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State of Minnesota
Dakota County

District Court
First Judicial District
Court File Number: **19HA-CV-10-7373**
Case Type: Contract

Notice of Filing of Order

E CURTIS ROEDER
8050 W 78TH ST
EDINA MN 55439

Charleswood Association vs Harleysville Insurance Company

You are notified that an order was filed on this date.

Dated: January 17, 2013

Carolyn M. Renn
Court Administrator
Dakota County District Court
1560 Highway 55
Hastings MN 55033
651-438-8100

cc: ROBERT J TERHAAR

A true and correct copy of this notice has been served by mail upon the parties herein at the last known address of each, pursuant to Minnesota Rules of Civil Procedure, Rule 77.04.

STATE OF MINNESOTA | DISTRICT COURT

COUNTY OF DAKOTA | FIRST JUDICIAL DISTRICT

Charleswood Association, a Minnesota Condominium Association,

Plaintiff,

vs.

Harleysville Insurance Company, a Pennsylvania Corporation,

Defendant.

Court File No. 19HA-CV-10-7373

ORDER FOR SUMMARY JUDGMENT, JUDGMENT AND MEMORANDUM

This matter came before the Court on October 30, 2012 at the Dakota County Judicial Center, Hastings, Minnesota, for hearing on Plaintiff's Motion for Summary Judgment.

Curtis Roeder, Esq., appeared on behalf of Plaintiff Charleswood Association. Robert Terhaar, Esq., appeared on behalf of Defendant Harleysville Insurance Company.

Based upon the file and arguments of counsel, the Court makes the following:

FINDINGS OF FACT

1. At all relevant times, Plaintiff Charleswood Association ("Charleswood") was insured under an insurance policy (the "Policy") issued by Defendant Harleysville Insurance Company ("Harleysville") with respect to townhomes located in Farmington, Minnesota. *See Affidavit of Howard Glad, filed January 10, 2011 ("Glad Aff."),* Ex. 1.

2. On May 25, 2009, Charleswood suffered covered losses under the Policy when a severe storm damaged the roofs and siding on a number of Charleswood's townhomes. *Id.*, ¶ 2, Exs. 2 & 3.

3. Charleswood submitted a claim for the storm damage under the Policy. *See Id.*, ¶ 3, Ex. 3; *Affidavit of John Hagan ("Hagan Aff."),* ¶ 1.

4. On August 5, 2009, at the request of Harleysville, Haag Engineering ("Haag") inspected Charleswood's property to determine the extent of the storm damage. *See Affidavit of M. Chapin Hall ("Hall Aff."),* Ex. 1.

5. On September 3, 2009, Haag issued a report detailing its findings and conclusions regarding the nature, extent and causes of Charleswood's damages. *Id.*

6. On November 25, 2009, Harleysville issued a claims payment to Charleswood in the amount of $9,197.77, "which represented the cost to repair the [storm damage] minus [Charleswood's] $5,000.00 deductible." *Hagan Aff.,* ¶ 4; Ex. 1.

7. Because the siding on the townhomes was no longer being manufactured, Harleysville proposed to replace the damaged siding using siding of "like kind and quality to the extent practicable," as required by the Policy. *Id.,* ¶ 3.

8. In January and February of 2010, Charleswood's Board of Directors reviewed Harleysville's proposed samples of replacement siding. *Id.,* ¶¶ 5-6. The Board rejected the samples after determining they were "not of like kind and quality and [did] not reasonably match the existing siding on the buildings." *Id.; Glad Aff.,* Ex. 4, attached letter dated April 14, 2010.

9. On August 13, 2010, Charleswood notified Harleysville that it had retained legal representation with regard to its claim for losses. *Id.,* Ex. 5.

10. By letter dated September 29, 2010, Charleswood objected to Harleysville's valuation of the losses and demanded appraisal, as provided by the Policy. *Id.,* Ex. 6.

11. On October 15, 2010, Harleysville refused to participate in appraisal based on its belief that the dispute involved questions of coverage not suitable for the appraisal process. *Id.,* Ex. 7.

