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Hennepin County Civil, MN

STATE OF MINNESOTA | DISTRICT COURT

COUNTY OF HENNEPIN | FOURTH JUDICIAL DISTRICT

Timberton Condominium Association, a Minnesota non-profit corporation,

Plaintiff,

v.

Mid-Century Insurance Company, a subsidiary of Farmers Insurance Group,

Defendant.

Court File No. 27-CV-11-24814
The Honorable Philip D. Bush

ORDER CONFIRMING APPRAISAL AWARD

The above-captioned matter came before the undersigned Judge of District Court on July 15, 2013 upon Plaintiff's motion to confirm an appraisal award.

Alexander M. Jadin, Esq., appeared on behalf of Plaintiff.

Kevin J. Kennedy, Esq., appeared on behalf of Defendant.

Based upon all the files, records, and proceedings herein, the Court makes the following:

ORDER

1. Plaintiff's motion to confirm the appraisal award is **GRANTED**.

2. The Appraisal Award dated May 30, 2013 is hereby confirmed.

3. Plaintiff shall have judgment against Defendant for its costs and disbursements and pre-judgment interest in the following amount: Interest accruing at

the rate of 10 percent per annum on the principal amount of $112,437.50 from July 22, 2010 until June 13, 2013.[1]

4. The attached Memorandum is made a part hereof.

BY THE COURT:

SgPlts1

10/ 10/ 2013 12:28:10 am

Dated: 10/10/2013

Philip D. Bush
Judge of District Court

[1] The principal amount has already been paid. Accordingly, the amount of the judgment consists solely of interest and costs and disbursements.

MEMORANDUM

This matter is before the Court on Plaintiff's motion to confirm an appraisal award. For the reasons set forth below, the motion is granted.

I. Background

Plaintiff Timberton Condominium Association ("Association") is the owners' association for a multi-unit condominium development located in Plymouth, Minnesota and consisting of thirteen multi-unit townhome buildings and a pool building. (Compl. ¶ 3; Answer ¶ 4.) From June 30, 2010 through June 30, 2011, Defendant Mid-Century Insurance Company ("Mid-Century) insured the Association under an insurance policy ("Policy") insuring the Association's property against various forms of loss, including storm damage. (Compl. ¶ 4; Answer ¶ 5; Affidavit of Anthony Smith filed on Feb. 8, 2012 ("First Smith Aff.") Ex. 3.)

On July 17, 2010, the Association's property was damaged by a storm. (First Smith Aff. Ex. 4.) The Association reported the damage to Mid-Century.[1] (Compl. ¶ 8; Answer ¶ 9.) Mid-Century acknowledged that the damage was covered by the Policy and valued the loss at $1,728.15, which is less than the Policy's $10,000 deductible. (First Smith Aff. Ex. 4.) Thus, by letter dated June 3, 2011, Mid-Century advised the Association: "[S]ince the amount of estimated damages is less than your deductible, no payments can be issued at this time and we are closing our claim file." (First Smith Aff. Ex. 4.)

[1] Mid-Century received the claim on July 22, 2010. (First Smith Aff. Ex. 4.)

On June 13, 2011, the Association made a written demand for an appraisal pursuant to the Policy.[2] (First Smith Aff. Ex. 7.) On June 25, 2011, Mid-Century responded to the demand by stating that (1) it would not proceed with an appraisal unless the Association provided further information and (2) any issue regarding the matching of shingles was not a proper subject for appraisal. (First Smith Aff. Ex. 8.)

On July 5, 2011, the Association responded by providing the requested information and again demanding an appraisal. (First Smith Aff. Ex. 9.) Mid-Century responded by requesting further information about the existing shingles and questioning the propriety of an appraisal. (First Smith Aff. Ex. 10.)

On November 11, 2011, the Association commenced this action against Mid-Century claiming breach of contract and seeking a declaratory judgment. On February 23, 2012, the Association moved to compel an appraisal. Mid-Century opposed the motion on the argument that the dispute involved a coverage issue outside the scope of an appraisal. Based largely on *QBE Ins. Corp. v. Twin Homes of French Ridge Homeowners Ass'n*, 778 N.W.2d 393, 399 (Minn. Ct. App. 2010), the Court granted the motion and ordered the parties to "submit their disagreement over the amount of the loss to a three-member appraisal panel."[3] (Order Compelling Appraisal ¶ 2.)

