Third District Court of Appeal

State of Florida

Opinion filed July 24, 2019.
Not final until disposition of timely filed motion for rehearing.

No. 3D19-927
Lower Tribunal No. 18-27366

State Farm Florida Insurance Company,
Petitioner,

vs.

Charles Sanders and Diana Sanders,
Respondents.

A Writ of Certiorari to the Circuit Court for Miami-Dade County, Martin Zilber, Judge.

Link & Rockenbach, P.A., Kara Berard Rockenbach and David A. Noel (West Palm Beach), for petitioner.

Marin, Eljaiek, Lopez & Martinez, P.L., Steven E. Gurian and Joe De Prado, for respondents.

Before EMAS, C.J., and FERNANDEZ, and LINDSEY, JJ.

FERNANDEZ, J.

State Farm petitions this Court for a writ of certiorari to quash the trial court's April 9, 2019 order allowing the insureds' agent/public adjuster to act as their "disinterested" appraiser. We agree with State Farm and quash the order.

Respondents/insureds Charles Sanders and Diana Sanders had a homeowners' insurance policy with State Farm to provide coverage for property damages. The appraisal condition in State Farm's Homeowner Policy states that, "Each party will select a qualified, disinterested appraiser . . ." On August 13, 2018, the insureds filed suit against State Farm for breach of contract arising out of a Hurricane Irma property damage claim, alleging that State Farm failed to provide coverage for the loss. In response to the complaint, State Farm filed a Motion to Invoke Appraisal, claiming that there was a pre-suit dispute regarding the insureds' selected appraiser.

On December 12, 2018, the parties entered into an agreed order granting State Farm's Motion to Invoke Appraisal. The Order named Peter Patterson of VRS Vericlaim as State Farm's appraiser and required the insureds to designate their "qualified, disinterested appraiser," as stated in State Farm's policy. The insureds selected Gian Franco Debernardi of 911 Claims Corporation as their appraiser.

Mr. Debernardi is the insureds' agent pursuant to their contract with 911 Claims Corporation, which states that he will "be the agent and representative, under the insurance contract by State Farm Insurance . . . to adjust, appraise, advise and assist in the settlement of the loss." In addition, the contract assigns 10% of the

amount recovered to 911 Claims Corporation. Previously, Mr. Debernardi inspected the property, reported the insurance claim to State Farm, and prepared the $88,536.41 estimate that is the subject of the dispute between State Farm and the insureds.

On February 20, 2019, the insureds filed a Motion to Lift Stay and Compel Compliance with the Court Order, contending that appraisal should move forward with Mr. Debernardi as their appraiser. State Farm argued that Mr. Debernardi was not "disinterested" because of his agent/principal relationship with the insureds, his contingency fee, and his prior estimate of damages. On April 9, 2019, the trial court granted the Motion to Lift Stay and entered an order permitting Mr. Debernardi to act as the insureds' "disinterested" appraiser. State Farm then filed this petition for writ of certiorari.

The trial court's April 9, 2019 order allowing Mr. Debernardi to act as the insureds' disinterested appraiser departs from the essential requirements of the law. This will cause material injury to State Farm that cannot be remedied on appeal. Rousso v. Hannon, 146 So. 3d 66, 69 (Fla. 3d DCA 2014) ("To invoke an appellate court's certiorari jurisdiction, '[t]he petitioning party must demonstrate that the contested order constitutes "(1) a departure from the essential requirements of the law, (2) resulting in material injury for the remainder of the case[,] (3) that cannot be corrected on post-judgment appeal."'" (first quoting Bd. of Trs. of Internal

Improvement Tr. Fund v. Am. Educ. Enters., 99 So. 3d 450, 454 (Fla. 2012); then quoting Reeves v. Fleetwood Homes of Fla., Inc., 889 So. 2d 812, 822 (Fla. 2004))).

Allowing Mr. Debernardi to act as the insureds' "disinterested" appraiser is a harm that cannot be remedied on appeal, due to the nature of appraisal. The insureds contend in their Response to State Farm's petition, once an appraisal award is confirmed by the trial court, State Farm could then move to vacate it and then file an appeal.

However, Florida case law does not support this position. After an insurer pays an appraisal award, the trial court is not required to confirm this award, as a petition to confirm an appraisal award is not authorized under Florida law. State Farm Fla. Ins. Co. v. Gonzalez, 76 So. 3d 34, 37 (Fla. 3d DCA 2011); Federated Nat. Ins. Co. v. Esposito, 937 So. 2d 199, 200-01 (Fla. 4th DCA 2006).