12. On March 1, 2011, Harleysville required Charleswood to complete and submit a form prepared by Harleysville entitled "Sworn Statement in Proof of Loss." *See Affidavit of Robert Terhaar ("Terhaar Aff."),* Ex. A, filed October 9, 2012.

13. On April 20, 2011, Charleswood submitted its Sworn Statement in Proof of Loss. *Id.,* Ex. B. In that Statement, Charleswood answers that the actual cash value (ACV) of the property at the time of the loss was "[v]ariable to individual properties"; the total loss was estimated at $1,249,804.00, per Central Roofing Company's proposal for repairs; and the depreciation value was "unknown." *Id.*

14. In a letter accompanying the Sworn Statement in Proof of Loss, Charleswood demanded that Harleysville tender payment in the amount of Central Roofing's repair estimate. *Id.* Approximately one week later, Charleswood submitted Central Roofing Company's written proposal and estimate for repairs. *Id.*

15. On December 30, 2011, Charleswood served Harleysville with a Petition for Removal to Appraisal. *See Affidavit of Service,* filed January 3, 2011.

16. The Court issued an order compelling Harleysville to participate in appraisal. *See Order* dated March 18, 2011.

17. Prior to the appraisal, Harleysville requested that the appraisal panel determine both the repair/replacement cost value (RCV) and the actual cash value (ACV) of Charleswood's losses. *See Terhaar Aff.,* Exs. C & D. Charleswood requested a determination of the RCV alone. *Id.*, Ex. D. It was Harleysville's position that the Policy required an ACV award to trigger its duty to tender payment. *See Glad Aff.,* Ex. 1.

18. On June 28, 2011, the appraisal panel issued an Award determining that the RCV of Charlewood's losses was $521,835.72. *Beckmann Aff.,* Ex. 1. The Award did not include an ACV figure. *Id.* The issue of interest was not submitted to the panel and the Award did not include any interest. *Id.*

19. The Policy required Harleysville to tender a loss payment within 30 days of its receipt of an appraisal award. *See Glad Aff.,* Ex. 1. Twenty eight days after the Award issued, Harleysville notified Charleswood of its intent to appeal the Award because it failed to include an ACV figure. *See Terhaar Aff.,* Ex. B.

20. By letter dated August 31, 2011, Charleswood made a formal demand that Harleysville pay the RCV Award. *See Roeder Aff.*, Ex. A, filed September 21, 2011. The letter also indicated that the parties agreed to remand the Award to the appraisal panel for a determination of the ACV of Charleswood's losses. *Id.*

21. In September of 2011, Charleswood moved the Court to confirm the RCV Award and grant leave to amend the Complaint to add a claim for taxable costs under

Minn. Stat. § 604.18 ("Good Faith Statute"). *See Notice of Motion and Motion to Confirm Award & Amend Complaint.*

22. A hearing on Charleswood's Motion to Confirm was held on September 26, 2011. The parties informed the Court that the appraisal panel issued a Supplemental Decision that same day which determined that the ACV of the losses was $335,624.01. *See Beckmann Aff.,* Ex. 2. The issue of interest was not submitted to the panel and the Supplemental Award did not include interest. *Id.*

23. At the hearing, Charleswood argued that Harleysville violated the Good Faith Statute by unreasonably denying Charleswood the Policy benefits of appraisal and claims-payment within 30 days of receiving the June 28, 2011 Award. Harleysville asserted the Good Faith Statute was inapplicable because appraisal occurred, the original Award was incomplete in that it failed to include the ACV of the losses and Harleysville intended to tender an ACV payment within 30 days of the Supplemental Award.

24. On October 24, 2011, within 30 days of receiving the Supplemental Award, Harleysville tendered payment to Charleswood in the amount of the ACV stated therein. *See Terhaar Aff.,* Ex. E. The parties requested that judgment be entered in the amount of the ACV Award. The parties stipulated that Harleysville would pay an amount up to the RCV Award if Charleswood conducted repairs and expended an amount over the ACV payment. That agreement was conditioned upon Harleysville's receipt of Charleswood's proper notice of pending repairs and documentation to support the additional claim beyond the ACV, and Harleysville's opportunity to audit repair invoices for an RCV claim.

