DISTRICT COURT, ADAMS COUNTY, STATE OF COLORADO Adams County Justice Center 1100 Judicial Center Dr. Brighton, CO 80601 _____ **ROOFTOP ROOFING, INC.** Plaintiff, v. **FIRE INSURANCE EXCHANGE** Defendant.	 **COURT USE ONLY** _____ Case No. 11 -CV-668 Division: C Courtroom: 506
ORDER	

Plaintiff filed a Motion to Compel Appraisal-Arbitration and for Attorney's Fees (Motion) on October 6, 2011. A Response was filed on November 7, 2011. A Reply was filed on November 9, 2011. The Court, being fully advised, finds and orders as follows:

History of the Case

Plaintiff, Rooftop Roofing, Inc. (Rooftop), filed a Complaint on May 5, 2011asserting claims for Breach of Contract, Compelling Appraisal and Unreasonable Delay against Fire Insurance Exchange (FIE). FIE answered and the case is set for a 3-day jury trial beginning July 9, 2012. Rooftop has now moved to compel appraisal-arbitration, which is the subject of the second claim for relief and stay the case pending resolution of the appraisal process.

Nature of the Motion

Rooftop alleges that it is the assignee of the contractual rights of Ed Hermann and Carol Satersmoen in connection with their claim against FIE. It is

alleged that FIE has refused to engage in a contractually mandated appraisal/arbitration process to determine the amount of damages payable under the insurance policy.

Brief Statement of the Parties' Positions

Rooftop

The policy provides, *inter alia*, that "if you and we fail to agree on the amount of loss, either one may make a written demand for appraisal." There was a disagreement and plaintiff has made repeated demands for appraisal. FIE has refused appraisal, without any reason, although Rooftop surmises it may be for the same reason it was refused in the Elbert County dispute, i.e. appraisal only applies to a failure to agree, not to disputes over the cause or scope of the loss. If there is any ambiguity in the policy regarding the purpose of the appraisal, it should be construed against FIE and protect the reasonable expectations of the insured.

This issue has already been decided against FIE by another court involving the same parties and the same policy language as presented herein. FIE is precluded from re-litigating the issue of appraisal by issue preclusion. All the elements of issue preclusion are present. The Court should order the appraisal-arbitration and stay this lawsuit. Rooftop also seeks its attorney fees.

FIE

This case is not identical to the Elbert County case because that case involved a home owned by Angela Brown in Elbert County being damaged by hail. This case involves a home owned by Satersmoen and Herman located in Adams County. The facts and circumstances surrounding the damage are completely different.

The appraisal process involves each party selecting an appraiser to visit the property and observe the damage and determine the amount they believe is

necessary to repair the damage. If an agreement cannot be reached the matter is submitted to an umpire who determines the repair estimate. Rooftop has waived the right to appraisal by destroying evidence of the damages rendering performance impossible.

Collateral estoppel does not apply because the cases involve different insureds, different locations and different damages.

There are also coverage issues which are inappropriate for appraisal. Questions of coverage and policy interpretation are questions for the Court, not an appraisal process.

Rooftop's Reply

The appraisal process is both possible and practical despite the necessary repairs having been done. In the Elbert County action the Court ordered the appraisal despite it being conducted subsequent to repair. The panel of appointed appraisers came back with a unanimous appraisal award although repairs had already been done. The appraiser for the insurance company had correspondence, photographs, estimates and invoices to use in the appraisal process.

Rooftop did not waive its right to engage in the appraisal process. Demands for appraisal were made and refused. The roof needed to be repaired since it was leaking.

FIE has confused the principles of collateral estoppel and other defenses. Issue preclusion precludes relitigating "issues" actually litigated in the first proceeding. Issue preclusion is broader than claim preclusion.

This is not a situation where the insurer is denying coverage. The Court should adopt the reasoning of the Court in *Cigna Ins. Co. v. Didimoi Prop. Holdings*, N.V., 110 F.Supp 2d 259 (D.Del.2000), that the determination of the amount of the loss under the appraisal clause included determination of causation.

