

In The
Court of Appeals
Ninth District of Texas at Beaumont

NO. 09-11-00054-CV

IN RE RANCHERS & FARMERS MUTUAL INSURANCE COMPANY

Original Proceeding

MEMORANDUM OPINION

Relator, Ranchers & Farmers Mutual Insurance Company, insured property owned by David Colman and Marie Colman. Under the homeowners' policy, either party may demand an appraisal of the loss. In litigation between Relator and the Colmans, the trial court denied Relator's motion to compel an appraisal. Relator seeks to enforce its contractual right to an appraisal through this mandamus proceeding. We conditionally grant relief.

The Colmans contend this proceeding is moot because they have filed a motion to vacate the order with the trial court. Citing *General Motors Corporation v. Gayle*, the Colmans contend this Court should defer to the trial court because there is a pending

motion to vacate the order that is subject to this mandamus proceeding. 940 S.W.2d 598, 599 (Tex. 1997). When the Colmans notified this Court that they had filed a motion to vacate in the trial court, we provided additional time for the parties to resolve the dispute in the trial court. We have not been notified that the trial court vacated its order and enforced the appraisal provision of the insurance policy. Because the underlying dispute has not been fully resolved in the trial court, this mandamus proceeding is not moot.

In the trial court, the Colmans opposed Relator's motion on the ground that Relator waived its right to invoke the appraisal process by failing to invoke its right in a timely fashion. In their response to this Court, the Colmans concede that *In re Southern Insurance Company* provides the guiding principle here. See No. 09-11-00022-CV, 2011 WL 846205, *2 (Tex. App.—Beaumont Mar. 10, 2011, orig. proceeding) (mem. op.). The trial court did not have the benefit of our opinion in *Southern Insurance*, but the trial court denied Relators' motion after two cases by the Supreme Court held that a contractual appraisal provision is enforceable. See *State Farm Lloyds v. Johnson*, 290 S.W.3d 886, 895 (Tex. 2009); *In re Allstate Cnty. Mut. Ins. Co.*, 85 S.W.3d 193, 194-95 (Tex. 2002). As was the case in *Southern Insurance*, here the party resisting the appraisal process failed to establish a waiver of the right to an appraisal by the party seeking to enforce the insurance policy's appraisal clause. 2011 WL 846205 at **1-2. In the absence of a valid waiver, the appraisal clause is enforceable. See *Johnson*, 290 S.W.3d at 888. A trial court abuses its discretion if it denies enforcement of a valid appraisal clause. See

Allstate Cnty. Mut. Ins. Co., 85 S.W.3d at 196. We hold that the trial court abused its discretion by denying the motion to compel an appraisal.

Relator argues that this Court should also order the trial court to abate the suit pending the outcome of the appraisal process. “While the trial court’s denial of the motion to invoke appraisal was error, the failure to grant the motion to abate is not subject to mandamus.” *Id.* “While the trial court has no discretion to deny the appraisal, the court does have some discretion as to the timing of the appraisal.” *Id.*

We conditionally grant the petition for a writ of mandamus. We are confident that the trial court will vacate its order denying the motion to compel an appraisal and will enforce the appraisal provision of the policy. The writ of mandamus will issue only if the trial court fails to act in accordance with this opinion. Our order granting temporary relief is lifted and Relator’s motion to clarify the stay order is denied as moot.

PETITION CONDITIONALLY GRANTED.

PER CURIAM

Submitted on March 24, 2011
Opinion Delivered April 28, 2011
Before McKeithen, C.J., Kreger and Horton, JJ.