

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2012-007860

09/10/2012

HONORABLE MARK H. BRAIN

CLERK OF THE COURT
T. Nosker
Deputy

KELLY GOODMAN

KEVIN B. WEIN

v.

SAFECO INSURANCE COMPANY OF
ARIZONA, et al.

SCOTT A SALMON

RULING MINUTE ENTRY

This matter came before the Court on defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction or, in the Alternative to Stay Pending Appraisal or to Dismiss for Failure to State a Claim (filed July 16, 2012). Having considered the parties' papers and oral arguments, the Court DENIES the motion. The Court notes the following.

First, the Court rejects the motion to dismiss for lack of subject matter jurisdiction. The word "jurisdiction" is often misused, and it is perfectly clear that this Court has subject matter jurisdiction over this dispute. *See* Ariz. Const. Art. 6 § 14. The presence of an appraisal clause in the contract does not change that analysis. Likewise, the first amended complaint plainly sets forth a claim upon which relief can be granted. The interesting question presented is whether the matter should be sent to the limited form of "arbitration" contemplated by the parties' insurance contract, which contains an appraisal clause. That clause is, of course, enforceable, but it can also be waived. *See Meineke v. Twin City Fire Ins. Co.*, 181 Ariz. 576 (App. 1994).

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The timeline appears undisputed. *See* Response at p. 4 (“Safeco accurately describes the timeline related to its request for appraisal.”).¹ Goodman claims her home was damaged by the hail storm of February 14, 2011.² Goodman made a claim, and Safeco “completed” its investigation of that loss by May 26, 2011. *See* Exhibit 2 to the Motion to Dismiss. On July 28, 2011, Safeco notified Goodman that it has completed its evaluation of a second claim. *See* Exhibit 4. And, on December 16, 2011, Safeco notified Goodman that it was rejecting another claim. *See* Exhibit 5. And, although it was not until April 17, 2012 that Safeco demand appraisal, from the records presented, it does not appear that Safeco did not know that Goodman was contesting these denials until sometime in 2012, when it had contact with Joe Hensley (an Independent Adjustor hired by Goodman). Goodman filed this lawsuit on May 17, 2012.³ The Court concludes that Safeco has not acted in a way that waives the appraisal clause, and Goodman has not been prejudiced by the delay.

Regarding Goodman’s claim that the claim is not subject to appraisal, the Court agrees. The policy provides for the appraisal process on demand of either party “[i]f you and we do not agree on the amount of the loss, including the amount of actual cash value or replacement cost...” But here, the dispute is not over the amount of money required to remedy an agreed-upon loss; instead, the principal debate appears to be over whether there was a covered loss in the first place, or whether instead what Goodman calls a loss was a result of improper installation and defective shingles. As such, this dispute falls outside the appraisal process under *Hanson v. Commercial Union Ins. Co.*, 150 Ariz. 283 (App. 1986).

ALERT: The Arizona Supreme Court Administrative Order 2011-140 directs the Clerk's Office not to accept paper filings from attorneys in civil cases. Civil cases must still be initiated on paper; however, subsequent documents must be eFiled through AZTurboCourt unless an exception defined in the Administrative Order applies.

¹ The Court appreciates counsel’s candor.

² At oral argument, plaintiff’s counsel indicated that the 2010 date attributed to the storm was a typographical error. The Court assumes that the reference to damage caused by “fire” (First Amended Complaint ¶ 11) was also a typographical error.

³ The policy also contained the following provision: “Suit Against Us. No action shall be brought against us unless there has been compliance with the policy provisions and the action is started within one year after inception of the loss or damage.” Such a time limit in an insurance policy is unenforceable absent a showing of prejudice. *Zuckerman v. Transamerica Ins. Co.*, 133 Ariz. 139 (1982). Here, Safeco has failed to demonstrate any prejudice; among other things, it obviously had a chance to inspect Goodman’s home by the end of May 2011.