

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

FIREMEN'S INSURANCE )  
COMPANY OF )  
WASHINGTON, D.C. )

Plaintiff, )

v. )

C.A. No. 08C-04-081 JAP

BIRCH POINTE )  
CONDOMINIUM )  
ASSOCIATION, INC. )

Defendant. )

Submitted: December 9, 2008

Decided: December 17, 2008

**MEMORANDUM OPINION**

Sean J. Bellew, Esquire, Ballard Spahr Andrews & Ingersoll LLP,  
Wilmington, Delaware, Attorney for the Plaintiff

Katharine V. Jackson, Esquire, Reed Smith LLP, Wilmington, Delaware,  
Attorney for the Defendant

This case arises from a provision in an insurance contract which provides a mechanism for resolving disputes over the amount of loss to be paid by the insurer. In general terms this provision required the insurer and the insured to each appoint a neutral appraiser and those appraisers were to appoint an umpire. Plaintiff Firemen’s Insurance Company (“FIC”) has brought this action seeking certain declaratory relief and the appointment of an umpire and now seeks summary judgment. For the reasons stated below, the Court has *sua sponte* concluded that it lacks jurisdiction over this matter. Therefore jurisdiction in this case is denied<sup>1</sup> with leave to transfer to the Court of Chancery pursuant to 10 *Del. C.* §1902.

A. *Factual Background*

The facts in this case are largely undisputed. In 2004 defendant Birch Pointe Condominium Association (“Birch Pointe”) purchased an insurance policy from FIC which covered, among other things, property damage. On January 17, 2006 a fire heavily damaged 12 units at Birch Pointe. The ensuing reconstruction has not been cheap. Birch Pointe has requested coverage for loss in excess of \$3 million and FIC has already paid out well over \$2 million for the costs. The parties cannot agree on the exact amount of the remaining loss to be paid.

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<sup>1</sup> The phrase “jurisdiction in this case is denied” and similar phrases in this memorandum opinion are used so as to mirror the language of 10 *Del. C.* § 1902.

The FIC policy contains a provision for resolving disputes over the amount of alleged loss to be paid by the carrier. It provides in pertinent 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.

In September, 2007 Birch Pointe invoked this provision, whereupon FIC nominated Joseph Schleifer as its impartial appraiser. Birch Pointe has never challenged Mr. Schleifer's impartiality. On the other hand, it had difficulty appointing its own impartial appraiser:

- Birch Pointe's first appraiser worked for an insurance adjustment company retained by Birch Pointe.
- Birch Pointe's second appraiser was actively involved on behalf of Birch Pointe in its efforts to calculate its loss.

Next Birch Pointe appointed Paul Petschelt of Protech Construction Company as its appraiser. At Mr. Petschelt's suggestion, FIC's appraiser agreed to the appointment of Julius Berman as the umpire.

The appointment of Mr. Berman was not the end of the story. Sometime after Mr. Berman's appointment, FIC received a copy of an invoice from Protech Construction to Birch Pointe for construction work performed at Birch Pointe. As mentioned earlier, Protech Construction is the employer of Birch Pointe's appraiser, Mr. Petschelt. Understandably this

caused FIC to question Mr. Petschelt's impartiality. Apparently Birch Pointe agreed (or at least acquiesced) to FIC's challenge of Mr. Petschelt and appointed Jeff Martin of J. D. Martin Building & Remodeling as its fourth appraiser. FIC does not question Mr. Martin's impartiality in this lawsuit.

Despite the fact that Mr. Petschelt was not an impartial appraiser, Birch Pointe insisted that Mr. Berman should remain as the umpire. FIC disputed this, and its appraiser sent the names of several possible umpires to replace Mr. Berman, Birch Pointe's latest appraiser.<sup>2</sup> No response has been forthcoming from Birch Pointe's appraiser, and it is clear to the Court that the parties are now at an impasse.

*B. The Procedural History*

FIC moved for summary judgment, arguing that under the previously described facts, which are undisputed in all material respects, it was entitled to judgment as a matter of law. After receiving Birch Pointe's response to that motion, the Court conducted a conference with the counsel on November 20, 2008. The Court believed this matter should, and could, be resolved quickly. Accordingly it directed the parties to appear, along with their respective appraisers, at a conference on December 2, 2008. At the November 20 conference the Court advised the parties that it would require

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<sup>2</sup> Nothing in this memorandum opinion is intended to question Mr. Berman's qualifications to serve as an umpire other than the manner in which he was appointed.

the parties to attempt to informally resolve the dispute over the umpire at the December 2 conference. The parties were further advised that if they were unable to resolve their differences at that time, the Court would announce its ruling on FIC's motion for summary judgment at the conclusion of the conference.

