Mutual Fire Insurance Company,* 664 N.Y.S.2d 430 (E.C.1997).

End of Document

EXHIBIT K

2016 WL 4650007
Only the Westlaw citation is currently available.
United States District Court,
E.D. Virginia,
Alexandria Division.

METROPOLITAN APARTMENTS
at Camp Spring, LLC, Plaintiff,
v.
NATIONAL SURETY
CORPORATION Defendant.

Civil Action No. 1:14–cv–107
|
Signed 03/22/2016

Opinion

ORDER

Anthony J. Trenga United States District Judge

***1** Pending before the Court is plaintiff Metropolitan Apartments at Camp Spring, LLC ("Metropolitan")'s Motion to Enforce Appraisal Award [Doc. No. 79] (the "Motion"). On Friday, March 18, 2016, the Court held a hearing on the Motion, following which it took the matter under advisement [Doc. No. 90]. Upon consideration of the Motion, the memoranda of law in support thereof and in opposition thereto, and the arguments of counsel at the March 18, 2016 hearing, the Court concludes that the appraiser and umpire acted within the scope of their authority and will therefore grant plaintiff's Motion and enforce the appraisal award.

I. Background

Defendant National Surety Corporation ("National") issued an insurance policy to Metropolitan for the period September 30, 2007 to September 30, 2012 ("the Policy"), under which Metropolitan is the named insured with respect to its 397–unit apartment complex in Suitland, Maryland, consisting of eight apartment buildings and a clubhouse (the "Property"). Amended Complaint [Doc. No. 34] ¶¶ 5–6. On August 23, 2011, an earthquake damaged the Property. During the subsequent investigation into property damages, Metropolitan discovered that there were certain "construction defects" at the Property. National agreed to pay under the Policy for some, but not all, of the property damage and income losses sustained by Metropolitan.

Metropolitan originally filed this action on January 30, 2014 [Doc. No. 1] and on April 24, 2014, an Amended Complaint seeking in Count I a declaratory judgment that National is obligated to indemnify Metropolitan for "all claimed losses at the Property resulting from construction defects, including all claimed property damage and business interruption losses up to the limits of the Policies," and in Count II, general and consequential damages due to National's breach of contract. Amend. Compl. ¶¶ 73(i), 91–92.

Under the terms of the Policy, either party is permitted to invoke a right of appraisal after dispute over an amount of loss arises. On April 24,2014, Metropolitan sent National a letter demanding an appraisal of all losses payable on the Property under the Policy.[1] On May 8, 2014, National declined to participate in an appraisal and asserted that Metropolitan had waived any right to an appraisal under the Policy. Thereafter, Metropolitan sought an order compelling National to comply with its demand for an appraisal. [Doc. No. 42]. By Proposed Findings of Fact and Recommendations dated May 29, 2014, the Magistrate Judge recommended, *inter alia*, a finding that Metropolitan had not waived its contractual and statutory right to compel appraisal of the loss amount, and that National should submit to the appraisal process. [Doc. No. 51]. By Order dated July 17, 2014, the Court adopted the recommendations of the Magistrate Judge, granted Metropolitan's motion to compel an appraisal and ordered, *inter alia*, that National submit to the appraisal process. [Doc. No. 59].

***2** On October 22, 2015, the appraisers issued their Appraisal Award that calculated interior property damage and other fees and expenses at $3,030,000 for "Permanent Building Repairs—

Cladding/Sheathing—ensuing water damage." *See* Appraisal Award Form—Building [Doc. No. 80, Ex. A] (the "Award"). There is no dispute as to the Award for "Permanent Building Repairs —Excluding Cladding/Sheathing" in the amount of $20,826,000, or any of the other line items on the Award. National contests, however, the award for "Permanent Building Repairs—Cladding/Sheathing—ensuing water damage" in the amount of $3,030,000. Specifically, National claims, as its appointed appraiser concluded, that this disputed amount was "install-related" damage that was expressly excluded under the Policy, while Metropolitan's appointed appraiser and the jointly-selected umpire concluded that it was due to "ensuing water damage."

II. Standard of Review

The Policy's appraisal clause is binding and enforceable. *See, e.g.*, *High Country Arts & Craft Guild v. Hartford Fire Ins. Co.*, 126 F.3d 629, 634 (4th Cir. 1997) ("[I]n the absence of evidence of fraud, mistake, duress, or other impeaching circumstances ... the parties [are] contractually bound by the results of the appraisals); *Hartford Fire Ins. Co. v. Adcor Indust., Inc.*, 158 Fed. App'x 430, 431 (4th Cir. 2005) (stating that there is a "narrow set of grounds on which" courts will set aside appraisal awards, including "mistake" by the appraisers). The issue for the Court is whether the appraisers, in issuing the Award, exceeded their authority and the scope of the appraisal process.

