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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2004-004534 09/27/2007

HONORABLE PETER SWANN

CLERK OF THE COURT
D. Monroe
Deputy

CLIFFORD PETTINGILL, et al. STEPHEN E SILVERMAN

v.

FRANK CONSULTING LTD, et al. SCOTT A SALMON

RICHARD T TREON

MINUTE ENTRY

Pending before the Court is Defendant's motion for summary judgment. The Court has reviewed the parties' memoranda, heard oral argument and now rules. For the following reasons,

IT IS ORDERED denying the motion.

Defendants seek summary judgment on a single, narrow theory: The undisputed facts show that the insured property suffered no diminution in value after the alleged smoke damage, and Plaintiff has already sold the property at a profit rendering the cost of repair irrelevant. Though the rationale underlying Defendant's motion is facially appealing, the Court concludes that the motion must be denied. The Court takes as undisputedly true Defendant's point that there was no diminution in value of the property and that Plaintiffs failed to disclose any significant damage in connection with their recent sale. Because credibility determinations are not the stuff of summary judgment, the Court views the facts in light most favorable to the non-movant, and assumes for purposes of this motion that there was smoke damage, though there is no express or implied finding as to the extent of that damage.

The benefits available to the insured under a policy of insurance are defined by the policy itself. Here, the insurance policy at issue provides:

In the event of loss or damage covered by this Coverage Form, at our option, we will either:

(1) Pay the value of the lost or damaged property;

(2) Pay the cost of repairing or replacing the lost or damaged property;

(3) Take all or any part of the property at an agreed or appraised value; or

(4) Repair, rebuild or replace the property with other property of like kind and quality.

The only provision that might support Defendant's theory is paragraph (1). But the paragraph does not give the insurer the option to pay the *value* of the *loss* (i.e. diminution in value of the property) – it gives the insurer the option to pay the value of the property itself. The remaining provisions make clear that unless the insurer elects to take the property itself, it must elect to pay the cost of repair or replacement. There is no limit in the policy that caps the cost of repair at the diminution in value. Moreover, there is no provision of Arizona law requiring such a result. Rather, an economically-rational reading of the policy gives the insurer the *de facto* right to cap its own costs: If the insurer believes that the property has suffered no loss in market value and would be too costly otherwise to repair, it can elect under paragraph (1) to take the property itself and sell it on the open market. But the insurer cannot escape all liability for a covered loss merely by claiming that no diminution in market value has occurred. To hold otherwise would be to create a new rule of law, and the Court declines that invitation. *Blanton & Co. v. Transamerica Title Ins. Co.,* 536 P.2d 1077 (Ct. App. 1975) does not require a contrary result, as it dealt only with the measure of damages awardable against a tortfeasor – not the amount payable under a first- party insurance claim.

Defendant further argues that recovery by a Plaintiff who sold without effecting repairs would amount to a windfall without meaningful economic purpose, as any actual defects would never be corrected by such an award. Plaintiffs argue, with equal force, that entry of summary judgment would amount to a windfall for the insurer, who would escape all liability for a covered loss by virtue of a fortuitous transaction independent of the coverage for which the insured paid.

Surprisingly few appellate decisions throughout the country have addressed the issue, but the weight of current authority in other contexts supports Plaintiffs' position. In *Wentworth v. Air Line Pilots Ass'n*, 336 A.2d 542 (D.C. 1975), the court adopted the reasoning that Defendants

urge here, holding that Plaintiff's sale of the subject property made repairs impossible and limited recovery to diminution in value, if any. That reasoning of that decision has been expressly rejected by at least two courts of other states. *See St. Louis, LLC v. Final Touch Glass & Mirror, Inc.*, 899 A.2d 1018 (N.J. Super., App. Div. 2006); *Greene v. Bearden Enters., Inc.*, 598 S.W.2d 649 (Tex. Civ. App. 1980) (disapproved on other grounds). *See also Vaughn v. Dame Const. Co.*, 272 Cal. Rptr. 261 (1990); *General Outdoor Advertising Co. v. La Salle Realty Corp.*, 218 N.E.2d 141 (Ind. App. 1966) (declining to adopt another case relied upon by defendants, *Maryland Casualty Company v. Rittiner*, 133 So.2d 172 (La.App., 1961)). This Court is satisfied that the reasoning of the Texas and New Jersey courts reflects an economically rational approach to damages in such cases, and one that is consistent with that taken by the Arizona Court of Appeals in an analogous context. *See Dixon v. City of Phoenix*, 173 Ariz. 612, 618 (Ct. App. 1992) (allowing recovery for property damage flowing from breach of breach of entry agreement in condemnation case, despite the unavailability of such damages to a divested property owner as a matter of eminent domain law).

There is ample evidence from which a trier of fact might draw dramatically different inferences concerning the *bona fides* of the claimed damage to the property and the process used to appraise that damage. Those issues are not properly before the Court. The motion is denied.