

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:21-cv-01723-CNS-MEH

THE CALVARY BAPTIST CHURCH OF DENVER,

Third-Party Plaintiff and
Counterclaim Defendant,

CHURCH MUTUAL INSURANCE COMPANY; and
CHURCH MUTUAL INSURANCE COMPANY, S.I.,

Cross Claim Defendants and
Counterclaim Plaintiffs,

SKYYGUARD CORP.,

Third-Party Defendant, Counterclaim
Plaintiff, Cross Claim Plaintiff, and
Counterclaim Defendant.

**CALVARY BAPTIST AND CHURCH MUTUAL'S JOINT STIPULATED MOTION TO
VACATE APPRAISAL AWARD**

Third-Party Plaintiff and Counterclaim Defendant The Calvary Baptist Church of Denver ("Calvary") and Counterclaim Plaintiff Church Mutual Insurance Company, S.I., incorrectly sued here as "Church Mutual Insurance Company; and Church Mutual Insurance Company, S.I.," (hereinafter, "Church Mutual"), through undersigned counsel, hereby submit this joint stipulated motion to vacate the appraisal award.

CERTIFICATE OF CONFERRAL

Counsel for Calvary and Church Mutual have conferred with counsel for Skyyguard regarding the relief requested in this motion. Skyyguard opposes. However, Calvary and Church Mutual contend that Skyyguard does not have standing to oppose

the relief requested in this motion. (See Order, ECF 154 (“[Skyyguard] was not a party to the insurance contract at issue, nor the appraisal award.”))

FACTUAL BACKGROUND (“FACTS”)

Calvary and Church Mutual stipulate to the below undisputed facts in support of this motion:

I. THE POLICY

1. Church Mutual issued to Calvary insurance policy number 0035405-02-968733, effective January 10, 2017 to January 10, 2020 (“Policy”, Ex. A). The Policy provided coverage at relevant times (subject to its terms, conditions, and exclusions) for Calvary’s property located at 6500 E. Girard Ave., Denver, CO 80224 (the “Property”).

2. The Policy provides coverage for “direct physical loss of or damage to Covered Property at the premises described in the Declarations Page caused by or resulting from any Covered Cause of Loss,” subject to the terms and conditions of the Policy. (Ex. A at page 9.)

3. The Property Coverage Part of the Policy contains the following pertinent provisions:

PROPERTY CONDITIONS

C. LOSS CONDITIONS

2. Appraisal

If 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. In this event, each party will select a competent and impartial appraiser. The two appraisers will select an umpire. If they cannot agree, either

may request that selection be made by a judge of a court having jurisdiction. The appraisers will state separately the value of the property and amount of loss. If they fail to agree, they will submit their differences to the umpire. A decision agreed to by any two will be binding. Each party will:

- a. Pay its chosen appraiser, and
- b. Bear the other expenses of the appraisal and umpire equally.

If there is an appraisal, we will still retain our right to deny the claim.

4. Loss Payment

- a. In the event of loss or damage covered by this Coverage Part, at our option, we will either:
 - (1) Pay the value of lost or damaged property;
 - (2) Pay the cost of repairing or replacing the lost or damaged property, subject to b. below;
 - (3) Take all or any part of the property at an agreed to appraised value; or
 - (4) Repair, rebuild or replace the property with other property of like kind and quality, subject to b. below.

We will determine the value of lost or damaged property, or the cost of its repair or replacement, in accordance with the applicable terms of the Valuation Condition in this Coverage Form or any applicable provision which amends or supersedes the Valuation Condition.

- b. The cost to repair, rebuild or replace does not include the increased cost attributable to enforcement of any ordinance or law regulating construction, use or repair of any property.

- g. We will pay for covered loss or damage within 30 days after we receive the sworn proof of loss, if you have complied with all of the terms of this Coverage Part and:
 - (1) We have reached an agreement with you on the amount of loss; or
 - (2) An appraisal award has been made.

7. Valuation

- a. Replacement Cost. If Replacement Cost is shown in the Declarations Page as applicable to Covered Property, we will determine the value of Covered Property in the event of loss or damage as follows:
 - (1) At Replacement Cost (without deduction for depreciation) as of the time of loss or damage, except as provided under c. below.