III. Analysis

As confirmed at the hearing held on March 18, 2016, National concedes that the Property experienced water damage as a result of certain construction defects, such as faulty window flashing, improper window framing, poor HVAC installation, etc. (but not the allegedly defective installation of the sheathing and cladding). National also concedes that the water damage is a "Covered Cause of Loss" that entitled Metropolitan to recover the amount necessary to repair that water damage. *See* [Doc. No. 85–1 at 5]. Finally, National concedes that the water damage included damage to certain sheathing and cladding and that in order to repair the water damage, that sheathing and cladding needed to be replaced. Nevertheless, National contends that by attributing the cost to repair and replace sheathing and cladding systems to "ensuing water damage," the Award is based on resolution of a disputed "scope of coverage" issue reserved to the court and not simply the calculation of the "amount of loss."

Here, it appears that the appraisal process determined that repair or replacement of the water-damaged sheathing and cladding was necessary to adequately repair water damage that ensued as a result of the construction defects. That determination was not a determination of the "scope of coverage" as defendant claims, but rather a necessary determination concerning what repairs were necessary to adequately address an admittedly covered event, *i.e.* ensuing water damage. *See Coates v. Erie Ins. Exchange, et al.*, 79 Va. Cir. 440,2009 WL 7416039, at *2 (Va. Cir. Ct. 2009) ("once the insurer admits coverage of the event itself, any dispute over the cost of repair is a disagreement as to 'amount of loss' ").

National contends that because the sheathing and cladding was improperly installed, its replacement was not a "Covered Cause of Loss" within the meaning of the Policy. Indeed, had Metropolitan sought coverage for its replacement simply because it was improperly installed, the parties agree that replacement costs would not have been a covered expense. But, in fact, the sheathing and cladding was replaced not because it was improperly installed, but because it was damaged by water resulting from a covered peril, and therefore would have required repair or replacement regardless of whether or not it had been installed correctly. For this reason, the costs attributed to its repair or replacement was not the resolution of a "coverage issue" but rather a "scope of repairs" issue necessarily bound up with the calculation of the "amount of loss." *See Coates*, 2009 WL at *4 ("what must be replaced in order to adequately repair the damage caused by the admittedly covered Event in this case is not a question of coverage. Rather, it is question of the extent or 'amount of

loss,' and is therefore appropriate for appraisal"); *see also Cigna Ins. Co. v. Didimoi Prop. Holdings, N.V.*, 110 F. Supp. 2d 259, 264 (D. Del. 2000) ("... [I]n the insurance context, an appraiser's assessment of the 'amount of loss' necessarily includes a determination of the cause of the loss, as well as the amount it would cost to repair that which was lost"); *State Farm Lloyds v. Johnson*, 290 S.W.3d. 886, 891 (Tex. 2009) ("A dispute about how many shingles were damaged and needed replacing is surely a question for the appraisers"). [2]

***3** In effect, National's position is that since the sheathing and cladding would have ultimately needed to be repaired and replaced in any event, the costs associated with its replacement occasioned by water damage is also excluded. *See generally* [Doc. No. 84]. While there is some element of a windfall to Metropolitan, National's position would effectively rewrite the Policy to expand the exclusions enumerated in the Policy, which expressly extends coverage under the Policy to a "Covered Cause of Loss"—water damage—caused by an excluded condition, here, the construction defects. [3]

IV. Conclusion

For the foregoing reasons, it is hereby

ORDERED that plaintiff's Motion to Enforce Appraisal Award [Doc. No. 79] be, and the same hereby is, GRANTED and the Appraisal Award is CONFIRMED in the sum of $27,633,900.00 as an amount of loss payable under the Policy, with any unpaid amount to be included in a final judgment, to be entered upon the adjudication of all remaining claims.

The Clerk is directed to forward a copy of this Order to all counsel of record.

All Citations

Not Reported in F.Supp.3d, 2016 WL 4650007

Footnotes

1 Va. Code § 38.2–2105 requires that all insurance policies include an appraisal clause which requires that either party, upon written demand, submit a dispute concerning "amount of loss" to the appraisal process that substantially conforms to the following:

> In case the insured and this Company shall fail to agree as to the actual cash value or the amount of loss, then, on the written demand of either, each shall select a competent and disinterested appraiser and notify the other of the appraiser selected within twenty days of such demand. The appraisers shall first select a competent and disinterested umpire; and failing for fifteen days to agree upon such umpire, then, on request of the insured or this Company, such umpire shall be selected by a judge of a court of record in the state in which the property covered is located.

2 National likens this case to *Wells v. American States Preferred Insurance Company*, 919 S.W.2d 679 (Ct. App. Tex. 1996). In *Wells*, the issue for the court was which of two causes, one within the scope of coverage, and one outside the scope of coverage, was responsible for damage requiring repair. 919 S.W.2d at 680–81. Here, however, there is no dispute that water damage is a "Covered Cause of Loss" and the issue for the appraisal process was what scope of repairs was necessary to address that covered loss.

3 Section B to the Causes of Loss forms of the Policy provides in pertinent part: "We [National] will not pay for loss or damage caused by or resulting from any of the following [including construction defects]. But if loss or damage by a Covered Cause of Loss results, we will pay for that resulting loss or damage...." [Doc. No. 85–1 at 5].

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