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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA (SOUTHERN DIVISION)

K4 DEV, LLC,

Plaintiff,

vs.

ACE AMERICAN INSURANCE COMPANY, and DOES ONE through FIFTY,

Defendants.

Case No: 8:25-cv-01540 FWS (ADSx)

POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR ORDER COMPELLING APPRAISAL (ARBITRATION) AND FOR STAY OF LITIGATION

Date: 9/18/2025
Time: 10:00 a.m.
Assigned to: Hon. Fred W. Slaughter

TABLES OF AUTHORITIES

Cases

Statutes

I. BACKGROUND

Plaintiff, K4 DEV, LLC ("K4") was the owner and developer of property located at 1616 Market Street, Denver, CO. K4 started construction on a 12 story, 216 room hotel in 2019. K4 insured the project on a Builder's Risk insurance policy with ACE American Insurance Company ("Chubb"). As of May 2021, plaintiff's insurance policy with defendant Chubb showed a date of construction completion date of September 30, 2021, which was on track as the opening date of the hotel.

During a rainstorm between May 26 and May 29, 2021, the building suffered extensive water damage resulting from an incomplete roofing system. Water came into the building over that three-day period and inundated six full floors damaging more than 32 guest rooms which were substantially complete at the time. On July 6, 2021, the building suffered another water intrusion event, which primarily damaged the sixth-floor bar, restaurant and meeting areas.

Plaintiff made claim for the water damage with its insurer, Chubb. Chubb accepted coverage for this loss and has paid $1.6 million out of the $1.8 million that K4 actually incurred for repair of the covered water damage. The hotel construction, including the nearly $2 million in water damage repair, was completed in mid-February 2022 and the hotel opened for business to the public on February 22, 2022 – 144 days after the original planned opening date of September 30, 2021.

K4's policy with Chubb includes coverage under a "Delay in Opening Endorsement" which provided coverage for lost income caused by a delay in construction completion resulting from the covered loss event. Plaintiff made claim for the 144-day delay (minus the waiting period in the policy). Chubb contends that the hotel would have opened on February 22, 2022, even without the water losses and that the $1.8 million in repairs caused zero days delay in the construction.

K4 demanded Appraisal -- arbitration under an insurance policy when the insured and insurer disagree as to the "amount of loss." Chubb refused to submit to Appraisal claiming the issues to be resolved are not as to the "amount of loss."

II. SUMMARY OF ARGUMENT

Under Federal procedural law, and California State law, Appraisal under a first party insurance policy is a contractual arbitration provision. As such, it is governed by California law relating to arbitrations.

The Appraisal provision in the subject insurance policy requires that where there is a dispute as to the measurement of the amount of loss, and either insurer or insured demand Appraisal, the resolution of the dispute(s) must be determined by a three-person Appraisal panel. The insured appoints an "appraiser." The insurer appoints an "appraiser." The appraisers appoint an umpire. In California an Appraisal panel may not interpret disputed policy language or resolve "coverage issues." However, the requesting party is entitled to have the measurement of the amount of loss resolved by an Appraisal panel.

The present disputes present only loss measurement issues. Plaintiff and defendant disagree on the cost of repairs ($1.6 million paid vs. $1.8 million claimed). The parties differ as to the number of days construction was delayed for opening by the covered water losses (zero days per Chubb v. 144 days as claimed by plaintiff). **Chubb has already acknowledged that the dispute on the Delay in Opening claim is only "how to measure any potential delay" and on "how to calculate any delays."** As these are strictly loss measurement issues, and the insured, K4, has demanded Appraisal, the claim must proceed to Appraisal for resolution.

Appraisal can be accomplished in a matter of months with a sophisticated professional Appraisal panel. To try these complex issues to a jury, with millions of construction documents from a 5-year construction project, will take months.

One additional claim for "Claims Expense" – or the cost to K4 to perfect its claims with Chubb—also remains unpaid. It, too, should be resolved by the Appraisal panel as it only involves a determination of amount of that expense.

