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United States District Court, W.D.
Arkansas, Fayetteville Division.

SIMMONS FOOD, INC., Plaintiff
v.
INDUSTRIAL RISK INSURERS, an Unincorporated for Profit Association; Swiss Reinsurance America Corporation; Westport Insurance Corporation; and Ironshore Specialty Insurance Company, Defendants

Case No. 5:13-CV-05204
|
Signed 10/19/2015

Attorneys and Law Firms

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ORDER

TIMOTHY L. BROOKS, UNITED STATES DISTRICT JUDGE

***1** Now before Court is the parties' briefing (Docs. 191, 192) on the issue of whether evidence may be submitted to the jury at trial regarding Plaintiff Simmons Foods, Inc.'s ("Simmons") failure to agree to Defendants Industrial Risk Insurers, Swiss Reinsurance America Corporation, Westport Insurance Corporation, and Ironshore Specialty Insurance Company's (collectively, "the Insurers") written demand to engage in a binding appraisal process. The Insurers made a written demand for appraisal several months after the instant lawsuit was filed. They believe that Simmons' refusal to submit to the appraisal process constitutes a failure by Simmons to perform under the terms of the contract. The issue was brought to the Court's attention by way of a proposed jury instruction and verdict interrogatory submitted by the Insurers. The Court raised the issue at the final pre-trial conference (because of evidentiary concerns the issue would present at trial) and requested further briefing as to the Parties' respective positions. The Court construes the briefing as a Motion and Response to exclude from trial all evidence and argument of the Insurers demand for appraisal. For the reasons set forth below, Simmons Motion to exclude is **GRANTED.**

I. BACKGROUND

As a preliminary matter, the Court observes that only one of the two insurance policies at issue in this case—that of Industrial Risk Insurers ("IRI")—contains a general provision regarding appraisal. [1] This provision, appearing in the policy at Doc. 1-1, p. 4, states:

> In case the insured and the Companies 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, the, on request of the insured or the Companies, such umpire shall be selected by a judge of a court of record in the state in which the property covered is located. The appraisers shall then appraise the loss, stating separately actual cash value and loss to each item; and, failing to agree, shall submit their differences, only, to the umpire. An award in writing, so itemized, of any two when filed with the Companies shall determine the amount of actual cash value and loss.

By the clear language of this provision, the appraisal process set forth is non-voluntary once a written demand is made, and

the outcome appears to be binding on both parties. *Id.* The Ironshore policy does not contain an appraisal provision, so it will not be discussed in this Order.

***2** The IRI policy also contains certain amendatory endorsements applicable to real property situated in particular states. The Arkansas Amendatory Endorsement to the IRI policy (Doc. 1-1, p. 107) amends the general appraisal provision so that appraisal must now be both voluntary and non-binding:

The Appraisal condition in this policy is amended by adding the following:

1. If the Companies and the Insured disagree on the value of the amount of loss, either party may make a written request for an appraisal of the loss. However, an appraisal will be made only if both the Companies and the Insured agree, voluntarily, to have the loss appraised. If so agreed, 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.

2. An appraisal decision will not be binding on either party.

3. If there is an appraisal, the Companies will still retain its right to deny the claim.

Interestingly, an Oklahoma Amendatory Endorsement in the IRI policy also appears—and would seem to be pertinent to the case at bar, as the lawsuit concerns real property located in Oklahoma—but the Endorsement is silent about the appraisal process. *See* Doc. 1-1, p. 119. [2]

II. CHOICE OF LAW

In previous Orders, the Court determined that Arkansas law applied to the statute of limitations provision in the policies, *see* Doc. 25, and likely applied to the policies in general, *see* Doc. 32. Both policies insured multiple Simmons buildings located in Arkansas and Oklahoma. The Insurers urge the Court to reconsider its prior Orders and construe the policy under Oklahoma law, it appears, simply because the claim at issue in this lawsuit concerns real property in Oklahoma. One state's law must properly govern the contract as a whole, and the choice-of-law analysis involves more than simply looking at the location of the particular loss at issue. Accordingly, the Court extends and incorporates its choice-of-law analysis from its prior Order to find that Arkansas law applies to the policies here. *See* Doc. 32, p. 4. That said, the Court has, in an abundance of caution, considered the IRI policy's general appraisal provision under both Arkansas and Oklahoma law, as set forth below.