- (3) We will not pay on a replacement cost basis for any loss or damage:
 - (a) Until the lost or damaged property is actually repaired or replaced; and
 - (b) Unless the repair or replacement is made as soon as reasonably possible after the loss or damage.
- (4) We will not pay more for loss or damage on a Replacement Cost basis than the least of:
 - (a) The Limit of Insurance applicable to the lost or damaged property;
 - (b) The cost to replace “on the same premises” the lost or damaged property with other property;
 - 1) Of comparable material and quality; and

2) Used for the same purpose; or

(c) The amount you actually spend that is necessary to repair or replace the lost or damaged property.

(5) The cost of repair or replacement does not include the increased cost attributable to enforcement of any ordinance or law regulating the construction, use or repair of any property.

II. THE CLAIM AND APPRAISAL

4. In the Fall of 2018, Calvary retained Skyyguard to perform work on its gutters at the Property. At Skyyguard's recommendation, Calvary submitted a property damage claim to Church Mutual related to a storm that was believed to have occurred on June 18, 2018 (the "Storm").

5. New Line Roofing, LLC, prepared an estimate for Skyyguard, dated March 13, 2019, in an amount of \$734,755.28 for the purported cost of a full replacement of the roof of the Property (the "New Line Roofing Estimate," Ex. B).

6. On or about September 23, 2019, Skyyguard prepared a new estimate of repairs, including a complete roof replacement, for a total of \$1,810,944.32 RCV. (Ex. C.)

7. At Skyyguard's recommendation, Calvary retained Steven Ziegler of Reserve Capital LLC as its appraiser and invoked the Policy's appraisal clause.

8. Church Mutual acknowledged the appraisal demand, named Brett Lochridge of Unified Building Sciences as its appraiser, and requested that Ziegler

exchange disclosures pursuant to Colorado DORA Bulletin B-5.26 (“DORA Bulletin”).

(Ex. D.)

9. The DORA Bulletin requires “the selected appraiser” “be fair and competent,” and states that the appraiser “must disclose to all parties any known facts that a reasonable person would consider likely to affect an appraiser’s interest in the amounts determined by the appraisal process.” The appraiser’s disclosure obligation under the DORA Bulletin is continuous throughout the appraisal process. (DORA Bulletin No. B-5.26.)

10. Neither Skyyguard nor Ziegler disclosed any information to Church Mutual or Lochridge that would indicate that Ziegler was not competent or impartial.

11. On November 5, 2019, Ziegler provided his disclosures to Lochridge. Ziegler disclosed that he had “no financial interest in the outcome of this appraisal.” (Ex. E.)

12. Using many of the same line items from Skyyguard’s September 23, 2019 estimate, Ziegler prepared an estimate for the amount of loss at \$1,147,221.68 RCV for repair costs, excluding building code upgrades, and \$481,987.57 RCV for the building code upgrades. (Ex. F.)

13. On or about May 19, 2020, the appraisers arrived at the final appraisal award (“Appraisal Award”) of \$1,011,245.86 RCV for the Building, \$382.29 RCV for Other Structure, and \$423,065.14 for Code Upgrade coverage. The total RCV was \$1,434,693.29. The ACV was \$828,933.39. (Ex. G.)

14. The Appraisal Award was signed by the appraisers and states that the signatories “acknowledge we have no personal or financial interest in the outcome of this matter in accordance with the Department of Regulatory Agencies, Department of Insurance, Bulletin No. B-5.26 and Colorado Uniform Arbitration Act; C.R.S. 13-22-201 *et seq.*” (*Id.*)

III. DISCOVERY REVEALED THAT ZIEGLER WAS NOT IMPARTIAL AND THAT THE APPRAISAL AWARD WAS GROSSLY INFLATED

15. During discovery in this litigation, Church Mutual and Calvary discovered that Ziegler was not “impartial” as required by the Policy, nor was he “fair and “competent” as required by the DORA Bulletin.

16. Skyyguard contacted Ziegler via text message as early as September 13, 2018 to notify Mr. Ziegler of the forthcoming Claim and to advise that they anticipated needing his “assistance”. (Ex. H.) Skyyguard then requested Ziegler assist with the Claim around July 2019 and sent Ziegler a copy of New Line Roofing Estimate. (S. Ziegler Dep. Tr., Ex. I, at 76:2-8.) At Skyyguard’s request, Ziegler inspected the Property, along with Skyyguard, on July 17, 2019. (*Id.*, at 117:9-16.)

