2020 WL 6106624
Only the Westlaw citation is currently available.
United States District Court, N.D. Florida,
PANAMA CITY DIVISION.

Rebekah REGISTER and Scott Randall, Plaintiffs,
v.
CERTAIN UNDERWRITERS AT LLOYD'S,
London Subscribing To Policy Number
Hca H03 0000001289 00, Defendant.

Case No. 5:20cv52-Tkw-mjf
|
Signed 04/20/2020

Attorneys and Law Firms

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John A. Campbell, III, Pensacola, FL, for Defendant.

ORDER COMPELLING APPRAISAL

T. KENT WETHERELL, II, UNITED STATES DISTRICT JUDGE

***1** This is an insurance dispute arising out of Hurricane Michael. Plaintiffs filed suit in state court, alleging that Defendant breached the insurance policy by not paying the full amount due for their loss. Defendant filed an answer denying the allegations in the complaint and raising various affirmative defenses, including lack of coverage. [1] Defendant thereafter removed the case to this Court and filed a motion to compel appraisal of the loss (Doc. 5). Plaintiffs did not respond to the motion to compel, and the motion is now ripe for a ruling.

While reviewing the motion to compel, the Court became concerned that it did not have jurisdiction over the case, so the Court ordered Defendant to show cause why this case should not be dismissed for lack of jurisdiction. *See* Doc. 7. [2] In its response (Doc. 10), Defendant argues that the Court has jurisdiction under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("the Convention"), 9 U.S.C. § 201, *et seq.*, because the appraisal provision in the insurance policy is an "arbitration agreement" subject to the Convention. The Court agrees, although as discussed below, the issue is more nuanced and complex than the response suggests.

The district courts have original jurisdiction over "[a]n action or proceeding falling under the Convention." 9 U.S.C. § 203; *see also Bautista v. Star Cruises*, 396 F.3d 1289, 1294-99 (11th Cir. 2005) (discussing the history of the Convention and its scope and operation in relation to the Federal Arbitration Act). For an action to fall under the Convention, it must involve "[a]n arbitration agreement ... arising out of a legal relationship, whether contractual or not, which is considered as commercial." 9 U.S.C. § 202 (emphasis added).

There do not appear to be any cases addressing whether an appraisal provision like the one in this case is an "arbitration agreement" subject to the Convention. There are, however, numerous circuit court decisions addressing what constitutes "arbitration" for purposes of the Federal Arbitration Act (FAA), 9 U.S.C. § 1, *et seq.*See footnote 3 below. There are also Florida cases discussing the differences between appraisal and arbitration. *See, e.g., Fla. Ins. Guar. Ass'n v. Devon Neighborhood Ass'n*, 67 So. 3d 187, 190 n.3 (Fla. 2011); *Allstate Ins. Co. v. Suarez*, 833 So. 2d 762, 765 (Fla. 2002); *Citizens Prop. Ins. Corp. v. Mango Hill #6 Condo Ass'n*, 117 So. 3d 1226, 1229 (Fla. 3d DCA 2013); *U.S. Fidelity & Guar. Co. v. Romay*, 744 So. 2d 467 (Fla. 3d DCA 1999).

The circuit courts are split on the issue of whether federal or state law governs the determination as to whether an alternative dispute resolution procedure is "arbitration" for purposes of the FAA. [3] The Eleventh Circuit has not explicitly held one way or the other, [4] but consistent with the decisions holding that federal law governs, the Eleventh Circuit has explained that:

> ***2** when there is a dispute about whether any particular dispute resolution method chosen in a contract is FAA arbitration, we will look for the "common incidents" of "classic arbitration," including (i) an independent adjudicator, (ii) who applies substantive legal standards (*i.e.* the parties' agreement and background contract law), (iii) considers evidence and argument (however formally or informally) from each party, and

> (iv) renders a decision that purports to resolve the rights and duties of the parties, typically by awarding damages or equitable relief. The presence or absence of any one of these circumstances will not always be determinative, and parties have great flexibility under the FAA to select pre-packaged dispute resolution procedures, or to craft their own.

