SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. Nancy Bannon *Justice* PART 42

SYDNEY HYMAN

- v -

STATE FARM FIRE AND CASUALTY COMPANY

INDEX NO. 651791/2015

MOTION DATE 6/22/2016

MOTION SEQ. NO. 001

The following papers were read on this motion to compel an appraisal in lieu of trial to assess damages

Notice of Motion/ Order to Show Cause — Affirmation — Affidavit(s) — Exhibits — Memorandum of Law----------	No(s). 1
Answering Affirmation(s) — Affidavit(s) — Exhibits ----------	No(s). 2
Replying Affirmation — Affidavit(s) — Exhibits ----------	No(s). 3

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

In this action to recover benefits under a policy of casualty insurance, plaintiff moves pursuant to Insurance Law § 3408(c) to compel the court to direct an appraisal in lieu of trial to assess the value of plaintiff's losses arising from water damage to real and personal property. Defendant, State Farm Fire and Casualty Company (State Farm), opposes the motion. The motion is granted.

Plaintiff owns real property located at 51 Greene Street in Manhattan. State Farm issued a policy of fire and casualty insurance to plaintiff covering loss to the subject premises and plaintiff's personal property arising from certain enumerated perils, including water damage. On May 23, 2013, while the policy was in effect, the premises and plaintiff's personal property were damaged by flood. Plaintiff made claim upon State Farm in the sum of $635,178.42 for combined losses arising from expenses she incurred for structural repairs, damage to personal property, and additional living expenses that were necessitated when she temporarily vacated the premises. State Farm paid plaintiff the sum of $350,501.62. On May 21, 2015, plaintiff commenced this action against State Farm, seeking to recover $239,625.39, representing the difference between her claim and the amount paid. According to plaintiff, the sum she seeks represents $149,186.54 in unpaid expenses for structural repairs, $54,663.94 in unpaid damages to personal property, and $35,774.91 in unpaid reimbursements for temporary living expenses.

As relevant here, the subject policy, at Section I Conditions Number 5, provides that if the parties fail to agree on the amount of loss, "either one can demand that the amount of the loss be set by appraisal." Although that provision does not fix a deadline by which a demand for appraisal must be made, it recites that "[e]ach shall notify the other of the appraiser's identity within 20 days of receipt of the written demand. The two appraisers shall then select a competent, impartial umpire. If the two appraisers are unable to agree upon an umpire within 15 days, [the parties] can ask a judge of a court

of record in the state where the residence premises is [sic] located to select an umpire." If the two appraisers agree on the amount of loss, State Farm is obligated to pay that amount. If they do not, they must submit their reports to the umpire. Thereafter, a written agreement between two of the three appointed persons fixes the amount of loss. On January 29, 2016, plaintiff made a written demand to State Farm that the loss be assessed by means of appraisal. In a letter dated February 17, 2016, State Farm objected to the employment of the appraisal procedure on the grounds that plaintiff's letter "fail[ed] to identify the specific items or areas of damage which form the basis of Plaintiff's disagreement with State Farm," and that the "belated demand for appraisal was made nearly three years after the loss occurred."

Plaintiff moves pursuant to Insurance Law § 3408(c) to enforce the terms of the policy so as to compel State Farm to accede to the appraisal procedure in the assessment of the loss. Insurance Law § 3408(c) provides that "[i]n the event of a covered loss, whenever an insured or insurer fails to proceed with an appraisal upon demand of the other, either party may apply to the court in the manner provided in subsection (a) of this section for an order directing the other to comply with such demand. An appraisal shall determine the actual cash value, the replacement cost, the extent of the loss or damage and the amount of the loss or damage which shall be determined as specified in the policy and shall proceed pursuant to the terms of the applicable appraisal clause of the insurance policy and not as an arbitration. Notwithstanding the provisions of this subsection, an appraisal shall not determine whether the policy actually provides coverage for any portion of the claimed loss or damage."

Contrary to State Farm's contentions, there is no deadline fixed by the statute or the policy for demanding an appraisal, and neither the statute nor the policy obligates plaintiff to identify the specific items or areas of damage which form the basis of her disagreement with State Farm. In any event, the disclosure exchanged in the instant action has provided State Farm with detailed information concerning the items of loss claimed by plaintiff.

The court also rejects State Farm's contention that the dispute between the parties implicates the issue of coverage under the policy. Plaintiff, an artist, resides in the subject premises, portions of which she also uses in connection with her profession. State Farm's assertion that wall-to-wall carpeting and a hard floor covering installed in two rooms of the premises were used for "business" purposes and, hence, outside of the ambit of the policy, appears to raise a feigned issue of fact as to whether the dispute is solely over valuation rather than coverage. There is no merit to State Farm's assertion that a determination of whether to repair or replace damaged floor covering implicates issues of coverage. There is no dispute that these and other items of personal property were damaged. Where, as here, the parties "dispute the extent of work required to repair the damage caused by the [covered peril] and the necessary methods of such repair," such disputes are "related to the extent and amount of the damage to the insured property," and "are factual questions that fall squarely within the scope of the policy's appraisal clause." Quick Response Commercial Div., LLC v Cincinnati Ins Co., 2015 US Dist LEXIS 120415, * 8, 2015 WL 5306093, * 3 (ND NY 2015) (construing New York law); see Zarour v Pacific Indem. Co., 113 F Supp 3d 711 (SD NY 2015) (construing New York law); see also

Amerex Group, Inc. v. Lexington Ins. Co., 678 F.3d 193, 206 (2nd Cir 2012); cf. Pilkenton v New York Cent. Mut. Fire Ins. Co., 112 AD3d 1327, 1327 (4th Dept 2013).

In light of the strong public policy favoring appraisal as the method of resolving valuation disputes (see Amerex Group, Inc. v. Lexington Ins. Co., supra) and the nature of the claims made by plaintiff, there is no basis on which the court may deny plaintiff's request to compel an appraisal.

Accordingly, it is hereby

ORDERED that plaintiff's motion to compel an appraisal in accordance with the terms of the underlying policy is granted; and it is further,

ORDERED that defendant shall notify plaintiff of the identity of its appraiser within 20 days of service upon it of a copy of this order with notice of entry, and shall proceed with the appraisal process in accordance with the terms of the subject insurance policy.

This constitutes the Decision and Order of the court.

Dated: 9/27/16

JSC

HON. NANCY M. BANNON

1. Check one: ..... ☐ **CASE DISPOSED** ■ **NON-FINAL DISPOSITION**

2. Check as appropriate: MOTION IS: ■ **GRANTED** ☐ **DENIED** ☐ **GRANTED IN PART** ☐ **OTHER**