2019 WL 8128570
Only the Westlaw citation is currently available.
United States District Court, N.D. California.

FEDERAL INSURANCE COMPANY, Plaintiff,
v.
Richard ANDERSON, M.D., et al., Defendants.

Case No. 18-cv-06920-JST
|
Signed 09/27/2019

Attorneys and Law Firms

Jonathan Gross, Sheila Thompson Addiego, Lawrence Hecimovich, Mound Cotton Wollan & Greengrass LLP, Emeryville, CA, for Plaintiff.

Tyler Churchill Gerking, Shanti Eagle, Farella Braun Martel LLP, San Francisco, CA, for Defendants.

ORDER GRANT MOTION TO COMPEL APPRAISAL

Re: ECF No. 27

JON S. TIGAR, United States District Judge

***1** Before the Court is Plaintiff Federal Insurance Co.'s ("FIC") motion to compel appraisal. ECF No. 27. The Court will grant the motion.

I. BACKGROUND

A. Factual Background

FIC issued Defendants Richard Anderson and Alice Anderson (collectively, "the Andersons") a homeowner's insurance policy that went into effect on July 6, 2014. ECF No. 27-4 at 3. The policy originally provided coverage to the Andersons' property in Yountville, California. *Id.*

Sometime in 2015, the Andersons purchased the property at 45 Vineyard View Drive in Napa, California, for roughly $5,950,000. ECF No. 27-3 ¶ 4; ECF No. 32 ¶¶ 2, 5. The Anderson's policy was modified to include the Vineyard View property, effective February 17, 2015. ECF No. 27-4 at 35. Eleven days later, a fire destroyed the main house on that property. ECF No. 32 ¶ 2.

The parties dispute how much FIC owes the Andersons under the terms of their policy. FIC has paid the Andersons $3,317,517.80 to date, but it asserts that no further payments are required. ECF No. 27-3 ¶ 7; ECF No. 32 ¶ 15. The Andersons contend that FIC owes them roughly $3 million more. ECF No. 27-3 ¶¶ 8-9; ECF No. 32 ¶ 4.

B. Claims Process

After the fire, the Andersons elected to rebuild the house to different specifications that were larger and more expensive than the original. *Id.* ¶ 7. To determine the compensable cost of rebuilding the original home, FIC initiated a competitive bidding process seeking estimates for the hypothetical rebuild project. ECF No. 32-1 at 15-17. The notice informed potential bidders that "[t]he owner may still select you for the *new project* based upon what the receive from you for the replacement of the original home." *Id.* at 15. After receiving four bids, FIC based its measurement of the Anderson's loss, i.e., the cost of original home replacement, on the low bid of $2,537,768. ECF No. 27-4 at 44. FIC provided its estimate to the Andersons on July 6, 2015. *Id.*

In May 2017, after the Andersons completed the rebuilding project, they submitted an updated request based on the actual construction costs. ECF No. 32 ¶ 14. Although FIC paid some of additional costs, it declined to pay the vast majority of them. *See* ECF No. 27-4 at 78. On June 6, 2018, the Andersons served a settlement demand for the difference, based on a total rebuild cost of $6,552,202.38. *Id.* In response, FIC invoked the policy's appraisal provision on June 27, 2018. *Id.* at 78-79. That provision states:

> If you or we fail to agree on the amount of loss, you or we may demand an appraisal of the loss. Each party will select an appraiser within 20 days after receiving written request from the other. The two appraisers will select a third appraiser. If they cannot agree on a third appraiser within 15 days, you or we may request that the selection be made by a judge of a court having jurisdiction. Written agreement signed by any two of the three appraisers shall set the amount of the loss. However, the maximum amount we will pay

 © 2020 Thomson Reuters. No claim to original U.S. Government Works.

> for a loss is the applicable amount of coverage even if the amount of the loss is determined to be greater by appraisal. Each appraiser will be paid by the party selecting the appraiser. Other expenses of the appraisal and the compensation of the third appraiser shall be shared equally by you and us. We do not waive our rights under this policy by agreeing to an appraisal.

