NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

AMERICAN CAPITAL ASSURANCE COPORATION, Appellant, v. LEEWARD BAY AT TARPON BAY CONDOMINIUM ASSOCIATION, INC. Appellee.	)	Case No. 2D20-165

Opinion filed November 4, 2020.

Appeal pursuant to Fla. R. App. P. 9.130 from the Circuit Court for Collier County; Elizabeth V. Krier, Judge.

Patrick E. Betar, Evelyn M. Merchant, and Andrew S. Genden of Berk, Merchant & Sims, PLC, for Appellant.

Cary J. Goggin and Amanda Broadwell of Goede, Adamczyk, DeBoest & Cross, PLLC, Naples, for Appellee.

LaROSE, Judge.

American Capital Assurance Corporation appeals a nonfinal order compelling appraisal and staying the proceedings in favor of Leeward Bay at Tarpon Bay Condominium Association, Inc. We have jurisdiction. See Fla. R. App. P. 9.130(a)(3)(C)(iv). Because the gravamen of American Capital's defense was amount of loss, not coverage, we affirm.

I. Background

American Capital insured Leeward Bay's thirty-four buildings. After Hurricane Irma damaged its buildings, Leeward Bay filed a claim under the policy. American Capital agreed that approximately $76,000 of the loss was covered and issued payment. Leeward Bay subsequently submitted a proof of loss for $8,135,118 and requested an appraisal under the policy. The next month, Leeward Bay sued American Capital for breach of contract and moved to stay and compel appraisal. In response, American Capital alleged that the policy was void. It denied the claim, allegedly, because Leeward Bay overinflated its claim, thus voiding the policy because of fraud.

At the nonevidentiary hearing on the motion, American Capital reasserted its position that Leeward Bay's claim was void because Leeward Bay "falsely inflated the claim well beyond its actual value which constitutes an intentional misrepresentation and/or concealment of fact." American Capital contended that Leeward Bay included "things in their estimate that shouldn't have been included."

The trial court found that the case was "a dispute as to scope of loss [or amount] not whether there is coverage," and granted Leeward Bay's motion. In its written order, the trial court directed the appraiser to "itemize each category and component of damage appraised, the cause of damage, as well as costs thereof."

II. Analysis

American Capital argues that appraisal was premature because it denied Leeward Bay's claim was covered because of fraud. It asserts that the trial court should have resolved the coverage dispute—whether Leeward Bay voided the policy by

overinflating its claim—before any appraisal because "there is no appraisable issue until and unless a trial court determines there is a covered loss to appraise."[1]

Leeward Bay contends that American Capital cannot avoid appraisal by claiming fraud after it previously admitted coverage. Leeward Bay also argues that the trial court was well within its discretion to resolve the appraisal issue first because appraisals conserve judicial resources, the coverage dispute may be preserved for later determination, and the appraisal is necessary to determine whether there was fraud. In reply, American Capital maintains that the trial court's discretion exists only where the coverage dispute pertains to part of the claim, not the whole claim.

On orders compelling appraisal, we review the trial court's factual findings for competent substantial evidence. Fla. Ins. Guar. Ass'n v. Hunnewell, 173 So. 3d 988, 991 (Fla. 2d DCA 2015). "We review the trial court's application of the law to the facts de novo." Kennedy v. First Protective Ins. Co., 271 So. 3d 106, 107 (Fla. 3d DCA 2019) (citing Fla. Ins. Guar. Ass'n v. Lustre, 163 So. 3d 624, 628 (Fla. 2d DCA 2015)).

Initially, "[b]efore a [trial] court can compel appraisal under an insurance policy, it must make a preliminary determination as to whether the demand for appraisal is ripe." Citizens Prop. Ins. Corp. v. Admiralty House, Inc., 66 So. 3d 342, 344 (Fla. 2d DCA 2011) (citing Citizens Prop. Ins. Corp. v. Mango Hill Condo. Ass'n 12 Inc., 54 So. 3d 578, 581 (Fla. 3d DCA 2011)). A demand is ripe where postloss conditions are met, "the insurer has a reasonable opportunity to investigate and adjust the claim," and there is a disagreement regarding the value of the property or the amount of loss. Id. at 344

[1]American Capital also asserts that the trial court erroneously ruled "on the merits of the misrepresentation defense without a proper presentation of facts and evidence." American Capital did not request an evidentiary hearing below, and the trial court made no such ruling.

(quoting Citizens Prop. Ins. Corp. v. Galeria Vilas Condo Ass'n, 48 So. 3d 188, 191 (Fla. 3d DCA 2010)); see also State Farm Fla. Ins. Co. v. Hernandez, 172 So. 3d 473, 476-77 (Fla. 3d DCA 2015) ("The law in this district is clear and has been for nearly twenty years: the party seeking appraisal must comply with all post-loss obligations before the right to appraisal can be invoked under the contract.").