III. APPLICABLE FACTS

Plaintiff, K4 DEV, LLC ("K4") was the owner and developer of property located at 1616 Market Street, Denver, CO. K4's consultant T2 Development, LLC ("T2") is an experienced builder of hotel properties having completed some 25 hotel construction projects prior to this one. (Decl. Mont Williamson, member of K4 and President and COO of T2, ¶3.) K4 started the actual construction on a 12 story, 216 room hotel in 2019, with a lower portion of the hotel consisting of seven floors and basement. (Decl. Mont Williamson, principal of K4, ¶3.)

K4 insured the project on a Builder's Risk insurance policy with ACE American Insurance Company ("Chubb"). At all relevant times, this project was insured under Chubb's Construction Risk Coverage Form ACE 0728 (10/15). (**Exhibit 1,** relevant portions of policy highlighted.)

As of April 2021, construction was scheduled to be completed on September 11, 2021, with a planned opening date for business on September 30, 2021. (See **Exhibit 1,** pdf p. 4, April 7, 2021, Change Endorsement to the policy reflected the end of construction, and opening of the hotel for September 30, 2021; Decl. Williamson ¶5.)

During a rainstorm between May 26 and May 29, 2021, the building suffered a serious water loss. An immense volume of water entered the building through the 6th floor roof, and inundated the entire 6th floor all the way down to the ground floor. The exterior soffits, 32 already completed guestrooms, and other amenities were all substantially water damaged in the event. (Decl. Williamson, ¶6.)

On July 6, 2021, the building suffered another water intrusion event. That event primarily damaged the bar, restaurant and meeting areas on the 6th floor and caused additional damage and complications for construction. (Decl. Williamson, ¶7.)

Prior to that late May storm, had there been no water damage, construction would have been completed in September 2021 and the hotel would have opened to the public on September 30, 2021 as scheduled. (Decl. Williamson, ¶8.)

K4's insurance policy with Chubb included coverage under a "Delay in Opening Endorsement." The full scope of that coverage is set out in the endorsement but in significant part stated:

> "…Company will pay the actual loss of RENTAL INCOME, Loss of BUSINESS INCOME and/or SOFT COSTS/ADDITIONAL EXPENSES sustained during the PERIOD OF INDEMNITY as a result of a DELAY in completion of the INSURED PROJECT…when such DELAY is caused by an OCCURRENCE or series of OCCURRENCE(S) resulting in physical LOSS to insured property by an insured peril." (**Exhibit 1,** pdf pp 38-42**.)**

K4 made claim for these events with Chubb which Chubb treated as separate claims. (Decl. Williamson, ¶9.) However, under the language of the policy, a "series of similar originating causes, events, incidents or repeated exposures to the same originating cause, event or incident …will be treated as one OCCURRENCE." (**Exhibit 1**, Policy, pdf p. 35.) Chubb accepted coverage and, after an adjustment, paid $1,670,338 of the $1,840,616 K4 actually incurred in repairs. (Decl. Williamson, ¶10.)

The time necessary to complete the $1.8 million in repairs from these water damage events did, in fact, delay the opening of the hotel from September 30, 2021, until February 22, 2022, or 144 days. (Decl. Williamson, ¶11.)

Once the hotel finally opened, and K4 had the information necessary to make the claim based on the work of forensic accountant Rollins, claim was made under the "Delay in Opening" coverage on April 11, 2022. (Decl. Williamson, ¶12.)

The Chubb policy also provided coverage for "claims expense" meaning the:

> … reasonable expenses incurred by the NAMED INSURED for preparing and certifying details of a claim resulting from a direct physical LOSS which would be payable under this Policy, provided that the total amount of the direct physical LOSS exceeds the applicable Deductible. (**Exhibit 1**, pdf p. 15.)

That claim for $655,217 in "Claims Expense" was submitted two years ago and has not been paid. (Decl. Williamson, ¶13.; **Exhibit 2,** Claims Expenses.)

