COURT OF CHANCERY
OF THE
STATE OF DELAWARE

DONALD F. PARSONS, JR.
VICE CHANCELLOR

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Re: *Firemen's Insurance Company of Washington, D.C. v. Birch Pointe Condominium Association, Inc.*, Civil Action No. 4313-VCP

Dear Counsel:

This matter involves a dispute over the implementation of the arbitration clause in an insurance policy. Plaintiff has moved for judgment on the pleadings or for summary judgment in its favor. For the reasons stated, I grant Plaintiff's motion.

I. BACKGROUND

A. The Facts

Plaintiff, Firemen's Insurance Company of Washington, D.C. ("Plaintiff" or "FIC"), is a Delaware corporation with its principal place of business in Virginia.

Defendant, Birch Pointe Condominium Association, Inc. ("Defendant" or "Birch Pointe"), is a Delaware not-for-profit corporation. Birch Pointe is an association of condominium owners located in New Castle County, Delaware.

Sometime before 2006,[1] Birch Pointe purchased from FIC an insurance policy covering, among other things, direct physical loss of or damage to buildings and personal property. On January 17, 2006, a fire caused significant damage and property loss to twelve units in Wilmington, Delaware owned by Birch Pointe. Consequently, Birch Pointe filed a claim for insurance coverage and an accompanying proof of loss in the amount of $3,125,019.12.[2] FIC has paid Birch Pointe approximately $2,727,259, but the parties dispute whether any unpaid balance remains on the insurance claim.

The insurance policy anticipates disagreement over the amount of claims and contains a provision for resolving such disputes. It provides in relevant part:

> If we and you 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.[3]

The parties invoked this provision in September 2007 because they could not agree on the remaining money, if any, owed to Birch Pointe.

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[1] Plaintiff's complaint lists the contract date for the insurance policy as December 20, 2004, while Defendant avers the effective date of the policy was December 20, 2005. Compl. ¶ 4; Answer ¶ 4. There is no dispute, however, that the policy was in effect when the fire that precipitated this litigation occurred.

[2] Defendant now claims the covered property loss from the fire exceeds $3.3 million. Answer ¶ 9.

[3] Compl. Ex. A, Ins. Policy, Businessowners [sic] Coverage Form § I.E.2.

FIC nominated Joseph Schleifer as its impartial appraiser, and Birch Pointe has never challenged his impartiality or objected to his selection. The first two appraisers appointed by Birch Pointe, however, had ties to the association and were not retained. Birch Pointe's third selection, Paul Petschelt, works for Protech Corporation, which, as was revealed later, performed construction work for Birch Pointe. Before this conflict was discovered, Petschelt suggested to Schleifer that they select Julius Berman to serve as umpire of the dispute. Schleifer agreed.

Following Berman's selection as umpire, FIC discovered an invoice from Protech Corporation, Petschelt's employer, to Birch Pointe for construction work it had performed. FIC then challenged Petschelt's appointment as a "competent and impartial appraiser," and Birch Pointe appointed Jeff Martin of J.D. Martin Building & Remodeling as its fourth appraiser. FIC has not challenged Martin's appointment or impartiality, but it has suggested the names of several candidates to replace Berman as umpire. Although Birch Pointe removed Petschelt as appraiser and appointed Martin in his stead, it contends that Berman's selection as umpire should stand.

B. Procedural History

Plaintiff filed its original complaint in the Delaware Superior Court on April 10, 2008; Defendant answered on July 25. On November 3, Plaintiff moved for judgment on the pleadings, or in the alternative, summary judgment. Defendant filed its opposition and cross motion for summary judgment on November 14, 2008. The Superior Court held a conference with the parties on December 2, 2008 during which it informed them it

intended to rule in Plaintiff's favor and appoint an independent umpire to evaluate Defendant's insurance claim. After that conference, however, the court determined it lacked jurisdiction over the subject matter of the case. On December 17, Judge John A. Parkins, Jr. issued a memorandum opinion setting forth his reasons for finding no jurisdiction and dismissed the case with leave to transfer it to the Court of Chancery pursuant to 10 *Del. C.* § 1902.[4] Plaintiff then transferred the case to this Court, effective January 26, 2009. Defendant filed its answer and counterclaims on March 5. The parties then submitted the matter for disposition based on the briefs previously submitted to the Superior Court.[5]

