

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
MCALLEN DIVISION**

CARL SCALISE

§

CIVIL ACTION NO. 7:13-cv-178

VS.

§

§

JURY DEMANDED

ALLSTATE TEXAS LLOYDS

§

AND STEPHEN MEDEIROS

§

DEFENDANT ALLSTATE TEXAS LLOYDS MOTION FOR SUMMARY JUDGMENT

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES, Defendant, **ALLSTATE TEXAS LLOYDS** and files this Motion for Summary Judgment and would show unto the Court as follows:

**I.
BACKGROUND**

This lawsuit arises out of the March 29, 2012 hailstorm. After his claim had been resolved through the appraisal process set forth in his homeowners insurance policy, Plaintiff, Carl Scalise, filed suit in State Court on or about March 19, 2013. Plaintiff asserted claims for breach of contract, bad faith, violations of the Texas Insurance Code, and breach of the appraisal provision of the insurance policy. Defendant filed an answer and removed this case to Federal Court.

**II.
SUMMARY OF THE ARGUMENT**

Plaintiff's claim has been through the appraisal process. The award has been paid. The appraisal process has been concluded. There are no issues left to be resolved between the parties. Accordingly, Allstate moves for summary judgment on the Plaintiff's claims, because payment of the appraisal award precludes Plaintiff's causes of action for breach of contract and any extra-contractual claims as a matter of law.

**III.
SUMMARY JUDGMENT EVIDENCE**

In support of this summary judgment, the Defendant will rely on the following:

Exhibit A: Letter dated July 31, 2012 from Plaintiff's counsel invoking the appraisal provision.

Exhibit B: Letter dated September 13, 2013 from Defendant's counsel appointing Stephen Medeiros

Exhibit C: Agreement for Submission to Appraisers signed by both appraisers

Exhibit D: Letter dated March 11, 2013 from Plaintiff's counsel withdrawing from appraisal.

Exhibit E: Appraisal Award

Exhibit F: Property Loss Worksheet

Exhibit G: Letter enclosing check for appraisal award.

Exhibit H: Plaintiff's Original Petition

Exhibit I: Plaintiff's policy

**IV.
SUMMARY JUDGMENT STANDARD**

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, Summary Judgment is proper when the pleadings, depositions, discovery and affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 371, 322, 106 S.Ct. 2548, 91 L.Ed2d 265 (1986) A defendant who seeks summary judgment on a plaintiff's cause of action may demonstrate the absence of a genuine issue of material fact either by (1) submitting evidence that negates the existence of a material element of plaintiff's claim or (2) showing there is no evidence to support

an essential element of plaintiff's claim. *Celotex*, 477 U.S. at 322-25. A party opposing a motion for summary judgment may not rely on mere allegations or denials in his pleadings but must set forth specific facts, showing a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242, 256, 106 S.Ct. 2505, 91 L.Ed2d 202 (1986).

**V.
ARGUMENT AND AUTHORITIES**

A. Factual Background:

Plaintiff, Carl Scalise, invoked the appraisal clause of his insurance policy with Allstate on July 30, 2012. Plaintiff's counsel, F. Blake Dietzman, sent correspondence dated July 30, 2012 to Allstate invoking the appraisal provision and appointing appraiser James Ward. *Exhibit A*. Allstate in turn appointed its appraiser, Stephen Medeiros. *See Exhibit B*. The appraisers agreed on Paul Poncio as the umpire. *See Exhibit C*.

In total Ward and Medeiros worked on 6 cases involving Allstate insureds. On three of the cases, Rick Guerra Prats was agreed to as umpire on the other three, Paul Poncio. On this case, Paul Poncio was the agreed upon umpire. The Guerra Prats cases were finalized and paid in January. The Poncio cases took longer. As the process was about to conclude, attorney Dietzman withdrew from the appraisal process. *See Exhibit D* By this point, the property had been inspected, each appraiser had submitted his information and estimate and the umpire was about to issue his award. Despite the eleventh hour attempt to withdraw from the appraisal process, the umpire still rendered his decision on April 10, 2013. The decision was agreed to by Stephen Medeiros. *See Exhibit E*.

Based on the policy language, two of the three had agreed, and the amount of the loss was set. *See Exhibits A and J*. The appraisal award was sent to Allstate. The umpire issued an award under the dwelling portion of the policy for \$4,803.30 and under the other structures

coverage for \$4,992.00 for a total award of \$9,795.30. The deductible and prior payments were subtracted to come up with the final award of \$ 9,243.51. *See Exhibit F.* The award check was issued by Allstate and sent to defense counsel who forwarded it to Plaintiff's counsel on April 30, 2013. *Exhibit G.* In the meantime, Plaintiff had filed suit in State Court on March 19, 2013.

