**UNITED STATES DISTRICT COURT**
**MIDDLE DISTRICT OF FLORIDA**
**FT. MYERS DIVISION**

NATIONWIDE MUTUAL FIRE INSURANCE COMPANY,

Petitioner,

v. CASE NO. 2:08-CV-277-FtM-36SPC

JOHN FRANCISCO, JR.,

Respondent.
_____/

**ORDER**

**THIS CAUSE** is before the Court on Petitioner's Motion to Strike the Appraisal Award (Dkt. 18) and Respondent's Cross-Motion to Confirm the Appraisal Award (Dkt. 19). The parties appeared for oral arguments on these motions on March 30, 2010.

## I. BACKGROUND

### A. Motion to Appoint Neutral Umpire and Delineate Appraisal Award

On April 2, 2008, Nationwide filed a petition for appointment of a neutral umpire (Dkt. 1). Nationwide, an Ohio company, carried an insurance policy for Francisco, a Florida resident, to cover his home located in Collier County, Florida. On July 29, 2005, Francisco's insured property suffered damage (Dkt. 1, ¶6). Francisco filed his claim with Nationwide and was unsatisfied with Nationwide's evaluation of the damage (Dkt. 1, ¶¶7-8). Pursuant to the insurance policy, the parties agreed to select appraisers who would choose a neutral umpire to determine the appraisal award (Dkt. 1, ¶¶9-10). The provision in the policy reads:

> If we and you disagree on 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 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.

(Dkt. 1, ¶8).

Because the selected appraisers could not agree on a neutral umpire, Nationwide petitioned this Court to select a neutral umpire (Dkt. 1, ¶11-12). Nationwide also requested that this Court "require the appraisal panel, in making its decision and ultimate award, to delineate between any damages caused by water as opposed to mold (or any other perils)" (Dkt. 1, ¶12). Both parties provided lists of proposed umpires to the Court (Dkt. 8, 11).

In responding to the Petition to Appoint a Neutral Umpire, Francisco specifically "denied" or objected to requiring the appraisal panel to delineate between damages caused by water as opposed to mold or other perils (Dkt. 7, ¶12).

On June 3, 2008, Nationwide re-filed its Motion to Appoint Neutral Umpire and Delineate Award (Dkt. 12). In the Motion, Nationwide again requested that this Court "enter an Order requiring the appraisal panel to enter an Appraisal Award that delineates, by peril/cause, any amounts awarded" (Dkt. 12, p. 2-3). Nationwide also attached a proposed Appraisal Award form to be used by the neutral umpire (Dkt. 12, Ex. B). Francisco responded in opposition to the Motion to the

extent that it required delineation of the appraisal award. First, Francisco noted that the provision cited by Nationwide was not included in the insurance policy and that Nationwide had not filed a copy of the insurance policy with the Court (Dkt. 14, p. 2-3). Then, Francisco noted that under Florida law, delineation of an appraisal award is not permitted (Dkt. 14, p. 5-6). He specifically cited an unpublished opinion from Magistrate Judge Sheri Chappell that denied a motion to delineate an appraisal award. (Dkt. 14, Ex. A - *Royal Marco Point 1 Condominium Assoc., Inc. v. QBE Ins. Corp.*, No. 2:07-CV-16-FtM-34SPC, 2007 LEXIS 60940 (M.D. Fla. Aug. 14, 2007)).

On June 17, 2008, Magistrate Judge Chappell issued an order appointing former Judge Guy Spicola as the neutral umpire (Dkt 15, p. 2). The Order further granted Nationwide's Motion to Delineate the Appraisal Award and denied Nationwide's Motion to Compel the use of the appraisal form attached as Exhibit B (Dkt. 15, p. 2).

**B. Motion to Re-Open the Case**

On April 15, 2009, Nationwide filed a Motion to Re-Open File (Dkt. 17). Nationwide stated that on April 1, 2009, the Appraisal Panel entered an appraisal award but failed to delineate the appraisal award pursuant to Magistrate Judge Chappell's Order (Dkt. 17, p. 2). Francisco responded in opposition to the Motion to Re-Open File on April 23, 2009 (Dkt. 19). On May 5, 2009, Judge Marcia Morales Howard entered an order re-opening the case for the purpose of resolving the motions regarding the appraisal award issued on April 1, 2009 (Dkt. 22).