It quickly became apparent at the December 2 conference that the parties were at an impasse and would be unable to reach an agreement. Accordingly, as promised, the Court orally advised the parties of its ruling. It told them that, in the Court's view, FIC had a contractual right to have Birch Pointe appoint an impartial appraiser and that Birch Pointe materially breached its contractual obligation when it appointed Mr. Petschelt. This Court concluded that the resultant appointment of Mr. Berman as the umpire was flawed and the FIC was entitled to the appointment of a new umpire.

This Court further told the parties that it concluded they were at an impasse and, accordingly, under the insurance contract it was appropriate for the Court to appoint an umpire. The Court appointed James Gallagher of Resolution Management Consultants, Inc. as the umpire. Mr. Gallagher and Resolution Management are highly regarded in the construction industry and are experienced at evaluating construction costs. Neither Mr. Gallagher nor Resolution Management has any connection with the parties, and neither

party suggested him as an umpire during the December 2 conference. Consequently, Mr. Gallagher's impartiality is beyond question and he unquestionably possesses the skills sets necessary to serve as an umpire.

After orally announcing its opinion, the Court advised the parties that it would soon follow with a written opinion and final judgment so that if either side wished to appeal it could do so. While preparing its opinion the Court, sua sponte, began to question its jurisdiction. Much of FIC's complaint is couched in terms of seeking a declaratory judgment, and since the end result of the dispute would be money damages, at first blush it appeared that jurisdiction is vested in this Court.<sup>3</sup> Moreover, in at least one other instance the Superior Court, without expressly considering its jurisdiction, appointed an umpire under a similarly worded insurance agreement.<sup>4</sup> Finally neither party in the present action questioned the jurisdiction of this Court. Nonetheless, the Court's research led it to conclude that it lacked subject matter jurisdiction.

On December 10, 2008 the Court advised the parties by way of email of its concerns over its jurisdiction and outlined for the parties the authorities giving rise to those concerns. The following day the Court conducted a telephone conference with both sides at which time the Court asked whether

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<sup>3</sup> *Diebold Computer Leasing, Inc. v. Commercial Credit Corp.*, 267 A.2d 586, 590-1 (Del. 1970).

<sup>4</sup> *Sherman v. Underwriters at Lloyd's London*, 1999 WL 1223579 (Del. Super. Nov. 2, 1999).

either or both wished to make a written submission on the jurisdictional issue. Both sides declined that offer.

## ANALYSIS

The pertinent provision in the insurance policy is, without doubt, an agreement to arbitrate the disputed amount of a loss to be paid to the insurer. The General Assembly has provided that when disputes arise concerning the appointment of arbitrators pursuant to an arbitration agreement, those disputes are to be resolved by the Court of Chancery.

The provision in question is, on its face, an agreement to arbitrate. Not surprisingly the Delaware Supreme Court found a nearly identical provision in an insurance policy to constitute an agreement to arbitrate. In *Closser v. Penn Mutual Fire Insurance Company*,<sup>5</sup> the Supreme Court considered the following provision:

In case the insured and this Company shall fail to agree as to the actual cash value or the amount of the loss ...each shall select a competent and disinterested appraiser ...The appraisers shall first select a competent and disinterested umpire; and failing for fifteen days to agree on such an umpire...such umpire shall be selected by a judge of a court of record ...The appraisers shall then appraise the loss ...and, failing to agree, shall submit their differences, only to the umpire. An award in writing ...of any two ...determine the amount of actual cash value and loss.<sup>6</sup>

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<sup>5</sup> 457 A.2d 1081 (Del. 1983).

<sup>6</sup> Id. at 1085.

It construed this provision “to provide a mandatory form of arbitration, precluding recourse to the courts.”<sup>7</sup>

Delaware’s version of the Uniform Arbitration Act vests the Court of Chancery with exclusive jurisdiction to appoint an arbitrator when the method of appointment contained in an arbitration agreement fails for any reason. It provides that:

If the arbitration agreement provides a method of appointment of arbitrators, this method shall be followed. In absence thereof, or if the agreed method fails or for any reason cannot be followed ...the Court on complaint or on application in an existing case of a party shall appoint one or more arbitrators.<sup>8</sup>

Elsewhere the Act defines the “court” to be the Court of Chancery.<sup>9</sup>

The Court concludes, therefore, that it must deny jurisdiction in this action subject to plaintiff’s right to transfer the matter to the Court of Chancery pursuant to 10 *Del. C.* § 1902. Should plaintiff fail to transfer this case within 60 days of the date hereof, this Court will dismiss the matter for lack of jurisdiction.

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John A. Parkins, Jr.  
Superior Court Judge

cc: Prothonotary

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<sup>7</sup> Id. at 1087.

<sup>8</sup> 10 *Del. C.* § 5704.

<sup>9</sup> 10 *Del. C.* § 5702 (“The term ‘Court’ means the Court of Chancery of this Sate, unless otherwise specifically provided.”)