Advanced Bodycare Sols., LLC v. Thione Int'l, Inc., 524 F.3d 1235, 1239 (11th Cir. 2008). *Accord Fit Tech*, 374 F.3d at 7 (holding that the determination as to whether an alternative dispute resolution process is "arbitration" for purposes of the FAA is based on "how closely the specified procedure resembles classic arbitration" and explaining that the common elements of classic arbitration include an independent adjudicator, substantive standards, an opportunity for each side to present its case, and a final remedy); *Salt Lake Tribune*, 390 F.3d at 689 ("Central to any conception of classic arbitration is that the disputants empowered a third party to render a decision settling their dispute."); *see also* Black's Law Dictionary (11th ed. 2019) (defining "arbitration" as "[a] dispute-resolution process in which the disputing parties choose one or more neutral third parties to make a final and binding decision resolving the dispute").

The Eleventh Circuit emphasized that "[i]f a dispute resolution procedure does not produce some type of award that can be meaningfully confirmed, modified, or vacated by a court upon proper motion, it is not arbitration within the scope of the FAA." *Advanced Bodycare Sols.*, 524 F.3d at 1239. However, the court also noted that "[t]he inverse is not true" because "[t]he presence of an award does not by itself make a procedure 'arbitration' if the procedures that produce the award bear no resemblance to classic arbitration." *Id.* at 1239 n.3.

***3** The Court sees no reason that the principles in *Advance Bodycare Solutions* and the other FAA cases cited above should not be used when determining whether an alternative dispute resolution process is an "arbitration agreement" subject to the Convention. Indeed, the FAA and the Convention are codified in the same title (and adjacent chapters) of the United States Code, and the Eleventh Circuit has described them as being "closely interrelated." *Bautista*, 396 F.3d at 1296. Moreover, both statutes were enacted for the purpose of promoting judicial recognition and enforcement of arbitration agreements. *See Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 510-11, 520 n.15 (1974).

The appraisal provision in this case provides that if there is a disagreement as to the amount of the loss, the parties will each choose a "competent and impartial appraiser" and the appraisers will jointly choose an "umpire." Doc. 5-1, at 25. [5] The appraisers will then "separately set the amount of loss." *Id.* If the appraisers agree, then "the amount agreed upon will be the amount of loss," but if they disagree, "they will submit their differences to the umpire" and "[a] decision agreed to by any two will set the amount of loss." *Id.*

This process has many elements of classic arbitration in that it provides for an independent adjudicator (the umpire) who will render a final, binding determination as to the amount of loss if the party-appointed appraisers cannot agree. Although the appraisal provision does not dictate how the appraisers are to determine the amount of loss, [6] the insurance policy contains standards for "loss settlement" that will presumably guide the determination. *See* Doc. 5-1, at 24-25. Additionally, the appraisal award can be confirmed, modified, or vacated by a court upon proper motion. *See Three Palms Pointe, Inc. v. State Farm Fire & Cas. Co.*, 250 F. Supp. 2d 1357, 1361-63 (M.D. Fla. 2003), *aff'd* 362 F.3d 1317 (11th Cir. 2004).

The appraisal process does, however, lack some elements of classic arbitration. Most notably, there is no opportunity for the parties to present evidence or argument in support of their positions, either to the appraisers or the umpire. *See Citizens Prop.*, 117 So. 3d at 1229 ("There is no obligation for appraisers to give formal notice of their activities to the parties or counsel, or to hear evidence."); *Liberty Mut. Fire Ins. Co. v. Hernandez*, 735 So. 2d 587, 589 (Fla. 3d DCA 1999) (noting that an appraisal does not contemplate "a trial-type hearing"); *but see AMF Inc. v. Brunswick Corp.*, 621 F.Supp. 456, 460 (E.D.N.Y.1985) ("An adversary proceeding, submission of evidence, witnesses and cross-examination are not essential elements of arbitration.") (quoted with approval in *Bakoss*, 707 F.3d at 143). Additionally, the appraisal will not necessarily produce an award that will resolve the case in its entirety because confirmation of the appraisal award does not foreclose the insurer from raising defenses to coverage, *see Three Palms Pointe*, 250 F. Supp. 2d at 1362; *Citizens Prop.*, 117 So.3d at 1229.