Issues

1. Should the policy's appraisal process be enforced in this case?

a. Has Rooftop waived the right to enforce the appraisal process by proceeding to make repairs?
b. Does the destruction of the damage preclude the appraisal process by virtue of impossibility?
c. Are there coverage or policy interpretation issues which preclude using the appraisal process?
d. Does the principle of "issue preclusion" preclude FIE from re-litigating the issue of enforcing the appraisal provision of the policy?

2. If so, what should the Court do regarding the present action?

Analysis

a. Has Rooftop waived the right to enforce the appraisal process by proceeding to make repairs?

"Waiver is the intentional relinquishment of a known right. Waiver may be express, as when a party states its intent to abandon an existing right, or implied, as when a party engages in conduct which manifests an intent to relinquish the right or acts inconsistently with its assertion. To constitute an implied waiver, the conduct must be free from ambiguity and clearly manifest the intent not to assert the benefit. *In re Marriage of Robbins,* 8 P.3d 625, 630 (Colo.App.2000)." *In re Marriage of Hill,* 166 P.3d 269, 273 (Colo.App. 2007).

According to the pleadings and documents, the date of loss was June 11, 2010. On July 7, 2010 and again on July 13, 2010 the insureds invoked the appraisal clause of the insurance policy. The insureds were advised that FIE does not arbitrate these types of disputes. (Affidavit, Phil Coutu ¶5, Exhibit 4, and Exhibit 5). When FIE refused to act in accordance with the appraisal clause, it was necessary to repair the damaged roof.

Neither Rooftop nor the insureds stated an intention to waive or manifested an intent to relinquish their right to enforce the appraisal provisions of the insurance contract. Instead they specifically invoked the clause on two separate occasions. FIE's refusal to proceed under that provision made further efforts futile. There was no waiver of the right to enforce the appraisal process.

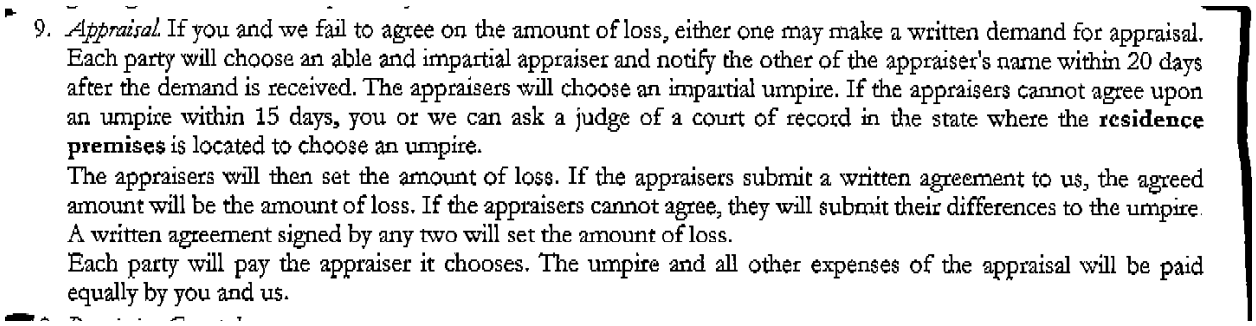
b. Does the destruction of the damage preclude the appraisal process by virtue of impossibility?

"According to the Restatement [Restatement of the Law of Contracts § 454], impossibility means not only strict impossibility but impracticability because of extreme and unreasonable difficulty, expense, injury or loss involved." *City of Littleton v. Employers Fire Ins. Co.*, 169 Colo. 104, 108, 453 P.2d 810, 812 (1969). According to Rooftop, the appraisal process was followed in the Elbert County case, when the Court ordered the process to be followed. The insurance company's appraiser was provided with correspondence, photographs, estimates and invoices to use in the appraisal process. The appraisers were able to come back with a unanimous appraisal award although repairs had already been done. The Court finds that the appraisal process is not "impossible" as defined by Restatement of the Law of Contracts §454.

c. Are there coverage or policy interpretation issues which preclude using the appraisal process?