**C. Motion to Strike/Confirm Appraisal Award**

Nationwide also filed a Motion to Strike the Appraisal Award on April 15, 2009 (Dkt. 18). Francisco filed a response and a Cross-Motion to Confirm the Appraisal Award on April 23, 2009 (Dkt. 19). On April 30, 2009, Nationwide filed a Motion for Entry of Order Authorizing Deposit

of Money into Court Registry (Dkt. 20), which was granted by Judge Richard Lazzara on May 12, 2009 (Dkt. 24). Nationwide responded to Francisco's Cross-Motion on May 4, 2009 (Dkt. 21).

On January 22, 2010, Francisco filed a motion for oral arguments on the pending motions to strike and confirm the appraisal award (Dkt. 29). Nationwide responded to the motion for oral arguments on February 1, 2010 (Dkt. 30).

## II. ANALYSIS

"A federal court applies the substantive law of the forum state in a diversity case, unless federal constitutional or statutory law requires a contrary result." *Galindo v. ARI Mut. Ins. Co.*, 203 F.3d 771, 775 (11th Cir. 2000). "Absent a decision by the highest state court or persuasive indication that it would decide the issue differently, federal courts follow decisions of intermediate appellate courts in applying state law." *Id*. at 776. "Concomitantly, the Florida Supreme Court has held that " '[t]he decisions of the district courts of appeal represent the law of Florida unless and until they are overruled by this Court.' Thus, in the absence of interdistrict conflict, district court decisions bind all Florida trial courts." *Id*. (citing *Pardo v. State*, 596 So.2d 665, 666 (Fla. 1992)). When the Florida Supreme Court has not spoken and the federal district court "is faced with contradictory decisions of the Eleventh Circuit and the state's intermediate appellate courts," the district court "believes it is bound to follow the Eleventh Circuit's interpretation of Florida Supreme Court precedent absent an intervening decision to the contrary by the Florida Supreme Court or the Eleventh Circuit." *Muckenfuss v. The Hanover Ins. Co.*, No. 5:05-CV-261-Oc-10GRJ, 2007 U.S. Dist. LEXIS 28742, at *9 (M.D. Fla. Apr. 18, 2007).

### A. Motion to Strike Appraisal Award

Nationwide seeks to strike the appraisal award entered on April 1, 2009 on the basis that the

appraisal award did not delineate between damages caused by water as opposed to mold or other perils, which "ignores Magistrate Judge Chappell's June 16, 2008 Order" (Dkt. 18, p. 3).[1] Francisco notes that Nationwide cites no legal authority for striking the appraisal award (Dkt. 19, p. 3-4). Francisco further emphasizes that Nationwide has not stated a reason for vacating the appraisal award pursuant to Fla. Stat. §682.13(1) (Dkt. 19, p. 6-7).

Federal courts have determined that under Florida law, "an insurer can only dispute coverage for the loss as a whole and not as individual parts." *Muckenfuss* 2007 U.S. Dist. LEXIS 28742 at *7. The leading case in the Eleventh Circuit on whether an insurer can challenge or require a delineation of an appraisal award is *Three Palms Pointe, Inc. v. State Farm Fire and Casualty Co.*, 250 F. Supp. 2d 1357 (M.D. Fla. 2003), *aff'd* 362 F.3d 1316 (11th Cir. 2004).

In *Three Palms Pointe*, State Farm, as the insurer, had an appraisal award of $11,300,000, which included $560,000 for personal relocation expenses. *Id*. at 1359. After the appraisal award was issued, State Farm alleged that the "personal relocation expenses of residents were not recoverable." *Id*. Three Palms filed suit to confirm the appraisal award, which essentially would require State Farm to pay the total appraisal award and not delineate between what it considered to be covered and non-covered losses. *Id*.

The District Court held that the appraisal award should be confirmed. *Id*. at 1361. First, the Court confirmed the appraisal award because it was issued under valid procedures used in the Florida courts. *Id*. at 1361-62. The Court noted that once a petitioner moves to confirm an appraisal award,

[1] The Court notes that the previous order issued by Magistrate Judge Chappell does not specify how the appraisal award is to be delineated. The actual appraisal award may be viewed as delineating the valuation of the damage to the extent that the award was issued for losses due to water related damage to the dwelling. No award was issued for contents or ALE/Loss of Use. (Dkt. 18, Ex. D; Dkt. 19, Ex. B).

the insurer may assert an affirmative defense for "lack of coverage, policy limits, or a violation of policy conditions such as fraud, lack of notice, or failure to cooperate." *Id*. at 1362. Furthermore, "if the insurer fails to raise an affirmative defense or the insured defeats the defenses raised in a judicial proceeding, then a valid enforceable judgment is entered and the appraisal award is confirmed." *Id*.

