

2020 WL 7974330

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United States District Court, D. Minnesota.

AXIS SURPLUS INSURANCE COMPANY, Plaintiff,

v.

CONDOR CORPORATION, Defendant.

CIVIL NO. 20-789(DSD/KMM)

Signed 10/08/2020

Attorneys and Law Firms

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[Bradley K. Hammond, Esq.](#) and Smith Jadin Johnson, PLLC, 7900 Xerxes Avenue South, #2020, Bloomington, MN 55431 counsel for defendant.

ORDER

[David S. Doty](#), United States District Court Judge

*1 This matter is before the court upon defendant and counterclaim plaintiff Condor Corporation's motion to compel appraisal, disqualify plaintiff and counterclaim defendant Axis Surplus Insurance Company's chosen appraiser, and stay litigation. Based on a review of the file, record, and proceedings herein, and for the following reasons, the motion is granted in part and denied in part as explained below.

BACKGROUND

This case arises out of an insurance coverage dispute. Condor owns the Promenade Oaks apartment complex in Eagan, Minnesota. Compl. ¶ 1. Axis issued Condor first-party commercial property insurance policies for the Promenade Oaks effective during the time period relevant here. *Id.* ¶¶ 7, 8, 17. The policies cover losses or damage that occur within the policy period and within the coverage territory, and each policy contains an appraisal provision that states, in relevant

part, “[i]f we and you disagree on the value of the property or the amount of loss, either may make written demand for an appraisal of the loss.” *Id.* ¶¶ 40, 53.

On June 6, 2019, Condor submitted a property loss notice regarding hail damage to the roofs of the buildings at Promenade Oaks that Condor alleged occurred on October 3, 2018. *Id.* ¶ 21. Condor then amended the date of loss twice; the alleged date of loss currently at issue is May 29, 2018.¹ *Id.* ¶¶ 23, 33. Axis appointed Sedgwick as the independent adjuster to investigate the claim and retained J.S. Held, LLC to perform an inspection and evaluation of the damage, which took place on July 1 and 2, 2019. *Id.* ¶¶ 22, 24–25. Although there was hail damage to some of the roofs, J.S. Held determined that the damage must have occurred before 2012. *Id.* ¶ 31. It based its conclusion on a comparison to similar hail damage reported during a 2016 insurance claim inspection, signs that the damage was old, and the lack of damage to roofs that were replaced in 2012. *Id.* ¶¶ 26–31; *Id.* Ex. C; *Id.* Ex. D. As a result, J.S. Held concluded that “no direct hail-related damages were sustained ... as a result of the claimed date of loss ...” and Axis denied coverage for the claim. Compl. ¶¶ 31–32.

Condor disputed Axis's no-coverage determination and submitted a claim for the cost to replace the roofs in December of 2019, stating that it would demand appraisal if Axis failed to pay the claim. *Id.* ¶ 35. On February 21, 2020, Axis again stated that there was no coverage and denied the claim. *Id.* ¶ 37. Axis further stated it did not believe appraisal was warranted because the “amount of loss” was not in dispute given its coverage denial. *Id.* Ex. E. Condor submitted a written demand for appraisal on February 25, 2020. *Id.* ¶ 38; Hammond Aff. Ex. 7, ECF No. 47.

On March 24, 2020, Axis filed suit seeking relief in the form of a declaration that the policies do not cover the hail damage claimed by Condor. Compl. ¶ 43. Condor filed a counterclaim alleging breach of contract and seeking to compel an appraisal pursuant to the appraisal provision of the policies. *See* ECF Nos. 10, 58. On July 8, 2020, Condor filed the instant motion to compel appraisal. ECF No. 23.

DISCUSSION

I. Motion to Compel Appraisal

*2 The main point of contention between Axis and Condor is whether the appraisal provision is triggered when there is

a dispute over whether a loss covered by the policy occurred. The policy calls for appraisal when the parties disagree over the “value of the property or the amount of loss.” Axis argues that the motion to compel appraisal must be denied because Condor has not met its burden of establishing that a covered loss within the policy period occurred — *i.e.* that the hail damage was caused by a storm that occurred during the policy period. As such, Axis asserts that the appraisal provision has not been triggered because this is a coverage dispute and not a disagreement over the “amount of loss.” Condor argues that, under Minnesota law, an appraisal to determine amount of loss necessarily and properly includes a determination of the cause of the loss. If the appraisal concludes that a storm outside the policy period caused the damage, it will determine that the amount of loss is \$0.

