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HEADLINE: Judge Dismisses Insurer's Coverage Action Regarding Costs For Water Damage

DATELINE: SAN FRANCISCO -

BODY:

Noting an existing appraisal proceeding between an insurer and its insured, a California federal judge on March 28 dismissed the insurer's coverage action regarding a dispute over costs for water damage to the insured's home (Federal Insurance Co. v. Tom Newby, No. 12-5084, N.D. Calif.; 2013 U.S. Dist. LEXIS 34301).

(Amended order available 69-130409-051R)

On June 15, 2010, Tom Newby reported to his insurer, Federal Insurance Co., that his residence had sustained water damage. Before Federal adjusted the claim, Newby had the master bathroom repaired and remodeled.

Total construction costs were \$501,727.03, of which Newby's contractor estimated \$221,702.02 was the cost to repair the water damage, with the remainder of the costs being for work solely related to upgrades.

Appraisal

Federal's claims adjuster determined that Newby was entitled to \$123,156.94 for the water damage. The insurer paid Newby that amount. However, Newby requested an appraisal. Federal and Newby subsequently selected appraisers and exchanged their respective proposed award forms.

On Oct. 1, 2012, Federal sued Newby in the U.S. District Court for the Northern District of California, seeking declaratory relief and alleging that the parties to the appraisal could not reach an agreement as to the scope of loss to submit to the panel and as to an award form.

On Oct. 28, William C. Thomas, the appraisal panel umpire, notified Federal and Newby that the appraisal had

been scheduled for Dec. 10 and 11 and advised the parties that they would present evidence and testimony of witnesses to the panel on the issue of value and loss only. On Nov. 27, Thomas, after being notified of Federal's complaint and its plans to file a motion for summary judgment, canceled the appraisal hearing.

Water Damage

In the federal court, Federal moved for summary judgment, arguing that the parties dispute how the appraisal panel should resolve their disagreement as to the amount of the loss. Newby responded that the complaint should be dismissed. Judge Maxine M. Chesney dismissed the case and denied the motion as moot.

The judge found that Federal has failed to show that the appraisal panel has taken any action that suggests that it does not understand its duties under the parties' agreement.

The judge also explained that the insurer failed to allege that the appraisal panel, in the absence of declaratory relief, is likely to act in a way that would violate any law or the terms of the appraisal clause in the policy. Federal's request for declaratory relief directing the appraisal panel to conduct the appraisal hearing in a certain manner is premature, the judge said.

Thus, the judge determined that Federal has failed to show the existence of a case or controversy sufficient to warrant issuance of the type of declaratory relief it seeks.

Jurisdiction

Alternatively, Judge Chesney declined to exercise discretion to hear Federal's complaint. She found that the Federal's issues are procedural issues arising in the context of a pending appraisal proceeding governed by state law and that nothing suggests that the appraisal panel would be unable or unwilling to resolve the issues.

"Here, rather than present its issues to the appraisal panel in the first instance and later seeking review by a petition to vacate any adverse award the panel may issue, Federal seeks to have a federal district court make, in advance of the appraisal hearing, what is in essence an advisory ruling as to how the panel should conduct certain aspects of the proceeding and how it should set forth its findings in writing," the judge said.

Finally, the judge ruled that resolution in the federal court of Federal's issues would not resolve the parties' dispute as to the amount of loss, and, consequently, would not avoid the need for further litigation before the appraisal panel.

Philip L. Pillsbury Jr. and Eric K. Larson of Pillsbury & Levinson in San Francisco represent Newby. Gene A. Weisberg of Gladstone Michel Weisberg Willner & Sloane in Marina del Rey, Calif., represents Federal.

(Additional documents available: Plaintiff's motion for summary judgment 69-130409-052B

Defendant's opposition 69-130409-053B

Plaintiff's reply 69-130409-054B)

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