FIE discussed at length the function of appraisers and the limited scope of their responsibilities and stated, "Here, however, the issue to be arbitrated is beyond the scope of an appraisal provision or arbitration agreement…" FIE also stated that the "Policy does not identify issues of the cause of the loss, liability for a loss, coverage or cause of loss as items subject to appraisal," citing *State Farm Mut. Auto. Ins. Co. v. Stein*, 886 P.2d 326, 328 (Colo. App. 1994).

Preliminarily the Court would note that the parties' use of term "arbitrate" is somewhat misleading. The precise language of the disputed clause follows:



9. *Appraisal.* If you and we fail to agree on the amount of loss, either one may make a written demand for appraisal. Each party will choose an able and impartial appraiser and notify the other of the appraiser's name within 20 days after the demand is received. The appraisers will choose an impartial umpire. If the appraisers cannot agree upon an umpire within 15 days, you or we can ask a judge of a court of record in the state where the **residence premises** is located to choose an umpire.
The appraisers will then set the amount of loss. If the appraisers submit a written agreement to us, the agreed amount will be the amount of loss. If the appraisers cannot agree, they will submit their differences to the umpire. A written agreement signed by any two will set the amount of loss.
Each party will pay the appraiser it chooses. The umpire and all other expenses of the appraisal will be paid equally by you and us.

Only if the two appraisers selected by the parties cannot agree on the amount of loss, will their differences be submitted to an umpire. Then, a written agreement signed by any two of the three will set the amount of the loss. Technically, there is no "arbitration" as that term is traditionally used.

Next, the Court has scoured FIE's answer and affirmative defenses. The Court cannot find that FIE has asserted that this is not a covered loss. In *Cigna Ins. Co. v. Didimoi Prop. Holdings, N.V.*, 110 F. Supp. 2d 259 (D.Del. 2000), the Court was faced with a practically identical appraisal provision as found in the instant case. The parties were disputing the meaning of the term "amount of loss." The Court stated, "Specifically, the Court concludes that in 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. The Court's conclusion in this regard is consistent with the plain meaning of the terms 'amount of loss' and 'loss' in the insurance context." *Id*. at 264. The issue of the cause of the loss in the instant case does not appear to be contested. The argument is purely academic and rhetorical.

Further, the clause in question simply asks the appraisers/umpire to determine the amount of the loss, not to interpret policy language.

d. Does the principle of "issue preclusion" preclude FIE from re-litigating the issue of enforcing the appraisal provision of the policy?

"Issue preclusion bars relitigation of an issue if: (1) the issue sought to be precluded is identical to an issue actually determined in the prior proceeding; (2) the party against whom estoppel is asserted has been a party to or is in privity with a party to the prior proceeding; (3) there is a final judgment on the merits in the prior proceeding; and (4) the party against whom the doctrine is asserted had a full and fair opportunity to litigate the issue in the prior proceeding. *Bebo Constr.,* 990 P.2d at 85; *Guar. Nat'l Ins. Co. v. Williams*, 982 P.2d 306, 308 (Colo.1999); *Indus. Comm'n*, 732 P.2d at 619-20. Only when each of these elements has been satisfied are the equitable purposes of the doctrine furthered by issue preclusion." *Sunny Acres Villa, Inc. v. Cooper*, 25 P.3d 44, 47 (Colo. 2001).

FIE has argued that this case is not identical to the Elbert County case because that case involved a home owned by Angela Brown in Elbert County being damaged by hail. This case involves a home owned by Satersmoen and Herman located in Adams County. Therefore, FIE claims, the facts and circumstances surrounding the damage are completely different and issue preclusion does not apply. FIE misses the point of issue preclusion. The Court will analyze the four prongs of issue preclusion to determine whether it should be applied in this case.