***2** ECF No. 27-4 at 27. FIC provided its appraiser selection on July 19, 2018, and requested that the Andersons disclose their selection by August 17, 2018. ECF No. 27-2 at 10-11. The Andersons refused to participate in the appraisal process, reiterating their settlement demand. *Id.* at 29.

After the onset of litigation, the Andersons obtained an independent estimate of the total rebuild cost, which came to $5,979,838.83. ECF No. 31-1. The Andersons provided this updated figure to FIC on December 4, 2018. ECF No. 31 ¶ 2.

C. Procedural History

On November 15, 2018, FIC filed this action, styled as a petition to compel appraisal pursuant to Section 4 of the Federal Arbitration Act ("FAA"). ECF No. 1. The Andersons filed an answer on December 27, 2018, along with California law counterclaims against FIC for breach of contract and breach of the implied covenant of good faith and fair dealing. ECF No. 11.

On May 1, 2019, FIC filed this motion to compel arbitration, again invoking Section 4 of the FAA. ECF No. 27.

II. JURISDICTION

"Section 4 provides for an order compelling arbitration only when the federal district court would have jurisdiction over a suit on the underlying dispute; hence, there must be diversity of citizenship or some other independent basis for federal jurisdiction before the order can issue." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 25 n.32 (1983). Here, the Court has diversity jurisdiction over the underlying dispute, including the Andersons' state-law counterclaims, pursuant to 28 U.S.C. § 1332(a)(1). *See* ECF No. 1 ¶¶ 4-7.

III. MOTION TO COMPEL

FIC's motion invokes Section 4 of the FAA as the Court's authority to grant the requested relief. ECF No. 27 at 6-8. The Andersons' opposition, by contrast, primarily relies on California statutes and state cases applying those provisions. ECF No. 30 at 10-15. The Court therefore must resolve threshold issues determining the applicable law.

A. Legal Background

1. FAA

With some exceptions not applicable here, the FAA applies to arbitration agreements in any contract affecting interstate commerce. *See Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 119 (2001); 9 U.S.C. § 2. Under the FAA, arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds that exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. This provision reflects "both a liberal federal policy favoring arbitration, and the fundamental principle that arbitration is a matter of contract." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011) (internal quotation marks and citations omitted).

Section 4 of the FAA permits "[a] party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration" to petition a district court "for an order directing that such arbitration proceed in the manner provided for in such agreement." 9 U.S.C. § 4. On a motion to compel arbitration, the court's role under the FAA is "limited to determining (1) whether a valid agreement to arbitrate exists and, if it does, (2) whether the agreement encompasses the dispute at issue." *Chiron Corp. v. Ortho Diagnostic Sys., Inc.*, 207 F.3d 1126, 1130 (9th Cir. 2000). When deciding whether a valid arbitration agreement exists, federal courts "apply ordinary state-law principles that govern the formation of contracts." *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995). "[T]he party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration." *Green Tree Fin. Corp. Ala. v. Randolph*, 531 U.S. 79, 91 (2000).

***3** If the court is "satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement." 9 U.S.C. § 4. This provision "leaves no place for the exercise of discretion by a district court, but instead mandates that district courts shall direct the parties to proceed

 © 2020 Thomson Reuters. No claim to original U.S. Government Works.

to arbitration on issues as to which an arbitration agreement has been signed." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985). Accordingly, even "if a dispute presents multiple claims, some arbitrable and some not, the former must be sent to arbitration even if this will lead to piecemeal litigation." *KPMG LLP v. Cocchi*, 565 U.S. 18, 19 (2011) (per curiam).

2. California Arbitration Act

The California Arbitration Act ("CAA") likewise provides for the enforcement of agreements to arbitrate. Cal. Civ. Proc. Code § 1281 ("A written agreement to submit to arbitration an existing controversy or a controversy thereafter arising is valid, enforceable and irrevocable, save upon such grounds as exist for the revocation of any contract."). Of particular relevance here, the Act defines such agreements to include "agreements providing for valuations, appraisals and similar proceedings." *Id.* § 1280(a).

