2021 WL 3518639
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United States District Court, D. Arizona.

John KLEIN, et al., Plaintiffs,
v.
SAFECO INSURANCE COMPANY OF AMERICA, et al., Defendants.

No. CV-20-02432-PHX-ESW
|
Signed 03/31/2021

Attorneys and Law Firms

Douglas F. Dieker, Deiker Voightmann Donovan PLLC, Scottsdale, AZ, for Plaintiffs.

Cassandra Victoria Meyer, Karen Christine Stafford, Victoria Renee Kelly, Cavanagh Law Firm PA, Phoenix, AZ, for Defendant Safeco Insurance Company of America.

ORDER

Eileen S. Willett, United States Magistrate Judge

***1** Pending before the Court is John and Marta Klein's ("Plaintiffs") Motion to Compel Appraisal (Doc. 1-1 at 20-22). Safeco Insurance Company of America ("Defendant") has filed a Response (Doc. 20) and Plaintiffs have filed a Reply (Doc. 21). Also pending before the Court is Defendant's Motion (Doc. 22) for leave to file a sur-reply (Doc. 22), which Plaintiffs oppose (Doc. 24). The Court finds good cause to grant Defendant's Motion (Doc. 22) and has considered Defendant's Sur-Reply in deciding Plaintiffs' Motion to Compel Appraisal. For the reasons set forth herein, the Court will grant Plaintiffs' Motion to Compel Appraisal.

I. LEGAL STANDARDS

The Arizona Court of Appeals has explained that "appraisal is analogous to arbitration" and the "principles of arbitration law" should be applied to proceedings involving appraisals. *Meineke v. Twin City Fire Insurance Co.*, 892 P.2d 1365, 1369 (Ariz. Ct. App. 1994). "Public policy favors arbitration," which is "an expeditious and inexpensive method of dispute resolution." *Id.* at 1369-70 (internal quotation marks and citation omitted). Due to this public policy, any doubts as to whether or not a matter is subject to arbitration should be resolved in favor of arbitration. *New Pueblo Constructors, Inc. v. Lake Patagonia Recreation Ass'n*, 467 P.2d 88, 91 (1970). Likewise, doubts as to whether an issue is subject to appraisal should be resolved in favor of appraisal. *Carbonneau v. Am. Fam. Mut. Ins. Co.*, No. 06-1853-PHX-DGC, 2006 WL 3257724, at *2 (D. Ariz. Nov. 9, 2006).

II. DISCUSSION

Defendant issued homeowners' insurance Policy Number OY7759310 (the "Policy") to Plaintiffs for their residence located in Mesa, Arizona. Plaintiffs assert that their residence incurred damage following a storm that occurred on or about November 29, 2019. After submitting their claim to Defendant, Defendant provided an estimated cost of Plaintiffs' damages, which included costs to repair a portion of Plaintiffs' roof. Plaintiffs then retained their own public adjuster, who assessed that the roof needed to be replaced. Plaintiffs seek to invoke the appraisal process set forth in the Policy. The appraisal provision provides:

> **7. Appraisal.** If you and we do not agree on the amount of the loss, including the amount of *actual cash value or replacement cost*, then, on the written demand of either, each shall select a competent and disinterested appraiser and notify the other of the appraiser selected within 20 days of such demand. The appraisers shall first select a competent and disinterested umpire; and failing for 15 days to agree upon such umpire, then, on request of you or the company, 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 resolve the issues surrounding the loss, appraise the loss, stating separately the *actual cash value or replacement cost* of each item, and, failing to agree, shall submit their differences, only, to the umpire. An award in writing, so itemized, of any two of these three, when filed with the

> company shall determine the amount of loss.