Moreover, according to the terms of State Farm's homeowner's insurance policy, State Farm is required to pay an appraisal award within sixty days after State Farm receives the insureds proof of loss and there is a filing of an appraisal award with State Farm. If State Farm did not comply with this term in the contract, it would be in breach. Consequently, State Farm would not have the chance to vacate the appraisal award, as the insureds argue, because the trial court would not have confirmed such award.

Additionally, pursuant to the terms of the State Farm policy and Florida law, appraisal is binding on the parties. State Farm Fire & Cas. Co. v. Licea, 685 So. 2d 1285, 1287-88 (Fla. 1996) ("If a court decides that coverage exists, the dollar value agreed upon under the appraisal process will be binding upon both parties."). The binding nature of appraisal is outlined in the "Appraisal" provision of the State Farm policy: "The appraisers shall then set the amount of the loss. … Written agreement signed by any two of these three shall set the amount of the loss." For these reasons, certiorari review is proper in this case, as the harm to State Farm cannot be remedied on direct appeal.

We turn next to the "disinterested" appraiser issue presented by State Farm. In Florida, "[a]ppraisals are creatures of contract and the subject or scope of the appraisal depends on the contract provisions." Fla. Ins. Guar. Ass'n v. Branco, 148 So. 3d 488, 491 (Fla. 5th DCA 2014). Thus, it is clear that State Farm and the insureds were free to contract for the qualifications of the appraisers involved in their alternative dispute resolution. Here, the parties contracted for each other's appraiser to be "disinterested." State Farm's Homeowners Policy appraisal condition stated, "Each party will select a qualified, disinterested appraiser..." According to Branco, this "policy provision, which requires a 'disinterested appraiser,' expresses the parties' clear intention to restrict appraisers to people who are, in fact, disinterested." Id. at 496.

Addressing the definition of "disinterested," the court in Branco stated, "'Disinterested' is defined as '[f]ree from bias, prejudice, or partiality; not having a pecuniary interest.'" Id. at 496 n.9 (citing Black's Law Dictionary 536 (9th ed. 2009)). The court also stated "disinterested" meant "not having the mind or feelings engaged: not interested . . . free from selfish motives or interest: unbiased," and "the quality of being objective or impartial." [1] Id. (citing Miriam-Webster's Collegiate Dictionary 333 (10th ed. 2000)).

Additionally, we find the analysis in Branco to be particularly instructive. In Branco, the insureds named one of their attorneys as an appraiser in the insureds' sinkhole claim. Id. at 494. The appellate court held that if an appraiser owes his nominating party a "fiduciary duty of loyalty" or a "confidential relationship," then "[t]he existence of such a relationship between a litigant and an [appraiser] creates

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[1] An additional description of the term "disinterested" is provided as follows:

> [A] person may be described as "disinterested" when he or she is "[f]ree from bias, prejudice, or partiality; not having a pecuniary interest." *Black's Law Dictionary* 536 (9th ed. 2009). It follows that a "disinterested witness"—as the term is used in section 733.207—refers to a person "who has no private interest in the matter at issue." *Black's Law Dictionary* 1740 (9th ed. 2009). To put it differently, a "disinterested witness" has no stake in the outcome of the matter in which he or she offers evidence. *See The American Heritage Dictionary of the English Language* 519, usage note (4th ed. 2000) ("In traditional usage, *disinterested* can only mean 'having no stake in an outcome,'....").

Smith v. DeParry, 86 So. 3d 1228, 1235 (Fla. 2d DCA 2012).

too great a likelihood that the [appraiser] will be incapable of rendering a fair judgment." Id. Accordingly, the Branco court held that attorneys cannot be named as their clients' "disinterested appraisers."

In the case before us, the contract language between the insureds and Mr. Debernardi made Mr. Debernardi the insureds' agent. The insureds then selected Mr. Debernardi to be their "disinterested" appraiser. We find that the distinguishing fact that the disinterested appraiser in Branco was an attorney, as opposed to here, an agent, is irrelevant. Florida law is clear that an agent owes a fiduciary duty to his or her principal. See Fisher v. Grady, 178 So. 2d 852, 860 (Fla. 1937); Capital Bank v. MVB, Inc., 644 So. 2d 515, 518 (Fla. 3d DCA 1994). Moreover, Florida law regulates public adjusters. See § 626.854, Fla. Stat. (2018). Florida Administrative Code Rule 69B-220-201(3) (2015), Ethical Requirements for All Adjusters and Public Adjuster Apprentices, states, "The work of adjusting insurance claims engages the public trust. An adjuster shall put the honest treatment of the claimant above the adjuster's own interests in every instance." Consequently, Branco's holding is applicable to the case before us. Because Mr. Debernardi is the insureds' agent, he cannot be named their disinterested appraiser.

