STATE OF MICHIGAN

COURT OF APPEALS

ROBERT J. ROEHRIG,

Plaintiff-Appellee,

v

STATE AUTO MUTUAL INSURANCE CO.,

Defendant-Appellant.

UNPUBLISHED
July 5, 2005

No. 252742
Oakland Circuit Court
LC No. 2002-038111-CK

Before: Gage, P.J., and Cavanagh and Griffin, JJ.

PER CURIAM.

Defendant appeals as of right from an order of judgment awarding plaintiff damages pursuant to two appraisal awards in this homeowner's insurance case. We affirm.

On February 6, 2002, plaintiff filed a complaint against defendant averring that defendant rejected his proof of loss on claims under his homeowner's policy for water and fire damage submitted in 1999 and 2000, and then refused his demand for appraisals under MCL 500.2833(1)(m). Plaintiff requested that the court appoint an independent umpire, in conformity with the policy of insurance and MCL 500.2833(1)(m), for the purpose of appraising the property losses because defendant refused to appoint an appraiser or participate in the appraisal process.

On January 27, 2003, the trial court entered an order appointing an umpire, Bryan Levy, a former district court judge. Thereafter, the contractual and statutory appraisal process was completed and the umpire issued two awards—one for the water damage that occurred primarily to the upper level of the house and one for the fire damage that occurred primarily to the lower level of the house—and they were signed by plaintiff's appraiser and the umpire. Defendant failed to pay the amounts awarded and plaintiff sought entry of judgment against defendant in the amount of the awards. Defendant responded by claiming that the awards were erroneous because they were duplicate awards and filed a motion to modify or set aside the appraisal awards.

In response to defendant's motion, plaintiff argued that defendant delayed the matter for over three and one-half years, did not object during the six month appraisal process, and sought to attack the awards only because of dissatisfaction with the outcome. Plaintiff attached the umpire's affidavit to his response which indicated that, after an extensive appraisal process that included review of voluminous documents, he purposely issued two appraisal awards regarding

the water and fire losses. Umpire Levy further indicated that, because extensive mold remediation was required, repair of the home would cost more than its demolition and rebuilding so his appraisal awards were based on a tear down and rebuild of the premises.

After hearing oral arguments, on October 22, 2003, the trial court entered its order denying defendant's motion to modify or set aside the appraisal awards, holding that there was no evidence that "the Umpire made a mistake or had less than a full understanding of the facts and circumstances presented by both parties." On November 19, 2003, an order of judgment was entered by the trial court awarding plaintiff the damages provided in the appraisal awards, $883,133.42, as well as interest. Defendant appeals.

Defendant first argues that his motion to modify or set aside the appraisal awards should have been granted due to a manifest mistake because the umpire awarded total loss damages for both the tear down and rebuild related to the fire, as well as total loss damages for the tear down and rebuild related to the earlier water incident. We disagree. The appraisal process for determining the amount of loss for insurance claim purposes is a common-law arbitration procedure. *Manausa v St Paul Fire & Marine Ins Co*, 356 Mich 629, 633; 97 NW2d 708 (1959); *Thermo-Plastics R & D, Inc v General Acc Fire & Life Assurance Corp, Ltd*, 42 Mich App 418, 422; 202 NW2d 703 (1972). Judicial review of the appraisal award is limited to instances of bad faith, fraud, misconduct, or manifest mistake. *Auto-Owners Ins Co v Kwaiser*, 190 Mich App 482, 486; 476 NW2d 467 (1991).

We are guided by the long-standing principles applicable to the appraisal process, including that it is considered "a substitute for judicial determination" and "a simple and inexpensive method for the prompt adjustment and settlement of claims." See *Themo-Plastics R & D, Inc*, *supra* (citation omitted). And,

> there are great objections to any general interference by courts with awards. They are made by a tribunal of the parties' own selection, who are, usually at least, expected to act on their own view of law and testimony more freely and less technically than courts and regular juries. They are also generally expected to frame their decisions on broad views of justice, which may sometimes deviate from the strict rules of law. It is not expected that after resorting to such private tribunals either party may repudiate their actions and fall back on the courts. And equity, on whatever pretext it may intervene in such cases, does so upon the reason that the tribunal has not really acted within the lines of the duty laid upon it, and has not in fact carried out the agreement under which it has obtained authority to proceed. [*Davis v National American Ins Co*, 78 Mich App 225, 234-235; 259 NW2d 433 (1977), quoting *Port Huron & Northwestern R C v Callanan*, 61 Mich 22, 26; 34 NW 678 (1887).]