The Eleventh Circuit made clear in *Advanced Bodycare Solutions* that the "presence or absence of any one [element

of classic arbitration] will not always be determinative," 524 F.3d at 1323; and here, on balance, the Court concludes that the appraisal process in this case is "arbitration"—and, thus, this case involves an "arbitration agreement"—because the elements of classic arbitration that are missing from the process are outweighed by the elements that are present. Indeed, even though the parties do not have the opportunity to present evidence or argument in support of their positions, the appraisal provision clearly contemplates that the umpire will consider the parties' positions before making his or her decision because the appraisers (who are separately selected by the parties) are to "submit their differences" to the umpire if they cannot agree on the amount of loss.

***4** This conclusion is consistent with the district court's decision in *Liberty Mutual Group, Inc. v. Wright*, 2012 WL 718857 (D. Md. Mar. 5, 2012). The issue in that case was whether an appraisal provision nearly identical to the one in this case was an arbitration clause subject to the FAA. *Id.* at *4. The court explained that the resolution of the issue was governed by federal law and that the proper focus was not on the use (or not) of the word "arbitration" but rather whether the parties clearly intended to submit some disputes to binding review by a third party. *Id.* at *5. The court reasoned that although the appraisal process was not arbitration simply because an umpire was involved, "[w]hen viewed as a whole ..., the entire appraisal process does constitute 'arbitration' " because the "[s]ubmission of the dispute to the appraisers—perhaps through the involvement of the umpire—will reach a binding decision through that process." *Id.* at *6. The court acknowledged that the appraisal process would not necessarily settle the entire controversy and that it did not involve a formal adversary proceeding with witnesses and cross-examination, but the court found those omissions to be "of no moment," *id.* (citing *Fit Tech*, 374 F.3d at 7, and *AMF*, 621 F. Supp at 640), because " 'as a matter of federal law, any doubts concerning [arbitrability] should be resolved in favor of arbitration,' " *id.* (alteration in original) (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983))

The Court has not overlooked *Devon Neighborhood Association, supra*, in which the Florida Supreme Court unequivocally stated that "an appraisal provision in an insurance contract is not an agreement to submit to formal arbitration proceedings under the Florida Arbitration Code." 67 So. 3d at 190 n.3 (emphasis added) (citing *Suarez*, 833 So. 2d at 765). However, that case is not controlling here because the determination as to whether the appraisal provision in the insurance policy in this case is an "arbitration agreement" subject to the Convention is governed by federal law, not state law. *See Bakoss v. Certain Underwriters at Lloyds of London*, 2011 WL 4529668, at *5-7 (E.D.N.Y. Sept. 27, 2011) (looking to federal law to determine whether a dispute resolution procedure in an insurance policy was an "arbitration agreement" for purposes of the Convention), *aff'd*, 707 F.3d 140 (2nd Cir. 2013); *Portland Gen. Elec. Co.*, 218 F.3d at 1091 (9th Cir. 2000) (Tashima, J., concurring) ("It seems counter-intuitive to look to state law to define a term in a federal statute on a subject as to which Congress has declared the need for national uniformity.").

In sum, because the appraisal provision in this case is an "arbitration agreement" subject to the Convention, this Court has jurisdiction under 9 U.S.C. § 203. That being the case, the Court will now turn its attention to Defendant's motion to compel appraisal.

The motion to compel appraisal was not contested by Plaintiffs, so it could be granted by default pursuant to N.D. Fla. Loc. R. 7.1.(H). However, on the merits, the Court finds that the motion is supported by the language of the insurance policy—which gives either party the right to "demand" an appraisal of the loss, *see* Doc. 5-1, at 25—and the law—which authorizes the Court to compel the parties to participate in the appraisal process, *see* 9 U.S.C. § 206; *Three Palms Pointe*, 250 F. Supp. 2d at 1362 (citing cases), where, as here, the "jurisdictional prerequisites" under the Convention are met [7] and none of the Convention's affirmative defenses apply, [8] *see Bautista*, 396 F.3d at 1294-95. Accordingly, the motion to compel is due to be granted.

