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WASHINGTON COUNTY
DISTRICT COURT

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STATE OF MINNESOTA

APR 20 2016

DISTRICT COURT

COUNTY OF WASHINGTON

TENTH JUDICIAL DISTRICT

COURT ADMINISTRATOR

By JMA Deputy

Court File: 82-CV-15-5709

Dawn Kaltenhauser,

Plaintiff,

vs.

ORDER

American Family Mutual Insurance Company,

Defendant,

The above-entitled matter came before the Honorable B. William Ekstrum on February 12, 2016, at the Washington County Courthouse, Stillwater, Minnesota, pursuant to Plaintiff's Motion to Confirm an Appraisal Award and for Pre-Award Interest, Post Judgment Interest, and Costs and Disbursements.

Timothy Johnson, Esq. appeared on behalf of Plaintiff, Dawn Kaltenhauser. Mark Hellie, Esq. appeared on behalf of Defendant, American Family Mutual Insurance Company.

Based upon the files, records and proceedings herein, the Court makes the following:

ORDER

1. Plaintiff's motion to confirm the appraisal award of September 3, 2015 is hereby **GRANTED**. The Court hereby confirms the entire appraisal award including the award of \$6,831 for mismatched shingles.

2. Plaintiff's motion for pre-award interest is hereby **GRANTED**. Plaintiff is hereby awarded pre-award interest from the time her claim was reported to American Family Insurance, June 29, 2014, until the appraisal panel's award on September 3, 2015. Plaintiff is hereby awarded post-award interest at ten percent from September 3, 2015, the date of the appraisal award, until the date that all underlying amounts are paid in full.

3. Plaintiff's motion for costs and disbursements pursuant to Minn. Stat. §§ 549.02 and 549.04

is **GRANTED**, in part and **DENIED**, in part. Plaintiff is hereby awarded costs of \$205.50 under Minn. Stat. § 549.02 and Plaintiff's request for disbursements under Minn. Stat. § 549.04 is denied.

4. Plaintiff's motion for an Order declaring that payment pursuant to the loss payment provision of the policy is immediately due is **GRANTED**. Defendant is hereby ordered to immediately make payment to Plaintiff.

5. All other requests for relief are hereby **DENIED**.

6. The attached Memorandum of Law is hereby incorporated by reference.

7. The Washington County Court Administrator shall transmit notice of filing of this Order by the designated e-filing and e-service system, e-mail, or mail to every party affected thereby or upon such party's attorney of record, whether or not such party has appeared in the action, at the party or attorney's last known mail or e-mail address. Such transmittal shall constitute due and proper notice of the Order for all purposes.

LET THE JUDGMENT BE ENTERED ACCORDINGLY

4/20/16
Date

BY THE COURT:

B. William Ekstrum
B. William Ekstrum
Judge of District Court

JUDGMENT

Pursuant to the Rules of Civil Procedure, I hereby certify that the foregoing Order constitutes the judgment of this court.

Annette Fritz
Court Administrator

Date: 4/21/16 By: [Signature]
Deputy Clerk of District Court

File # _____
F I L E D WASHINGTON COUNTY DISTRICT COURT **F I L E D**
APR 21 2016
COURT ADMINISTRATOR
By: [Signature] Deputy

MEMORANDUM OF LAW

Background

Plaintiff is the owner of real property located at 9506 Newgate Avenue North in Stillwater, Minnesota. (Compl., p. 2.) Plaintiff's property was insured under an HO-5 insurance policy through Defendant that included protection against storm losses. (*Id.*) In the summer of 2014, the property suffered storm damage from wind, hail, and rain. (*Id.*) The date of loss on subsequent insurance documents is listed as June 19, 2014. (Johnson Aff., Ex. 1, p.3.) Plaintiff reported the loss to Defendant on June 29, 2014. (*Id.*; Johnson Aff., Ex. 1, p.3.) At the time of the loss, Plaintiff resided at the property with her son, Derek Estelle. (Pl.'s Mem. of Law in Support of Motion, p. 4.)

