

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
MIDLAND/ODESSA DIVISION

FIRST BAPTIST CHURCH OF
ODESSA,

Plaintiff,

v.

BROTHERHOOD MUTUAL
INSURANCE COMPANY,

Defendant.

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MO:18-CV-00208-DC

**ORDER GRANTING MOTION TO VACATE
UNILATERAL STATE COURT UMPIRE APPOINTMENT AND APPRAISAL AWARD**

BEFORE THE COURT is the Motion to Vacate Unilateral State Court Umpire Appointment and Appraisal Award filed by Defendant Brotherhood Mutual Insurance Company (BMIC). (Doc. 32). Also before the Court are the response filed by Plaintiff First Baptist Church of Odessa (FBCO) and reply filed by BMIC.¹ (Docs. 33, 34, 61). After due consideration of the parties' arguments, the record, and the applicable law, the Court **GRANTS** BMIC's Motion to Vacate Unilateral State Court Umpire Appointment and Appraisal Award. (Doc. 32).

I. BACKGROUND

This case arises from an insurance dispute between FBCO, the insured, and BMIC, the insurer. FBCO purchased an insurance policy (the Policy) from BMIC to insure properties located in Odessa, Texas (the Property). (Doc. 2-1 at 4).

On or about June 14, 2017, a severe storm caused damage to the Property. FBCO filed a claim with BMIC. BMIC assigned an adjuster to inspect the Property and paid FBCO a sum that FBCO found insufficient to cover the alleged loss. As a result, on October 19, 2018, FBCO filed suit in the 161st Judicial District Court of Ector County, Texas. (Doc. 2-2). The case was

1. Defendant also filed a Notice of Supplemental Authority. (Doc. 69). However, the Court did not rely on the "supplemental authority" to rule on the instant Motion.

removed to this Court on November 28, 2018. (Doc. 1). On November 7, 2019, the Court granted the parties' joint motion to stay the case pending the outcome of the appraisal process, which FBCO invoked. (*See* Docs. 8, 9). The case was administratively closed pending the outcome of the appraisal.

On November 6, 2020, the parties advised the Court that an executed appraisal award was issued on October 23, 2020. (Doc. 13). Nonetheless, the parties requested that the Court continue to stay the case pending mediation. *See id.* The Court agreed, and, on February 1, 2021, the parties filed a joint motion to lift the stay and a status report. (Doc. 14). Therein, the parties noted that they were unable to settle the case. *Id.* Accordingly, the Court reinstated the case to the Court's active docket. (Doc. 17).

On March 10, 2021, BMIC filed the instant Motion. (Doc. 32). BMIC urges the Court to set aside the umpire award, alleging that the award was issued without authority and is invalid. *See id.* FBCO filed a response opposing the Motion on March 17, 2021. (Doc. 33). BMIC filed a reply on March 24, 2021, a sur-reply² on July 28, 2021, and a Notice of Supplemental Authority on September 8, 2021. (Docs. 34, 61, 69). FBCO filed a response to the Notice of Supplemental Authority on September 15, 2021. (Doc. 73).

II. DISCUSSION

BMIC raises three arguments in favor of vacating the umpire and umpire award. (Doc. 32). First, BMIC argues that FBCO's request for the state court to appoint an umpire was premature because FBCO did not wait 15 days before filing an ex parte request for the appointment of an umpire as required under the Policy. *Id.* at 4–6. Second, BMIC claims that FBCO's request and the appointment of Mike Weeks (Mr. Weeks) as umpire are *void ab initio* because the request circumvented this Court's jurisdiction. *Id.* at 6–8. Finally, BMIC contends

2. The Court granted BMIC's motion for leave to file sur-reply as unopposed. (*See* Text Only Entry, July 28, 2021).

that FBCO's ex parte request and the appointment of Mr. Weeks are void because the request violated due process. *Id.* at 9–11.

Under Texas law, three scenarios warrant disregarding an appraisal award: “(1) when the award was made without authority; (2) when the award was the result of fraud, accident, or mistake; or (3) when the award was not made in substantial compliance with the terms of the contract.” *See Cantu v. S. Ins. Co.*, No. 03-14-00533-CV, 2015 WL 5096858, at *4 (Tex. App.—Austin Aug. 25, 2015, no pet.) (citations omitted). The party seeking to set aside the award carries the burden of proof. *Id.*

BMIC's motion first challenges contractual authority: the authority of the state court to appoint Mr. Weeks and Mr. Weeks' derivative authority to issue an award. (Doc. 32). Specifically, the first issue raised by the parties is whether FBCO waited 15 days before asking the state court judge to select an umpire. (*See* Docs. 32, 33, 34, 61). If FBCO did not, BMIC argues the umpire selected by the state court, Mr. Weeks, did not have the authority to issue an appraisal award. (Doc. 32).

The Court first recognizes that an insurance policy serves the legal function of a contract between the insured and the insurer. *See Friedrichs v. Geovera Specialty Ins. Co.*, No. 7:12-CV-392, 2013 WL 674021, at *6 (S.D. Tex. Feb. 22, 2013). Accordingly, the Court applies the same rules to the interpretation of insurance policies as to any other contract, and “read[s] all parts of each policy together and exercise[s] caution not to isolate particular sections or provisions from the contract as a whole.” *ARM Properties Mgmt. Grp. v. RSUI Indem. Co.*, 400 F. App'x 938, 940 (5th Cir. 2010) (quoting *Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 216 (Tex. 2003)). An appraisal clause in an insurance policy “binds the parties to have the extent or amount of the loss determined in a particular way.” *Mattox v. Safeco Ins. Co. of Indiana*, No.