III. DISCUSSION

As explained previously, the general appraisal provision in the IRI policy is non-voluntary, as it requires that both parties "shall select a competent and disinterested appraiser" once either party makes a written demand for appraisal. (Doc. 1-1, p. 4). The provision is also binding on both parties, as the umpire's appraisal decision "shall determine the amount of actual cash value and loss." *Id.*

According to the undisputed documentary evidence submitted by the parties, approximately three months after the Complaint was filed in this Court, the Insurers collectively requested in writing on December 10, 2013, that Simmons submit to the general appraisal provision in the IRI contract —and demanded that the outcome of the appraisal be binding on the parties. *See* Doc. 192-4, p. 4. In response, on December 13, 2013, a corporate representative for Simmons wrote a letter to the Insurers rejecting the notion of a binding appraisal process, but suggesting that Simmons would be willing to enter into the appraisal process if it were non-binding. Specifically, Simmons stated it would agree to appraisal "on the condition that the Insurers likewise agree that the appraisal determination would not be binding on Simmons Foods, and that the Insurers further agree that the fact that the parties participated in the process, as well as in the appraisal determination, would not be admissible in the referenced litigation." (Doc. 192-5, pp. 2-3).

***3** The Insurers then wrote another letter to Simmons on December 27, 2013 (Doc. 191-3, p. 1), stating that they "will not agree to restrict the enforceability or admissibility of any appraisal award, and instead will request that the appraisal go forward pursuant to the terms of the Policy and applicable law." Simmons responded on January 14, 2014, restating its previous position that it would agree to enter into the appraisal process, but only if the process were non-binding on Simmons. (Doc. 191-4).

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Turning now to the law of both Arkansas and Oklahoma, it is clear that the Insurers' position is untenable, as Simmons had no legal obligation to submit to a non-voluntary, binding appraisal process, as set forth in the general appraisal provision of the IRI policy or in the Insurers' written demands. Arkansas law provides that a non-voluntary, binding appraisal provision is unenforceable, as it would deprive a contracting party of the right to trial by jury on material issues of fact under the policy. *See* Ark. Code Ann. § 23-79-203 ("No insurance policy or annuity contract shall contain any condition, provision, or agreement which directly or indirectly deprives the insured or beneficiary of the right to trial by jury on any question of fact arising under the policy or contract ... All such provisions, conditions, or agreements shall be void."). [3]

Similarly, the law in Oklahoma is that an appraisal provision that is binding on a party that did not request the appraisal, but was compelled to participate, is void and unenforceable. The Oklahoma Supreme Court in *Massey v. Farmers Ins. Group*, 837 P.2d 880, 883-34 (Okla. 1992), in answering a certified question of law from the Tenth Circuit Court of Appeals, determined that an appraisal provision [4] that compels a party to submit to an appraisal process and accept the result of that process as binding "would run afoul of the [Oklahoma Constitution's] Art. 2, § 19 right of jury trial." [5] Tellingly, the Insurers did not cite to—nor attempt to distinguish—*Massey* in their brief to the Court, even though *Massey* is clearly dispositive of this appraisal dispute under Oklahoma law.

As the Insurers' written demands for appraisal were conditioned on the process being both binding and non-voluntary as to Simmons, these demands were unenforceable under both Arkansas and Oklahoma law, and Simmons was not required to comply with these requests. The Insurers argue (or "concede" as they say) in their brief that even if Simmons' refusal to comply with their demands was not a "material breach" of the appraisal provision of the policy, it "was still an <u>immaterial</u> breach, however, because Simmons could have complied with the request for appraisal, an undisputed contractual term, and preserved its right to a jury trial on that issue." (Doc. 192, p. 11) (emphasis in original). The Court rejects this argument for two reasons. First, the general appraisal provision of the IRI policy is contrary to both Arkansas and Oklahoma state law, and thus void. The Insurers' demands, predicated on the terms of the policy's general appraisal provision, sought compliance with a void and illegal contractual provision. Second, the Insurers presented no evidence that Simmons "could have complied" with a legal request for appraisal, as no legal request was made. All demand letters attached to the briefing by the parties required that Simmons submit to binding appraisal. Considering the Court's analysis, the Insurers will not be permitted to introduce any evidence or argument at trial regarding Simmons' refusal to participate in an appraisal.