17. Ziegler obtained information about the Claim and inspected the Property to assess the purported damage for the purpose of determining whether to assist Skyyguard with the Claim as Calvary’s public adjuster or appraiser. (*Id.* at 47:2-7, 48:5-14, 50:10-51:10, 52:6-7, 52:23-54:13, 71:4-19, 76:21-77:7, 117:14-19.) During the inspection, Mr. Ziegler provided Skyyguard with his opinion that he was “90 percent sure” the Claim should be covered by insurance. (S. Smith Dep. Tr., May 12, 2022, Ex. J, at 164:18-23.) He testified that he would not agree to be an appraiser if he did not

believe that there was coverage for the loss, or if he believed that the damage was insufficient for appraisal. (Ex. I, 71:4-19, 52:23-54:13, 72:5-8.) Skyyguard prepared its inflated September 23, 2019 estimate—which more than doubled the New Line Roofing Estimate—only after receiving Ziegler’s appraisal recommendation. (Ex. C.)

18. Mr. Ziegler testified that he decides whether to serve as an insured’s public adjuster or appraiser based on what he believes is in the insured’s best interest. (Ex. I, 52:3-14.)

19. Ziegler testified that, in developing the Appraisal Award, he did not evaluate whether or not the alleged damage was caused by the Storm. (*Id.* at 66:4-67:14, 110:22-112:2.)

20. On or about May 26, 2020, Mr. Ziegler submitted his one and only invoice for the work performed for the appraisal to Calvary. (Ex. K.) Mr. Ziegler’s invoice charged \$75,000 for 250 hours of work. (*Id.*) Mr. Ziegler’s invoice provided no line itemization of his work performed, and Mr. Ziegler testified that he did not keep track of his time working on the appraisal. (Ex. I, 104:19-24, 168:22-169:2.)

21. Skyyguard’s owners, Chase Baron and Sean Smith, each testified that they understood that Mr. Ziegler’s fee was based on a percentage of the Appraisal Award. (Ex. J, 168:8-23; C. Baron Dep. Tr., Jan. 11, 2024, Ex. L, at 114:8-115:2.) Skyyguard knew that Mr. Ziegler’s invoice was inflated yet directed Calvary to pay it with funds received from the Appraisal Award.

22. It was also discovered that, during the appraisal process, Skyyguard met with Ziegler and prepared inflated estimates for Ziegler to use in connection with the

appraisal. (Ex. L, 108:24-112:6; S. Smith Dep. Tr., January 11, 2024, Ex. M, at 43:14-25.)

23. Ziegler did not disclose to Church Mutual or Lochridge that he inspected the Property on July 17, 2019 with Skyyguard, developed damage opinions, recommended that he be retained as an appraiser, rather than as a public adjuster, and recommended that Calvary invoke the appraisal clause. Nor did Ziegler disclose that his decision to work as an insured's appraiser is guided by what he believes is most beneficial to the insured.

24. Church Mutual and Calvary also discovered that the actual cost of the work was much less than the Appraisal Award. Skyyguard retained New Line Roofing to complete the roof replacement work, including code upgrades, for hundreds of thousands of dollars less than what was indicated on the Appraisal Award and submitted to Church Mutual. New Line Roofing completed all roof replacement work, including the purported "code upgrades" for a total of \$764,114.78. (New Line Roofing Contract and Invoices, Ex. N; Ex. J, at 201:25-202:3; 202:16-24, Ex. M, at 35:19-24, 67:16-25.)

ARGUMENT

THE APPRAISAL AWARD IS INVALID AS A MATTER OF LAW AND SHOULD BE VACATED

Calvary and Church Mutual entered the subject appraisal pursuant to the terms and conditions of the Policy. Calvary and Church Mutual are the only parties to the Policy. Thus, they are the only parties with any enforceable rights thereunder, including rights related to the subject appraisal. During this litigation, Calvary and Church Mutual

discovered that the Appraisal Award was the product of a sham appraisal process caused by a partial appraiser. They also discovered that the Appraisal Award was grossly inflated and that the actual cost of the work was hundreds of thousands of dollars less than what was indicated on the Appraisal Award. As a result, Calvary and Church Mutual jointly agree and stipulate that the Appraisal Award should be vacated in its entirety.