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[4] The Superior Court found that the provision at issue constitutes an agreement to arbitrate. *Firemen's Ins. Co. of Washington, D.C. v. Birch Pointe Condo. Ass'n*, C.A. No. 08C-04-081 JAP, mem. op. at 7-8 (Del. Super. Dec. 17, 2008). The court noted that the Delaware Supreme Court previously ruled that a similar provision in an insurance policy constituted a mandatory agreement to arbitrate. *Id.* (citing *Closser v. Penn Mut. Fire Ins. Co.*, 457 A.2d 1081 (Del. 1983)). Judge Parkins held that, because the Delaware Uniform Arbitration Act ("DUAA") vests the Court of Chancery with exclusive jurisdiction to appoint an arbitrator when the method of appointment set forth in an agreement to arbitrate fails for any reason, it had no jurisdiction to rule on the merits. *See id.* at 8 (citing 10 *Del. C.* §§ 5702, 5704). Moreover, even if this action does not come under the DUAA, this Court's inherent equity jurisdiction, inherited from the English Court of Chancery, includes the power to enforce arbitration agreements. *See Nash v. Dayton Superior Corp.*, 728 A.2d 59, 62 (Del. Ch. 1998) (citing *SBC Interactive, Inc. v. Corporate Media Partners*, 1998 WL 749446, at *4 (Del. Oct. 7, 1998)). I further note that neither party has objected either to Judge Parkins's determination that the Superior Court lacked jurisdiction or to this Court's exercise of jurisdiction.

[5] *See* D.I. 4, 7.

C. Parties' Contentions

The parties have stipulated that the matter before me is "limited to appointment of an Umpire for appraisal of the amount of loss to property caused by the January 17, 2006 fire."[6] Thus, the only issue presently before me relates to Plaintiff's complaint and Count I of Birch Pointe's counterclaims. FIC contends that it is empowered under the insurance policy to request this Court to select an umpire because Martin and Schleifer cannot agree on one. Birch Pointe argues that, because Petschelt and Schleifer previously agreed to appoint Berman, this Court should deny FIC's request. FIC counters that the agreement between Petschelt and Schleifer to appoint Berman was flawed and voided by Petschelt's connection to Birch Pointe, which means the parties have reached an impasse on the selection of an umpire.

II. ANALYSIS

A. Standard for Summary Judgment and Judgment on the Pleadings

Summary judgment may be granted where the moving party demonstrates that there are no genuine issues of material fact in dispute and that it is entitled to judgment as a matter of law.[7] The burden is on the moving party to show the absence of any genuine issue of material fact.[8] The court views the facts in the light most favorable to the

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6 I granted an order memorializing the parties' stipulation on February 17, 2009. *See* D.I. 3.

7 Ct. Ch. R. 56(c); *Burkhart v. Davies*, 602 A.2d 56, 59 (Del. 1991).

8 *Quereguan v. New Castle County*, 2004 WL 2271606, at *2 (Del. Ch. Sept. 28, 2004).

nonmoving party.[9] Summary judgment will be denied where the proffered evidence provides "a reasonable indication that a material fact is in dispute."[10] Moreover, "[w]hen the issue before the Court involves the interpretation of a contract, summary judgment is appropriate only if the contract in question is unambiguous."[11] A threshold inquiry on a motion for summary judgment in a contract dispute, therefore, becomes whether the contract contains an ambiguity.[12] "A contract provision is ambiguous only when it is fairly susceptible to two or more reasonable interpretations."[13]

A Rule 12(c) motion for judgment on the pleadings is similar but not identical. Court of Chancery Rule 12(c) provides: "After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings." A party is entitled to judgment on the pleadings when, accepting as true and drawing all reasonable inferences from the nonmoving party's well-pleaded facts, "there is no material fact in dispute and the moving party is entitled to judgment under the law."[14]

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9 *Acro Extrusion Corp. v. Cunningham*, 810 A.2d 345, 347 (Del. 2002).

10 *Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del. 1962).

11 *United Rentals, Inc. v. RAM Holdings, Inc.*, 937 A.2d 810, 830 (Del. Ch. 2007).

12 *Id.*

13 *Rossi v. Ricks*, 2008 WL 3021033, at *2 (Del. Ch. Aug. 1, 2008) (citing *Concord Steel, Inc. v. Wilm. Steel Processing Co.*, 2008 WL 902406, at *3 (Del. Ch. Apr. 3, 2008)).