Chubb hired a consultant who issued a report that, had the water losses not occurred, the hotel would have opened exactly February 22, 2022, anyway—144 days after the scheduled end of the Builder's Risk policy period. (See **Exhibit 1,** pdf p. 4, April 7, 2021, Change Endorsement.) **Based on its expert's calculation of zero days of delay,** Chubb determined there was no payment owing under the Delay in Opening coverage. (Decl. Williamson, ¶14.) K4 submitted reports from its general contractor and expert consultant proving that the 144-day delay was the result of the covered water loss. (Decl. Williamson, ¶¶11-12.) The parties disagree on the number of days the opening was delayed. In fact, Chubb has admitted that the dispute is simply **"how to measure any potential delay" and "how to calculate any delays."** (See **Exhibit 3**, January 21, 2025, letter from Chubb's Sr. Claim Director, Kim Carpenter, Decl. Williamson ¶15.) That measurement/calculation must, under the law, be made by the Appraisal panel.

The other disputes also, as to the amount of the repair cost and "Claims Expense," also involve measurements of the amount of loss.

Plaintiffs' Policy contains an Appraisal (arbitration) provision in that states:

> "11. Appraisal
>
> If the NAMED INSURED and the Company fail to agree on the amount of the LOSS, each, upon written demand of either the NAMED INSURED or the Company made within sixty (60) days after receipt of proof of LOSS by the Company, shall select a competent and disinterested appraiser. The appraisers shall then select a competent and disinterested umpire. If they should fail for fifteen (15) days to agree upon such umpire, then upon the request of the NAMED INSURED or the Company, such umpire shall be selected by a judge of a court of record in the jurisdiction in which

> such appraisal is pending. Then, at a reasonable time and place, the appraisers shall appraise the LOSS based on the Valuation conditions within the Policy. If the appraisers agree, their written agreement shall determine the amount of LOSS and shall be paid by the Company within thirty (30) days thereafter. If the appraisers fail to agree, they shall submit their differences to the umpire. The umpire shall then submit a written award resolving such differences. Such award shall determine the amount of the LOSS and shall be paid by the Company within thirty (30) day thereafter." (**Exhibit 1**, pdf p. 27.)

K4, through counsel, Joel Gumbiner, demanded Appraisal under the policy on January 27, 2025. (**Exhibit 4,** Decl. Gumbiner ¶3.) K4's demand for appraisal was rejected by counsel for Chubb, William Wilson, on February 6, 2025, because the loss dispute did not involve loss measurement (contradicting Chubb's prior letter), but rather "coverage" issues which he contended could not be Appraised in California. (**Exhibit 5**, Decl. Gumbiner ¶4.) On February 25, 2025, K4's counsel responded to Chubb's rejection, demanded Appraisal again, and named its appointed appraiser. (Decl. Gumbiner ¶5.) On March 19, 2025, counsel for Chubb affirmed its position rejecting Appraisal. (**Exhibit 6**, Decl. Gumbiner ¶6.)

Counsel then met and conferred on August 11, 2025, by phone, but Chubb counsel has steadfastly refused to submit to Appraisal. (Decl. Gumbiner ¶7.)

K4 requests that this Court order that the following claims be submitted to Appraisal (arbitration) for determination of:

- Amount of the disputed repair costs;
- Number of delay days caused by the water loss (i.e., whether it is zero, 144 or something else); and
- Amount of K4's "Claims Expenses."

IV. THE POLICY AND LAW REQUIRE THE CLAIM BE RESOLVED THROUGH THE APPRAISAL (ARBITRATION) PROCESS

A. The Federal Arbitration Act Favors Arbitration

Under the Federal Arbitration Act (FAA), an arbitration clause in a written contract is valid and enforceable. 9 U.S.C. § 2. Because arbitration is a matter of contract, the question of arbitrability is an issue for judicial determination. *Howsam v. Dean Witter Reynolds, Inc.* (2002) 537 U.S. 79, 84. The court's role in addressing a question of arbitrability is "limited to determining (1) whether a valid agreement to arbitrate exists, and if it does, (2) whether the agreement encompasses the dispute at issue." *Chiron Corp. v. Ortho Diagnostic Sys. Inc.* (2000) 207 F.3d 1126, 1130. If the court finds that both of these requirements are met, the FAA requires it to enforce the provision in accordance with its terms. *Id.*

The FAA "was created to counter prevalent judicial refusal to enforce arbitration agreements ... and has been interpreted to embody 'a liberal federal policy favoring arbitration.' " *Mortenson v. Bresnan Comm, LLC* (2013) 722 F.3d 1151, 1157.

