

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2005-018396

02/06/2008

HONORABLE GLENN M. DAVIS

CLERK OF THE COURT
L. Muhammad
Deputy

BRIAN STEELE, et al.

THOMAS B DIXON

v.

AMERICAN FAMILY MUTUAL INSURANCE COMPANY, et al. LYNN M ALLEN

MINUTE ENTRY

The Court has reviewed and considered the Plaintiff's First Motion for Partial Summary Judgment Re: Breach of the Appraisal Clause; Plaintiffs' Second Motion for Partial Summary Judgment Re: American Family's Appointment of its own Claims Adjuster as a "Disinterested" Appraiser; Plaintiffs' Third Motion for Partial Summary Judgment Re: Estoppel and Waiver of Right to Dispute Amount of Damages and Plaintiffs' Fourth Motion for Partial Summary Judgment Re: Coverage for Smoke Damage to Dwelling., the Responses and the Replies thereto. The Court has further reviewed the file, the pleadings and the materials filed by the parties in support of their positions.

Based upon its consideration of the foregoing and the arguments presented by counsel, the Court makes the following findings and enters the following orders in this case.

1. Plaintiff's First Motion for Partial Summary Judgment Re: Breach of the Appraisal Clause

There are a number of disputed factual issues material to whether there was in fact a breach of contract as to the appraisal clause. The Plaintiff's cite Arizona cases that support the premise that at least some of the damage dispute was not a coverage issue but a dispute over the amount of loss, which would have been subject to the appraisal clause. The cases cited however were cases dealing with motions to compel appraisals, not summary judgment cases.

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In this case there are facts and circumstances at issue which, when viewed in a light most favorable to the party opposing the motion, could be material to whether there was a breach. these includes facts related to whether Defendant actually withdrew from the appraisal process, whether the Defendant was attempting to negotiate with Plaintiff when Plaintiff elected to file suit and even whether there was a clear understanding of what was in dispute at the time Plaintiff filed the lawsuit.

There was a dispute over what part of the claim was related to poor workmanship. There was a dispute over whether the contractor appraiser picked by American Family was independent that was a distraction from the negotiations as to what was subject to appraisal. It is not even clear from the material submitted in support of the motion that there had been a specific demand as to what was subject to appraisal as of the time the Plaintiff filed suit in this case. It is not clear exactly what was at issue at the time negotiations broke down and Plaintiff filed suit.

Under the circumstances the Court is unable to find as a matter of law that there was a breach of the appraisal clause. The finder of fact in this case will have to make that judgment considering all of the circumstances and evidence in the context of trial.

Therefore,

IT IS ORDERED denying Plaintiff's First Motion for Partial Summary Judgment Re: Breach of the Appraisal Clause.

2. Plaintiffs' Second Motion for Partial Summary Judgment Re: American Family's Appointment of its own Claims Adjuster as a "Disinterested" Appraiser

The issue of whether the appraiser was disinterested is similarly fact intensive. Arizona Courts have noted the difficulty in defining what constitutes partiality so as to render an appraiser biased. Plaintiffs' argue that Mr. McMahon's relationship with Defendant vis-à-vis his frequent work as one of Defendant's adjusters automatically renders him "interested" and hence unable to serve as Defendant's appraiser. Plaintiffs' concede there are factual disputes as to the depth of this relationship, but nevertheless argue that such disputes are irrelevant with regards to deciding the issue.

A.R.S. §12-1512(A)(2) provides that a Court "shall decline to confirm" an award if there was "evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or misconduct prejudicing the rights of any party." Defining "evident partiality," however, has eluded both federal and state Courts. *Wages v. Smith Barney Harris Upham & Co.*, 188 Ariz. 525, 531, 937 P.2d 715, 721 (Ariz.App.1997). Neither is the term defined by the statute.

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Plaintiffs' cite *Wages* in support of their argument, but this support appears misplaced. In *Wages*, the Court emphasized that the case before it was a nondisclosure case- the arbitrator for the plaintiff failed to disclose that he had sued Defendant's predecessor on two earlier occasions involving similar circumstances as the present case. *Id.* In the present case, Defendant claims to have disclosed McMahon's prior relationship with Defendant and those claims must be viewed as truthful ones for the purpose of this motion. Plaintiffs' argue that letterhead and certain estimation software used by McMahon indicates his bias, but Defendant counters that said letterhead is customizable and tailored for specific purposes and that the estimation software represents an industry standard.

While the Plaintiff's make a strong argument that the McMahon was not disinterested, the Court is unable to find that there is such clear-cut, obvious and evident impartiality that a finding that he was not disinterested as a matter of law. A finder of fact could believe Defendant's position that there was sufficient independence as to make McMahon disinterested. Further a finder of fact could conclude that Defendant's disclosure of McMahon's prior business relationship sufficed to eliminate the issue as to his partiality.

Based upon the foregoing,

IT IS ORDERED denying Plaintiffs' Second Motion for Partial Summary Judgment Re: American Family's Appointment of its own Claims Adjuster as a "Disinterested" Appraiser.

3. Plaintiffs' Third Motion for Partial Summary Judgment Re: Estoppel and Waiver of Right to Dispute Amount of Damages

There are facts at issue that prevent the Court from finding as a matter of law that Defendant did expressly, voluntarily, or intentionally waived its rights to dispute the amount of damages.

"Waiver is defined as a voluntary and intentional relinquishment of a known right, whereas 'estoppel' means that a party is precluded by his own acts from asserting a right to the detriment of another who, entitled to rely on such conduct, has acted thereon." *Serv. Holding Co., Inc. v. Transamerica Occidental Life Ins. Co.*, 180 Ariz. 198, 206, 883 P.2d 435, 443 (Ariz. App. 1994) (citing *Waugh v. Lennard*, 69 Ariz. 214, 223, 211 P.2d 806, 812 (1949)). A clear showing of intent to waive is required, while for estoppel to be found there must be a showing of detrimental reliance by the party claiming it. *Id.* at 206-7, 883 P.2d at 443-4.

Viewing the facts in a light most favorable to Defendants, as is required on a motion for summary judgment, the finder of fact could find there was not a waiver. Throughout the entire

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process, Defendant repeatedly asserted in writing that its actions did not constitute a waiver to any of its rights under the policy provisions. The positions taken and negotiations create fact issues as to whether there was an intentional relinquishment of a known right.

As to the issue of estoppel there is clearly an issue of fact as to whether there was really any detriment to Plaintiff or any reliance related to the letter from the attorney for Defendants, since a finder of fact could find that there was evidence that the Plaintiffs did not intend to pursue a motion to compel appraisal even before the letter was received. Further, the positions taken by Defendants are arguably not clearly inconsistent.

Therefore,

IT IS ORDERED denying *Plaintiffs' Third Motion for Partial Summary Judgment Re: Estoppel and Waiver of Right to Dispute Amount of Damages.*

4. Plaintiffs' Fourth Motion for Partial Summary Judgment Re: Coverage for Smoke Damage to Dwelling

At the time of the oral argument it was clear that the parties are in complete agreement on the fact that if the Plaintiff can prove there was damage caused by smoke related to the March fire, it would be covered. There is a fact issue as to what damage was caused by the fire and what may not have been, such as damage caused by poor workmanship. The motion essentially sought a ruling on an issue is not in dispute. However, the relief requested in the motion is broader than the Court is willing to grant at this juncture,

Therefore,

IT IS ORDERED denying Plaintiffs' Fourth Motion for Partial Summary Judgment Re: Coverage for Smoke Damage to Dwelling

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