VI.

B. Breach of Contract

The appraisal clause in the Scalise policy provides as follows:

C. Appraisal. If you and we fail to agree on the actual value, amount of loss, or cost of repair or replacement, either can make a written demand for appraisal. Each will then select a competent, independent appraiser and notify the other of the appraiser's identity within 20 days of receipt of the written demand. The two appraisers will choose an umpire. If they cannot agree upon an umpire within 15 days, you or we may request that the choice be made by a judge of a district court of a judicial district where the loss occurred. The two appraisers will then set the amount of loss, stating separately the actual cash value and loss to each item. If you or we request that they do so, the appraisers will also set:

- a. the full replacement cost of the dwelling.
- b. the full replacement cost of any other building upon which loss is claimed.
- c. the full cost of repair or replacement of loss to such building, without deduction for depreciation.

If the appraisers fail to agree, they will submit their differences to the umpire. An itemized decision agreed to by any two of these three and filed with us will set the amount of the loss. Such award shall be binding on you and us.

Each party will pay its own appraiser and bear the other expenses of the appraisal and umpire equally.

Exhibit I.

VII.

C. Attempted Withdrawal from Appraisal

By letter correspondence, Plaintiff's counsel unilaterally attempted to withdraw from the appraisal process erroneously alleging that Allstate's appraiser had not complied with the Appraisal agreement because in Plaintiff's view he had not included various items in his estimate. *See Exhibit D*. They suggested that the appraiser was not competent or independent. The insurance policy does not provide for withdrawal from the appraisal process once invoked. The insurance policy does not provide for withdrawal from the appraisal process when the appraisers have been appointed, the umpire selected, costs incurred and the process substantially complete.

The Texas Supreme Court has enunciated a strong policy in favor of enforcing appraisal clauses in insurance contracts...." *Sanchez v. Property and Casualty Insurance Company of Hartford*, 2010 WL 413687, at *3 (S.D. Tex. Jan. 27, 2010) (citing *State Farm Lloyds v. Johnson*, 290 S.W.3d 886, 888–89, 895 (Tex.2009)). Plaintiff's complaints about Allstate's chosen appraiser do not entitle him to unilaterally withdraw from the appraisal process he invoked when it is near completion. Plaintiff's attempt to withdraw from the appraisal process at the eleventh hour is improper. As a result, the award rendered by the umpire and agreed to by one of the appraisers is binding on the Plaintiff.

D. Payment of the Appraisal Award Negates Breach of Contract Claims

Texas Courts have long held that "appraisal awards made pursuant to the provision of an insurance contract are binding and enforceable and every reasonable presumption will be indulged to sustain an appraisal award". *JM Walker LLC v. Acadia Ins. Co.*, 356 Fed. Appx. 744, 746 (5th Cir. 2009); *Franco v. Slavonik Mutual Fire Insurance Association*, 154 S.W. 3d

777, 786 (*Tex. App. – Houston, [14th Dist.], 2004, no pet*); *Lundstrom v. USAA* 192 S.W.3d 78, 87 (*Tex. App. – Houston [14th Dist.] 2006, pet. den'd*). As a result, compliance with the contractual appraisal provision and payment of the appraisal award negates any claim for breach of contract. *Id at 787*. Indeed, a pre-appraisal failure to agree is a condition precedent to appraisal. Appraisal is a contractual dispute resolution procedure – a binding extra-judicial remedy for any disagreement regarding the amount of the loss. *Id.; Amine v. Liberty Lloyds of Texas Insurance* 2007 WL 2264477 (*Tex. App. – Houston [1st Dist.] 2007, no pet.*) (*not designated for publication*).

Allstate complied with the terms of the insurance contract, participated in the appraisal process -- which Plaintiff invoked -- and tendered payment of the appraisal award upon completion of the process. Accordingly, there is no breach of contract as a matter of law. *Breshears at 345*. When an insurance contract provides that disputes between the insurance carrier and the insured may be submitted to appraisal and the carrier participates in the appraisal process and pays the amount set by the appraisers, then the carrier cannot be found to be in breach of the insurance contract as a matter of law. *Id., Brownlow v. USAA* 2005 *Tex. App. LEXIS 1987 at *5-7* (*Tex. App. – Corpus Christi March 17 2005*) (*Not designated for publication*); *Toonen v. United Servs. Auto Ass'n* 935 S.W.2d 937, 940 (*Tex. App. San Antonio 1996, no writ*) (holding that insurer was entitled to summary judgment on breach of contract claim because it had tendered appraisal award to claimant pursuant to contract); *Providence Lloyds Ins. Co. v. Crystal City Indep. Sch. Dist.* 877 S.W.3d 872, 875 (*Tex. App. – San Antonio 1994, no writ*) (holding that appraisal award made pursuant to the insurance contract was binding and there was no breach of contract).