The Court also specifically held that the relocation expenses that State Farm said were not covered under the policy were, in fact, recoverable in accordance with Florida law and the Court's interpretation of the policy. *Id*. at 1363-1364 (citing *Azalea, Ltd. v. American States Ins. Co.*, 656 So.2d 600, 602 (Fla. Dist. Ct. App. 1995)). Additionally, the Court found that "when an insurer admits that the loss is covered [under the policy], the appraisers can determine the cause of damage and the amount of that loss without judicial review of that decision (other than through Florida Statutes §§ 682.13, -.14). When the insurer claims that the loss is not covered, then the coverage question must be judicially determined." *Id*. at 1365 n. 11.[2]

The Eleventh Circuit Court of Appeals affirmed the decision of the district court. *See Three Palms Pointe, Inc. V. State Farm Fire & Casualty, Co.,* 362 F.3d 1316 (11th Cir. 2004). The Eleventh Circuit further interpreted the Florida Supreme Court case of *State Farm Fire & Casualty Co. v. Licea*, 685 So.2d 1285 (Fla. 1996). According to the Eleventh Circuit, "the Florida Supreme Court held that if an insurer and an insured party go to appraisal, the insurer can only dispute coverage for the 'loss as a whole.'" *Id*. at 1319 (citing *Licea*, 685 So.2d at 1288)). In sum, the Eleventh Circuit found that *Licea* held that "once an award has been made, the only defenses that

[2] The Florida Supreme Court in *Johnson, et al. v. Nationwide Mutual Ins. Co.*, 828 So.2d 1021, 1026 (Fla. 2002), specifically cited *Licea* and held that "coverage issues [are] to be judicially determined by the court and [are] not subject to a determination by appraisers."

remain for the insurer to assert are lack of coverage for the entire claim, or violation of one of the standard policy conditions (fraud, lack of notice, failure to cooperate, etc.) . . . ." *Id.*

In the present case, Nationwide specifically requested that the appraisal award delineate damage due to water from damage due to mold and other perils. The Court presumes that the reason for the delineation is for Nationwide to distinguish between covered (water) and non-covered damage (other perils).[3] Because the Eleventh Circuit has held that in Florida, once an appraisal award has been issued, an insurer may only challenge the lack of coverage of the entire claim, this Court is bound to hold that Nationwide may not challenge part of the appraisal award.[4] *Royal Marco*

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[3] To date, neither party has filed a copy of the actual insurance policy covering Francisco's home. Based on statements during oral arguments, the Court understands that mold is a covered peril, but coverage is limited under the policy. However, without the actual insurance policy, the Court can make no determination as to what perils are and are not covered by the insurance policy.

[4] There have been several Florida District Court and Federal District Court cases that have held that the Eleventh Circuit misinterpreted the holding of *Licea*. *Liberty American Ins. Co. v. Kennedy, et* al., 890 So.2d 539, 541-42 (Fla. Dist. Ct. App. 2005)("We conclude, however, that the court in *Three Palms Pointe, Inc*. misinterpreted the holding of *Licea* . . . . [T]he submission of the claim to appraisal does not foreclose Liberty American from challenging an element of loss as not being covered by the policy."); *see Jablonski v. St. Paul Fire and Marine Ins. Co.*, No. 2:07-cv-00386, 2009 U.S. Dist. LEXIS 65247, at * 26-27 (M.D. Fla. July 24, 2009)(noting that "[a]t least two Florida district courts of appeals have concluded, either expressly or implicitly that the Eleventh Circuit's holding in *Three Palms Pointe* . . . misinterpreted the Florida Supreme Court's decision in . . . *Licea*."); *Sands on the Ocean Condominium Assoc., Inc. v. QBE Ins. Corp.*, No. 05-14362-CIV, 2009 U.S. Dist. LEXIS 24689, at *8 (S.D. Fla. Mar. 23, 2009)(noting that state district courts found that *Three Palms Pointe* misinterpreted *Licea* and holding that "Defendant is entitled to challenge the coverage as to portions of the appraisal award."); *Pacific Ins. Co., Ltd. v. New Park Towers Condominium Assoc., Inc.*, No. 07-60512-CIV, 2008 U.S. Dist. LEXIS 4091, at * 11 (S.D. Fla. Jan. 18, 2008)(In *Licea*, "[t]he Supreme Court agreed . . . that the appraisal provision 'require[s] an assessment of the amount of a loss. This necessarily includes determinations as to the cost of repair or replacement and whether or not the requirement for a repair or replacement was caused by a coverage peril or a cause not covered, such as normal wear and tear, dry rot, or various other designated, excluded clauses.'" (citing *Licea*, 685 So.2d at 1287)).