In addition, State Farm contends in its petition that Mr. Debernardi was involved with the insureds' claim from the beginning. He inspected the loss at the insureds' property, reported the claim to State Farm, and prepared the written

estimate for the $88,536.41 claim. Moreover, Mr. Debernardi has a financial interest in the insurance claim. Under his agency contract with the insureds, he stands to earn a 10% contingency fee of whatever amount the insureds recover from State Farm. See Brickell Harbour Condo. Ass'n, Inc. v. Hamilton Specialty Ins. Co., 256 So. 3d 245, 248 n.4 (Fla. 3d DCA 2018) ("The existence of a contingent fee payable to the party-appointed appraiser has been identified as a 'factor' in assessing partiality . . . ."). As such, Mr. Debernardi cannot be disinterested, as he has a financial interest in whether or not the insureds recover from State Farm and how much they recover.

Federal case law also supports State Farm's position. In Verneus v. Axis Surplus Ins. Co., No. 16-21863-CIV, 2018 WL 3417905, at *1 (S.D. Fla. July 13, 2018), a court order required both parties to select "competent and impartial" appraisers. Id. The insured selected her public adjuster who had originally inspected the loss and submitted his estimate to the insurer. The federal district court agreed with the insurance company's position that the public adjuster was not impartial. The court stated:

> Boaziz is the appraiser who already examined the property and prepared the demand for payment for Verneus. He is the one who submitted Verneus's scope of loss to the defendant insurer, Axis. So he has an interest to protect. As a professional who presumably values his reputation, Boaziz is unlikely to reach a conclusion as an appraiser that is significantly different from the work product he already produced.

Id. at *6.

Thereafter, when the magistrate judge in Verneus v. Axis Surplus Ins. Co., No. 16-21863-CIV, 2018 WL 4150933, at *1 (S.D. Fla. Aug. 29, 2018) disqualified the insured's public adjuster by finding he was not "disinterested," the insured went ahead and named her expert witness as her "disinterested" appraiser. Id. at *1. The magistrate also disqualified this appraiser, as well, as not "disinterested." The Court stated:

> In this case, as a paid expert for Verneus, Brizuela [the expert witness] has already taken a position about the cause of the damages and the scope of the damages. If chosen as the appraiser, then Brizuela would be tasked with doing so again—but, this time, he would also [be] wearing the hat of an impartial appraiser, rather than one of a party-retained expert. Yet he is unlikely to adopt a different opinion merely because he is now appointed as an appraiser. To the contrary, it seems likely that he would want to maintain his earlier opinion, especially because experts rely in significant part on their reputations, reliability, and consistency.

Id. at *3.

Similarly, in the case before us, Mr. Debernardi has previously inspected the loss, and he was the person who prepared the written estimate of damages the insureds used to file their claim. It is hard to imagine that Mr. Debernardi is going to reach a different amount from the initial $88,56.41 estimate he already reached. See also Landmark Am. Ins. Co. v. H. Anton Richardt, DDS, PA, No. 2018-CV-600-FtM-29UAM, 2019 WL 2462865 at *1 (M.D. Fla. June 13, 2019); The Shores at Coco Plum Condo. Ass'n, Inc. v. Westchester Surplus Lines Ins. Co., No. 18-23910-CIV, 2019 WL 2223172 at *1 (S.D. Fla. Apr. 29, 2019).

Accordingly, we hold that a fiduciary, such as a public adjuster who is in a contractual agent-principal relationship with the insureds, cannot be a disinterested appraiser as a matter of law. The trial court thus departed from the essential requirements of the law in allowing Mr. Debernardi to be named the insureds' disinterested appraiser. As the harm cannot be remedied on appeal because pursuant to the policy language the appraisal process is binding and cannot be undone, we grant the petition for writ of certiorari and quash the trial court's April 9, 2019 order that allowed the insureds' agent to act as their disinterred appraiser.

Petition granted, writ issued, and order quashed.