25. The Court issued an Order finding that the Good Faith Statute was applicable but that Charleswood failed to make a prima facie showing that Harleysville's actions rose to the level of constituting bad faith. *See Order*, dated November 17, 2011. Pursuant to the parties' stipulation, the Court confirmed the Supplemental Award and incorporated the parties' agreement regarding Charleswood's option to bring a later RCV claim. *Id.*

26. On July 26, 2012, following Charleswood's completion of repairs and Harleysville's inspection of the property, Harleysville issued payment to Charleswood for the remaining RCV claim of $177,013.94. *See Beckmann Aff.*, Ex. 4; *Terhaar Aff.*, Ex. K. In a letter accompanying that payment, Harleysville stated that the amount paid included a deduction of $9,197.77, which represented "the amount of the advance payment Harleysville already made on [the] claim" in November of 2009. *Terhaar Aff.*, Ex. K.

27. Charleswood now moves for entry of judgment and an award of prejudgment interest under Minn. Stat. § 549.09.

28. Harleysville does not object to entry of judgment but disputes Charleswood's entitlement to prejudgment interest.

ORDER

1. Charleswood is entitled to judgment in the amount of $512,637.95, plus prejudgment interest in the amount of $123,168.50, for a total amount of $635,806.45. *See attached Interest Calculation.* Defendant Harleysville, having tendered payment in the amount of $512,637.95 prior to the making of this Order, is entitled to a credit in the amount of said payment, leaving a judgment balance of $123,168.50.

2. Judgment shall be entered in favor of Charleswood Association, against Harleysville Insurance Company, in the amount of $123,168.50.

3. Charleswood is entitled to post-judgment interest, as calculated by the Court Administrator.

4. The attached Memorandum is incorporated herein as additional Findings of Fact and Conclusions of Law.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: January 17, 2013

BY THE COURT:

Patrice K Sutherland
JUDGE OF DISTRICT COURT

JUDGMENT

I HEREBY CERTIFY THAT THE ABOVE ORDER CONSTITUTES THE JUDGMENT OF THE COURT.

CAROLYN M. RENN, COURT ADMINISTRATOR

BY: _____ DEPUTY

DATED: 1/17/2013 (SEAL)

MEMORANDUM

Summary judgment is appropriate if the pleadings, affidavits and other documents before the court clearly show there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. Minn. R. Civ. P. 56.03. The moving party has the burden of proof, and the court must resolve all doubts and factual inferences against the moving party. *Nord v. Herreid,* 305 N.W.2d 337, 339 (Minn. 1981). However, the non-moving party must provide specific facts indicating that there is a genuine issue of fact. *Hunt v. IBM MidAmerica Employees Federation,* 384 N.W.2d 853, 855 (Minn. 1986).

An award of prejudgment interest lies within the sound discretion of the district court and will not be disturbed absent an abuse of that discretion. *In re Estate of Renzykowski,* 409 N.W.2d 888, 892-93 (Minn. App. 1987).

There are no genuine issues of material fact and the matter is ripe for summary judgment.

Prejudgment interest may be provided by statute, common law or contract. *See* Minn. Stat. 549.09, subd. 1(b) (providing for prejudgment interest "except as otherwise provided by contract or allowed by law"); *see also Trapp v. Hancuh,* 587 N.W.2d 61 (Minn. App. 1998) ("By making an exception for prejudgment interest 'allowed by law,' the legislature supplemented, but did not replace, the existing common law allowing prejudgment interest.").

In this case, prejudgment interest is not "otherwise provided by contract." The Policy contains no provision that allows or excludes prejudgment interest in the case of a first-party insurance dispute. Where an insurance policy is silent on the issue of

prejudgment interest, prejudgment interest is allowed unless the sum of the judgment for damages and award for prejudgment interest exceeds the policy's liability limits. *Lessard v. Milwaukee Ins. Co.,* 496 N.W.2d 852, 856 (Minn. App. 1993). Here, the total judgment for damages is $512,637.95 and the award for prejudgment interest is $123,168.50. The sum of these amounts is $635,806.45, which is well within the Policy's aggregate liability limit of $2,000,000 and occurrence limit of $1,000,000.