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[2] The Policy contains the following provision for an appraisal: "If [Mid-Century] and [the Association] disagree on the amount of loss, either may make written demand for an appraisal of the loss. In this event, each party will select a competent and impartial appraiser. The two appraisers will select an umpire. If they cannot agree, either may request that selection be made by a judge of a court having jurisdiction. The appraisers will state separately the amount of the loss. If they fail to agree, they will submit their differences to the umpire. A decision agreed to by any two will be binding." (Smith Aff. Ex. 3.)

[3] In opposing the motion, Mid-Century relied primarily on *Quade v. Secura Ins.*, 792 N.W.2d 478 (Minn. Ct. App. 2011), which was later reversed by the Minnesota Supreme Court. *See* 814 N.W.2d 703 (Minn. 2012).

On May 30, 2013, the appraisal panel issued an Appraisal Award quantifying Replacement Cost Value ("RCV") as $148,687.50 and Actual Cash Value ("ACV") as $122,437.50. (Second Smith Aff. Ex. 2.) The Association had requested pre-award interest as part of the award. (Kennedy Aff. ¶ 4.) The appraisal panel did not grant that request based on its understanding that it lacked authority to award interest. (Moe Aff. ¶ 2; Norcia Aff. ¶ 2.) On June 13, 2013, Mid-Century paid $112,437.50 to the Association, which is the ACV set forth in the Appraisal Award less the Policy's deductible of $10,000. The Association now moves to confirm the Appraisal Award pursuant to Minn. Stat. § 572B.22.

II. Analysis

In opposing the motion to confirm the Appraisal Award ("Award"), Mid-Century raises essentially two issues – neither relating to the substance of the Award. First, Mid-Century argues that the Association is not entitled to recover pre-award interest. Second, Mid-Century argues that the Association is not entitled to recover its costs and disbursements.

a. Pre-Award Interest

In arguing that the Association is not entitled to recover pre-award interest, Mid-Century raises four issues that warrant discussion. First, Mid-Century argues, as a policy matter, that the availability of pre-award interest gives the insured an incentive to drag out an appraisal and thereby obtain a windfall via pre-award interest. This argument is unavailing because pre-award interest does not constitute a windfall.

Rather, pre-award or pre-judgment interest is intended to account for the time value of money.[4] *See, e.g., Staab v. Diocese of St. Cloud*, 830 N.W.2d 40, 47 (Minn. 2013).

In this case, the time value of money is a factor because the loss suffered by the Association preceded reimbursement under the Policy by nearly three years. Also, as a general policy matter, not allowing pre-award interest in the case of an insurance appraisal would generate a windfall for the insurer and give the insurer an incentive to drag out the process since the time value of the money at issue would inure solely to the benefit of the insurer. Public policy thus favors pre-award interest in this case.

Second, Mid-Century argues that the Association cannot recover interest under Minn. Stat. § 549.09 because the availability of interest is governed by Minn. Stat. § 60A.0811, subd. 2(a), which provides:

> An insured who prevails in any claim against an insurer based on the insurer's breach or repudiation of, or failure to fulfill, a duty to provide services or make payments is entitled to recover ten percent per annum interest on monetary amounts due under the insurance policy, calculated from the date the request for payment of those benefits was made to the insurer.

Id. Mid-Century further argues that the Association is not entitled to interest under Minn. Stat. § 60A.0811 because Mid-Century made the payments required by the Policy.

Assuming that Minn. Stat. § 60A.0811 is applicable,[5] the Association is still entitled to pre-judgment interest under Minn. Stat. § 549.09 because the two statutes may be construed together so that both statutes are given effect in litigation between an insurer and an insured. *See* Minn. Stat. § 645.26, subd. 1 ("When a general provision

[4] If Mid-Century's objection is based on the rate of interest specified by Minn. Stat. § 549.09, that argument should be directed to the legislature.
[5] The statute only applies to "commercial" insurance policies but does not define that term.

in a law is in conflict with a special provision in the same or another law, the two shall be construed, if possible, so that effect may be given to both."); *Appeal of Crow Wing Cnty. Attorney*, 552 N.W.2d 278, 280 (Minn. Ct. App. 1996) ("[T]wo laws are to be construed together, if possible, to give effect to both provisions, even if they apparently conflict.") Specifically, Minn. Stat. § 60A.0811, subd. 2(a) may be construed as supplemental to Minn. Stat. § 549.09 as affording a more expansive provision for pre-award or pre-judgment interest in those cases where an insurer has breached a contractual obligation to the insured.[6] Given the unique role of insurance companies and the attendant regulation,[7] it is more likely that, for disputes involving insurer and insured, the legislature intended to augment the standard approach to pre-award interest it, not curtail it. Case law supports this interpretation. *See Kraus-Anderson Const. Co. v. Transp. Ins. Co.*, No. A10-698, 2011 WL 1364251, at *13 (Minn. Ct. App. Apr. 12, 2011) ("Because the prejudgment interest awarded for Kraus-Anderson's declaratory-judgment attorney fees is authorized by section 549.09, we need not address section 60A.0811 as an *alternative* ground for the same prejudgment-interest award.") (emphasis added).