A. Ziegler is Not Impartial as Required by the Policy, the DORA Bulletin, or Colorado Law

In *Dakota Station*, the Colorado Supreme Court held that when the insurance policy requires “impartial” appraisers, like the Policy here, that means the appraiser must be “unbiased, disinterested, without prejudice, and unswayed by personal interest.” *Owners Ins. Co. v. Dakota Station II Condo. Ass’n, Inc.*, 2019 CO 65, ¶ 44. An impartial appraiser “must not favor one side more than another” (*id.*), and he may not advocate for one side, meaning he cannot “act[] for or in support of that party” and may not submit values “on behalf of a party[.]” *Id.* ¶¶ 41, 43.

Moreover, the DORA Bulletin’s disclosure requirement is a “fairly broad one,” which imposes heightened disclosure obligations on each side. See *Copper Oaks Master Home Owners Ass’n v. Am. Family Mut. Ins. Co.*, No. 15-cv-01828-MSK-MJW, 2018 WL 3536324, at *12 (D. Colo. July 23, 2018), *appeal dismissed* (Sept. 26, 2018) (discussing October 2015 DORA Bulletin). Under the DORA Bulletin, an appraiser is “prohibited from having ‘direct material interest in the amounts determined by the appraisal process’” and he has a “continuing obligation to disclose ‘facts that a reasonable person would consider likely to affect the appraiser’s interest in the amounts

determined by the appraisal process.” *Id.* (quoting DORA Bulletin B-5.26(A)(1), Oct. 26, 2015, 2015 WL 7459138).

In *Copper Oaks*, this Court found that the policyholder’s appraiser was not impartial as required by the insurance policy or DORA Bulletin where the appraiser had a financial interest in the amounts determined by the appraisal process, and he failed to disclose his referral relationship with the contingent-fee public adjuster or his relationship with the policyholder’s legal counsel, among other things. *Copper Oaks*, 2018 WL 3536324, at *10-15. Other courts have found the same when the insurance policy requires “impartial” appraisers, regardless of whether the DORA Bulletin or any other disclosure order applied. See *GSL Grp., Inc. v. Travelers Indem. Co.*, 18-CV-00746-MSK-SKC, 2021 WL 4245372, at *4-5 (D. Colo. Sept. 16, 2021) (vacating appraisal award based on appraiser’s lack of impartiality where appraiser “acknowledged that he advertises his services as providing ‘an advocate for policyholders.’”); *Colo. Hosp. Servs. Inc. v. Owners Ins. Co.*, No. 14-CV-001859-RBJ, 2015 WL 4245821 (D. Colo. July 14, 2015) (vacating award where appraiser’s fee was based on percentage of award). In *Dakota Station* on remand from the supreme court, the trial court found that the policyholder’s appraiser was partial by relying in part on multiple examples of her advocacy, such as the appraiser’s testimony that she can be an advocate and be unbiased, that it is “natural” for an appraiser “to be an advocate for an insured,” and that it would be “appropriate for her to ‘favor’ [the HOA if it was a close call.]” *Owners Ins. Co. v. Dakota Station II Condo. Ass’n, Inc.*, 2021 COA 114, ¶¶ 14-18

(discussing *Owners Ins. Co. v. Dakota Station II Condo. Ass'n, Inc.*, Case No. 2015cv3103).

Here, the operative facts establish that Mr. Ziegler is not impartial. Like *Copper Oaks*, Ziegler agreed to be bound by the DORA Bulletin and he was aware of his disclosure obligations under it. However, he failed to disclose that he was contacted by Skyeguard prior to the Claim even being submitted, that he inspected the Property on July 17, 2019 with Skyeguard, developed damage opinions, recommended Calvary retain him as an appraiser, rather than as a public adjuster, and to invoke the appraisal clause, or that he met with Skyeguard and obtained inflated estimates from them to use during the appraisal process. Like in *Dakota Station*, Ziegler testified that he is an advocate for the policyholder, and that his decision to work as an insured's appraiser is guided by what he believes is most beneficial to the insured. And while Ziegler may not admit it, both Skyeguard owners testified that it was their understanding that Ziegler's \$75,000 fee was based on a percentage of the Appraisal Award or benefits paid by Church Mutual; however, no such disclosure related to this financial interest was ever made.