According to the pleadings attached as exhibits to briefing, Rooftop and FIE were the plaintiff and defendant, respectively, in the Elbert County case, 10CV243. Those are the same parties in the within action. According to Judge Jeffrey Holmes' April 8, 2011 Order, Rooftop filed a Motion to Compel Appraisal/Arbitration. FIE filed a Response and Rooftop filed a Reply and exhibits were submitted. FIE had a full and fair opportunity to litigate the issue in

the prior proceeding. Judge Holmes Order noted that after Rooftop invoked the provision for appraisal, FIE refused the request claiming the appraisal was not applicable because the parties' dispute does not concern the amount of the loss, but whether the policy covered the situation that was the cause of the loss. Exhibit 1, Motion. According to the Response and Answer filed herein, FIE has not claimed the policy in this case does not cover the situation that was the cause of the loss. FIE has only argued that the appraisal process should not be ordered because the evidence of the damage has been destroyed making appraisal impossible/impracticable; Rooftop waived the right to enforce the appraisal clause; collateral estoppel is inapplicable; and there were coverage issues inappropriate for appraisal. These are not the same issues presented in and resolved by Judge Holmes' Order. Finally, according the statewide index of cases, Elbert County case number 10CV243 is still pending. That index indicates that on November 8, 2011 the Court granted an unopposed motion to file a response to motion for summary judgment by November 22, 2011. An appeal would still lie from any judgment in the trial court. "A final judgment is 'one which ends the particular action in which it is entered, leaving nothing further for the court pronouncing it to do in order to completely determine the rights of the parties involved in the proceeding.' *E.O. v. People, El Paso County Dept. of Social Serv.*, 854 P.2d 797, 800 (Colo.1993) (citing *Stillings v. Davis*, 158 Colo. 308, 406 P.2d 337, 338 (1965)). The final judgment in the Summit County Case was issued on January 28, 2002, and was not appealed. Hence, the third prong of the issue preclusion doctrine is satisfied." *In re Water Rights of Elk Dance Colorado, LLC*, 139 P.3d 660, 668 (Colo. 2006). "*Carpenter* [*Carpenter v. Young By & Through Young*, 773 P.2d 561, 564 (Colo. 1989)] requires an opportunity for review before a judgment can be considered final for purposes of issue preclusion. Pronouncing a judgment to be final while it is still pending on appeal would negate that requirement." *Rantz v.*

Kaufman, 109 P.3d 132, 141 (Colo. 2005). The Elbert County case is not a final judgment.

It is unimportant, however, whether issue preclusion precludes FIE from opposing Rooftop's Motion. The Court has analyzed each of FIE's other arguments—the appraisal process should not be ordered because the evidence of the damage has been destroyed making appraisal impossible/impracticable; Rooftop waived the right to enforce the appraisal clause; and there were coverage issues inappropriate for appraisal, and rejected them all.

2. If the policy's appraisal process should be enforced in this case, what should the Court do regarding the present action?

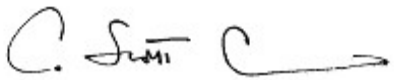
The policy language in ¶9 clearly and unambiguously provides that each party shall choose an able and impartial appraiser and notify the other party of the appraiser's name within 20 days after the demand is received. The appraisers will choose an impartial umpire. If they can't agree on an umpire within 15 days, either or both may ask the judge to choose an umpire. ¶9 of the policy sets out the balance of the steps to be taken. The Court orders the parties to choose their appraiser with 20 days of the date of this Order and timely continue with the sequence of steps set out in ¶9 of the policy. The Court orders that this case is stayed subject to being reactivated by notice from either party requesting reactivation. If the appraisal process has not been completed by January 16, 2012, plaintiff's counsel shall file a status report reflecting the actions completed and the prospect for the case to be reactivated.

Order

Plaintiff's Motion is granted. The request for attorney fees is denied.

Dated this 16th day of November, 2011.

By the Court:

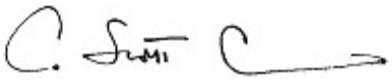


C. Scott Crabtree

District Court Judge

CERTIFICATE OF MAILING

I hereby certify that the foregoing document was sent via LexisNexis (e-file) to all counsel of record and to all *pro se* parties this 16th day of November, 2011.



Court