As with the FAA, the CAA requires courts to enforce appropriate petitions to compel arbitration of covered agreements. *Id.* § 1281.2. Unlike the FAA, however, California law provides that, in certain circumstances, a court may stay an order to arbitrate while allowing litigation to proceed. For instance, "[i]f the court determines that there are other issues between the petitioner and the respondent which are not subject to arbitration and which are the subject of a pending action or special proceeding between the petitioner and the respondent and that a determination of such issues may make the arbitration unnecessary, the court may delay its order to arbitrate until the determination of such other issues or until such earlier time as the court specifies." *Id.* [1]

B. Appraisals

Under Ninth Circuit precedent, whether an appraisal constitutes arbitration for purposes of the FAA is a question of state law. *Portland Gen. Elec. Co. v. U.S. Bank Tr. Nat. Ass'n*, 218 F.3d 1085, 1086 (9th Cir. 2000) ("[B]ecause the FAA neither defines arbitration nor spells out whether the term arbitration includes appraisal, we look to state law." (citing *Wasyl, Inc. v. First Bos. Corp.*, 813 F.2d 1579, 1582 (9th Cir. 1987)). [2] The parties do not dispute that California provides the law applicable to this question. ECF No. 27 at 7; ECF No. 30 at 10-11; *see also* ECF No. 27-4 at 37. [3]

***4** California law, in turn, defines appraisals as a form of arbitration. *See Kirkwood v. Cal. State Auto. Assn. Inter-Ins. Bureau*, 193 Cal. App. 4th 49, 57 (2011) ("An agreement to conduct an appraisal included in a standard fire insurance policy constitutes an 'agreement' within the meaning of Code of Civil Procedure section 1280, subdivision (a) and thus is considered to be an arbitration agreement subject to the statutory contractual arbitration law."); *Wasyl*, 813 F.3d at 1582.

Accordingly, an appraisal provision is the proper subject of a motion to compel arbitration under either the FAA or CAA.

C. Governing Law

FIC argues that the Court must compel appraisal under the FAA. ECF No. 27 at 7; *see also Dean Witter*, 470 U.S. at 218. The Andersons, by contrast, contend that the Court should exercise its discretion to defer the request for appraisal under the CAA. ECF No. 30 at 11. The Court concludes that FIC is correct.

First, the FAA applies to the appraisal provision, and FIC invoked the FAA as the exclusive basis for its initial petition and subsequent motion to compel. [4] The Court therefore need not consider whether FIC could alternatively bring a motion under section 1281.2, nor whether the Court would have discretion to stay an appraisal order in an action under that provision. *Cf. Kum Tat Ltd. v. Linden Ox Pasture, LLC*, 845 F.3d 979, 982 (9th Cir. 2017) (explaining that the denial of a motion to compel that "expressly urged application only of California arbitration law and contained no citation to the FAA" was not immediately appealable as a denial of a motion under the FAA); *KCOM, Inc. v. Employers Mut. Cas. Co.*, 829 F.3d 1192, 1197 (10th Cir. 2016) (explaining that party "was the master of its motion to confirm" an arbitration award and giving similar effect to its decision to invoke state arbitration law exclusively). In other words, FIC's motion provides no statutory trigger for the Court to draw on the discretionary authority in section 1281.2.

The Court must also consider an alternative basis for applying section 1281.2; namely, whether the parties incorporated it into the Andersons' policy as a matter of contract. The Supreme Court has explained that where "the parties have agreed to abide by state rules of arbitration, enforcing those rules according to the terms of the agreement is fully consistent with the goals of the FAA, even if the result is that arbitration is stayed where the Act would otherwise permit

it to go forward." *Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989). "In other words, parties are free to contract around the FAA by incorporating state arbitration rules into their agreements." *Wolsey, Ltd. v. Foodmaker, Inc.*, 144 F.3d 1205, 1209 (9th Cir. 1998). To incorporate such rules, "parties must clearly evidence their intent to be bound by [the] rules" in order to overcome "the strong default presumption is that the FAA, not state law, supplies the rules for arbitration." *Sovak v. Chugai Pharm. Co.*, 280 F.3d 1266, 1269 (9th Cir.), *opinion amended on other grounds on denial of reh'g*, 289 F.3d 615 (9th Cir. 2002); *see also Mave Enterprises, Inc. v. Travelers Indem. Co.*, 219 Cal. App. 4th 1408, 1430 (2013) ("[A] federal district court will apply the procedural provisions of the FAA unless the parties expressly adopt the provisions of the CAA.").