The Supreme Court has held that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." (*Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.* (1983) 460 U.S. 1, 24-25.)

Arbitration is a way to resolve those disputes …the parties have agreed to submit to arbitration. *Granite Rock Co. v. Int'l Bhd. of Teamsters* (2010) 561 U.S. 287, 299. There is presumption favoring arbitration of a particular dispute where it "is what the parties intended because their express agreement to arbitrate was validly formed and ... is legally enforceable and best construed to encompass the dispute." (*Id.* at 303.) Where the presumption applies, Courts "compel arbitration **'unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.**' " *Goldman, Sachs & Co. v. City of Reno* (2014) 747 F.3d 733, 746 (quoting *AT & T Techs., Inc. v. Commc'ns Workers of Am.* (1986) 475 U.S. 643, 650 (emphasis added, internal quotes and citation omitted)).

B. Insurance Appraisal is Subject to California Law and Mandated for the Disputes in This Case

"Under Ninth Circuit precedent, whether an appraisal constitutes arbitration for purposes of the FAA is a question of state law." *Fed. Ins. Co. v. Anderson* (2019) No. 18-CV-06920-JST, 2019 WL 8128570, at *5, at *3 (citing *Portland Gen. Elec. Co. v. U.S. Bank Tr. Nat. Ass'n.* (2000) 218 F.3d 1085, 1086). As a general rule, courts apply state contract law in determining the validity and scope of an arbitration agreement. *Wolsey, Ltd. v. Foodmaker, Inc.* (1998)144 F.3d 1205, 1210. Thus, in determining whether there is a valid agreement to arbitrate, "courts must 'apply ordinary state-law principles that govern the formation of contracts.' " (*Id.*)

The parties here appear to agree that California Laws govern this dispute. Under California law, "[a]n agreement to conduct an appraisal included in a standard fire insurance policy constitutes an 'agreement' within the meaning of the California Arbitration Act. C.C.P. §§1280, et. seq.; *Kirkwood v. Cal. State Auto Ass'n. Inter-Ins. Bureau* (2011) 193 Cal.App.4th 49, 57. Accordingly, such an appraisal provision is the proper subject of a motion to compel arbitration under the FAA (*Anderson*, 2019 WL 8128570, at *4) and under California law:

> "Under the statutorily-mandated appraisal provision, the parties are required to participate in an informal appraisal proceeding in the event there is a disagreement about the actual cash value **or the amount of the loss** and the insurer or insured makes a written request for an appraisal." *Lee v. California Capital Ins. Co.* (2015) 237 Cal.App.4th 1154,1165–1166 (emphasis added).

If the insured disagrees with an insurer's measurement of a covered loss, the dispute is resolved through Appraisal. *Community Assisting Recovery, Inc. v. Aegis Secur. Ins. Co.* (2001) 92 Cal.App.4th 886, 895.

California Code of Civil Procedure § 1281.2, mandates that arbitration "shall" be ordered:

> On petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy and that a party thereto refuses to arbitrate such controversy, the court **shall** order the petitioner and the respondent to arbitrate the controversy if it determines that an agreement to arbitrate the controversy exists… (emphasis added).

In California, "[t]here is a strong public policy in favor of arbitration agreements." (*Blake v. Ecker* (2001) 93 Cal.App.4th 728, 741. "As this court has noted in the past, arbitration agreements should be liberally interpreted and arbitration should be ordered unless an agreement clearly does not apply to the dispute in question. (Citation)." *Oakland-Alameda County Authority v. CC Partners* (2002) 101 Cal.App.4th 635, 644.

