# FIRST DISTRICT COURT OF APPEAL
# STATE OF FLORIDA

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No. 1D20-1280

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STATE FARM FLORIDA
INSURANCE COMPANY,

Appellant,

v.

NEAL R. NORDIN,

Appellee.

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On appeal from the Circuit Court for Duval County.
Tyrie Boyer, Judge.

February 24, 2021

LONG, J.

State Farm Florida Insurance Company (State Farm), appeals a nonfinal order denying its motion to abate action, stay discovery and compel appraisal. In denying the motion, the trial court determined that State Farm waived its right to appraisal by participating in the litigation between the parties. Because State Farm's participation was consistent with its right to appraisal, we reverse.

*The Facts*

State Farm insured Appellee, Neal Nordin, under a homeowner's policy (the Policy). During the coverage period, Mr.

Nordin's home suffered water damage from a cast iron pipe failure. A State Farm representative inspected the damage, assigned a date of loss, and prepared an estimate for the covered water damage.

The representative then sent a coverage determination letter to Mr. Nordin explaining that State Farm would provide coverage for the resulting loss and "tear out" of the area necessary to access where the water escaped, but that it would not provide coverage to replace the damaged cast iron pipes. The partial denial cited the policy's exclusions for wear, tear, deterioration, and corrosion. State Farm sent a separate letter to Mr. Nordin informing him of his right to mediation through the Florida Department of Financial Services. A coverage payment was made based on the estimate provided by the representative.

Mr. Nordin then sued State Farm for breach of contract. The complaint alleged a material breach because State Farm "failed to provide coverage for certain of Plaintiff's losses" and "failed to pay for all of Plaintiff's losses." The complaint contained no further explanation of the nature of the claim.

State Farm responded by filing a motion for a more definite statement and to stay discovery. The motion explained that State Farm could not determine whether Mr. Nordin was disputing the valuation of the water damage, the coverage denial for replacement of the plumbing line, the valuation of the tear out, or some combination of valuation and coverage denial. State Farm noted that it could not determine whether the dispute was appropriate for appraisal. The motion also sought to stay discovery pending resolution of the motion.

The trial court agreed that the pleading was insufficient. It dismissed the complaint with leave to file an amended complaint. At the same time, the trial court denied State Farm's motion to stay discovery. The result was an order to respond to discovery in a case with a dismissed complaint and *before* the filing of an amended complaint. State Farm's request to respond to discovery after the amended complaint was filed was denied and the trial court affirmatively ordered State Farm to respond. State Farm complied with the order and served its responses and objections to

Mr. Nordin's discovery demands. State Farm sought no discovery of its own.

A month later, Mr. Nordin filed an amended complaint. The amended pleading provided clarifying information about the nature of his claim:

> The loss and damage was throughout Plaintiff's house, and known loss at this time includes, but is not limited to, loss and damage to Plaintiff's flooring, subflooring; foundation/slab; grade fill; laundry room/area flooring, subflooring, and drywall, as well as the cost of tearing out and replacing any part of Plaintiff's home necessary to repair and replace the failed cast iron plumbing system and any other losses and damages that may have occurred, or will occur in the future like additional living expenses and/or law and ordinance damages.

State Farm responded to the amended complaint with three documents: a motion to abate action, stay discovery and compel appraisal, a letter to Mr. Nordin invoking appraisal under the policy, and an answer and affirmative defenses to the amended complaint. State Farm's answer denied the alleged material breach of contract and raised the right to appraisal in its first two affirmative defenses.

Mr. Nordin responded to State Farm's appraisal motion, arguing, in part, that State Farm had waived its right to appraisal. A hearing was held on State Farm's appraisal motion. Mr. Nordin argued that the Fifth District case *Fla. Ins. Guar. Ass'n v. Branco*, 148 So. 3d 488 (Fla. 5th DCA 2014), prohibited State Farm from compelling appraisal after filing "motions and pleadings" and participating in the litigation. State Farm distinguished *Branco*, arguing that its motion to compel appraisal and answer were timely filings that consistently invoked its appraisal rights.

The trial court denied State Farm's appraisal motion. Relying on *Branco* the trial court determined that, because State Farm had filed "motions and pleadings," it had waived its appraisal right. This appeal followed.

*The Law*

We have jurisdiction. Art. V, § 4(b)(1), Fla. Const; Fla. R. App. P. 9.130(a)(3)(C)(iv). An interlocutory order denying the right to appraisal is subject to de novo review. *State Farm Fla. Ins. Co. v. Sheppard*, 268 So. 3d 1006, 1007 (Fla. 1st DCA 2019); *MKL Enters. LLC v. Am. Traditions Ins. Co.*, 265 So. 3d 730, 731 (Fla. 1st DCA 2019).

Waiver is the "voluntary and intentional relinquishment of a known right or conduct which implies the voluntary and intentional relinquishment of a known right." *Raymond James Fin. Servs., Inc. v. Saldukas,* 896 So. 2d 707, 711 (Fla. 2005). At the hearing on the appraisal motion, the trial court referenced "examples" of waiver cited by *Branco*, concluding they showed that filing any motion or pleading before the invocation of appraisal constitutes participation in the litigation and a waiver of appraisal. But those examples do not support the trial court's conclusion. In analogizing appraisal and arbitration, and explaining situations in which both were waived, *Branco* stated:

> FIGA also argues that the Brancos waived their right to appraisal by initiating and participating in litigation. In this regard, appraisal clauses are viewed similarly to arbitration clauses. . . .
>
> In the context of arbitration, a waiver of the right to arbitrate occurs when a party actively participates in a lawsuit or engages in conduct inconsistent with the right to arbitrate. *Raymond James Fin. Servs., Inc. v. Saldukas*, 896 So. 2d 707, 711 (Fla. 2005). Active participation in a lawsuit is considered a waiver because it is generally presumed to be inconsistent with the right to arbitrate. [*Doctors Assocs. v.*] *Thomas*, 898 So. 2d [159,] 162 [(Fla. 4th DCA 2005)]; *see, e.g.*, *Morrell v. Wayne Frier Manufactured Home Ctr.*, 834 So. 2d 395, 395–98 (Fla. 5th DCA 2003) (finding waiver where party litigated for eleven months with various motions and pleadings); *ARI Mut. Ins. Co. v. Hogen*, 734 So. 2d 574, 576 (Fla. 3d DCA 1999) (finding waiver when party engaged in "aggressive" litigation for nine months with

> pleadings, interrogatories, requests for productions, sought hearings, and contested other party's motions and pleadings); *Owens & Minor Med., Inc. v. Innovative Mktg. & Distribution Servs., Inc.*, 711 So. 2d 176, 176 (Fla. 4th DCA 1998) (finding waiver when party litigated for thirteen months, secured prejudgment writ of garnishment, made multiple requests for admissions, filed pleadings and motions, and contested other party's pleadings and motions); *Gray Mart, Inc. v. Fireman's Fund Ins. Co.*, 703 So. 2d 1170, 1171–73 (Fla. 3d DCA 1997) (finding waiver following fourteen months of litigation and demand for appraisal one month before trial).

*Branco*, 148 So. 3d at 493.

Like these examples, the Fifth District found that the Brancos had "litigated their case for more than two years with multiple pleadings and discovery requests." *Id.* Yet, the court emphasized that "the question of waiver of appraisal is not solely about the length of time the case is pending or the number of filings the appraisal-seeking party made. Instead, the primary focus is whether the Brancos *acted inconsistently with their appraisal rights*." *Id.* (emphasis added).

The circumstances surrounding waiver in *Branco*, and the case examples cited, are distinguishable from this case. In those cases, the parties seeking to compel appraisal or arbitration had filed motions, pleadings, and discovery requests that were inconsistent with their right to appraisal. *Id.* Those cases do not hold that simply filing any motion or pleading is an act inconsistent with the right of appraisal.

Here, before moving to compel appraisal, State Farm's actions aligned with its right of appraisal. First, in response to the original complaint, State Farm filed a motion for a more definite statement and to stay discovery. State Farm filed the motion with the express purpose of determining whether appraisal was appropriate. Coverage disputes cannot be resolved through appraisal. *See Johnson v. Nationwide Mut. Ins. Co.*, 828 So. 2d 1021, 1022 (Fla. 2002) (holding that insurance disputes over

coverage are exclusively judicial questions that cannot be resolved by an appraisal panel). The Policy also rejects the use of appraisal to resolve disputes of coverage: "Appraisal is only available to determine the actual cash value, market value or replacement cost of the loss, *and has no effect on matters of coverage*." (emphasis added). So, for example, if Mr. Nordin was disputing the partial denial of coverage regarding the exclusion of the cost of replacing the pipe, then appraisal would not have been appropriate.

The trial court agreed that the original complaint was insufficient and dismissed it. It was not until receiving the amended complaint that State Farm knew the dispute was over the amount of loss and that appraisal would be appropriate.

Mr. Nordin next argues that State Farm's failure to raise its right of appraisal in its discovery answers acts as a waiver. But again, State Farm had not yet received the amended complaint and could not know if the claims in the future complaint would be appropriate for appraisal. And the trial court denied State Farm's request to answer discovery after receiving the complaint. If it ignored the trial court's order it would have risked establishing facts, court sanctions, and judgment by default. *See* Fla R. Civ. P. 1.380(b).

Finally, Mr. Nordin argues that State Farm waived appraisal by filing a notice of appearance, a certified copy of the Policy, and a motion for an extension of time to respond to the amended complaint. But Mr. Nordin does not explain why such ministerial and procedural filings would conflict with a right of appraisal. To the contrary, the notice of appearance and copy of the Policy are arguably necessary to establish and assert the right of appraisal. They were also both filed before Mr. Nordin filed his amended complaint clarifying the nature of the claims. State Farm responded to the amended complaint with the motion to compel appraisal. And a request for an extension of time to file a motion to compel appraisal can hardly be an act inconsistent with the right of appraisal.

State Farm responded to the amended complaint by moving to compel appraisal, sending a letter invoking appraisal under the Policy, and raising its right of appraisal in the affirmative defenses

of its answer. Unlike the examples cited in *Branco*, the length of litigation, the number of filings, and the substance of State Farm's motions and pleadings were all consistent with its right of appraisal. *Cf. Gonzalez v. State Farm Fire & Cas. Co.*, 805 So. 2d 814, 817–18 (Fla. 3d DCA 2000), *approved sub nom*, *Johnson,* 828 So. 2d at 1025 (finding no waiver of appraisal where the insurer timely demanded appraisal in its answer thirty days after the lawsuit was filed).

*The Holding*

Nothing in the record establishes that State Farm knowingly waived or engaged in conduct that implies it knowingly waived its right to appraisal. To the contrary, the record reflects deliberate action to evaluate the nature of the claims and then invoke appraisal at the first reasonable opportunity.

State Farm did not waive its right to appraisal. The order denying State Farm's motion to abate action, stay discovery and compel appraisal is REVERSED and the cause is REMANDED for further proceedings consistent with this opinion.

LEWIS and MAKAR, JJ., concur.

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

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