

# **Third District Court of Appeal**

## **State of Florida**

Opinion filed June 24, 2020.  
Not final until disposition of timely filed motion for rehearing.

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No. 3D19-1153  
Lower Tribunal No. 18-12050

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**People's Trust Insurance Company,**  
Appellant,

vs.

**Orlando Ortega and Bonnie Ortega,**  
Appellees.

An Appeal from a non-final order from the Circuit Court for Miami-Dade County, Barbara Areces, Judge.

Cole, Scott & Kissane, P.A., and Mark D. Tinker (Tampa); Brett Frankel and Jonathan Sabghir (Deerfield Beach), for appellant.

Marin, Eljaiek, Lopez & Martinez, P.L., and Anthony M. Lopez, Steven E. Gurian and David F. Garcia, for appellees.

Before EMAS, C.J., and SCALES and GORDO, JJ.

GORDO, J.

People's Trust Insurance Company appeals the trial court's order granting Orlando and Bonnie Ortega's motion to compel the parties to proceed with an appraisal. People's Trust argues that the trial court erred in doing so prior to holding an evidentiary hearing to determine whether the Ortega's complied with their policy's post-loss obligations. We agree, reverse and remand for an evidentiary hearing to determine compliance with post-loss obligations under the policy.

### **RELEVANT FACTUAL AND PROCEDURAL BACKGROUND**

On August 8, 2017, the Ortegas applied for a homeowner's insurance policy with People's Trust, and People's Trust accepted the application and issued them a policy with a preferred contractor endorsement.<sup>1</sup> The policy contained an appraisal provision, which read, in relevant part, as follows:

**S. Appraisal**, the following is added to the policy:

Where "we" elect to repair:

1. If "you" and "we" fail to agree on the amount of loss, which includes the scope of repairs, either may demand an appraisal as to the amount of loss and the scope of repairs. In this event, each party will choose a competent appraiser within 20 days after receiving a written request from the other. The two appraisers will choose an umpire. If they cannot agree upon an umpire within 15 days, "you" or "we" may request that the choice be made by a judge of a court of record in the state where the Described Location is located. The appraisers will separately set the amount of loss and scope of repairs. If the appraisers submit a written report of an agreement to "us", the amount of loss and scope of repairs agreed upon will be the amount of loss

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<sup>1</sup> This endorsement permits People's Trust to elect to repair damages using its preferred contractor, rather than paying the insured for the loss.

and scope of repairs. If they fail to agree, they will submit their differences to the umpire. A decision agreed to by any two will set the amount of loss and the scope of repairs. Each party will pay its own appraiser, and bear the other expenses of the appraisal and umpire equally.

On September 10, 2017, Hurricane Irma affected South Florida, and on October 18, 2017, the Ortegas sent People’s Trust a letter through their attorneys, asserting that Hurricane Irma had damaged their roof and caused water intrusion to the property’s interior.

On October 31, 2017, People’s Trust accepted the claim, advised the Ortegas that it would be sending a field adjuster to inspect their property and requested that the Ortegas comply with their post-loss obligations, including the completion and submission of a Sworn Proof of Loss within 60 days. The policy delineates the following post-loss obligations:

## **SECTION I – CONDITIONS**

...

### **C. Duties After Loss**

In case of a loss to covered property, we have no duty to provide coverage under this policy if the failure to comply with the following duties is prejudicial to us. These duties must be performed either by you, an “insured” seeking coverage, or a representative of either:

...

**8. Send to us, within sixty (60) days after our request, your signed, sworn proof of loss which sets forth, to the best of your knowledge and belief:**

- a. The time and cause of loss;**
- b. The interests of all “insureds” and all others in the property involved and all liens on the property;**
- c. Other insurance which may cover the loss;**

- d. Changes in title or occupancy of the property during the term of the policy;**
- e. Specifications of damaged buildings and detailed repair estimates;**
- f. The inventory of damaged personal property described in **C.6.** above;
- g. Receipts for additional living expenses incurred and records that support the fair rental value loss

(emphasis added to 8a–e).