As a practical matter, these disputes, which involve analysis of literally millions of commercial construction documents and millions of dollars in repair costs, are best resolved by a sophisticated and professional Appraisal panel rather than a jury after what will be a months-long jury trial years away. This is why Appraisal is mandated by California Insurance Code 2071 and found in all property insurance policies.

C. Defendant is Bound by Appraisal Agreement in the Policy

The subject Builder's Risk insurance policy was issued in California by defendant Chubb and mandates that disputes as to "amount of loss" be resolved by the Appraisal process.

Once a party requests Appraisal under the California Standard Fire Insurance Policy (Cal Ins. Code § 2071), **Appraisal is mandatory**. *Community Assisting Recovery, supra,* 92 Cal.App.4th supra at 892.

D. All Repair Costs, Calculation of Delay and Amount of "Claims Expenses" are Subject to Appraisal

"The function of appraisers is to determine the amount of damage resulting to various items submitted for their consideration." *Alexander v. Farmers Ins. Co., Inc.* (2013) 219 Cal.App.4th 1183, 1187. The contractual disputes between K4 and Chubb here are merely as to disputed amounts and simply involve a resolution of numerical disputes. The parties disagree as to the cost of repairs of water damage, the number of delay days and amount of "Claims Expense" K4 incurred to present its claim.

Under the holding in *Lee v. California Capital* (2015) 237 Cal.App.4th 1154, an Appraisal panel is supposed to resolve exactly these types of factual disputes to determine the "appropriate scope and method of repair" to arrive at a value of the loss which the insurer is bound to pay. *Id*. at 1175.

Plaintiff is entitled, under the policy language and Insurance Code Section 2071, to have the amount of the loss owing under the insurance policy resolved through the Appraisal process. Defendant is wrong that determination of any of these disputes would require the panel to decide issues of law and/or interpret policy language. All three disputes merely call for a reconciliation between the insured's measurements of loss, as determined by its actual expenses and expert analysis, and the insurer's expert's analyses and claims personnel's determinations.

E. This Motion is Being Made as Soon as Practicable

Plaintiff's counsel first demanded Appraisal under the policy on January 27, 2025. (Decl. Gumbiner ¶3.) Chubb counsel rejected that request on February 6, 2025. (Decl. Gumbiner ¶4.)

This case was filed in California Superior Court County of Orange primarily for the purpose of making a motion to compel Appraisal. (Decl. Gumbiner ¶8.) Plaintiff and Chubb agreed to mediation, the first session of which took place on April 11, 2025. Mediation failed when the second session scheduled for July 28, 2025, after further briefing of the parties, was canceled by Chubb. (Decl. Gumbiner ¶9.)

Chubb removed the case to federal court on July 9, 2025. After the mediation was canceled, pursuant to the local rule, counsel was required to meet and confer personally to discuss a stipulation to avoid this motion. During the week of August 4, plaintiff's counsel sent emails and made several phone calls to attempt to comply with Local Rule 7-3 and discuss the proposed motion to compel Appraisal. (Decl. Gumbiner ¶7.) That meet and confer meeting (Local Rule 7-3) was finally able to be scheduled on August 11, 2025. Again, Chubb counsel refused to submit the claim to Appraisal. (Decl. Gumbiner ¶7.) Under Local Rule 7-3, plaintiff was then required to wait an additional seven days after the "meet and confer" before filing this motion which is therefore being filed on August 18, 2025.

V. CONCLUSION

Plaintiff is entitled to have the amount of the claims finally resolved under the terms of the insurance policy as written and under California law. Both Chubb and K4 agree that all three remaining claims present nothing more than issues as to the "measurement" or "calculation" of the amount of loss—exactly what the insurance policy, Federal and California law require to be resolved by Appraisal if either party so requests. The law is clear that arbitration (Appraisal) provisions in the policy are favored, and actually mandatory, and that this Court should order the claims be resolved by Appraisal rather than having to be submitted to a years-long litigation process for determination by a jury.

DATED: August 18, 2025

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