

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2013 CA 0545

JANICE H. DORÉ

VERSUS

SHELTER MUTUAL INSURANCE COMPANY

DATE OF JUDGMENT: NOV 01 2013

ON APPEAL FROM THE TWENTY-SECOND JUDICIAL DISTRICT COURT
NUMBER 2009-15250, DIVISION "D," PARISH OF ST. TAMMANY
STATE OF LOUISIANA

HONORABLE PETER J. GARCIA, JUDGE

David A. Oriol
Madisonville, Louisiana

Counsel for Plaintiff-Appellee
Janice H. Doré

Craig J. Fontenot
Baton Rouge, Louisiana

Counsel for Defendant-Appellant
Shelter Mutual Insurance Company

BEFORE: KUHN, HIGGINBOTHAM, AND THERIOT, JJ.

Disposition: AFFIRMED AND REMANDED.

KUHN, J.,

Defendant-appellant, Shelter Mutual Insurance Company, appeals a partial summary judgment in favor of plaintiff-appellee, Janice H. Doré, awarding her \$62,677.63 under a homeowner's policy for storm damage to her house. For the following reasons, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Due to high winds from Hurricane Gustav on September 1, 2008, a tree fell through the roof of Ms. Doré's home in Madisonville, Louisiana, causing substantial damage. A policy of homeowner's insurance issued by Shelter Mutual and covering Ms. Doré's property for replacement cost value was in effect at that time. After Ms. Doré provided Shelter Mutual with several proofs of loss claiming a total loss of \$91,279.60, Shelter Mutual tendered payments to Ms. Doré totaling \$12,937.37.¹ Due to the parties' disagreement regarding the amount of the loss, on April 16, 2009, Ms. Doré demanded an appraisal in accordance with the following provision of the policy.

Appraisal

If **you** and **we** fail to agree on the actual cash value or amount of loss, either party may make written demand for an appraisal. Each party will select an appraiser and notify the other of the appraiser's identity within 20 days after the demand is received. The appraisers will select a competent and impartial umpire. If the appraisers are unable to agree upon an umpire within 15 days, **you** or **we** can ask a judge of a court of record in the state where the **residence premises** is located to select an umpire.

The appraisers shall then appraise the loss, stating separately the actual cash value and loss to each item. If the appraisers submit a written report of an agreement to **us**, the amount agreed upon shall be the actual cash value or amount of loss. If they cannot agree, they will submit their differences to the umpire. *A written award by two will determine the actual cash value or amount of loss.*

Each party will pay the appraiser it chooses, and equally pay expenses for the umpire and all other expenses of the appraisal.

(Italics added.)

¹ These consisted of a payment of \$8,193.54 on December 13, 2008, for wind damage; a payment of \$4,403.07 on December 16, 2008, for personal property loss; and a payment of \$340.76 on January 22, 2009, for supplemental wind damage.

In accordance with this provision, each party appointed an appraiser. The two appraisers jointly selected an umpire to settle any differences between them. Thereafter, on September 2, 2009, Ms. Doré filed a suit for damages against Shelter Mutual seeking the actual value of her loss, less her deductible and payments received, as well as penalties and attorney fees for Shelter Mutual's alleged failure to deal with her claim in good faith and make timely payment. Once suit was filed, Shelter Mutual refused to participate further in the appraisal procedure, and its appraiser did not attend an August 4, 2010 appraisal meeting, even though given notice thereof.

On August 6, 2010, the umpire issued an appraisal award concluding the total cash value of Ms. Doré's loss was \$96,051.00 and the total replacement cost value was \$103,732.00. Ms. Doré's appraiser signed the appraisal award indicating his agreement with the umpire's conclusions. On August 30, 2011, Shelter Mutual issued an additional \$16,000.00 payment to Ms. Doré for supplemental wind damage.

On September 5, 2012, Ms. Doré filed a motion for summary judgment on the basis that it was undisputed Shelter Mutual had failed to comply with the policy provision requiring it to pay the cash value of the loss "within 30 days after we [Shelter Mutual] receive **your** [Ms. Doré] proof of loss and the amount of loss is finally determined by ... an appraisal award." Consequently, she asserted Shelter Mutual was liable for the cash value of the loss (less her deductible and payments received), as well as for statutory penalties, attorney fees and costs under La. R.S. 22: 1892(B)(1) due to Shelter Mutual's arbitrary and capacious failure to pay the amount due under the policy.