American Capital does not claim that Leeward Bay failed to satisfy any postloss conditions. American Capital's position at the hearing confirmed that it disputed the amount of loss. Thus, Leeward Bay's demand for appraisal was ripe. Cf. Admiralty House, 66 So. 3d at 344 (reversing order compelling appraisal because demand for appraisal was not ripe where insurer alleged that insured failed to comply with postloss duties); Sunshine State Ins. Co. v. Rawlins, 34 So. 3d 753, 754 (Fla. 3d DCA 2010) (holding that the matter was ripe for appraisal where "the insurer twice admitted there was a loss" and raised noncausation defenses); Corzo v. Am. Superior Ins. Co., 847 So. 2d 584, 585 (Fla. 3d DCA 2003) (holding that demand for appraisal was premature where insured had not yet filed suit on the policy and the insurer denied the entire claim based on lack of coverage and did not dispute the amount).

We must now assess whether the trial court erred in compelling appraisal before resolving any coverage dispute. Cf. Admiralty House, 66 So. 3d at 344 (recognizing that after determining the ripeness of a demand for appraisal, the next step was to determine the order in which to resolve appraisal and coverage issues). Undisputedly, coverage issues are judicial questions for the court; amount-of-loss issues are questions for appraisers. Johnson v. Nationwide Mut. Ins. Co., 828 So. 2d 1021, 1025 (Fla. 2002); see also Gonzalez v. State Farm Fire & Cas. Co., 805 So. 2d 814, 816 (Fla. 3d DCA 2000) ("[W]hen the insurer admits that there is a covered loss,

but there is a disagreement on the amount of loss, it is for the appraisers to arrive at the amount to be paid." (citing State Farm Fire & Cas. Co. v. Licea, 685 So. 2d 1285, 1288 (Fla. 1996))).

> Thus, where there is a demand for an appraisal under the policy, the only "defenses" which remain for the insurer to assert are that there is no coverage under the policy for the loss as a whole or that there has been a violation of the usual policy conditions such as fraud, lack of notice, and failure to cooperate.

Licea, 685 So. 2d at 1288.

But must the trial court always resolve coverage issues before compelling appraisal where the insurer denies coverage? American Capital asserts that the supreme court in Johnson "held that the [trial] court must determine whether there was a covered loss first." This is incorrect. The dispositive issue in Johnson was "whether causation [was] a coverage question for the court or an amount of loss question for the appraisal panel when the insurer wholly denie[d] that there [was] a covered loss." Johnson, 828 So. 2d at 1022. Johnson did not hold that the trial court had to resolve coverage issues before compelling appraisal. Rather, it held that appraisers may not determine what caused the damage "when an insurer wholly denies that there is a covered loss" because causation is exclusively a judicial question. Id. at 1022-23, 1026. Causation is only "an amount-of-loss question for the appraisal panel when an insurer admits that there is covered loss, the amount of which is disputed." Id. at 1022; see also Freeman v. Am. Integrity Ins. Co. of Fla., 180 So. 3d 1203, 1208 (Fla. 1st DCA 2015) ("While courts are exclusively charged with determining issues of coverage, appraisers are charged with determining the amount of loss when an insurer admits to a covered loss and the parties disagree regarding the amount of the loss."); Citizens Prop.

Ins. Corp. v. Mango Hill #6 Condo. Ass'n, 117 So. 3d 1226, 1227 n.1 (Fla. 3d DCA 2013) (" 'Appraisal award' is really a misnomer because the appraisal panel only determines the amount of loss, not an insured's entitlement to any damages, prominently including coverage issues such as whether the loss falls within the insuring clause of the policy, and whether the loss was caused by a covered peril.").

The district courts have yet to reach a consensus regarding the order in which the trial court should resolve appraisal and coverage issues. The Third District, for example, uses the dual-track approach, leaving "the order in which the issues of damages and coverage are to be determined . . . to the discretion of the trial court." Rawlins, 34 So. 3d at 754. The trial court may compel an appraisal on the dual-track basis, "while preserving all of [the insurer's] rights to contest coverage as a matter of law." See id. at 755. The Third District reasons that the dual-track approach is necessary to avoid any "adverse effects on the expeditious, out of court disposition of litigation" and to "save[] 'judicial resources which might otherwise be required in resolving the factual and legal issues involved in the [coverage issue] by a relatively swift and informal decision by the appraisers as to the amount of the loss.' " Id. (second alteration in original) (quoting Paradise Plaza Condo. Ass'n v. Reinsurance Corp. of N.Y., 685 So. 2d 937, 941 (Fla. 3d DCA 1996) (en banc)). In exercising its discretion, the trial court may consider factors such as "the costs involved and the relative importance and viability of the damages and the coverage issues, respectively." Paradise Plaza Condo. Ass'n, 685 So. 2d at 941.