On November 15, 2017, a People’s Trust field adjuster inspected the damage and estimated that the costs of repairs were \$5,686.69. This amount was less than the Ortegas’s \$10,638.00 hurricane deductible. On November 30, 2017, People’s Trust sent the Ortegas a letter “to provide [them] with the results of [its] evaluation of [their] recent claim.” The letter advised that, while the loss was caused by a peril covered under the Ortegas’ policy, People’s Trust would not be performing any repairs on their property because, based on its assessment of the damages, the cost of repair did not exceed their hurricane deductible amount. The letter informed the Ortegas that if they “[had] any additional information not previously provided that [People’s Trust] should consider for purposes of reassessing [its] claim decision,” they should promptly provide it to their assigned claims adjuster. It reminded the Ortegas of the availability of an appraisal mechanism, if the Ortegas disagreed with People’s Trust’s assessment of the cost and scope of repairs. That same correspondence requested once again that, pursuant to their policy obligations, the Ortegas complete a Sworn Proof of Loss within 60 days, if they disputed the estimate

or its scope. Specifically, the letter included a block in the middle of the page, with a notice highlighted in red, which stated:

**NOTE: THIS WILL REQUIRE ACTION ON YOUR PART**

**What if you disagree with what we believe needs to be repaired?**

In order to assess whether there is a disagreement as to Estimate and Scope of Repairs, or specifically what the disagreement is if there is one, and to the extent that we have not already requested your Sworn Proof of Loss (“POL”) by previous correspondence, **we are at this time hereby requiring that you provide us within sixty (60) days of this letter, your executed Sworn Proof of Loss (“POL”) which provides the details of what you believe the proper scope to be, including, but not limited to, a scope prepared by you or on your behalf.** The details of what must be contained in a Sworn Proof of Loss are shown in your policy, and a copy of a Sworn Proof of Loss which we commonly use, is attached for your convenience. See, ***SECTION I - CONDITIONS; Paragraph C.8.*** of your policy for the precise requirements of a POL.

People’s Trust advised the Ortegas that repairs would not commence until the parties agreed on an amount of loss in excess of the deductible or until an appraisal panel ultimately determined the repairs exceed the deductible amount.

On December 19, 2017, the Ortegas returned a document titled “Proof of Loss,” which was different from the form provided by People’s Trust and which did not contain a detailed repair estimate as required in Section I(C)(8)(e) of the policy. The word “pending” was written on the lines in the form for “the whole loss and damage” and “the amount claimed” under the policy.

People's Trust, on January 26, 2018, advised the Ortegas that the submitted Proof of Loss was rejected because it did not contain any supporting documentation and requested completion and submission of the "fully completed executed Sworn Statement in Proof of loss [that People's Trust sent the Ortegas] with the supporting documentation." The letter also reminded the Ortegas that "a properly executed Proof of Loss with supporting documentation [was] required as part of [their] post-loss obligations under [their] policy." There is no record evidence of any other communication between the Ortegas and People's Trust in the nearly three months that followed.

Then, on April 13, 2018, the Ortegas filed the underlying suit seeking a declaratory judgment that they were entitled to coverage and damages for breach of contract. People's Trust denied that it breached and that it owed the Ortegas anything under the policy. It also asserted several affirmative defenses, alleging (1) that the Ortegas's policy was void due to material misrepresentations, (2) that the Ortegas failed to satisfy a condition precedent by failing to provide a sufficient Proof of Loss, and (3) that the loss previously covered in good faith was no longer covered under the circumstances, namely, the Ortegas's failure to comply with their contractual obligations. People's Trust also filed a counterclaim seeking a declaratory judgment that the Ortegas had breached their obligations and to void its

obligations given the Ortegas's failure to satisfy all conditions precedent. Both the Ortegas and People's Trust demanded a trial by jury in their respective pleadings.

On April 4, 2019, the Ortegas filed a motion to dismiss People's Trust's counterclaim or, in the alternative, compel appraisal. Attached to their motion was a copy of their repair estimate, estimating their damage at \$68,208.37. At a case management conference where the trial court heard argument on the Ortegas's motion, People's Trust objected to the appraisal. People's Trust specifically argued that based on this Court's precedent, the trial court was required to hold an evidentiary hearing on the issue of the Ortegas's compliance with post-loss obligations prior to compelling the requested appraisal. The trial court denied the Ortegas's motion to dismiss People's Trust's counterclaim, but granted the Ortegas's motion to compel appraisal, and ordered the parties to complete the appraisal process within 120 days from the date of the order. This appeal followed.

### **LEGAL ANALYSIS**

“We review de novo a trial court's order compelling an appraisal under an insurance policy.” Sunshine State Ins. Co. v. Corridori, 28 So. 3d 129, 130 (Fla. 4th DCA 2010) (citing Fla. Ins. Guar. Ass'n v. Castilla, 18 So. 3d 703, 704 (Fla. 4th DCA 2009)).