In Colorado, appraisal awards must be vacated if the award was procured in violation of the insurance policy or Colorado law. See, e.g., *Providence Wash. Ins. Co. v. Gulinson*, 215 P. 154, 155 (Colo. 1923) (vacating appraisal award that had hallmarks of procedural unfairness); *St. Paul Fire & Marine Ins. Co. v. Walsenburg Land & Dev. Co.*, 278 P. 602, 602-03 (Colo. 1929) (same); *Auto-Owners Ins. Co. v. Summit Park Townhome Ass'n*, No. 14-cv-03417-LTB, 2016 WL 1321507, at *5 (D. Colo. Apr. 5,

2016), *aff'd*, 886 F.3d 852 (10th Cir. 2018) (vacating appraisal award due to partiality); *Colo. Hosp. Servs. Inc.*, 2015 WL 4245821, at *2 (vacating appraisal award due to one of the appraisers having a financial incentive to be partial). “The appraisal award issued under an insurance policy is binding so long as the appraisers (including the umpire) have performed the duties required of them by the policy.” *Andres Trucking Co. v. United Fire & Cas. Co.*, 2018 COA 144, ¶ 49. Appraisal awards may be disregarded where they are “made without authority,” among other things. *Id.*

Here, Ziegler has not “performed the duties required” of an appraiser “by the policy,” because he was not impartial. *See id.*; *Owners Ins. Co. v. Dakota Station II Condo. Ass’n, Inc.*, 2021 COA 114, ¶¶ 44-45 (finding that appraiser’s “lack of impartiality signifies [] that one of the appraisers didn’t perform the duties required of her by the policy”).

Additionally, the appraisal award was made “without authority.” Where the “insurance policy stated that an appraisal award is valid only if signed by two impartial appraisers,” and one appraiser is disqualified for bias, the “insurance policy would have compelled vacatur of the appraisal award” because “the appraisal award had only one valid signature,” and the “award was therefore invalid under the terms of the insurance policy.” *Auto-Owners Ins. Co. v. Summit Park Townhome Ass’n*, 886 F.3d 852, 857 (10th Cir. 2018) (applying Colorado law); *Dakota Station II Condo. Ass’n, Inc.*, 2021 COA 114, ¶¶ 45-48. That is exactly what has occurred here. There is no valid award under the policy because the award has only one valid signature—Church Mutual’s

appraiser. Accordingly, Calvary and Church Mutual agree that the award must be vacated.

B. The Appraisal Award Is Invalid Under the Terms of the Policy

Here, it was discovered that the actual cost of the roof replacement work—even after factoring 10% overhead and 10% profit to Skyysguard—was significantly less than the Appraisal Award. The Appraisal Award indicated that the roof replacement work, excluding HVAC replacement, was \$961,877.28 RCV plus an additional \$423,065.14 for code upgrades, for a total of **\$1,384,942.42**. However, during this litigation, Calvary and Church Mutual discovered that New Line Roofing performed all the roof replacement work, including the purported code upgrades, for only \$764,114.78. Thus, after factoring in 20% for overhead and profit, the total actual cost for the roof replacement work was only **\$916,937.74**.

The Policy states that Church Mutual “will not pay more for loss or damage on a Replacement Cost basis than the least of . . . (c) The amount actually you spend that is necessary to repair or replace the lost or damaged property.” Because the actual cost—i.e., the amount actually spent—was far less than that amount indicated on the Appraisal Award, the Appraisal Award is invalid. Accordingly, Calvary Baptist and Church Mutual agree that the Appraisal Award must also be vacated as a matter of law for reasons independent from Ziegler’s lack of impartiality.

CONCLUSION

The Court should grant this joint motion as stipulated to by Calvary and Church Mutual.

Dated: June 10, 2024

Respectfully submitted,

s/ William M. Brophy

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CERTIFICATE OF SERVICE (CM/ECF)

I HEREBY CERTIFY that on June 10, 2024, I electronically filed the foregoing **CALVARY BAPTIST AND CHURCH MUTUAL'S JOINT STIPULATED MOTION TO VACATE APPRAISAL AWARD** with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following email addresses:

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