Accordingly, Charleswood's entitlement to prejudgment interest lies with common law or Minnesota Statute § 549.09.

Under common law, prejudgment interest on an unliquidated claim begins to accrue at the time the claim arises "where the damages were readily ascertainable by computation or reference to generally recognized standards such as market value and not where the amount of damages depended upon contingencies or upon jury discretion (as in actions for personal injury or injury to reputation)." *Potter v. Hartzell Propeller, Inc.,* 291 Minn. 513, 518, 189 N.W.2d 499, 504 (1971) (citations omitted); *ICC Leasing Corp. v. Midwestern Mach. Co.,* 257 N.W.2d 551, 556 (Minn.1977) (equating liquidated claims with readily ascertainable unliquidated claims).

Harleysville could not be expected to ascertain its liability until Charleswood gave Harleysville notice of its claim for insurance proceeds. The record does not disclose the date Charleswood first notified Harleysville of its claim for losses as a result of the May 25, 2009 storm. But the evidence clearly establishes that by August 5, 2009, Harleysville had notice of Charleswood's claim. On that date, Haag Engineering conducted a thorough on-site investigation of Charleswood's property at the request of Harleysville "to determine the extent of wind-caused damage." *See Hall Aff.,* Ex. 1, p. 1

("the Haag Report"). The Haag Report notes the file number assigned by Harleysville to Charleswood's claim and is addressed to John Hagan, the Claims Representative who handled Charleswood's claim. *Id.; Hagan Aff.* The Haag Report states:

> On August 5, 2009, we met with the following individuals at the beginning of our inspection: Bill Berscheld of VeriClaim, and Henry Germain of Stock Roofing. Mr. Germain reported that his company had been called to make repairs following wind damage to the siding and roofing of some buildings in May 2009.

Hall Aff., Ex. 1, p. 3. Notably, the Policy does not require written notice of its loss. *See Glad Aff.*, Exhibit 1, CO 0316 04 02, Amendatory Endorsement, p. 1, ¶ 5; CG 26 81 12 04 (stating that "[t]he requirement to notify us can be satisfied by notifying our agent" and that "[n]otice can be by any means of communication."). These facts clearly establish that, not only did Harleysville have notice of Charleswood's claim as of August 5, 2009, Harleysville was in the course of processing that claim. Once Harleysville had notice of the claim, it had a duty to settle the claim promptly and in good faith. *St. Paul Fire & Marine Ins. Co. v. A.P.I., Inc.,* 738 N.W.2d 401, 407 (Minn. App. 2007).

On September 3, 2009, Haag Engineering issued to Harleysville its ten page report detailing the nature, extent and causes of Charleswood's claimed damages. As of that date, Harleysville was in a position to readily ascertain its potential liability by use of an objective standard of measurement. That measurement is fixed by the Policy itself, as the ACV and/or RCV of the losses. The mere fact that the amount was not fixed and determined is of no legal significance so long as Harleysville could determine the amount of its *potential* liability by conducting an *objective* investigation of Charleswood's losses and by reference to the valuation provisions of the Policy. *See Solid Gold Realty, Inc. v. Mondry,* 399 N.W.2d 681, 684 (Minn. App. 1987) (the court does not require an

exact figure, but focuses on "whether [the defendant] could have determined the amount of its potential liability from a generally recognized objective standard of measurement.") (quoting *ICC Leasing Corp. v. Midwestern Mach. Co.* 257 N.W.2d 551, 556 (Minn. 1977)). Here, Harleysville was well aware of the claim against it and the extent of Charleswood's damages, and could thus quantify its potential liability.

