2018 WL 6575860 (Fla.App. 3 Dist.) (Appellate Brief)
District Court of Appeal of Florida, Third District.

SAFEPOINT INSURANCE COMPANY, Appellant,
v.
Daisy SOUSA, Appellee.

No. 3D18-1842.
November 30, 2018.

On Appeal from The Circuit Court in and for Miami-Dade County, Florida
Lower Court Case Number: 2018-9574 CA Division:31

Appellee's Answer Brief

Anthony M. Lopez, Esq., Florida Bar No. 13685, Marin, Eljaiek, Lopez, & Martinez, P.L., 2601 South Bayshore Drive, 18th Floor, Coconut Grove, Florida 33133, Tel: 305-444-5969, Fax: 305-444-1939, E-mail: AML@mellawyers.com, for appellee.

***ii** TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES iii
INTRODUCTION 1
STATEMENT OF THE FACTS AND THE CASE 2
QUESTIONS PRESENTED 4
STANDARD OF REVIEW 5
SUMMARY OF THE ARGUMENT 5
ARGUMENT 7
I. THE TRIAL COURT CORRECTLY ORDERED THAT THE PARTIES SUBMIT TO APPRAISAL AS THERE WAS A GENUINE DISAGREEMENT REGARDING THE LOSS AND NO CONDUCT AMOUNTING TO A WAIVER OCCURRED 7
CONCLUSION 12
CERTIFICATE OF COMPLIANCE 12
CERTIFICATE OF SERVICE 12

***iii** TABLE OF CASES AND AUTHORITIES

Cases

Citizens Prop. Ins. Corp. v. Galeria Villas Condo. Ass'n, Inc. 48 So. 3d 188 (Fla. 3d DCA 2010) 6, 11
Citizens Property Ins. Copr. v. Gutierrez 59 So.3d 177 (Fla. 3d DCA 2011) 9
Citizens Prop. Ins. Corp. v. Mango Hill Condo. Ass'n 12 Inc. 54 So. 3d 578 (Fla. 3d DCA 2011) 5
Florida Ins. Guar. v. Santos 148 So.3d 837 (Fla. 5th DCA 2014) 11
Florida Ins. Guar. v. Sill 154 So.3d 422 (Fla. 5th DCA 2014) 7, 10, 11
Hott Interiors, Inc. v. Fostock 721 So.2d 1236 (Fla. 4th DCA 1998) 7
King v. Bray 867 So.2d 1224 (Fla. 5th DCA 2004) 7
Paradise Plaza Condo. Ass'n, Inc. v. Reinsurance Corp. of New York 685 So. 2d 937 (Fla. 3d DCA 1996) 5
State Farm Ins. Co. v. Xirinachs 163 So.3d 559 (Fla. 3d DCA 2015) 9
Sunshine State Ins. Co. v. Rawlins 34 So.3d 753 (Fla. 3d DCA 2010) 5
United Community Ins. Co. v. Lewis 642 So. 2d 59 (Fla. 3d DCA 1994) 5, 8

***1 INTRODUCTION**

This answer brief is filed on behalf of the Appellee, DAISY SOUSA. The following is a list of the abbreviations that will be used in this Brief:

Appellant, SAFEPOINT INSURANCE COMPANY -Appellant

Appellee, DAISY SOUSA - Appellee

Appendix - [A. at #]

*2 STATEMENT OF THE FACTS AND THE CASE

Appellee, DAISY SOUSA, (hereinafter "Appellee") is the Plaintiff in the above styled matter.

Appellee was the owner of the real property located at 4130 S.W. 113th Avenue, Miami, Florida 33165 (hereinafter the "Property"). [A. at 2]. At all times material, there was in full force and effect, a homeowner's insurance policy (hereinafter the "Policy") issued by the Appellant, SAFEPOINT INSURANCE COMPANY, (hereinafter "Appellant") providing insurance coverage for the Property. [A. at 2]. On or about September 10, 2017, while the Policy was in full force and effect, the Property sustained a covered loss as a result of Hurricane Irma. (hereinafter the "Loss") [A. at 2]. Specifically, the Property sustained damage to the roof as a result of the wind and rain associated with Hurricane Irma. While the Appellant acknowledged coverage for the Loss and offered payment, after diligent inspection of the Loss, it was clear that the Property sustained damages greater than what was acknowledged by the Appellant. [A. at 2].