The parties were unable to agree upon the scope and value to repair the loss and Plaintiff made a demand for appraisal on September 26, 2014, as allowed under the policy and under Minnesota law. (Compl., p. 2.) On September 3, 2015, an appraisal hearing that included testimony took place and the appraisal panel reached a unanimous decision, issuing an appraisal award of \$110,177.53 as Actual Cash Value and \$191,440.61. (Pl.'s Mem. of Law in Support of Motion, p. 5.) The appraisal panel made findings specific to the property of others, to business property, and to property belonging to the insured. (*Id.*)

Under the terms of the policy, Conditions –Section I, paragraph 9, “Loss is payable within 5 working days . . . after there is a filing of an appraisal award with [Defendant].” (Johnson Aff., Ex. 16, p. 8 of 16.) In a letter from Defendant to Plaintiff, dated September 25, 2015, Defendant indicates that they do not dispute \$12,466.80 of the appraisal award, but the disputed portion for the contents was under legal review. (Johnson Aff. Ex. 17.) Enclosed with the September 25, 2015 letter was a check for \$12,466.80 payable to Plaintiff. (*Id.*) In the letter, Defendant also indicated that due to a provision of Plaintiff's policy that does not provide coverage for matching and undamaged shingles, Defendant was unable to extend coverage for undamaged roof shingles. (*Id.*) In the letter, Defendant also indicated that due to a provision of Plaintiff's policy, no amount greater than \$1,000 is paid for damage to the personal property of others. (*Id.*)

According to Plaintiff, the total ACV award of \$110,177.53 less the received check of \$12,466.80 less the downward \$6,559.50 adjustment to the appraisal panel's award of \$7,759.50 (based on the Business Personal Property policy limit of \$1,200 [$\$7,759.50 - \$1,200 = \$6,559.50$]), the total outstanding balance of the unpaid ACV award that is immediately due is \$91,151.23. (Pl.'s Mem. of Law in Support of Mot., pp. 16 – 17.) In Defendant's Memorandum of Law Opposing Plaintiff's Motion to Confirm, and at the Motion Hearing, Defendant indicates that the only portion of the appraisal panel's award that remains in dispute is \$6,831 for mismatching shingles. (Def.'s Mem. of Law Opposing Pl.'s Mot., p. 1.) Defendant asserts that it paid Plaintiff \$84,320.23, Plaintiff's asserted total balance of \$91,151.23 less the \$6,831 for mismatched shingles. ($\$91,151.23 - \$84,320.23 = \$6,831$). (*Id.* at 5.)

Analysis

I. Defendant's Purported Exclusion for Mismatched Shingles is Not Appropriate or Warranted

Defendant argues that according to Plaintiff's policy, mismatched shingles are not covered. (*Id.* at 1.) The language that Defendant cites appears in Conditions, Section I, of a policy endorsement page (END. 584C (MN) Ed. 5/12). While Defendant cites only a portion of the provision, the full section of the language makes it clear that the provision pertains to HO-6 policies (Plaintiff's policy is an HO-5). It states:

CONDITIONS – SECTION I

When this policy is a HO-6 policy (CONDO-UNIT FORM 6), the following condition is deleted from **CONDITIONS – SECTION I**, Paragraph 7. **Loss Deductible:**

In the event of a covered loss to the insured premises that results in coverage under Coverage A – Real Property, and when, at the time of the loss, the corporation or association of property owners that governs the affairs of the insured premises has coverage in force with American Family Mutual Insurance Company on the building containing the unit insured under this policy, no deductible applies.

The following is added to the **Loss Value Determination** condition:

Replacement cost coverage for a damaged building or other structure does not include any cost to repair or replace damaged property due to the requirements of any ordinance, law or regulation, unless specifically provided under this policy.