Here, defendant claims manifest mistake warrants reversal but, like the trial court, we disagree. Two appraisal awards were issued related to two separate insurance claims filed by plaintiff. The first was for water damage sustained by the upper floor of plaintiff's house in January of 1999, and the second was for the fire damage to the lower floor of plaintiff's house in July of 2000. Plaintiff did not claim that the house was a total loss from the water damage. Apparently because the damage from both incidents was not promptly repaired, the house required extensive mold remediation by the time of the appraisal process such that demolition

was the more economical option. Umpire Levy indicated in his affidavit that the damage was extensive and, as noted in the oral argument on the motion, the losses from both incidents overlapped. In other words, there were not two total losses to the one house; rather, there were two losses, one to the upper level and one to the lower level, that combined to cause a total loss. There was no manifest mistake in the appraisal awards.

Next, defendant argues that the appraisal awards should be set aside or modified because of umpire misconduct since defendant was not "permitted by the umpire to present evidence or participate equally in the appraisal process." We disagree. Defendant's claims, including that its appraiser was not provided with copies of materials presented by plaintiff's appraiser to the umpire, that there was an improper ex parte meeting between the umpire and plaintiff's appraiser, and its objection to the umpire's method of determining the amount of loss, are either unsubstantiated or do not establish the requisite unfairness and bias necessary for judicial interference with the appraisal proceedings. See *Emmons v Lake States Ins Co*, 193 Mich App 460, 466-467; 484 NW2d 712 (1992); *Davis*, *supra* at 232-235.

Next, defendant argues that the appraisal awards should be set aside "for the fraud, misconduct, and bad faith of the [plaintiff's] appraiser." We disagree. Defendant's claim is premised on the alleged issuance of an erroneous double award for the same loss. As discussed above, there was no manifest mistake in the appraisal awards.

To the extent that defendant further challenges the umpire's authority and the calculation of the awards in the argument section of its brief, such issues are waived because they were not raised in the statement of the questions involved in this appeal. See MCR 7.212(C)(5); *Bruley v Birmingham*, 259 Mich App 619, 631-632 n 28; 675 NW2d 910 (2003). In any event, the issues are without merit. An appraiser and the umpire determined and "set the amount of the loss" by written agreement. MCL 500.2833(1)(m). We cannot reconstruct this appraisal proceeding and will not attempt to recalculate the amount of loss through speculative means so as to defeat the purpose and effect of the appraisal process. See *DAIIE v Gavin*, 416 Mich 407, 429; 331 NW2d 418 (1982); *Davis*, *supra* at 237-238; *Themo-Plastics R & D, Inc*, *supra*.

Affirmed.

/s/ Hilda R. Gage
/s/ Mark J. Cavanagh

S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

ROBERT J. ROEHRIG, Plaintiff-Appellee,	UNPUBLISHED July 5, 2005
v	No. 252742 Oakland Circuit Court
STATE AUTO MUTUAL INSURANCE CO., Defendant-Appellant.	LC No. 2002-038111-CK

Before: Gage, P.J., and Cavanagh and Griffin, JJ.

GRIFFIN, J. (*dissenting*).

Defendant appeals as of right from an $883,133.42 judgment in plaintiff's favor, pursuant to two appraisal awards in this homeowner's insurance case. I would reverse the judgment and remand for entry of a judgment in the sum of the replacement cost contract insurance limits, minus the deductible and previous payments made by defendant to plaintiff on these claims.[1]

I

This insurance dispute arises out of losses sustained at plaintiff's residence located at 2360 East Hammond Lake Road, Bloomfield Hills, Michigan. At the time of the occurrences, plaintiff possessed a policy of homeowner's insurance with defendant. The maximum policy limits were: building replacement - $343,800.00, contents replacement - $240,660.00, and living expenses - $68,760.00. Plaintiff sustained two separate losses, each of which resulted in a total loss of the house. The total losses occurred because of a January 16, 1999, storm and subsequent water and mildew damage to the premises, and a July 23, 2000, fire.[2] The residence was not

[1] The insurance policy limits for the residence are: building replacement - $343,800.00, contents replacement - $240,660.00, and living expenses - $68,760.00, for total monetary coverage of $653,220.00. Defendant has made prior payments as follows: building - $119,860.89, contents - $90,934.58, and living expenses - $51,859.97, for total prior payments of $262,655.44. In my view, after subtraction of the $500.00 deductible and prior payments from the insurance limits, a total judgment of $390,064.56, plus interest, should be entered.