Prior to the initiation of the instant action, the Appellee, at the request of the Appellant, attended an examination under oath (hereinafter "EUO") on November 30, 2017. [A. at 106]. Appellant requested numerous documentation from the Appellee to be brought to the EUO, presumably, to assess the Loss. [A. at 108]. Appellee complied and provided a cover letter along with a majority of the ***3** documentation that was requested by the Appellant. [A. at 111-182]. On November 28, 2017, the Appellee provided all of the documentation requested by Appellant to the extent that it existed and was in her care, custody, and control. The EUO proceeded as scheduled by the parties, and the Appellant had an opportunity to examine all of the documents which it requested of the Appellee. [A. at 204]. Further, the Appellant had an opportunity to ask the Appellee questions regarding the Loss as well as her compliance with the Policy. Notwithstanding, the pre-suit discovery which included additional inspections, conducted by the Appellant, the Appellant denied to provide additional payment for the Loss. [A. at 2]. As a result, on March 26, 2018, the Appellee was forced to file suit.

On May 8, 2018, the Appellee filed its Motion to Compel Appraisal (hereinafter "Motion"). [A. at 65]. The Motion attached an estimate for the work that needed to be performed in order to repair the Property. [A. at 68].

Section 6(b) of the Policy provides:

Appraisal.

Appraisal is an alternate dispute resolution method to address and resolve disagreement regarding the amount of the covered loss.

(1) If you and we fail to agree on the amount of the loss, *either party may demand an appraisal,* the demand for appraisal must be in writing and shall include an estimate of the amount of any dispute that results from the covered cause of loss. [...] [A. at 42] [*Emphasis added*].

***4** Absent from the Policy is any provision that imposes a condition precedent prior to invoking the right of appraisal.

On August 7, 2018, the trial court correctly entered an Order granting Appellee's Motion and compelling appraisal. On September 5, 2018, this appeal ensued.

As will be explained in greater detail below, the trial court correctly compelled appraisal in light of the facts and circumstances surrounding the instant action. Further, according to Appellant, an evidentiary hearing would be "pointless" given the undisputed facts regarding Appellee's compliance with her post-loss obligations. See Appellant's Initial Brief at Page 13. If the facts are taken as undisputed, this Court should affirm the ruling of the trial court as the Appellee substantially complied with her post-loss obligations under the Policy.

QUESTIONS PRESENTED

Whether the trial court abused its discretion in ordering the parties to appraisal?

Whether the an "appraisable issue" existed?

Whether the Appellee substantially complied with her post-loss obligations under the Policy?

Whether the Appellee waived her right to appraisal?

*5 STANDARD OF REVIEW

The Appellee respectfully disagrees with the Appellant's assertion that a trial court's order compelling appraisal under an insurance policy is reviewed de novo. *Pursuant to Sunshine State Ins. Co. v. Rawlins,* 34 So.3d 753, 754-755 (Fla. 3d DCA 2010) this Court reviews the trial court's order compelling appraisal for abuse of discretion. *See also Paradise Plaza Condo. Ass'n, Inc. v. Reinsurance Corp. of New York,* 685 So. 2d 937, 941 (Fla. 3d DCA 1996) (internal citations omitted)(holding "the issue of the order in which the issues of damages and coverage are to be determined respectively by arbitration and the court should be left within the discretion of the trial judge."); *Citizens Prop. Ins. Corp. v. Mango Hill Condo. Ass'n 12 Inc.,* 54 So. 3d 578,581 (Fla. 3d DCA 2011) (citing *Paradise Plaza Condo. Ass 'n, Inc. v. Reinsurance Corp. of New York,* 685 So. 2d 937, 941 (Fla. 3d DCA 1996) (holding "we have left it to the trial court's discretion to decide 'the order in which the issues of damages and coverage are to be determined by arbitration and the court.'")

SUMMARY OF THE ARGUMENT

The trial court did not abuse its discretion when it ordered that the parties go to appraisal. The clear and unambiguous provisions of the Policy afford the right for either party to invoke appraisal. Once the right to appraisal is invoked, no party can later deny that right to appraisal. *See* ***6** *United Community Ins. Co. v. Lewis,* 642 So. 2d 59, 60 (Fla. 3d DCA 1994) (citing *Ziegler v. Knuck,* 419 So.2d 818 (Fla. 3d DCA 1982); *Intracoastal Ventures Corp. v. Safeco Ins. Co.,* 540 So.2d 162,164 (Fla. 4th DCA 1989)).