The following condition is added:

Matching of Undamaged Property. We will not pay to repair or replace undamaged property due to mismatch between undamaged material and new material used to repair or replaced damaged material because of:

- a. Texture, dimensional differences;
- b. Color, fading, oxidation, weathering differences;
- c. Wear and tear, marring, scratching, deterioration; or
- d. Obsolescence or discontinuation.

We do not cover the loss in value to any property due to mismatch between undamaged material and new material used to repair or replace damaged material.

(Johnson Aff. Ex. 16, p. 30 – END. 584C (MN) (emphasis in original).)

“Insurance contract exclusions are construed strictly against the insurer.” *Thommes v. Milwaukee Ins. Co.*, 641 N.W.2d 877, 880 (Minn. 2002). It is clear Plaintiff’s policy is an HO-5 policy merely from the HO-5 form that her policy is printed on (*See Id.*). In addition, this policy only pertains to undamaged property. Defendant does not deny that some of the shingles on Plaintiff’s property were damaged. In a very similar case, involving a similar mismatching provision in another of Defendant’s policies, the Minnesota Supreme Court held that where siding of a building was damaged due to hail, and the inability to replace damaged side panels with matching panels, the property sustained “a distinct, demonstrable, and physical alteration [and] . . .the covered property sustained a covered loss.” *Cedar Bluff v. American Fam. Ins. Co.*, 857 N.W.2d 290, 295 (Minn. 2014). Here, like in *Cedar Bluff*, the shingles were damaged because they sustained a distinct, demonstrable and physical alteration. Therefore, Defendant’s argument that the mismatch claims are excluded fails because (a) Plaintiff’s policy is not an HO-6 policy but an HO-5 policy and therefore the exclusion does not apply; and (b) because even if the exclusion applied, the exclusion only applies to undamaged property, and under *Cedar Bluff*, all of the mismatching shingles were damaged property.

Therefore, the only issues that remain in dispute are: (1) whether Plaintiff is entitled to pre-award interest; and (2) whether Plaintiff is entitled to costs and disbursements under Minn. Stat. §§ 549.02 and 549.04.

II. Plaintiff is entitled to both pre-award and post-award interest on the full RCV Award of \$191,440.61

Defendant next argues that Plaintiff is not entitled to interest on the award as a matter of law. Plaintiff argues that she is. Under Minnesota statute, for awards over \$50,000, post-award interest from the time of a verdict until judgment is entered shall be computed by the Court Administrator at a rate of ten percent (10%) per year, and added to the judgment. *See* Minn. Stat. § 549.09, subd. 1(a) (2015). Pre-award interest is computed from the time of the commencement of the action or demand for arbitration or at written notice of a claim, whichever occurs first. *See* Minn. Stat. § 549.09, subd. 1(b). Pre-award interest cannot be awarded for awards for future damages. *See* Minn. Stat. § 549.09, subd. 1(b)(2).

Here, Plaintiff requests an award of pre-award interest of the total RCV appraisal award of \$191,440.61 from the date the claim was reported to American Family Insurance, June 29, 2014, until the appraisal panel's award on September 3, 2015. Plaintiff requests post-award interest at ten percent from September 3, 2015, the date of the appraisal award, until the date that all underlying amounts are paid in full.

Defendant argues that under the terms of the policy, Replacement Cost Value ("RCV") is only payable once repairs have been made and because Plaintiff has not made repairs or replaced the contents, there can be no interest on the RCV amounts in the appraiser's award. Rather, Defendant argues, interest is only on the ACV amount and it only begins five days after the appraisal award was issued. The appraisal award was issued on September 23, 2015.

Under the terms of Plaintiff's policy:

3. Loss value Determination. The Loss Value Determination condition in Conditions – Section I is amended to add the following as item a(2):

a. (2) Loss to covered property covered by Option 14 – Personal Property Replacement Coverage will be settled subject to the following:

We will pay the cost of repair or replacement but not exceeding the smallest of:

(a) The actual cash value at the time of loss up to the limit applying to the property, if the property is not actually repaired or replaced;

- (b) The amount actually and necessarily spent for the replacement of an item with a similar item of like kind and quality at the time of loss;
- (c) The amount actually and necessarily spent for repair or restoration;
- (d) Any policy limit that applies.