***2** (Doc. 20-1 at 28) (emphasis in original).

Here, the parties do not dispute that the Policy is a valid agreement. Defendant does not assert that Plaintiffs waived their right to an appraisal. Rather, the parties disagree as to whether the Policy's appraisal provision applies to the parties' dispute concerning Plaintiffs' insurance claim. Plaintiffs argue that the appraisal provision applies because their dispute with Defendant regards "the scope of repairs necessary as a result of an admittedly covered peril." (Doc. 21 at 6). Defendant counters that "the disagreement here is not about the cost to repair the covered damages to the roof, but whether the Policy allows for coverage to replace the entire roof, and thus, it is not an appropriate dispute for an appraiser." (Doc. 20 at 10). The parties agree that in Arizona, appraisers may only determine the amount of damage and may not resolve questions of coverage. *Hanson v. Commercial Union Ins. Co.*, 723 P.2d 101, 104 (Ariz. Ct. App. 1986). However, "the line between liability and damage questions is not always clear[.]" *Quade v. Secura Ins.*, 814 N.W.2d 703, 706 (Minn. 2012).

The Court finds *Carbonneau v. American Family Mut. Ins. Co.*, No. 06-1853-PHX-DGC, 2006 WL 3257724 (D. Ariz. Nov. 9, 2006) instructive and persuasive in determining how to classify the parties' dispute. In *Carbonneau*, the plaintiffs sued their home insurance company after their home was damaged by a wind and hail storm. The plaintiffs disputed the defendant insurance company's assertion that fixing the storm damage did not require replacement of the entire roof. In granting the plaintiffs' motion to compel appraisal, the Court stated:

> Both parties agree that Defendant must repair storm damage. The dispute is over what repairs are necessary to repair such damage. Plaintiffs claim the dispute concerns the amount of damages while Defendant argues the dispute is about coverage. The record does not allow the Court to determine with finality how to classify the dispute. Resolving doubts in favor of appraisal, however, the Court will grant Plaintiffs' motion.

Id. at *2.

The Court also finds persuasive the following analysis in another District of Arizona case, which has similar facts to this case:

> [G]iven Arizona's strong policy in favor of alternative dispute resolution and its policy of construing ambiguities in insurance policies in favor of the insured, this Court finds that either party may invoke the appraisal clause to resolve the parties' current dispute. Travelers is not asserting that the storm did not cause any damage to the properties, nor is it asserting that the storm is not a covered event under the policy. Rather, the parties disagree over the amount of loss caused by the storm that is recoverable by the Plaintiffs from Travelers under the terms of the policy. This disagreement focuses on the extent of the insurer's liability, not over the meaning of the insurance policy itself. The parties agree that wind and hail are covered events, but the policy excludes coverage for damage caused by improper handling and installation, inadequate maintenance, imperfections on the tiles, and rocks being thrown onto the roof. Thus, the fundamental dispute here centers on a question of fact—what is the amount of the claimed loss that covered under the policy's coverage for wind and hail. This question may be properly resolved in the appraisal process.

***3** *Harvey Prop. Mgmt. Co. v. Travelers Indem. Co.*, No. 2:12-CV-01536-SLG, 2012 WL 5488898, at *5 (D. Ariz. Nov. 6, 2012) (footnotes omitted).

Similarly, in *Ori v. Am. Family Mut. Ins. Co.*, No. CV-2005-697-PHX-ROS, 2005 WL 3079044 (D. Ariz. Nov. 15, 2005), the Court found in favor of appraisal when the parties could not agree as to what types of repairs were necessary to remove a smoke odor after a fire and restore the property to its pre-fire state.

Defendant relies on *San Souci Apartments v. National Sur. Corp.*, No. CV–12–2389-PHX-GMS, 2013 WL 428091 (D. Ariz. Feb. 4, 2013) to support its opposition to Plaintiffs' Motion. (Doc. 20 at 7-9). The plaintiff in *San Souci* submitted a claim to its insurer for damage to its property following a hail storm. The plaintiff submitted a repair estimate for damage to its light gauge metal carport roofing, exterior stucco, and tile roofing of the property. The defendant insurer denied coverage for damage to the tile roofing on the ground that the damage was not a result of the hail storm. The Court in *San Souci* distinguished the matter from *Ori* and *Carbonneau*, explaining that:

> Both courts [in *Ori* and *Carbonneau*] compelled appraisal because the disputes related to the adequacy of repairs, not the scope of coverage....
>
> The issue of whether the roof tiles were damaged by the hail storm and whether the source of the damage is outside of the policy limits is not a dispute about the amount of loss that all parties agree to be covered. It is, therefore, not within the scope of the appraisal provision.