The Policy required Harleysville to tender payment for an insured loss "30 days after a satisfactory proof of loss is received, and the amount of the loss has been established either by written agreement with [the insured] or the filing of an appraisal award with [Harleysville]." *Glad Aff.,* Ex. 1, CO 1000 10 02, p. 29. The Policy did not require Charleswood to submit a Sworn Statement in Proof of Loss unless specifically requested by Harleysville. *See Id.*, CO 1000 10 02, p. 25; CO 0316 04 02, pp. 1-2. Harleysville did not request a Sworn Statement from Charleswood until March 1, 2011– two years after the date of the storm; one year after Harleysville had already conducted a thorough inspection of the Charleswood's property, valued the losses and issued a claims payment; and five months after Harleysville refused to comply with Charleswood's request for appraisal. These facts suggest that Harleysville received satisfactory proof of loss from Charleswood long before its request for a Sworn Statement. *See Reliance Motor Co. v. St. Paul Fire & Marine Ins. Co.,* 165 Minn. 442, 444, 206 N.W. 655, 656 (Minn. 1926) (stating: "The general rule is that there may be an express or an implied waiver of proofs of loss and that a waiver may be inferred from any words or conduct of the insurer's authorized officers or agents, evincing an intention on the part of the insurer not to insist on compliance with the requirements of the policy in respect to proofs of loss, and calculated to lead the insured to believe that they will

not be insisted on."). The delay in Charleswood's submitting the Sworn Statement in Proof of Loss and the delay in filing the Appraisal Award was wholly attributable to Harleysville's conduct. Under these circumstances, the due date for claims payment under the Policy cannot stand as the basis for denying Charleswood's recovery for the time-value of the amount it was rightfully owed.

On November 25, 2009, Harleysville issued a claims payment to Charleswood in the amount of $9,197.77, "which represented the cost to repair the [storm damage] minus [Charleswood's] $5,000.00 deductible." *Hagan Aff.,* ¶ 4; Ex. 1. This fact demonstrates Harleysville's recognition of its liability to Charleswood and its ability to quantify the liability. Harleysville issued that payment without requiring Charleswood to submit a Sworn Statement in Proof of Loss and without Charleswood having first repaired or replaced the damaged property. The fact that the parties disputed the amount owed does not preclude an award of interest. In completing the Sworn Statement of Proof of Loss, Charleswood relied on Central Roofing Company's estimate for repairs in claiming approximately $1.2 million in damages. Despite the Policy's aggregate and occurrence limits of $2 million and $1 million dollars, respectively, Harleysville stood firm on its valuation of approximately $14,000.00. Ultimately, Charleswood was awarded over $500,000.00 by the appraisal panel. This relatively wide range in damage estimates does not alter the conclusion that Harleysville could readily ascertain its potential liability to Charleswood as of September 3, 2009. In *ICC Leasing Corp. v. Midwestern Machinery Co.,* 257 N.W.2d 551 (Minn.1977), the supreme court stated:

> In determining whether interest should be allowed the question was not whether the parties agreed on the amount of damages *but whether [the defendant] could have determined the amount of its potential liability from a generally recognized objective standard of measurement.* * * * Mere difference of opinion as to the exact amount of damages was not sufficient to excuse [the defendant] from compensating [the plaintiff] for loss of the use of its money.

Id. at 556 (citation omitted) (emphasis supplied). The fact that Charleswood disputed Harleysville's claim valuation and arrived at a higher value for the losses does not justify a denial of prejudgment interest. "A bona fide dispute as to the amount of a claim should not bar the accrual of interest thereon. Where interest is considered solely in the light of compensation for the use by one of another's funds, it should be more readily awarded." *Lacey v. Duluth, M. & I.R. Ry. Co.*, 236 Minn. 104, 108, 51 N.W.2d 831, 834 (Minn. 1952) (citation omitted); *see also, Cargill, Inc. v. Taylor Towing Serv., Inc.*, 642 F.2d 239, 241-42 (8th Cir. 1981) (where trial court denied prejudgment interest on the grounds that the plaintiff had unreasonably inflated its claim, appellate court reversed and remanded the matter, stating that "[p]rejudgment interest is to be awarded...unless there are exceptional circumstances to justify the refusal."); *Potter v. Hartzell Propeller, Inc.*, 291 Minn. 513, 519 189 N.W.2d 499, 504 (1971) (citation omitted) ("A dispute as to the amount of damages should not in all circumstances bar the accrual of interest on the damages, else plaintiff's right to interest might depend merely upon the reasonableness of the defendant."). The fact that the parties disagreed about the amount of damages did not affect Harleysville's ability to quantify its potential liability and thus does not defeat an award for prejudgment interest.