1:16-CV-1037-DAE, 2018 WL 3603102, at *3 (W.D. Tex. May 29, 2018) (quoting *State Farm Lloyds v. Johnson*, 290 S.W.3d 886, 895 (Tex. 2009)). “Like any other contractual provision, appraisal clauses should be enforced.” *Johnson*, 290 S.W.3d at 895. The appraisal clause in this case, in relevant part, reads:

Appraisal: If **you** and **we** do not agree on the amount of the loss or the actual cash value of covered property, either party may demand that these amounts be determined by appraisal.

If either makes a written demand for appraisal, each selects a competent, independent appraiser and notifies the other of the appraiser’s identity within 20 days of receipt of the written demand. The two appraisers then select a competent, impartial umpire. If the two appraisers are unable to agree upon an umpire within 15 days, **you** or **we** can ask a judge of a court of record in the state where the property is located to select an umpire.

(Doc. 20-2 at 114).

After the case was closed pending the appraisal outcome, the parties agreed to appoint Eddie Kizer (Mr. Kizer) as the appraisal umpire. (Docs. 32 at 2; 33 at 3). However, on June 1, 2020, Mr. Kizer e-mailed V’Rhett F. Williams (Mr. Williams), FBCO’s appraiser, and Raymond Choate (Mr. Choate), BMIC’s appraiser, notifying them that “due to an increase claims volume from COVID19,” he had to withdraw as the umpire. (Doc. 40-1 at 8). Mr. Kizer’s affidavit, which FBCO references, states that he “talked with both Choate and Williams to let them know that [he] was going to withdraw from serving as the appraisal umpire . . .” on May 28, 2020. (Doc. 22-33). On June 15, 2020, FBCO requested that the 29th Judicial District Court for Palo Pinto County, Texas, select a replacement umpire. (Doc. 20-35). The state court did so on June 16, 2020. (Doc. 20-36).

FBCO argues that it waited 15 days before filing an ex parte application for the appointment of an umpire in state court, citing May 28, 2020, as the triggering date. (Doc. 33).

BMIC argues that FBCO did not wait 15 days before applying, citing the earliest triggering date as June 1, 2020.³ (Doc. 32).

Mr. Kizer's affidavit suggests that Mr. Kizer spoke to Mr. Choate and Mr. Williams about his intent to withdraw from serving as the appraiser on May 28, 2020. (Doc. 22-33). However, Mr. Kizer officially withdrew as the umpire for the appraisal on June 1, 2020. (Doc. 40-1 at 8). Mr. Choate and Mr. Williams did not begin discussing a replacement for Mr. Kizer until June 1, 2020. (*See* Doc. 40-2 at 7). On June 1, James McClenny, attorney of record for FBCO, contacted Mr. Choate, BMIC's appraiser, and suggested that the parties "discuss potential replacements for the umpire." (Doc. 40-2 at 7). Moreover, on June 2, Mr. Choate reached out to Mr. Williams, inquiring about Mr. Williams' availability to discuss replacing Mr. Kizer. (Doc. 32-3 at 2). Mr. Choate sent another e-mail on June 5, asking Mr. Williams when he would "like to discuss new umpires[.]" (Doc. 32-4 at 2). On June 12, Mr. Choate sent another e-mail to Mr. Williams concerning availability. (Doc. 32-5 at 2). On June 12, Mr. Williams provided Mr. Choate with a list of umpires he could agree to. (Doc. 32-6 at 2). On June 16, Mr. Choate notified Mr. Williams that he could not agree to one of the potential umpires listed by Mr. Williams but that he was considering whether he could work with the two alternatives listed. (Doc. 32-7 at 2).

FBCO's request for an umpire was filed on June 15, 2020, only 14 days after Mr. Kizer withdrew as the appraisal umpire. (Doc. 20-35). FBCO was not "authorized" to file its Application until June 16, 2020—after the expiration of 15 days from the date Mr. Kizer withdrew as umpire. *See e.g., Charter Oak Fire Ins. Co. v. Shamrock Steel Sales, Inc.*, No. MO:18-CV-00111-DC, 2019 WL 10351608, at *3 (W.D. Tex. Jan. 3, 2019) (noting that the

3. Notably, BMIC does not concede that June 1, 2020, was the triggering date. (Doc. 32). Rather, BMIC argues that June 1, 2020, is the earliest potential triggering date. *See id.*

defendant was authorized to file an application requesting that the judge select an umpire after the expiration of the contractually outlined 35 days). To hold otherwise would render the time specifications in the Policy meaningless. *See id.*

The Court rules that FBCO did not comply with the Policy and its request to the state court was premature, meaning the state court was without authority to appoint Mr. Weeks.⁴ Thus, Mr. Weeks was without derivative authority to issue an appraisal award. Because the Court grants BMIC's Motion on this ground, the Court need not address BMIC's other arguments in support of its Motion.

III. CONCLUSION

Based on the foregoing, the Court **GRANTS** the Motion to Vacate Unilateral State Court Umpire Appointment and Appraisal Award. (Doc. 32).

It is so **ORDERED**.

SIGNED this 9th day of February, 2022.

A handwritten signature in black ink, appearing to read "David Counts", with a stylized star or asterisk symbol to the right of the name.

DAVID COUNTS
UNITED STATES DISTRICT JUDGE

4. The Court notes that FBCO does not argue that even if its request was premature, the state court had authority to appoint Mr. Weeks as the appraisal umpire. (*See* Doc. 33).