Condor cites Quade v. Secura Insurance, 814 N.W.2d 708 (Minn. 2012), in support of its argument, and the court agrees that that case controls the outcome here. In Quade, the insurer paid part of a claim for storm damage to several of plaintiffs’ farm buildings but denied coverage on some of the buildings. Id. 704–05. The insurer determined that the damage was caused by inadequate maintenance, which was excluded from coverage. Id. The insurer encouraged the plaintiffs to seek appraisal if they disagreed with the determination. Id. The plaintiffs instead sued the insurer for breach of contract, making the same argument as Axis has done here: that appraisal was not required because the dispute was over coverage, not amount of loss. Id. at 705.

The Minnesota Supreme Court determined that appraisal is appropriate even when coverage issues surrounding the cause of loss exist because “an appraiser’s assessment of the ‘amount of loss’ necessarily includes a determination of the cause of loss, and the amount it would cost to repair that loss.” Id. at 706. The parties in Quade agreed that a covered occurrence — a wind storm — caused some damage, but disagreed as to the extent of the damage caused by the covered occurrence. Id. Where a case involves both questions of coverage and the amount of loss, the court concluded that it is appropriate for appraisers to “allocate damages between covered and excluded perils,” and to examine the cause of damage in order to “separate loss due to a covered event from a property’s preexisting condition.” Id. at 707.

Axis attempts to distinguish Quade by arguing that, unlike in Quade where the parties agreed that some damage was caused by a covered occurrence, here the primary dispute concerns whether any damage was caused by a covered occurrence.

This argument is unavailing. Courts in this district have relied on Quade in compelling appraisal even where there is a dispute as to whether any damage was caused by a covered occurrence. *See, e.g.,* Condominiums of Shenandoah Place v. Secura Ins., No. 15-cv-165, 2016 WL 614381 (D. Minn. Feb. 16, 2016) (compelling appraisal where the parties disputed whether wind and hail damage to buildings was caused by a storm within the covered policy period). Similarly, here, the parties do not dispute that there is hail damage to the roofs of some buildings at Promenade Oaks. Rather, the dispute centers on whether that damage existed before the claimed loss date, and thus whether it was caused by a storm that occurred within the covered policy period. As such, the court finds that Quade applies and it is appropriate to allow an appraiser to “separate [any] loss due to a covered event from [the] property’s preexisting condition.” 814 N.W.2d at 707.

II. Appointment of an Appraiser

The appraisal provision of the policy states that, in the event of an appraisal, “each party will select a competent and impartial appraiser.” Axis plans to appoint Jonathon Held, chief executive officer of J.S. Held, as its appraiser. Condor argues that Mr. Held is not an impartial appraiser because J.S. Held previously inspected the property and determined that the May 29, 2018, storm was not the cause of the damage. Further, Mr. Held cannot be impartial, Condor asserts, because he has *ex parte* knowledge of the previous inspection resulting in Axis’s denial of coverage and has a financial stake in the outcome. Axis counters that Mr. Held is competent and impartial because he was not involved in the previous inspection and was not involved in the report that determined the cause of loss.

*3 The policy is silent as to whether the court has the power to preemptively disqualify an appraiser, and the court is not convinced that it has such power. *See* Owners Ass’n of Bella Vista Villas, Inc. v. Owners Ins. Co., No. 16-cv-01018-WJM-NYW, 2016 WL 6962876, at *6 (D. Colo. Nov. 26, 2016) (expressing doubt over whether court had power to disqualify appraiser under similar policy language). Regardless, the court finds that disqualifying Mr. Held is not appropriate here. Although Condor alleges that Mr. Held cannot be impartial because he has *ex parte* knowledge of the previous inspection and a financial stake in the outcome of an appraisal, it has not submitted any actual evidence in support of these allegations. The court therefore denies Condor’s request to disqualify Mr. Held from serving as Axis’s appraiser.

CONCLUSION

Accordingly, **IT IS HEREBY ORDERED** that:

1. The motion to compel appraisal [ECF No. 23] is granted in part, as outlined above; and

2. This action is stayed pending completion of the appraisal process.

All Citations

Slip Copy, 2020 WL 7974330

Footnotes

- 1 The court makes no determination about the appropriate loss date. Any remaining dispute about the alleged date of loss is not relevant to the instant motion, as the court need not and will not determine at this time whether a storm within the policy period caused the damage.

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