The appraisal panel inspected Charleswood's property, reviewed documentation and received testimony in arriving at its Awards. In determining the value of

Charleswood's damages, the panel acted within its authority. The Awards suggests that Harleysville grossly undervalued Charleswood's claim. But this does not change the fact that Harleysville could readily determine its *potential* liability as of September 3, 2009. *See St. Joseph Light & Power Co. v. Zurich Ins. Co.*, 698 F.2d 1351, 1356 (8th Cir. 1983) ("a defendant's denial of liability or challenge to the amount claimed on a contract will not alter the fact that the amount claimed by the plaintiff is sufficiently ascertainable to require the award of prejudgment interest.").

Charleswood is entitled to prejudgment interest, whether or not it incurred any out-of-pocket expenses during the pendency of this dispute. Awards of prejudgment interest are designed to serve two functions: (1) to compensate prevailing parties for the true cost of money damages incurred, and (2) to promote settlements when liability and damage amounts are fairly certain and to deter attempts to benefit unfairly from delays inherent in litigation. *Stroh Container Co. v. Delphi Industries, Inc.*, 783 F.2d 743, 752 (8th Cir. 1986), *cert. denied,* 476 U.S. 1141, 106 S. Ct. 2249, 90 L.Ed.2d 695 (1986); *see also, Lienhard v. State*, 431 N.W.2d 861, 865 (Minn.1988) (finding in dictum that prejudgment interest "convert[s] time-of-demand damages into time-of-verdict damages"). The amount of damages awarded (over $500,000.00) is substantially greater than Harleysville's settlement offer (just over $14,000.00). There is no evidence that Harleysville ever budged from its under-valuation of the claim. Charleswood labored for three years to receive the amount it was owed. Charleswood attempted to settle the dispute expeditiously by invoking its Policy right to appraisal. Harleysville refused to participate, despite the fact that appraisal is a Policy right and is favored by the law. Harleysville's refusal further delayed Charleswood's recovery and forced

Charleswood to bring this action and incur additional losses by way of attorney's fees and costs. Further delay was caused when Harleysville waited 28 days, which was 2 days before payment on the Award was due, to notify Charleswood that it would not honor the Award for failure to include an ACV figure. In hindsight, the Order to Compel should have directed Harleysville to satisfy an RCV award without requiring Charleswood to first make repairs due to the earlier finding that Harleysville had waived the 180 day deadline for Charleswood to give notice of an RCV claim. During the pendency of this dispute, Harleysville has accrued pecuniary benefit by the simple expedient of producing a conflicting and inadequate estimate of value and refusing to appraise the losses. Under these circumstances, "it would be manifestly unfair to permit the insurance company to dispute a claim and leave the property owners the full burden of loss of the money until the award is approved." *David A. Brooks Enterprises, Inc. v. First Systems Agencies,* 370 N.W.2d 434, 435-36 (Minn. App. 1985).

Accordingly, to promote full compensation, prejudgment interest is appropriate pursuant to common law, at the statutory rate of 10% annually, commencing September 3, 2009 on the full balance of $512,637.95 until the ACV was paid on October 24, 2011, and then 10% annually on the remaining balance of $177,013.94 from October 25, 2011 until payment on July 26, 2012. *See* Minn. Stat. § 549.09, subd. 1(c); *Interest Calculation (attached).*

Interest Calculation

		Interest
Damages owing from 09/03/09-10/24/11:	$512,637.95	
Yearly Interest (10%):	$51,263.80	
Daily Interest:	$140.45	
09/03/09-09/03/10 (1 year):		$51,263.80
09/03/10-09/03/11 (1 year):		$51,263.80
09/03/11-10/24/11 (52 days):		$7,303.40
subtotal interest:		$109,831.00
Damages owing from 10/25/11-07/26/12:	$177,013.94	
Yearly Interest (10%):	$17,701.40	
Daily Interest:	$48.50	
10/25/11-07/26/12 (275 days):		$13,337.50
Grand Total Interest:		**$123,168.50**