In opposition, Shelter Mutual argued that the relief sought by Ms. Doré in the motion for summary judgment was beyond the scope of her pleadings, that the policy's appraisal provision was not enforceable judicially because it was not an

arbitration agreement, and that, to the extent it could be construed as such, it violated the prohibition contained in La. R.S. 22:868 against any policy provision depriving the courts of this state of jurisdiction over an action against an insurer.²

Following a hearing, the district court granted partial summary judgment in favor of Ms. Doré for \$62,677.63 based on the appraisal award, but denied summary judgment on Ms. Doré's claim for statutory penalties and attorney fees. Pursuant to La. C.C.P. art. 1915(B)(1), the court designated the partial summary judgment as final, finding no just cause for delay.³ Shelter Mutual now appeals, arguing on several grounds that the district court erred in granting the partial summary judgment. In an answer to the appeal, Ms. Doré asserts the district court erred in denying summary judgment on her claim for statutory penalties and attorney fees.

DISCUSSION

Appellate courts review summary judgments *de novo*, using the same criteria that govern the district court's consideration of whether summary judgment is appropriate. *Costello v. Hardy*, 03-1146 (La. 1/21/04), 864 So.2d 129, 137. A motion for summary judgment should only be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if

² Louisiana Revised Statutes 22:868 provides, in pertinent part, that:

A. No insurance contract delivered or issued for delivery in this state and covering subjects located, resident, or to be performed in this state ... shall contain any condition, stipulation, or agreement ...

(2) Depriving the courts of this state of the jurisdiction of action against the insurer.

The Louisiana Supreme Court has held that arbitration agreements are violative of this provision and, therefore, are unenforceable if contained in an insurance policy. *Doucet v. Dental Health Plans Management Corporation*, 412 So.2d 1383, 1384 (La. 1982).

³ The district court concluded there was no just cause for delay and designated the partial judgment as final, although it gave no reasons for its conclusion. Nevertheless, based on our *de novo* review of the relevant factors outlined in *R.J. Messinger, Inc. v. Rosenblum*, 04-1664 (La. 3/2/05), 894 So.2d 1113, 1122, we find the designation was proper.

any, show that there is no genuine issue as to material fact and that the movant is entitled to summary judgment as a matter of law. La. C.C.P. 966(B)(2).

Initially, Shelter Mutual contends the partial summary judgment was improper because the relief it granted was outside the scope of Ms. Doré's pleadings, since she did not plead for enforcement of the appraisal award in her petition for damages. Shelter Mutual further argues that the continuation of the appraisal procedure once suit was filed was an impermissible attempt to divest the district court of jurisdiction. Additionally, Shelter Mutual contends the policy's appraisal provision was not judicially enforceable because it was not an arbitration agreement and, to the extent that it could be so construed, it violated La. R.S. 22:868. These contentions lack merit.

In her petition for damages, Ms. Doré sought an award for the cash value of her loss pursuant to the policy issued to her by Shelter Mutual. In her subsequent motion for partial summary judgment, she requested that the district court apply the unambiguous language of that policy requiring Shelter Mutual to pay the amount of her loss as determined by the appraisal procedure outlined therein. Clearly, the relief Ms. Doré sought by summary judgment was encompassed in her claim for damages due to her under the policy.

Nor is there merit in Shelter Mutual's contentions that the appraisal provision violates La. R.S. 22:868 by divesting the district court of jurisdiction over Ms. Doré's claim. Appraisal provisions are enforceable in Louisiana. *Branch v. Springfield Fire & Marine Ins. Co. of Springfield, Mass.*, 198 La. 720, 727, 4 So.2d 806, 809 (La. 1941); *Dufrene v. Certain Interested Underwriters at Lloyd's of London Subscribing to Certificate No. 3051393*, 11-1002 (La. App. 5th Cir. 3/27/12), 91 So.3d 397, 400, writ denied, 90 So.3d 1065, 2012-0930 (La. 6/15/12); *Sevier v. U.S.F. & G.*, 485 So.2d 132, 136 (La. App. 2d Cir.), reversed on other grounds, 497 So.2d 1380 (La. 1986); *Girard v.*

Atlantic Mutual Insurance Company, 198 So.2d 444, 447 (La. App. 4th Cir. 1967). Appraisal provisions are distinct from arbitration agreements and do not contravene La. R.S. 22:868 by divesting courts of jurisdiction. *Dufrene*, 91 So.3d at 400; *Sevier*, 485 So.2d at 136; *Girard*, 198 So.2d at 447. The duty of appraisers is merely to ascertain the extent and value of an insured's loss and not to determine an insurer's liability. *Officer v. American Eagle Fire Ins. Co.*, 175 La. 581, 597, 143 So. 500, 504 (La. 1932); *Girard*, 198 So.2d at 446. Moreover, such awards are subject to the scrutiny of the courts if it appears the appraisers did not perform their duties under the policy, thereby clearly falling within the court's jurisdiction. See *Branch*, 198 La. at 727, 4 So.2d at 809; *Sevier*, 485 So.2d at 136; *Girard*, 198 So.2d at 447.