*Point 1 Condominium Assoc., Inc. v. QBE Ins. Corp.*, No. 2:07-CV-16-FtM-34SPC, 2007 U.S. Dist. LEXIS 60940, at *11-12 (M.D. Fla. Aug. 14, 2007); *Muckenfuss v. The Hanover Ins. Co.,* No. 5:05-CV-261-Oc-10GRJ, 2007 U.S. Dist. LEXIS 28742, at *9-10 (M.D. Fla. Apr. 18, 2007); *see Velez, et al. v. Metropolitan Property and Casualty Ins.* Co., No. 4:09-CV-49-SPM/WCS, 2009 U.S. Dist. LEXIS 81438, at *2 (N.D. Fla. Aug. 24, 2009); *Pacific Ins. Co., Ltd. v. New Park Towers Condominium Assoc., Inc.*, No. 07-60512-CIV, 2008 U.S. Dist. LEXIS 4091, at * 11 (S.D. Fla. Jan. 18, 2008).

**B. Motion to Confirm Appraisal Award**

Nationwide contends that confirmation of the appraisal award is not necessary because it timely paid the award into the Court registry on April 30, 2009. Nationwide relies on *Federated Nat'l Ins. Co. v. Esposito*, 937 So.2d 199 (Fla. Dist. Ct. App. 2006) to support this argument. *Esposito*, however, is distinguishable from the present case because the insurer filed a motion to confirm the appraisal award *after* the insurer paid the appraisal award in full to the insured. *Id.* at 200. Here, Francisco filed his motion to confirm the appraisal award on April 23, 2009 *after* Nationwide filed its motion to strike the appraisal award and *before* Nationwide paid the appraisal award in full into the Court registry. Furthermore, if Nationwide had paid Francisco the appraisal award once it was issued, then Francisco's Motion to Confirm the Appraisal Award would not have been necessary. *See Travelers v. Meadows MRI, LLP*, 900 So.2d 676, 678-79 (Fla. Dist. Ct. App. 2005); *but see TriStar Lodging, Inc. v. Arch Specialty Ins. Co.*, 434 F. Supp. 2d 1286, 1295 (M.D. Fla. 2006), *aff'd* 215 Fed. Appx. 879 (11th Cir. 2007); *Nationwide Property & Cas. Ins. v. Bobinski*, 776 So.2d 1047, 1048 (Fla. Dist. Ct. App. 2001).

Francisco's Motion to Confirm the Appraisal Award must be granted because Nationwide

does not assert a lack of coverage defense for the entire claim or a violation of one of the standard policy conditions, such as fraud, lack of notice, or failure to cooperate. *See Three Palms Pointe*, 362 F.3d at 1319 ("Given that an appraisal occurred, we hold [that the insurer] may not seek to challenge coverage with respect to part of the award on appeal."). Furthermore, the fact that Nationwide paid the appraisal award in full into the court registry after Francisco filed the Motion to Confirm does not preclude confirmation of the appraisal award. In light of Nationwide's Motion to Strike the appraisal award, the Motion to Confirm was necessary.

It is hereby **ORDERED** and **ADJUDGED** as follows:

1. Petitioner Nationwide's Motion to Strike the Appraisal Award (Dkt. 18) is **DENIED**; and

2. Respondent Francisco's Cross Motion to Confirm the Appraisal Award (Dkt. 19) is **GRANTED**. The Court will enter judgment confirming the appraisal award.

**DONE AND ORDERED** at Ft. Myers, Florida, on March 30, 2010.

Charlene Edwards Honeywell

Charlene Edwards Honeywell
United States District Judge

**COPIES TO**:
COUNSEL OF RECORD