FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D19-4009

CYPRESS PROPERTY & CASUALTY INSURANCE COMPANY,

Appellant,

v.

EMPIRE MITIGATION RESTORATION AND CONSULTING, LLC a/a/o Steve Wexler and Paula Wexler,

Appellee.

On appeal from the Circuit Court for Clay County.
Steven B. Whittington, Judge.

October 28, 2020

PER CURIAM.

At issue is whether the trial court erred in compelling an appraisal of a residential home under a policy of insurance issued by Cypress Property & Casualty Insurance Company. Cypress initially accepted coverage and paid benefits of $8,366.41 for damage to the home. It later withheld additional benefits the homeowners claimed based on an estimate of $98,000 for repairs provided by Empire Mitigation Restoration and Consulting, LLC, which initiated a lawsuit on the homeowners' behalf to recover damages for breach of the insurance contract. A central focus of

the lawsuit was whether the alleged losses to the home are covered under the insurance policy; some are and have been paid, others are vigorously contested by Cypress as unrelated to storm damage.

On appeal, Cypress argues it is error to compel an appraisal because coverage issues are not entirely resolved. It points out that the language in the insurance policy excludes an appraisal process where "coverage determination issues" exist, which is the case here. The language of the insurance contract requires an appraisal when a disagreement exists only as to the amount of a covered loss; it specifically precludes appraisal for coverage issues ("Coverage determination issues are not subject to appraisal."). The order requiring an appraisal was unwarranted under the terms of the insurance contract. *See generally Doe v. Natt*, 299 So. 2d 599, 605 (Fla. 2d DCA 2020) ("Arbitration provisions are creatures of contract and must be construed as 'a matter of contract interpretation.'") (quoting *Seifert v. U.S. Home Corp.*, 750 So. 2d 633, 636 (Fla. 1999)); *see e.g.*, *U.S. Fire Ins. Co. v. Franko*, 443 So. 2d 170, 172 (Fla. 1st DCA 1983) (explaining that the contract between the parties determined when the arbitration clause was triggered). Moreover, a review of the record establishes that Empire Mitigation filed suit and litigated the matter for a year before first requesting an appraisal, thereby constituting a waiver of whatever right of appraisal that may have existed. *Raymond James Fin. Servs., Inc. v. Saldukas*, 896 So. 2d 707, 711 (Fla. 2005) ("We have long held that a party's contract rights may be waived by actually participating in a lawsuit or taking action inconsistent with that right.") (citing *Klosters Rederi A/S v. Arison Shipping Co.*, 280 So. 2d 678, 680 (Fla. 1973)). Because the order compelling an appraisal was inconsistent with the insurance policy, and because the assertion of the right to an appraisal was waived under the circumstances, the order was in error.

REVERSED and REMANDED.

LEWIS, ROBERTS, and MAKAR, JJ., concur.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

Steven G. Schwartz and Karrie D. Cook of Schwartz Law Group, Boca Raton, for Appellant.

Mark A. Nation, Longwood, and Sheldon Carter Worrell of The Bush Law Group, LLC, Jacksonville, for Appellee.