Our conclusion that appraisal clauses are not violative of La. R.S. 22:868 is strengthened by the fact that this statute was enacted in the same legislative act as La. R.S. 22:1311, which sets forth the standard provisions required for fire insurance policies issued on Louisiana property.⁴ The significance of this point is that one of the standard provisions included in La. R.S. 22:1311 is an appraisal clause that is substantially the same as the one contained in the Shelter Mutual policy. Having so provided indicates that the Legislature did not intend appraisal clauses to fall within the category of policy provisions prohibited by La. R.S. 22:868(A)(2).

Additionally, despite Shelter Mutual's contention that appraisal procedures are intended exclusively as pre-suit settlement tools and are not viable after suit is filed, demands for appraisal have been permitted even after suit has been filed. See *Dufrene*, 91 So.3d at 398; *Newman v. Lexington Insurance Company*, No. 06-4668, 2007 WL 1063578, pp. 3-4 (E.D. La. 4/4/07) (unpublished). Moreover,

⁴ Louisiana Revised Statutes 22:868 originally was enacted as La. R.S. 22:629 and La. R.S. 22:1311 originally was enacted as La. R.S. 22:691 by La. Acts 1958, No. 125. These statutes subsequently were renumbered as currently referred to by La. Acts 2008, No. 415, § 1, effective January 1, 2009.

the instant policy contains no prohibition against appraisal proceedings after suit is filed. See Newman, 2007 WL 1063578 at pp. 3-4.

An insurance policy is a contract between the insured and the insurer and has the effect of law between them. *Latino v. Jones*, 11-0463 (La. App. 1st Cir. 2/10/12), 91 So.3d 335, 338. In this case, the policy unambiguously provided that either party could demand an appraisal and that an appraisal award reached in accordance with the procedure outlined therein will “determine the actual cash value or amount of loss.” Pursuant to the provisions of the policy, Ms. Doré clearly was entitled to summary judgment awarding her the unpaid portion of her losses in accordance with the appraisal award. The district court did not err in awarding partial summary judgment in her favor on this issue.

ANSWER TO APPEAL

In her answer to Shelter Mutual’s appeal, Ms. Doré contends the district court erred in denying that portion of her motion for summary judgment requesting an award for statutory penalties and attorney fees under La. R.S. 22:1892.

In order to assess penalties and attorney fees against the insurer under this statute, it must clearly be shown that the insurer was in fact arbitrary, capricious, and without probable cause in refusing to pay. La. R.S. 22:1892(B)(1); *Jones v. Johnson*, 45,847 (La. App. 2d Cir. 12/15/10), 56 So.3d 1016, 1023. Further, a determination of whether an insurer’s failure or refusal to pay within the time limits is arbitrary, capricious, or without probable cause is primarily a factual question dependent upon facts known to the insurer at the time of the insurer’s action. *Louisiana Bag Company, Inc. v. Audubon Indemnity Company*, 08-0453 (La. 12/2/08), 999 So.2d 1104, 1114; *Cryer v. Gulf Insurance Company*, 276 So.2d 889, 892 (La. App. 1st Cir. 1973). On her motion for summary judgment, Ms. Doré bore the burden of proof on this issue. La. C.C.P. art. 966(C).

Although Ms. Doré sufficiently supported her claim that Shelter Mutual did not tender the full amount of her loss, the evidence she presented in support of her motion was insufficient to establish that Shelter Mutual was arbitrary, capricious, or without probable cause in failing to do so. Consequently, summary judgment was precluded by the existence of a material issue of fact with regard to this issue. Based on our *de novo* review, we find no error in the district court's ruling denying summary judgment on this claim.

CONCLUSION

For the reasons outlined, the judgment of the district court granting partial summary judgment in favor of Ms. Doré for \$62,677.63 based on the appraisal award and denying that portion of her motion for summary judgment seeking statutory penalties and attorney fees is affirmed. The case is remanded for further action in accord with this opinion. All costs of this appeal and the answer thereto are to be paid by appellant, Shelter Mutual.

AFFIRMED AND REMANDED.