We have held that when an insurer reasonably disputes whether an insured has sufficiently complied with a policy's post-loss conditions so as to trigger the

policy's appraisal provision, a question of fact is created that must be resolved by the trial court before the trial court may compel appraisal. United Prop. & Cas. Ins. v. Concepcion, 83 So. 3d 908, 910 (Fla. 3d DCA 2012) (citing Citizens Prop. Ins. v. Gutierrez, 59 So. 3d 177 (Fla. 3d DCA 2011); Citizens Prop. Ins. v. Mango Hill Condo. Ass'n 12 Inc., 54 So. 3d 578 (Fla. 3d DCA 2011); Citizens Prop. Ins. Corp. v. Maytin, 51 So. 3d 591 (Fla. 3d DCA 2010)).

In this case, People's Trust asserts that the trial court's appraisal order is premature, and an evidentiary hearing is necessary, because there exists an unresolved factual dispute as to whether the Ortegas complied with the post-loss obligations imposed on them by the policy. Specifically, People's Trust asserts that the sworn proof of loss submitted by the Ortegas was not compliant with the policy's requirements. We agree with People's Trust that, before compelling appraisal in this case, the trial court should have held an evidentiary hearing to determine whether the Ortegas complied with their post-loss obligations.

This Court has previously reversed and remanded other premature orders compelling appraisal under similar circumstances. See, e.g., Concepcion, 83 So. 3d at 910; Gutierrez, 59 So. 3d 178–79; Mango Hill, 54 So. 3d at 582; Maytin, 51 So. 3d at 591. In Mango Hill, this Court acknowledged that while there are cases in which an appraisal may be ordered before coverage is resolved, before a trial court can order a case to appraisal, there must be an arbitrable issue. 54 So. 3d at 581.



Such an issue exists where “‘some meaningful exchange of information sufficient for each party to arrive at a conclusion’ has taken place.” Id. (citing U.S. Fid. & Guar. Co. v. Romay, 744 So. 2d 467, 470 (Fla. 3d DCA 1999)). “Thus, an ‘insured must comply with all of the policy’s post-loss obligations before the appraisal clause is triggered.’” Id. (citing Romay, 744 So. 2d at 471).

The right to an appraisal is created by the insurance policy and cannot be triggered until both parties have complied with their contractual obligations. See, e.g., Romay, 744 So. 2d at 471 (“The insured must comply with all of the policy’s post-loss obligations before the appraisal clause is triggered.”). The appraisal paragraph in the policy presupposes that there is a disagreement about a loss entitled to coverage pursuant to the terms of the policy. The insurer and insured must “fail to agree” about the amount of the loss once the parties agree that the loss at issue is entitled to coverage. Triggering the appraisal provision requires the insured to timely comply with providing the insurance company information that substantiates the existence of a disagreement. For there to be a disagreement, the insurance company must be put on notice that the insured’s damages estimate is different from the insurer’s estimate and scope of repairs.

Without the insureds’ compliance, insurance companies have no formal notice of disagreement with the amount or scope of repairs. In Romay, this Court stated:

No reasonable and thoughtful interpretation of the policy could support compelling appraisal without first

complying with the post-loss obligations. If that were so, a policyholder, after incurring a loss, could immediately invoke appraisal and secure a binding determination as to the amount of loss. That determination, in turn, could be enforced in the courts. Under that framework, expressed and agreed-upon terms of the contract, i.e., the post-loss obligations, would be struck from the contract by way of judicial fiat and the bargained-for contractual terms would be rendered surplusage. There exists but one reasonable interpretation of the terms of the policy at issue here: The insured must comply with all of the policy's post-loss obligations before the appraisal clause is triggered.

744 So. 2d at 471 (internal footnotes omitted) (citing Restatement (Second) of Contracts § 203 (1981)).

This Court's precedent makes clear that where there is a dispute over whether an insured has sufficiently complied with his or her contractual duties so as to trigger the policy's appraisal provision, that dispute must be resolved before compelling the parties to proceed with an appraisal of the disputed loss.

### **CONCLUSION**

We reverse and remand for the trial court to hold an evidentiary hearing on the motion to compel appraisal in order to determine whether the Ortegas complied or substantially complied with the policy's post-loss obligations. See Mango Hill, 54 So. 3d at 582 (reversing the trial court's order of appraisal and remanding for an evidentiary hearing to determining compliance with post-loss conditions under the policy); Concepcion, 83 So. 3d at 909 (same); Maytin, 51 So. 3d at 591 (same).

Reversed and remanded.