Mid-Century cites *Manitou Village Chalet Townhomes v. Harleysville Ins. Co.*, No. 12-386, 2013 WL 1881056 (D. Minn. Mar. 29, 2013), *report and recommendation*

[6] The Court refers to Minn. Stat. § 60A.0811 as "supplemental" insofar as its interest provision is more expansive than Minn. Stat. § 549.09. The Court does not intend to imply that interest under Minn. Stat. § 60A.0811 is in addition to the interest provided for by Minn. Stat. § 549.09. The interest provision at Minn. Stat. § 60A.0811 is more expansive in at least two respects. First, the rate of interest is 10 percent per annum regardless of the principal amount, whereas under Minn. Stat. § 549.09, the rate of interest is 10 percent per annum only if the principal amount exceeds $50,000. Second, under Minn. Stat. § 60A.0811, a party cannot stop the accumulation of interest by a written offer of settlement, whereas under Minn. Stat. § 549.09, a party may stop the accumulation of interest by a written offer of settlement.

[7] *See, e.g., Itasca Paper Co. v. Niagara Fire Ins. Co.*, 175 Minn. 73, 75, 220 N.W. 425, 426 (1928) ("Insurance is a business affected with public interest and by reason thereof must yield to governmental regulation.").

adopted, 2013 WL 1881605 (D. Minn. May 6, 2013) in support of its position that Minn. Stat. § 60A.0811 precludes pre-award interest in this case, Given the Court's conclusion that Minn. Stat. § 60A.0811 does not displace Minn. Stat. § 549.09, the Court does not agree with the result in *Manitou Village*.[8] In any event, *Manitou Village* is readily distinguishable insofar as that action was commenced solely because the parties could not agree on a neutral umpire to serve as the third member of the appraisal panel. *See id.* at *3 n. 5. Moreover, in *Manitou Village*, the insurer made a substantial payment to the insured before the action was even commenced. *See id.* at *1 (referring to an October 2011 payment of $289,066.02).[9] Conversely, this action was commenced because no payment from Mid-Century was forthcoming and Mid-Century was resisting the appraisal process.

Third, Mid-Century argues that awarding interest would be an impermissible modification of the Award because the appraisal panel denied the Association's request for pre-award interest. However, as the Association has established, the appraisal panel denied the request for pre-award interest based on their understanding that they lacked authority to award interest. Accordingly, in awarding interest, the Court would not be modifying the Award or encroaching on the authority of the appraisal panel.

Lastly, Mid-Century argues that its letter of June 3, 2011 valuing the loss at $1,728.16 constitutes a "written offer of settlement" that limits the accrual of interest under Minn. Stat. § 549.09. That letter does not constitute a written offer of settlement

[8] Above all else, the Court does not understand the rationale for the insurance company (i.e., the obligor) enjoying the time value of the money that accrues between the demand for payment and payment.

[9] It is clear from the court file number that the action was commenced in 2012. The Federal Rules of Civil Procedure do not allow pocket service. *See* Fed. R. Civ. Proc. 3.

because, given the $10,000 deductible, Mid-Century was offering nothing to the Association. In other words, there was no consideration and thus no offer.

For those reasons, the Court concludes that the Association is entitled to recover pre-Award interest under Minn. Stat. § 549.09. However, the pre-Award interest shall accrue only on the ACV amount (less the deductible) and not the RCV amount because (1) pre-Award interest does not accrue on future damages and (2) under the Policy, Mid-Century is not obligated to pay the RCV amount "until the lost or damaged property is actually repaired or replaced." (First Smith Aff. Ex. 3.)

b. Costs and Disbursements

Mid-Century argues that the Association is not entitled to recover its costs and disbursements under Minn. Stat. § 549.04 on the premise that the Association is not the "prevailing party" in this matter. The Association is the prevailing party in this matter because the Association prevailed on its motion for an order compelling an appraisal and obtained, via this action, payment in excess of $100,000 when Mid-Century had determined that the amount of the loss did not even exceed the deductible.

III. Conclusion

For the reasons set forth above, the Association's motion to confirm the Award is granted insofar as the Association is entitled to recover pre-Award interest on the ACV amount (less the deductible) and costs and disbursements. The Court is not entering judgment for the principal amount of the Award since Mid-Century has already paid the ACV amount less the deductible.

PDB