IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Chief Judge Marcia S. Krieger

Civil Action No. 17-CV-00291-MSK-STV

ZACHARY MCFARLAND,

Plaintiff,

v.

STATE FARM FIRE AND CASUALTY CO.,

Defendant.

ORDER ON MOTION TO CERTIFY

THIS MATTER comes before the Court on Defendant, State Farm Fire & Casualty Co.'s (State Farm), Motion to Certify (# **19**), Plaintiff, Zachary McFarland's, Response (# **24**), and State Farm's Reply (# **34**). Also before the Court is Mr. McFarland's Motion for a Ruling **(# 48**) on State Farm's Motion to Certify (which, in substance, is a motion to certify a question that varies slightly from that proposed by State Farm) and State Farm's Response (# **49**).

For purposes of these motions, the material facts are limited. Mr. McFarland's residence was insured under a policy (the Policy) issued by State Farm. *See* Doc. 37-1. Described as a Replacement Cost Policy, it provided that in the event that Mr. McFarland's home sustained covered damage, State Farm would pay "the cost to repair or replace with similar construction and for the same use on the premises . . . the damaged part of the property." *See* Policy at "Section I – Loss Settlement, Coverage A – Dwelling," Doc. 37-1 at 36. That section also provides that in the event of covered damage, State Farm would make a payment prior to

Dockets.Justia.com

completion of repairs in the amount of the actual cash value of the damaged part of the property. The Policy states:

> [U]ntil actual repair or replacement is completed, [State Farm] will pay only the actual cash value at the time of the loss of the damaged part of the property, up to the applicable limit of liability shown in the Declarations, not to exceed the cost to repair or replace the damaged part of the property.

Doc. 37-1 at 36. The Policy does not otherwise define the phrase "actual cash value."

In 2014, Mr. McFarland's roof was damaged in a hail storm. After he filed a claim, State Farm paid him the actual cash value of his roof, $6,885.79. The Explanation of Benefits (EOB) reflects that State Farm determined the actual cash value by taking the replacement cost of the roof, $9,766.43, and reducing it by $2,487.34 in "depreciation." Doc. 37-2.

Mr. McFarland brought this suit as a class action in state court. State Farm removed the matter to this Court pursuant to the Class Action Fairness Act, 28 U.S.C. § 1332(d) (CAFA). The Amended Complaint identifies the purported class of plaintiffs as persons or entities that received "actual cash value" payments from State Farm for loss or damage to a structure in Colorado for the last twelve years where the cost of labor was depreciated. Three claims are asserted: (1) breach of contract; (2) violation of the Colorado Consumer Protection Act; and (3) statutory bad faith. The basis of all of the claims is that in calculating "actual cash value," State Farm improperly included labor costs as part of "depreciation."

Both parties, by separate motions, ask this Court to certify a question to Colorado Supreme Court. State Farm proposes the following question:

> Where a homeowners insurance policy provides for payment of the actual cash value ("ACV") of the damaged part of the insured property at the time of the loss, and the insurer calculates ACV by estimating the total cost to repair or replace the damaged property minus any depreciation, does Colorado law require the insurer to exclude labor costs from the calculation of depreciation in order to arrive at the ACV figure?

Doc. 19 at 8. Mr. McFarland seeks certification of the following question: "Where a homeowner's insurance policy provides for 'actual cash value' coverage without defining 'actual cash value' or 'depreciation' may the insurer depreciate the labor that is necessary to accomplish repairs?" Doc. 48 at 1. Colorado Appellate Rule 21.1 permits the federal district court to certify any "questions of law of this state which may be determinative of the cause then pending in the certifying court and as to which it appears to the certifying court there is no controlling precedent in the decisions of the Supreme Court." But certification is discretionary and "is not to be routinely invoked whenever a federal court is presented with an unsettled question of state law." *Armijo v. Ex Cam Inc*., 843 F.2d 406, 407 (10th Cir. 1988).

The Court declines to certify either of the questions identified by the parties, finding that the dispositive issue in this case can be resolved by applying Colorado law to the terms of the policy. Under Colorado law, an insurance policy constitutes a contract, which courts construe using general principles of contractual interpretation. *Allstate Ins. Co. v. Huizar*, 52 P.3d 816, 819 (Colo. 2002) (en banc). Clear and unambiguous contractual provisions "should be given their plain meaning." *Id.* "To ascertain whether a provision is ambiguous," the Court construes it "in harmony with the plain, popular, and generally accepted meaning of the words employed." *Wota v. Blue Cross & Blue Shield*, 831 P.2d 1307, 1309 (Colo. 1992) (en banc).

The parties characterize their dispute as whether State Farm may depreciate both labor and materials' costs to determine the "actual cash value." But calculation of deprecation is not addressed in the Policy, nor does the Policy link depreciation and actual cash value.[1] Indeed, depreciation is not mentioned in the Policy at all. In reality,

---

[1] Mr. McFarland directs the Court to the "Summary of Coverage," a document which he contends defines the term "actual cash value" as "the cost of repairing or replacing damaged or destroyed property with property of the same kind and quality less depreciation." Doc. 24 at 3

the heart of the instant dispute is not the meaning of depreciation and what it includes, but instead the meaning of "actual cash value" under the terms of the Policy. Using "general principles of contractual interpretation," the Court is convinced that enough context exists to determine what the Policy means by "actual cash value," particularly considering its "popular" and "generally accepted meaning." *See Wota*, 831 P.2d at 1309.

It is clear that "actual cash value" stands for a specific concept in insurance law where the insured is paid only what the asset is worth at the time of loss, a theory of coverage distinct from "replacement cost," where the insured receives the amount to replace the asset. *See Graves v. Am. Family Mutual Ins. Co.*, — F. App'x —, 2017 WL 1416278 at *2–3 (10th Cir. Apr. 21, 2017). The Tenth Circuit has recently declined to certify the parties' proposed issue and the Oklahoma Supreme Court has decided the issue outright. *See id.* at *2; *Redcorn v. State Farm Fire & Cas. Co.*, 55 P.3d 1017, 1020 (Okla. 2002).

Under these circumstances, this matter can be resolved without certification to the Colorado Supreme Court. Accordingly, both Motions to Certify (# **19**) (# **48**) are DENIED. Mr. McFarland shall have 30 days from the date of this Order to file a Motion to Certify the Class.

(quoting Doc. 37-1 at 18). The Court disregards this reference for multiple reasons. First, the primary rule of contract interpretation is to begin with the terms of the contract — here, the Policy. Second the summary expressly states that it cannot be considered in interpreting or augmenting the terms of the Policy. It states that it "does not replace any policy provision", that "coverage is subject to the terms, conditions, special limits, and exclusions of the policy," and "in the event of a conflict between the policy and this summary disclosure form, your policy provisions shall prevail." Doc. 37-1 at 18.

Dated this 18th day of July, 2017.

BY THE COURT:

Marcia S. Krieger
Chief United States District Judge