The following procedure applies to loss to covered property under this option:

Procedures to Claim Replacement Coverage.

If you receive an actual cash value settlement for damaged or stolen property covered by replacement coverage and you have not reached your limit, you may make a further claim under this condition for any additional payment on a replacement cost basis provided:

- (1) You notify us within 180 days after the loss of your decision to repair or replace the damaged or stolen property; and
- (2) Repair or replacement is completed within one year of the date of loss.

(Johnson Aff. Ex. 16, p. 30 – END. 584C (MN).)

In their Reply Memorandum, Plaintiff argues that Defendant has no basis in law to contend that the RCV portion of the appraisal panel’s award constitute future damages, and in fact, argues that Minnesota courts have held otherwise.

“When interpreting an insurance contract, words are to be given their natural and ordinary meaning and any ambiguity regarding coverage is construed in favor of the insured.” *American Fam. Ins. Co. v. Walser*, 628 N.W.2d 605, 609 (Minn. 2001). In a persuasive case proffered by Plaintiff, *Cottage Heights Association v. American Family Insurance*, decided in Stearns County District Court, the Court held that there are public policy reasons to award pre-award interest for the entire RCV amount of an appraisal panel’s award: “Allowing preaward interest on the full amount of an insurance appraisal award provides an incentive for an insurer to timely settle a claim instead of prolonging the insurance claim process.” *Cottage Heights Association v. American Family Insurance*, Court File No. 73-CV-14-1180 (Stearns Cnty. Dist. Ct. Apr. 29, 2014.) While the *Cottage Heights* case is not binding precedent, the Court concludes that it is persuasive. Defendant provides no legal support for its bald assertion that RCV appraisal amounts are considered future damages, and the Court is not persuaded that they are.

Moreover, under the natural and ordinary meaning of the policy language, Plaintiff’s duty to repair or replace is triggered by receiving an actual cash value settlement. Here, Plaintiff has been actively

attempting to collect her cash value settlement since September of 2015. The Court declines to penalize Plaintiff for Defendant's failure to pay her full appraisal within 5 days of the panel's September 3, 2015 award, as mandated by the policy.

Therefore, the Court concludes that Plaintiff is entitled to both pre-award and post-award interest on the full \$191,440.61. Plaintiff is entitled to pre-award interest from the time her claim was reported to American Family Insurance, June 29, 2014, until the appraisal panel's award on September 3, 2015. Plaintiff is entitled to post-award interest at ten percent from September 3, 2015, the date of the appraisal award, until the date that all underlying amounts are paid in full.

III. Plaintiff's Motion for Costs Under Minn. Stat. §549.02 Is Granted, and for Disbursements Under Minn. Stat. § 549.04 Is Denied.

In district court actions, costs of \$200 are allowed upon a judgment in Plaintiff's favor that exceeds \$100. Minn. Stat. § 549.02 (2005). A prevailing party is also entitled to \$5.50 for the cost of filing a satisfaction of judgment. Minn. Stat. § 549.02 (2005). "In every action in a district court, the prevailing party . . . shall be allowed reasonable disbursements paid or incurred, including fees and mileage paid for service of process by the sheriff or by a private person." Minn. Stat. § 549.04 (2005).

Here, Plaintiff is entitled to both an award of \$200, as judgment will be entered in an amount exceeding \$500, and \$5.50, as Plaintiff is the prevailing party. Plaintiff has not provided any Affidavit or other information detailing her claims for reimbursement under § 549.04. While, for example, it is likely that Plaintiff incurred a fee for service of process, no supporting documentation was submitted to the Court.

While Plaintiff requests an award of attorney fees in her Memorandums of Law, attorney fees were not requested in Plaintiff's Motion and are therefore not addressed in this Memorandum.

B.W.E.