San Souci, 2013 WL 428091, at *2. In contrast to *San Souci*, the parties agree that the November 2019 storm caused damage to Plaintiffs' roof. The dispute pertains to the amount of work necessary to repair the storm damage. The Court finds that this case is distinguishable from *San Souci*.

The Court is persuaded by the reasoning in a number of cases that the "amount of loss" under the appraisal provision would necessarily include a determination of causation as to whether some of the damage to Plaintiffs' roof is due to another cause, such as wear and tear, and not by the November 2019 storm. *See Ori v. Am. Family Mut. Ins. Co.*, 2005 WL 3079044, at *4 ("The term 'amount of loss' 'necessarily ... includes the amount it would cost to repair that which was lost.' ") (citation omitted); *Quade*, 814 N.W.2d at 706-07 ("The Quades assert that the damage to the roofs is a covered loss for wind damage. Secura asserts that the damage to the roofs is due to wear and tear and is excluded under the policy. We believe that under the circumstances of this case a determination of the 'amount of loss' under the appraisal clause necessarily includes a determination of causation."); *Johnson v. State Farm*, 204 S.W.3d 897, 903 (Tex. App. 2006) ("If the parties had to first agree on which specific shingles were damaged and approach every disagreement on extent of damage as a causation, coverage or liability issue, either party could defeat the other party's request for an appraisal by labeling a disagreement as a coverage dispute. Instead, as the process is designed, once it is determined that there is a covered loss and a dispute about the amount of that loss, the appraisal process determines the amount that should be paid because of loss from a covered peril."); *Phila. Indem. Ins. v. WE Pebble Point*, 44 F.Supp.3d 813, 818 (S.D. Ind. 2014) ("[I]t would be extraordinarily difficult, if not impossible, for an appraiser to determine the amount of storm damage without addressing the demarcation between 'storm damage' and 'non-storm damage.' To hold otherwise would be to say that an appraisal is never in order unless there is only one conceivable cause of damage...."); *State Farm Lloyds v. Johnson*, 290 S.W.3d 886, 892-93 (Tex. 2009) ("If State Farm is correct that appraisers can never allocate damages between covered and excluded perils, then appraisals can never assess hail damage unless a roof is brand new. That would render appraisal clauses largely inoperative, a construction we must avoid."); *Walnut Creek Townhome Ass'n v. Depositors Ins. Co.*, 913 N.W.2d 80, 91 (Iowa 2018) (concluding that although coverage questions are for the court, factual causation issues may be decided through the appraisal process).

***4** Here, as in *Carbonneau, Harvey Property Management Co.*, and *Ori*, the parties agree that there is coverage under the Policy for the damage to Plaintiffs' home that resulted from a covered event. The parties disagree as to the extent of the work that is required to repair the damage. The Court agrees with the analysis in *Carbonneau* and other cases holding that doubts should be resolved in favor of appraisal. The appraisal process can properly resolve the resulting amount of damage to Plaintiffs' roof from the November 2019 storm. The Court will grant Plaintiffs' Motion to Compel Appraisal (Doc. 1-1 at 20-22).

III. CONCLUSION

Based on the foregoing,

IT IS ORDERED granting Defendant's "Motion Requesting Leave to File Sur-Reply to Plaintiffs' Reply in Support of Motion to Compel Appraisal" (Doc. 22).

IT IS FURTHER ORDERED granting Plaintiffs' Motion to Compel Appraisal (Doc. 1-1 at 20-22).

IT IS FURTHER ORDERED directing each party to select a competent and impartial appraiser within **twenty-one days** of the filing of this Order.

IT IS FURTHER ORDERED that the appraisal shall be limited solely to an itemized determination of the amount of loss to Plaintiffs' home that is attributable to the storm occurring on or about November 29, 2019.

All Citations

Slip Copy, 2021 WL 3518639