***5** Here, the Andersons do not identify any such evidence of an intent to incorporate section 1281.2. Though they cite *Volt*, the Supreme Court in that case accepted the state court's ruling "that by specifying that their contract would be governed by 'the law of the place where the project is located,' the parties had incorporated the California rules of arbitration, including § 1281.2(c), into their arbitration agreement." 489 U.S. at 472 (citation omitted); *see also Wolsey*, 144 F.3d at 1212 ("Significantly, the *Volt* Court *declined to review* the California Court of Appeal's interpretation of the contract." (emphasis in original)). Significant binding and persuasive authority has since concluded that "general choice-of-law clauses do not incorporate state rules that govern the allocation of authority between courts and arbitrators." *Wolsey*, 144 F.3d at 1213 (citing *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995)); *see also Sovak*, 280 F.3d at 1270; *Chiron Corp.*, 207 F.3d at 1131; *R. E. v. Pac. Fertility Ctr.*, No. 18-CV-01586-JSC, 2019 WL 1331044, at *13-14 (N.D. Cal. Mar. 25, 2019).

Indeed, the Andersons' policy does not even contain a true choice-of-law provision. The policy contains a general provision providing only that "[i]f any provision of this policy conflicts with the laws of the state you live in, this policy is amended to conform to those laws." ECF No. 27-4 at 24. This provision, which is not specific to California, does not help the Andersons.

In sum, the mandatory rule of Section 4 of the FAA controls and the Court lacks discretion to defer or stay an order compelling appraisal if FIC is entitled to one. The Andersons' argument that the Court should exercise discretion, and the state cases on which it relies,[5] is thus irrelevant to this motion.

D. Application of FAA

The parties do not dispute the appraisal provision's validity, but the Andersons appear to argue that FIC is seeking to compel appraisal of matters beyond the scope of the appraisal provision.

The Andersons correctly note that, under California law, "[t]he appraisal process is limited in scope." *Lee v. Cal. Capital Ins. Co.*, 237 Cal. App. 4th 1154, 1166 (2015). In short, "[t]he function of appraisers is to determine the amount of damage resulting to various items submitted for their consideration. It is certainly not their function to resolve questions of coverage and interpret provisions of the policy." *Id.* (quoting *Jefferson Ins. Co. v. Superior Court*, 3 Cal. 3d 398, 403 (1970)).

Here, the Andersons criticize FIC's bidding process for unfairly skewing incentives towards low bids, and they contend that their independent estimate presents a more accurate representation of the cost to rebuild. ECF No. 30 at 15-17. These are factual disputes that the appraisal panel may resolve by conducting its own independent valuation of the hypothetical rebuilt home and, if appropriate, various component parts of the project.

Even if the Andersons raise legal issues in addition to these factual disputes, that does not preclude submitting factual disputes to appraisal now. In general, "an appraisal panel may assign a value to items as to which coverage is disputed with the disclaimer that the award does not establish coverage or the insurer's liability to pay," and the "legal issues can be resolved through subsequent litigation." *Lee*, 237 Cal. App. 4th at 1169-70. And where, as here, Section 4 of the FAA applies, the Court lacks the authority to adopt the reverse order and litigate coverage first, regardless of any efficiency concerns cited by the Andersons. *See Dean Witter*, 470 U.S. at 218.