14 *In re Seneca Invs. LLC*, 2008 WL 4329230, at *2 (Del. Ch. Sept. 23, 2008) (quoting *Warner Commc'ns Inc. v. Chris-Craft Indus. Inc.*, 583 A.2d 962, 965 (Del. Ch. 1989), *aff'd*, 567 A.2d 419 (Del. 1989)).

In this Court the parties have presented the pending issues essentially as if they had filed cross motions for summary judgment and have not argued that there is any issue of material fact. Accordingly, pursuant to Court of Chancery Rule 56(h), "the Court shall deem the motions to be the equivalent of a stipulation for decision on the merits based on the record submitted with the motions."[15]

B. Is FIC Entitled to Summary Judgment?

The provision at issue is unambiguous on its face. It clearly provides either party with the right to seek a judicial order selecting an umpire if the competent and impartial appraisers appointed by the parties fail to agree on one. The central issue is whether the competent and impartial appraisers already agreed on an umpire, as Birch Pointe argues, or failed to agree, as FIC contends. Because there is no issue of material fact, this case is appropriate for summary judgment.

The relevant policy provision states that, in the event of a disagreement over the amount of the loss, "each party will select a competent and *impartial* appraiser."[16] Birch Pointe failed to comply with this provision when it appointed Petschelt as its third appraiser. Petschelt was not an impartial appraiser.[17] His company performed work for Birch Pointe and provided an invoice for compensation for that work contemporaneously

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15 Ct. Ch. R. 56(h).

16 Ins. Policy, Businessowners [sic] Coverage Form § I.E.2 (emphasis added).

17 *See Black's Law Dictionary* 767 (8th ed. 2004) (defining impartial as "[u]nbiased; disinterested").

with Petschelt's time as an appraiser for Birch Pointe. This connection is sufficient to demonstrate an interest or bias on Petschelt's part that disqualifies him from acting as an impartial appraiser. As Judge Parkins found, Birch Pointe materially breached its contractual obligation to select an impartial appraiser by appointing Petschelt. If I were to validate the selection of Petschelt's suggested umpire, Berman, I would be ignoring the word "impartial" and eviscerating the parties' obligation to appoint an "impartial appraiser."[18] Thus, the selection of Berman is void and the appraisers have failed to agree on an umpire, entitling FIC to request such an appointment from this Court.

In dicta, Judge Parkins indicated that he was prepared to appoint James Gallagher of Resolution Management Consultants, Inc. as the umpire during the December 2 conference. The only impediment to this appointment was Judge Parkins's *sua sponte* ruling that the Superior Court lacked jurisdiction to decide the matter. Judge Parkins found that Gallagher and his employer had no connection to either party. After noting some of Gallagher's qualifications, Judge Parkins further observed that Gallagher was impartial and competent. I have no reason to question Judge Parkins's opinion in this regard. Moreover, neither party challenged Gallagher's impartiality or competence. In

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[18] *See, e.g.*, *NAMA Holdings, LLC v. World Mkt. Ctr. Venture, LLC*, 2007 WL 2088851, at *6 (Del. Ch. July 20, 2007) ("Contractual interpretation operates under the assumption that the parties never include superfluous verbiage in their agreement, and that each word should be given meaning and effect by the court."); *E.I. du Pont de Nemours & Co. v. Shell Oil Co.*, 498 A.2d 1108, 1113 (Del. 1985) ("[A] court must construe the agreement as a whole, giving effect to all provisions therein.").

fact, the parties submitted nothing new to this Court that had not been submitted to the Superior Court, essentially agreeing to submit the case on the same record created there. Therefore, I appoint James Gallagher as the umpire to participate in the resolution of the dispute between the parties regarding the amount of loss from the January 17, 2006 fire for the same reasons set forth by Judge Parkins during the December 2, 2008 conference and in his December 17, 2008 memorandum opinion.

III. CONCLUSION

For the reasons stated in this letter opinion, I find that the Court of Chancery has jurisdiction to determine this controversy, and grant summary judgment in Plaintiff's favor. Specifically, I order the appointment of James Gallagher of Resolution Management Consultants, Inc. to serve as umpire for the underlying dispute. The parties shall bear their own costs.

Plaintiff's counsel shall submit a proposed form of judgment implementing this ruling within ten days of the date of this opinion.

Sincerely,

/s/Donald F. Parsons, Jr.

Vice Chancellor