

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2001-019327

05/15/2003

HON. FRANK T. GALATI

CLERK OF THE COURT
C. Hernden
Deputy

FILED: 05/16/2003

NICHOLA TAVILLA, et al.

RICHARD T TREON

v.

EMPLOYERS MUTUAL CASUALTY
INSURANCE COM, et al.

WILLIAM H DOUGLAS

MYLES P HASSETT

MINUTE ENTRY

Plaintiffs' motion to remand for appraisal was argued and taken under advisement on May 12, 2003.

First, the court notes that all this written and verbal jousting over Mr. O'Toole's conduct or alleged conduct in other matters is irrelevant to any issue or fact germane to this motion. Accordingly, the court has considered none of it.

Second, to the extent that a bad-faith claim is presented at trial and that claim is predicated, in whole or in part, upon an allegation that EMC refused to participate in a contractually required appraisal, issues surrounding plaintiffs' alleged failure to act upon a less-than-perfect but substantially complaint proof of loss may need to be resolved. But such issues are questions of fact for a jury and are not for the court to resolve at this time based upon legal briefing and oral argument.

Third, the court finds that Meineke v. Twin City Fire Ins. Co., 181 Ariz. 576, 892 P.2d 1365 (App 1994) is controlling. Clearly, Meineke is factually distinguishable from the instant case, but its holdings are applicable. Those are:

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1. a party to an insurance contract can waive its right to appraisal by filing a lawsuit in which it does not exert its claimed right;
2. a party to an insurance contract can waive its right to appraisal by undue delay.

The court finds that by not responding to EMC's rejection of their initial request for an appraisal, by filing a complaint which fails to request relief, in whole or in part, by way of appraisal and by making required disclosures which fail to raise referral to appraisal as an issue, plaintiffs have waived their contractual right to request appraisal at this time.

For these reasons,

IT IS ORDERED denying plaintiffs' motion for remand for appraisal.

IT IS FURTHER ORDERED that the parties consult with each other and this division's judicial assistant and reset a Rule 16 scheduling conference.