***6** The Court will therefore grant the motion to compel appraisal.

IV. MOTION TO STAY

FIC also asks the Court to exercise its inherent authority to stay these proceedings pending arbitration as a matter of discretion. ECF No. 27 at 8-10 (citing *Landis v. N. Am. Co.*,

299 U.S. 248, 254 (1936)). Because FIC brought its motion under the FAA, however, the Court construes this request as an application for a stay pursuant to 9 U.S.C. § 3. Section 3 provides that "the court ..., upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, *shall* on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement." *Countrywide Home Loans, Inc., v. Mortg. Guar. Ins. Corp.*, 642 F.3d 849, 854 (9th Cir. 2011) (emphasis in original) (quoting 9 U.S.C. § 3). Like Section 4, Section 3 "gives the adjudicating court no discretion as to whether to award relief." *Id.*

As discussed above, the Court concludes that FIC has raised issues that are referable to appraisal under the FAA. Accordingly, the Court will stay these proceedings pending appraisal.

V. APPRAISAL PROTOCOL

Finally, FIC asks the Court to approve its proposed appraisal protocol. ECF No. 27 at 10-11. The proposal includes both procedures for appraisal and directions to appraise specific items. *Id.* at 13-18.

The Court declines to impose procedural rules on the appraisal process. The procedural rules that govern an arbitration (or in this case, an appraisal) are generally a matter of the parties' contract, as supplemented by the appropriate federal or state default rules. *See, e.g., Sovak*, 280 F.3d at 1269. FIC cites no basis for providing the Court with a free-floating authority to fill any procedural gaps rather than leaving those decisions to the arbitrator or appraisers.

The specific items to be appraised is another matter. As part of compelling appraisal, the Court necessarily must tell the appraisal panel what to appraise. Stated differently, the Court must decide which factual disputes are "encompasse[d]" by the appraisal provision. *Chiron*, 207 F.3d at 1130. The Andersons object to the specific items proposed by FIC on the grounds that "[b]ecause coverage determinations are outside the scope of an appraisal, the *only* question the appraisers could answer is the cost to rebuild the house." ECF No. 30 at 21 (emphasis in original). This argument ignores that "[a]n appraisal may encompass disputed items when the disputes turn on issues of coverage, causation, or policy interpretation," provided that the court ultimately resolves those disputes. *Lee*, 237 Cal. App. 4th at 1174. It appears to the Court that an itemized appraisal that addresses the various disputed categories of loss, accompanied by "the disclaimer that the award does not establish coverage or the insurer's liability to pay," *id.* at 1170, will efficiently determine the amount of loss in advance of different conclusions the Court might reach as to the Andersons' coverage under the policy. *See also Garner v. State Farm Mut. Auto. Ins. Co.*, No. C 08-1365 CW, 2008 WL 2620900, at *10 (N.D. Cal. June 30, 2008) (instructing the appraisal panel to provide "alternative valuations" pegged to different coverage methodologies). The Andersons offer no reason to think otherwise.

***7** In the interests of fairness and efficiency, the Court will nonetheless provide the parties an additional opportunity to submit a joint or competing proposals for the Court's directions to the appraisal panel, consistent with the Court's rulings in this Order. The parties may not use these proposals as an opportunity to reargue any of the issues decided here.

CONCLUSION

For the foregoing reasons, the Court grants FIC's motion to compel appraisal and stay proceedings. [6] As discussed above, the parties shall submit either a stipulated proposed list of items to be appraised or competing proposed lists. The parties must make reasonable efforts to agree on a stipulated list. If the parties propose competing lists, they may each accompany their proposals with five pages of argument. [7] *See* Local Rule 3-4(c)(2). This submission is due by October 11, 2019.

In addition, the parties are instructed to submit a joint status report to the Court within ninety days of the date this order is electronically filed, and additional joint status reports every ninety days thereafter, apprising the Court of the status of the appraisal proceedings. Upon completion of the appraisal proceedings, the parties shall jointly submit to the Court, within fourteen days, a report advising the Court of the outcome of the arbitration, and request that the case be dismissed or that the case be reopened and a case management conference be scheduled.

IT IS SO ORDERED.