Appellant asserts that Appellee failed to comply with her post-loss obligations prior to initiating the instant action and that there was no appraisable issue. However, a cursory review of the ***complete*** record will demonstrate that the Appellee not only complied with her post-loss obligations under the Policy, but afforded the Appellant with every opportunity to conduct its own due diligence for which Appellant failed to take full advantage of. Further, a genuine dispute existed between the parties concerning pricing and scope of work. This dispute is evidenced by the Appellant's denial of additional coverage for the Loss as well as the exchange of information between the parties. "When there is a real difference in fact, arising out of an actual and honest effort to reach an agreement between the insured and the insurer, is an appraisal warranted." *Citizens Prop. Ins. Corp. v. Galeria Villas Condo. Ass 'n, Inc.,* 48 So. 3d 188, 191 (Fla. 3d DCA 2010). Clearly, an appraisable issue existed between the parties. As will be stated in greater detail below, the Appellee complied with her post-loss obligations, which in turn, permits appraisal. Additionally, Appellant states that

no evidentiary hearing is warranted or even desired because the facts in this case are clear. While Appellee agrees that an evidentiary hearing is unnecessary, Appellant failed to include pertinent portions of ***7** the record that will substantiate the notion that no evidentiary hearing is needed; however, not for the reasons set forth by the Appellant.

When the underlying facts are undisputed, as they are here, all that remains is to apply the law to the facts and no evidentiary hearing is even needed. *See Florida Ins. Guar. v. Sill,* 154 So.3d 422, 425 (Fla. 5th DCA 2014) citing *Truly Nolen of Am., Inc. v. King Cole Condo. Ass'n,* 143 So.3d 1015, 1017 (Fla. 3d DCA 2014).

Finally, Appellant's argument that Appellee waived her right to appraisal is likewise without merit. Appellee invoked her right to appraisal less than two months after filing the instant suit. Further, Appellee has not acted inconsistently with her right to appraisal, let alone heavily litigate this action.

ARGUMENT

I. THE TRIAL COURT CORRECTLY ORDERED THAT THE PARTIES SUBMIT TO APPRAISAL AS THERE WAS A GENUINE DISAGREEMENT REGARDING THE LOSS AND NO CONDUCT AMOUNTING TO A WAIVER OCCURRED.

When a statute or provision in a contract is clear and unambiguous, it must be afforded its plain meaning. *See Hott Interiors, Inc. v. Fostock,* 1 So.2d 1236 (Fla. 4th DCA 1998) (citing Holly v. Auld, 450 So.2d 217 (Fla. 1984)); see also King v. Bray, 867 So.2d 1224, 1227 (Fla. 5th DCA 2004).

Since the provisions of the Policy are clear and unambiguous, they must be afforded their plain and obvious meaning. *See King,* 867 So.2d at 1227.

8** Section 6(b)(1) of the Policy clearly and unambiguously states "If you and we fail to agree on the amount of the loss, ***either party may demand an appraisal [...]. [*Emphasis added*].

Once a party has demanded appraisal, "neither party has the right to deny that demand once it is made." *Lewis,* 642 So. 2d at 60 (citing *Ziegler v. Knuck,* 419 So.2d 818 (Fla. 3d DCA 1982); *Intracoastal Ventures Corp. v. Safeco Ins. Co.,* 540 So.2d 162, 164 (Fla. 4th DCA 1989)).

Appellant argues that Appellee failed to comply with her post-loss obligations prior to initiating the instant action and that no appraisable issue existed between the parties. As will be explained below, both assertions are inaccurate.

First, Appellee complied with her post-loss obligations under the Policy. Appellee provided the Appellant with all of the documentation it requested of her, Appellee sat through an EUO at the request of the Appellant, and Appellee even submitted an estimate for the repair work that needed to be performed on the Property. The only issue raised by the Appellant appears to be Appellee's failure to provide a sworn proof of loss. Nothing contained in Appellant's initial brief specifically details any other failure on the part of the Appellee. Further, on the record, at the EUO, Appellant not once asked for a copy of a sworn proof of loss. [A. at 306].

***9** While the standard in this Court is full compliance with post-loss obligations prior to invoking appraisal, this Court has also noted that substantial compliance is sufficient to invoke appraisal when requested by an insured. *See State Farm Ins. Co. v. Xirinachs,* 163 So.3d 559 (Fla. 3d DCA 2015); *see also Citizens Property Ins. Copr. v. Gutierrez,* 59 So.3d 177 (Fla. 3d DCA 2011).