VIII.

E. Extra-Contractual Claims

Plaintiff is also asserting claims for “bad faith and violations of the Texas Insurance Code”. Plaintiff’s bad faith claims appear to center upon the allegation that Allstate partially denied, delayed and failed to pay and properly investigate some or all of Plaintiff’s covered losses without reasonable basis. *Plaintiff’s Original Petition, Para. V, VI and VIII*. As a general rule, an insured does not have a bad faith claim in the absence of the breach of contract claim by the insured. *See Toonen v. United Services Automobile Association, 935 S.W. 2d 937, 941 (Tex. App –San Antonio, 1996, no writ); Citing Republic Insurance Company v. Stoker, 903 S.W. 2d 338, 341 (Tex. 1995)*.

As set forth above, there is no breach of claim when the appraisal award is timely paid. If payment of the appraisal award negates the claim for breach of contract, there can be no bad faith related to the handling of the claim. *See Franco v. Slavonic Mut. Fire Ins. Ass’n 154 S.W.3d 777, 787 (Tex. App. – Houston -14th Dist.) 2004, no pet); Blum’s Furniture Co., Inc. v. Certain Underwriters at Lloyds London 2012 WL 181413 slip op. at *3 (5th Cir. Jan. 24, 2012)* (because carrier timely paid appraisal award, insured “failed to establish a genuine issue of material fact regarding its bad faith claims”); *Hudgens v. Allstate Texas Lloyd’s, 2012 WL 2887219 (S.D. Tex. July 13, 2012)* (granting summary judgment as to the plaintiff’s breach of contract and extra-contractual claims after the timely payment of an appraisal award).

In most cases, an insured may not prevail on a bad faith claim without first showing that the insurer breached the contract. *Liberty Nat’l Fire Ins. Co. v. Akin, 927 S.W.2d 627 (Tex. 1996)*. There are exceptions such as when an insurer commits some act so extreme, that it would

cause injury independent of the policy claim or fails to timely investigate the claim. *Republic Ins. Co. v. Stoker*, 903 S.W.2d 338, 341 (Tex. 1995). Such circumstances are not present here.

IX.

F. Insurance Code Claims

Texas Courts have concluded that full and timely payment of an appraisal award under the policy precludes an award of penalties under the Insurance Code's prompt payment provisions as a matter of law. *In Re: Slavonik Mutual Fire Insurance Association*, 308, S.W. 3d, 556, 563, (Tex. App. –Houston, 14th District, 2010, no pet.); see also *Amine v. Liberty Lloyds of Texas Insurance*, 2007 W.L. 2264477.

Section 542.058 controls the payment of the award. Specifically, this section provides that if an insurer, “after receiving all items, statements and forms reasonably requested and required under Section 542.055 delays payment of the claim for more than 60 days”, delay damages may follow. The award in this case was paid within 30 days of receipt by Allstate of the umpire's decision. The award was received by Allstate on or about April 15, 2013. The check was issued and sent to Plaintiff on April 30, 2013. An insurer has 60 days after it receives all the items reasonably requested and required to pay the claim. Allstate could not reasonable pay the claim until the appraisal process was complete. Once the umpire's decision was issued, Allstate promptly paid the award. There was no violation of the Prompt Payment Act. See e.g., *Mag-Dolphys, Inc. v. Ohio Cas. Ins. Co.* 2012 WL 4018001 (S.D. Tex.); See also *Amine v. Liberty Lloyds of Tex. Ins. Co.* 2007 WL 2264477 (Tex. App. – Houston [1st Dist.] Aug. 9, 2007, no pet.) (where insurer timely pays an appraisal award, there is no violation of the Insurance Code's prompt payment deadlines); *Breashears, supra* (insureds not entitled to delay penalties even though final payment was delayed until appraisal complete).

**X.
CONCLUSION**

The appraisal process was completed at Plaintiff's request and the award paid. Nonetheless, Plaintiff filed suit alleging breach of contract and various extra-contractual causes of action. As set forth above, these claims lack merit because the appraisal process has been concluded and the award paid. Defendant is entitled to Summary Judgment on all the claims alleged in Plaintiff's lawsuit.

WHEREFORE, PREMISES CONSIDERED, Defendant prays that the court grant its Motion for Summary Judgment and enter an order that Plaintiff take nothing on her causes of action and grant Defendant such other and further relief to which it is justly entitled.

Respectfully submitted,

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