[2] There is also reference in the file that the residence was struck by lightning on July 28, 2000, although the lightning damage appears to have been combined with the July 23, 2000, fire

(continued…)

repaired between the January 16, 1999, and July 23, 2000, occurrences. Both resulted in the total loss of the residence because the cost to repair the damage from either occurrence would be greater than the cost of totally rebuilding the house.

Pursuant to the insurance policy's appraisal process, the trial court appointed an umpire to resolve a dispute between the parties regarding the amount of damage sustained to the house as a result of the two occurrences. Ultimately, the umpire, Bryan Levy, rendered separate appraisal awards for each loss. The awards contained identical damages. Each state:

> I. BUILDING LOSS
>
> A. Replacement cost value (RCV) for tear down and rebuild . . .
>
> $242,520.41
>
> B. Actual cash value (ACV) of the tear down and rebuild of the premises . . .
>
> $181,390.30
>
> II. CONTENTS LOSS
>
> A. Replacement cost value (RCV) of the contents loss:
>
> $155,875.70
>
> B. Actual cash value (ACV) of the contents loss:
>
> $109,112.99
>
> III. ADDITIONAL LIVING EXPENSES
>
> Additional living expenses (ALE):
>
> $43,170.60
>
> This award takes into consideration the deductible, and all previously paid amounts to the Insured by the Insurer.

Based on the appraisal awards, the trial court entered a judgment in favor of plaintiff in the sum of $883,133.42. When previous payments from defendant are included, plaintiff was awarded total damages of $1,145,788.26. This sum far exceeds the insurance policy limit of $653,220.00.

(…continued)

damage.

I would hold that the appraisal awards contain a manifest mistake because it is apparent on the face of the awards that the damage amount exceeds the policy limits of the insurance contract.

II

Because an appraisal clause in a fire policy that calls for a determination by an umpire is a common-law arbitration agreement, judicial review of the appraisal process is limited to "instances of bad faith, fraud, misconduct or manifest mistake." *Auto-Owners Ins Co v Allied Adjusters & Appraisers, Inc,* 238 Mich App 394, 399; 605 NW2d 685 (1999), quoting *Emmons v Lake States Ins Co,* 193 Mich App 460, 466; 484 NW2d 712 (1992). Common-law arbitration is not subject to as strict a standard of review as is statutory arbitration. *Emmons, supra* at 466.

The statutory appraisal process used to settle a homeowner's insurance claim is a substitute for a judicial determination of a dispute of the amount of loss. *Allied Adjusters & Appraisers, supra* at 399. If the insured and insurer fail to agree on the actual cash value or amount of the loss, either party may make a written demand that the amount of the loss or the actual cash value be set by appraisal. MCL 500.2833(m); *Allied Adjusters & Appraisers, supra* at 397. When they make a written demand for appraisal, each party chooses a "competent, independent appraiser." *Id.* Together, the appraisers pick a "competent, impartial umpire." *Id.* If the two appraisers are unable to agree upon an umpire, the insured or insurer may ask the trial court to select an umpire. *Id.* When any two of the three agree in writing on an amount, that amount becomes set and final. *Id.*

The insurance contract at issue provides for an appraisal award consistent with MCL 500.2833(m): "If [the parties' appraisers] fail to agree, they will submit their differences to the umpire. A decision agreed to by any two will set the amount of total loss." Contractual language is to be construed according to its plain and ordinary meaning, and technical or strained constructions should be avoided. *UAW-GM Human Resource Center v KSL Recreation Corp*, 228 Mich App 486, 491-492; 579 NW2d 411 (1998).

Defendant argues that the judgment based on the two appraisal awards must be reversed because the appraisal awards were based on manifest mistake, bad faith, and misconduct. I agree, in part. I would reverse the judgment and modify the appraisal awards because of manifest mistake regarding the amount of recoverable damages. However, I disagree with defendant's arguments that the appraisal awards must be set aside based on alleged bias of the umpire or alleged fraud, misconduct, or bad faith of plaintiff's appraiser.