All Citations

Slip Copy, 2019 WL 8128570

 © 2020 Thomson Reuters. No claim to original U.S. Government Works.

Footnotes

1 Another similar exception applies where "[a] party to the arbitration agreement is also a party to a pending court action or special proceeding with a third party, arising out of the same transaction or series of related transactions and there is a possibility of conflicting rulings on a common issue of law or fact." Cal. Civ. Proc. Code § 1281.2(c).

2 The Court notes that the Ninth Circuit is in the minority of a circuit split on this issue. *Compare* *Bakoss v. Certain Underwriters*, 707 F.3d 140, 144 (2d Cir. 2013); *Evanston Ins. Co. v. Cogswell Properties, LLC*, 683 F.3d 684, 693 (6th Cir. 2012); *Salt Lake Tribune Publ'g Co., LLC v. Mgmt. Planning, Inc.*, 390 F.3d 684, 689 (10th Cir. 2004); *Fit Tech, Inc. v. Bally Total Fitness Holding Corp.*, 374 F.3d 1, 6 (1st Cir. 2004), *with* *Hartford Lloyd's Ins. Co. v. Teachworth*, 898 F.2d 1058, 1062 (5th Cir. 1990) (following *Wasyl*); *see also* *Portland Gen. Elec.*, 218 F.3d at 1091 (Tashima, J., concurring) (acknowledging *Wasyl* as controlling but expressing concern that it was wrongly decided); *id.* at 1091-92 (McKeown, J., concurring) (same).

3 Indeed, the California Insurance Code requires contracts providing fire insurance to properties in California to include a standard appraisal provision. Cal. Ins. Code §§ 2070, 2071.

4 The parties do not dispute that the Andersons' insurance policy is a contract involving interstate commerce. *See also* *Pac. States Indus. Inc. v. Am. Zurich Ins. Co.*, No. 18-CV-04064-LHK, 2018 WL 6106383, at *4 (N.D. Cal. Nov. 21, 2018) ("The FAA applies to contracts in interstate commerce, and 'an insurance company doing business across state lines engages in interstate commerce.' " (quoting *Humana Inc. v. Forsyth*, 525 U.S. 299, 306 (1999)).

5 *See* ECF No. 30 at 12 (citing *Alexander v. Farmers Ins. Co.*, 219 Cal. App. 4th 1183 (2013); *Doan v. State Farm Gen. Ins. Co.*, 195 Cal. App. 4th 1082 (2011); *Kirkwood v. Cal. State Auto. Assn. Inter-Ins. Bureau*, 193 Cal. App. 4th 49 (2011)).

6 Arbitration proceedings will be initiated in the Northern District of California. As directed by 9 U.S.C. § 4, arbitration "shall be within the district in which the petition for an order directing such arbitration is filed." Under Ninth Circuit law, "arbitration cannot be compelled to occur somewhere outside this district," regardless whether the parties' arbitration agreement sets another location. *Capelli Enterprises, Inc. v. Fantastic Sams Salons Corp.*, No. 5:16-CV-03401-EJD, 2017 WL 130284, at *5 (N.D. Cal. Jan. 13, 2017) (citing *Cont'l Grain Co. v. Dant & Russell*, 118 F.2d 967, 968-69 (9th Cir. 1941)); *see also* *Homestake Lead Co. of Mo. v. Doe Run Res. Corp.*, 282 F. Supp. 2d 1131, 1144 (N.D. Cal. 2003).

7 If the parties submit competing lists, the Court will endeavor to choose, in all respects, the single proposal it concludes is most reasonable. *See* Michael Carrell & Richard Bales, *Considering Final Offer Arbitration to Resolve Public Sector Impasses in Times of Concession Bargaining*, 28 Ohio St. J. on Disp. Resol. 1, 20 (2013) ("In baseball arbitration ... the parties ... have every incentive to make a reasonable proposal to the arbitrator because the arbitrator will choose the more reasonable offer").

End of Document

© 2020 Thomson Reuters. No claim to original U.S. Government Works.