***4** In the alternative to the Court's finding that the appraisal provision is unenforceable as a matter of law, the Court holds that any contractual obligation on Simmons' part to submit to an appraisal was waived by the Insurers. The Second Circuit in *Amerex Group, Inc. v. Lexington Insurance Co.*, 678 F.3d 193, 201 (2d Cir. 2012), examined the timeliness of an appraisal demand under New York law, and articulated three pertinent factors for courts to consider: (1) whether the appraisal sought was impractical or impossible, (2) whether the parties engaged in good-faith negotiations over valuation of loss just prior to the appraisal demand, and (3) whether an appraisal was desirable or necessary under the circumstances. Examining these factors and applying them to the facts in the case at bar, the Court finds, first, that requiring Simmons to submit to a binding appraisal process was "impractical or impossible," as doing so was contrary to law and violated Simmons' right to jury trial; second, that the parties were not engaging in good faith negotiations at or around the time the demand was made, as the time for such negotiations had long since passed; and, third, that an appraisal was neither "desirable" nor "necessary" at the time the demand was made for the following reasons:

- the first appraisal demand in December of 2013 was presented to Simmons **five months after** the Insurers sent Simmons a letter stating they had "completed [their] evaluation of the Simmons claim" and had determined "[t]he final loss calculation" (Doc. 192-3);

- the first appraisal demand was presented **five months after** the Insurers paid Simmons with "two checks representing the remaining balance of our measurement of the loss," *id.*;

- Simmons had already incurred all costs for replacing the building by the beginning of 2012, **two years before** the demand for appraisal was made; and Simmons made a claim for damages under the second part of the Replacement Cost Endorsement for "actual expenditure incurred"—not a prospective claim for damages that had not yet been assessed;

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- an appraisal as to the appropriate cost to replace part of the building, as opposed to the whole building, would not have been helpful in avoiding litigation, as the parties disagreed about the scope of the loss—something that an appraisal cannot resolve; and
- the first appraisal demand was presented **three months after** Simmons filed suit in this Court over the scope of the loss.

In addition to the above factors, the Court finds that the Insurers waived their right to argue non-compliance with the appraisal provision as an affirmative defense. The Insurers generally pleaded in their Answer that Simmons was not entitled to recover because it "failed to comply with conditions precedent in the Policies...." (Doc. 27, p. 7). However, when the Court conducted a case management hearing on September 30, 2014, and asked counsel for the Insurers whether this particular affirmative defense concerned the appraisal process, counsel stated unequivocally that appraisal was not a condition precedent to performance, *see* Doc. 60, p. 20. To allow the Insurers to reverse their position at this late hour would unduly prejudice Simmons.

IV. CONCLUSION

In consideration of the Court's analysis above, **IT IS ORDERED** that the Insurers are not permitted to introduce evidence or argument at trial of Simmons' refusal to submit to the Insurers' demands for compliance with a binding appraisal process.

IT IS SO ORDERED this 19th day of October, 2015.

All Citations

Not Reported in Fed. Supp., 2015 WL 12912443

Footnotes

1 The Complaint (Doc. 1, p. 3) explains that Defendants IRI and Ironshore Specialty Insurance Company ("Ironshore") each sold and delivered to Simmons a policy of insurance with nearly identical terms, covering the period from September 1, 2010, to September 1, 2011. IRI and Ironshore agreed to jointly participate in the payment of covered losses under the policies, with IRI responsible for 71.43% of the losses and Ironshore responsible for 28.57% of the losses for the first $35,000,000.00; and IRI responsible for 35% of the losses and Ironshore responsible for 65% of the losses for the next $65,000,000.00.

2 Although the Ironshore policy does not contain a general provision on appraisal, it does include both the Arkansas and Oklahoma Amendatory Endorsements.

3 The Insurers concede that this is the law in Arkansas. *See* Insurers' Brief, Doc. 192, p. 10.

4 The provision at issue in *Massey* is nearly identical to the IRI provision at issue here.

5 The *Massey* Court's analysis depended on the interpretation of a statutorily mandated appraisal provision, codified at Oklahoma Statute, 36 O.S. 1981 § 4803, which was likewise in effect at the time the policies at issue in the case at bar were issued. Just as Simmons' right to jury trial would be affected under both Arkansas and Oklahoma law if the IRI appraisal provision were enforceable, so, too, would their Seventh Amendment right to jury trial be affected under the U.S. Constitution.

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