III. Manifest Mistake

On appeal, the parties dispute whether the two awards gave plaintiff a double recovery for a single loss. Defendant argues that it is apparent on the face of the awards that each loss necessitated replacement "for tear down and rebuild" of the house. Because plaintiff can recover only once for a total loss, *Great Northern Packaging, Inc v General Tire and Rubber Co*, 154 Mich App 777, 781; 399 NW2d 408 (1986), 12 Couch on Insurance 3d, §§ 175:5 and 175:6, defendant argues that the duplicate award must be vacated. Plaintiff, on the other hand, contends that the arbitrator divided the total damages between the two losses and intended to award fifty percent of the total damages for each loss.

In my view, we need not decide whether the two awards duplicate the total damages for the reason that either award, in itself, contains a manifest mistake on its face because after taking "into consideration the deductible, and all previously paid amounts to the Insured by the Insurer," both awards exceed the insurance policy limits for the residence. Specifically, each appraisal award awards plaintiff $242,520.41 for building replacement cost for tear down and rebuild. However, defendant has made prior payments of $119,860.89 to plaintiff for the building. Accordingly, on its face, both appraisal awards contain a manifest mistake: when the prior payment of $119,860.89 is added to the replacement award of $242,520.41, its total sum of $362,381.30 exceeds the building replacement limit of $343,800.00 by $18,581.13. Similarly, when defendant's prior payments to plaintiff for contents of $90,934.58 are added to the replacement content award of $155,875.70, the total of $246,810.28 exceeds the policy limit contents replacement coverage of $240,660.00. Finally, when the award of additional living expenses of $43,170.60 is added to the prior payment by defendant of living expenses of $51,859.97, the living expenses of $95,030.57 exceed the policy limit for living expenses of $68,760.00.

Because the appraisal awards contain a manifest mistake on their face, when the amounts previously paid by the insurer to the insured are taken into consideration, I would modify the awards and remand for judgment in the amount of the policy limits, minus defendant's prior payments and the $500 deductible.[3]

IV. Umpire Bias

Next, defendant argues that the umpire was biased because he did not allow it to present evidence or participate equally in the appraisal process. Defendant also asserts that there was bad faith and misconduct by the umpire. The umpire may not favor either party, but must serve only equity, fairness, and justice. *Allied Adjusters & Appraisers, supra* at 401. Defendant concludes, based on the amount of the award, that the umpire must have seen evidence that it did not review. Defendant provided its appraiser's affidavit to attack the appraisal award. However, defendant waived the issue of the umpire's misconduct on appeal because defense counsel stated on the record that the challenge was "not really because of any misconduct per se on the part of [the umpire]. I don't want to . . . have the court base it's [sic] decision on that . . . ." In any event, the record does not support a finding of bad faith, fraud, or misconduct by the umpire.

V. Appraiser Misconduct

Finally, defendant contends that the appraisal award should be modified or set aside because of the fraud, misconduct, or bad faith of plaintiff's appraiser. The party attacking an appraiser's impartiality has the burden of showing prejudicial conduct. *Id.* Defendant argues

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[3] I favor directing the entry of a judgment for the replacement cost value policy limits, rather than actual cash value, although at this time the residence and the personal property have not been replaced. In the event that timely replacement does not occur, I would allow defendant to bring an action against the plaintiff to recover the differential between actual cash value and replacement loss value.

that because plaintiff's appraiser previously acted as plaintiff's public adjuster, he committed misconduct in agreeing to the award. Defendant also asserted that plaintiff's appraiser was not an independent appraiser because he had not withdrawn his public adjuster contract. This Court has held that an insured's appraiser is not disqualified because he had a prior contract with the insured to adjust the loss. *Linford Lounge, Inc v Michigan Basic Property Ins Ass'n,* 77 Mich App 710, 713; 259 NW2d 201 (1977). Also, an independent appraiser is not disqualified, as long as the appraiser retains the ability to base any recommendation on his or her own judgment. *Allied Adjusters & Appraisers, supra* at 401. While defendant asserted that the appraiser was not independent, it did not meet its burden of proving that assertion.

I would reverse and remand for the entry of judgment consistent with this opinion and, therefore, respectfully dissent.

/s/ Richard Allen Griffin