In contrast, the Fourth District has "held that the trial court must resolve all underlying coverage disputes prior to ordering an appraisal" where the insurer wholly denies coverage. Citizens Prop. Ins. Corp. v. Demetrescu, 137 So. 3d 500, 502 (Fla.

4th DCA 2014); see also Citizens Prop. Ins. Corp. v. Mich. Condo. Ass'n, 46 So. 3d 177, 178 (Fla. 4th DCA 2010); Sunshine State Ins. Co. v. Corridori, 28 So. 3d 129, 131 (Fla. 4th DCA 2010). The Fourth District eschews the dual-track approach. Mich. Condo. Ass'n, 46 So. 3d at 178. It reasoned "that '[a] finding of liability necessarily precedes a determination of damages,' " and certified conflict with Rawlins. Mich. Condo. Ass'n, 46 So. 3d at 178 (alteration in original) (quoting Engle v. Liggett Grp., Inc., 945 So. 2d 1246, 1262-63 (Fla. 2006)).

We favorably noted the Third District's dual-track approach in Admiralty House, but the reference was dicta. See 66 So. 3d at 344 ("We note that '[o]nce the trial court determines that a demand for appraisal is ripe, the court has the discretion to control the order in which an appraisal and coverage determinations proceed.' " (alteration in original) (quoting Galeria Villas Condo. Ass'n, 48 So. 3d at 191-92)).

We now join the Third District and adopt the dual-track approach because the specific facts of this case demonstrate why it is preferable. Notably, American Capital initially conceded coverage. It then claimed fraud when it disagreed with Leeward Bay's allegedly overstated estimate of its loss. It seems clear to us that this case necessarily involves the amount of loss; any coverage dispute is intertwined with the amount of loss. The appraisal would likely assist the trial court when it later determines whether Leeward Bay fraudulently inflated its claim. The dual-track approach is not only judicially efficient, see Rawlins, 34 So. 3d at 755, but it may also be necessary where the findings in the appraisal are interconnected to the trial court's finding of liability.

III. Conclusion

The trial court acted within its discretion to compel appraisal. Cf. Rawlins, 34 So. 3d at 754-55. Thus, we affirm. Because the trial court directed the appraiser to specify the cause of each item of damage, we emphasize that the trial court must make the ultimate determination on any coverage disputes.[2] See Johnson, 828 So. 2d at 1022-23, 1026; Gonzalez, 805 So. 2d at 815. The appraisal addresses the amount of loss. See Freeman, 180 So. 3d at 1208; Mango Hill #6 Condo. Ass'n, 117 So. 3d at 1227 n.1; see, e.g., Grove Towers Condo. Ass'n v. Lexington Ins. Co., No. 19-24199-CIV, 2020 WL 4561599, at *2 (S.D. Fla. June 9, 2020) ("Consequently, the question of what repairs are needed to restore a property is a question relating to the amount of loss and not coverage, which is in the province of the court." (citing Baldwin Realty Grp., Inc. v. Scottsdale Ins. Co., No. 6:18-cv-785-Orl-41DCI, 2018 U.S. Dist. LEXIS 181709, at *8 (M.D. Fla. Sep. 6, 2018))), report and recommendation adopted, No. 19-24199-CIV, 2020 WL 4561600 (S.D. Fla. July 9, 2020).

Our disposition is without prejudice to American Capital's right to contest coverage as a matter of law and continue litigating its coverage defense after the appraisal. See Am. Coastal Ins. Co. v. Residences at Pelican Isle Condo. Ass'n, 291 So. 3d 1003, 1003 (Fla. 2d DCA 2020) (citing Liberty Am. Ins. v. Kennedy, 890 So. 2d 539, 541-42 (Fla. 2d DCA 2005), for the proposition "that submission of claim to appraisal does not foreclose insurer from challenging scope of coverage").

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[2]We note that the trial court permissibly directed the appraiser to itemize each type of damage. See Fla. Ins. Guar. Ass'n v. Olympus Ass'n, 34 So. 3d 791, 796 n.1 (Fla. 4th DCA 2010) ("When an appraiser uses a line-item appraisal form, as was done here, 'a court can readily identify any coverage issues that arise during the course of appraisal and resolve these without having to try and decipher what value the appraiser assigned for a particular type of damage.' " (quoting Bonafonte v. Lexington Ins. Co., No. 08-21062-CIV, 2008 WL 2705437, at *2 (S.D. Fla. July 9, 2008))).

Finally, we certify conflict with the Fourth District's opinions in Demetrescu, 137 So. 3d 502-03, Michigan Condo. Ass'n, 46 So. 3d at 178, and Corridori, 28 So. 3d at 131, to the extent that they hold the trial court must always resolve coverage disputes prior to compelling an appraisal.

Affirmed; conflict certified.

KHOUZAM, C.J., and SLEET, JJ., Concur.