***5** In sum, for the reasons stated above, it is **ORDERED** that:

1. Defendant's motion to compel appraisal (Doc. 5) is **GRANTED**, and the parties shall engage in the appraisal process set forth in the insurance policy.

2. The parties shall file a report regarding the status of the appraisal process and the need for any further judicial proceedings 120 days from the date of this Order.

DONE and ORDERED this 20th day of April, 2020.

All Citations

Slip Copy, 2020 WL 6106624

Footnotes

1 Defendant subsequently accepted coverage. *See* Doc. 5-2, at 9 ("Underwriters have initially accepted that coverage is triggered for this claim."); *see also id.* at 13 (noting that this matter is now a dispute regarding the valuation of Plaintiffs' claim); Doc. 5-3, at 2 (same).

2 The Order authorized Plaintiffs to file a reply to Defendant's response, but they did not do so.

3 The First, Second, Sixth, and Tenth Circuits have held that federal law governs, *see Bakoss v. Certain Underwriters at Lloyds of London*, 707 F.3d 140, 144 (2d Cir. 2013); *Evanston Ins. Co. v. Cogswell Props., LLC*, 683 F.3d 684, 693 (6th Cir. 2012); *Salt Lake Tribune Publ'g Co. v. Mgmt. Planning, Inc.*, 390 F.3d 684, 689 (10th Cir. 2004); *Fit Tech, Inc. v. Bally Total Fitness Holding Corp.*, 374 F.3d 1, 6 (1st Cir. 2004) whereas the Fifth and Ninth Circuits have held that state law governs, *see Portland Gen. Elec. Co. v. U.S. Bank Tr. Nat'l Ass'n*, 218 F.3d 1085, 1086 (9th Cir. 2000) (citing *Wasyl, Inc. v. First Boston Corp.*, 813 F.2d 1579 (9th Cir. 1987)); *Hartford Lloyd's Ins. Co. v. Teachworth*, 898 F.2d 1058, 1062 (5th Cir. 1990).

4 Although this Court stated in the order to show cause that "[s]tate law determines whether an agreement is an 'arbitration agreement' subject to the Convention," Doc. 7, at 2, a closer review of the Eleventh Circuit case cited for that proposition reflects that the case only holds that state law determines whether the parties entered into an agreement at all. *See Eassa Props. v. Shearson Lehman Bros., Inc.*, 851 F.2d 1301, 1304 n.7 (11th Cir. 1988) ("While federal law may govern the interpretation and enforcement of a valid arbitration agreement, state law governs the question of whether such an agreement exists in the first instance.") (emphasis added). The case did not address the question of what law governs the determination as to the nature of the agreement.

5 If the appraisers cannot agree on an umpire, either party "may request that the choice be made by a judge of a court of record in the state where the 'residence premises' is located." *Id.*

6 *See Citizens Prop.*, 117 So. 3d at 1229 (noting that appraisers are "expected to act on their own skill and knowledge relating to the matters being appraised").

7 The jurisdictional prerequisites are "(1) there is an agreement in writing within the meaning of the Convention; (2) the agreement provides for arbitration in the territory of a signatory of the Convention; (3) the agreement arises out of a legal relationship, whether contractual or not, which is considered commercial; and (4) a party to the agreement is not an American citizen, or that the commercial relationship has some reasonable relation with one or more foreign states." *Bautista*, 396 F.3d at 1294 n.7. Here, the parties' written agreement (the insurance policy) arises out of a commercial relationship between the parties (as insureds/insurer); one of the parties to the policy is not an American citizen (Defendant); and, the policy includes an agreement to arbitrate (the appraisal provision) in the state where the insured property is located (Florida).

8 Plaintiff did not assert any affirmative defenses under the Convention.