In the instant case, given that Appellant does not want to hold an evidentiary hearing, coupled with the substantial compliance of the Appellee, the trial court is left with nothing else but to rule on the record presented. Contrary to

Appellant's assertion that Appellee "hindered" its investigation, Appellee provided all of the requested documentation she had in her possession to Appellant prior to the EUO. Appellee had nearly nine months (from November 30, 2017 when the EUO took place to August 7, 2018 when the Motion was granted) to conduct any additional investigation it desired. Appellant chose not to do so. This is especially true since almost immediately after Appellant began its letter writing campaign on October 25, 2017, Appellee sat for an EUO a mere 36 days later. In fact, when Appellant inquired on January 9, 2018, requesting additional documentation, on January 11, 2018, the undersigned firm again provided the information requested to the extent that they existed. [A. at 183]. In its appendix, the Appellant failed to include some of the correspondence between the parties, and the record will show that Appellee did not fail to respond as Appellant would lead this Court to believe. The notion that ***10** the lack of a sworn proof of loss is essential for purposes of complying with conditions precedent is nothing more than a red herring designed to unnecessarily delay these proceedings. The information requested in a sworn proof of loss is the equivalent of the estimate that the Appellee submitted to the Appellant prior to the EUO. Recognizing this fact as well as the fact that the only issues remaining were a scoping and pricing issue, the trial court correctly compelled appraisal as it saw that there was substantial compliance from a review of the record. The record shows that from the outset, the Appellee cooperated with Appellant to ensure that Appellant could conduct a proper investigation. In fact, after appearing that the Appellant was giving the Appellee the "run around" asking for the same documentation yet again, Appellant had decided that it was left with no choice but to file suit. [A. at 186]. In fact, Appellee even attempted to coordinate an inspection with Appellant. [A. at 187]. When the underlying facts are undisputed, as they are here, all that remains is to apply the law to the facts and no evidentiary hearing is even needed. See Sill, 154 So.3d at 425 citing *Truly Nolen of Am., Inc. v. King Cole Condo. Ass'n,* 143 So.3d 1015, 1017 (Fla. 3d DCA 2014). The trial court recognized this fact and ruled accordingly.

Secondly, Appellant's claim that no appraisable issued existed is also patently false. "Only when there is a real difference in fact, arising out of an actual and honest effort to reach an agreement between the insured and the insurer, is an appraisal ***11** warranted." *Galeria Villas Condo. Ass'n, Inc.,* 48 So. 3d at 191. In the case at bar, there is clearly a difference in between the insured and the insurer regarding the price and scope of the repairs. Not only is this evident by the fact that the Appellee was forced to file suit when the Appellant did not remit additional payment for the Loss, but the exchange of documentation between the parties as well as Appellant's own adjustment of the Loss in it of itself evidences a genuine dispute regarding pricing and scoping.

Finally, Appellant's argument regarding waiver is without merit. "The question of waiver of appraisal is not solely about the length of time the case is pending or the number of filings the appraisal-seeking party made. Instead, the primary focus is whether [the insureds] acted inconsistently with their appraisal rights." Sill, 154 So. 3d at 424. In other words, the issue of waiver is a facts and circumstances analysis. In the instant case, the Appellee filed her lawsuit on March 26, 2018 and less than two months later, on May 8, 2018, filed the Motion. Clearly, her conduct does not warrant a waiver of her right to compel appraisal. This is particularly true when the appraisal provision of the Policy does not contain a waiver clause that disposes of the right to appraisal upon the filing of a lawsuit. Even propounding discovery does not in it of itself preclude a party from compelling appraisal. See Florida Ins. Guar. v. Santos, 148 So.3d 837, 839 (Fla. 5th DCA 2014)(finding that an insured's engaging in substantial litigation for approximately ***12** two years and propounding discovery was not tantamount to an insured acting inconsistently with an appraisal right when discovery was not targeting the subject of appraisal). In the instant case, the litigation was only pending for less than two months and the discovery propounded was general discovery aimed at gathering information regarding the claim. Appellee's actions were not in any way inconsistent with their appraisal rights.

CONCLUSION

The facts and issues surrounding this appeal are very clear. The Appellee at all times cooperated with the Appellant, delivered all of the documentation requested to the extent that it existed, followed up on various communications from Appellant, allowed Appellant to investigate the Loss, and did not act inconsistently with her appraisal rights. This Court should not disturb the ruling of the trial court, and should affirm the Order on the Motion to Compel.

End of Document