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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

HOUMAN N. MOGHTADER, Plaintiff and Appellant, v. TRAVELERS COMMERCIAL INSURANCE COMPANY, Defendant and Respondent.	B254173 (Los Angeles County Super. Ct. No. BS144163)

APPEAL from a judgment of the Superior Court of Los Angeles County. William F. Fahey, Judge. Affirmed.

Alexander Cohen & Associates and Robert H. Roe for Plaintiff and Appellant.

Weston & McElvain, LLP, Richard C. Weston and Coleman D. Heggi for Defendant and Respondent.

Houman N. Moghtader appeals from the order denying his petition to compel Travelers Commercial Insurance Company (Travelers) to arbitrate a dispute over the value of fire damage to Moghtader's house. We affirm because Travelers raised issues concerning coverage and policy interpretation that fell outside the permissible scope of the appraisal process.

FACTS AND PROCEDURAL HISTORY

On May 1, 2011, fire damaged a two-level exterior deck on the back of Houman Moghtader's Hollywood Hills home. Moghtader quickly submitted a claim to his insurance company, Travelers. Travelers' adjuster Eric Kongsli determined that the scope of repairs consisted mainly of replacing sections of the deck and its railings, along with clean-up and other related tasks. After accounting for Moghtader's $2,500.00 policy deductible, Travelers sent him a check for $6,537.46 on May 5, 2011.

In August 2011, contractor AMCC, Inc. bid $14,600.00 to carry out the repairs. Moghtader submitted the bid to Travelers, which told him it was too high and refused to pay it. Sometime thereafter AMCC determined that the damage exceeded its original estimate and that the work required to repair the deck was beyond the scope of its expertise.

In late May 2012, Moghtader obtained a bid from contractor Corona Construction. Corona estimated the repair costs at $45,344. Most of the increased cost was based on Corona's determination that new City of Los Angeles building codes required the construction of two vertical steel support beams. Corona estimated that it would cost $12,000 for a soil engineering report and city permit and $15,000 to erect the beams and their supporting concrete caissons.

Moghtader submitted the Corona bid to Travelers in late June 2012. In response, Travelers agreed to the amount of the $14,600 bid from AMCC that it had denied some time earlier and sent Moghtader a supplemental check for an additional $5,639.37 to cover the difference between adjuster Kongsli's original estimate and the AMCC bid. Even though Travelers had originally denied the AMCC bid, its August 9, 2012 letter to

Moghtader said it "received your documentation for the supplement[al AMCC] bid . . . and] have approved this supplement . . . ." The letter was silent as to Corona's much higher bid.

Frustrated by this response, Moghtader obtained a list of contractors approved by Travelers. Moghtader contacted one of them – William Holmquist of All American Construction (ACC) – who told him in January 2013 that he needed architectural plans, a soil engineering report, and city approval before he could prepare an accurate bid. Moghtader later learned that it would cost between $10,000 and $20,000 to have the required plans prepared.

Moghtader then hired lawyer Alexander Cohen, who wrote Travelers in late April 2013. The letter included an e-mail from Holmquist concerning the need for soil and engineering reports as a prerequisite to an accurate bid. Cohen recommended that Travelers pay for the necessary reports. Once those reports were approved by the city, a proper bid would be submitted, Cohen wrote. On May 24, 2013, Cohen sent Travelers a letter demanding an appraisal of the fire damage pursuant to a statutorily-mandated provision (Ins. Code, § 2071) of the policy.[1]

Adjuster Kongsli responded in a June 13, 2013 letter that said Travelers was reviewing the May 24 letter and would draft a response soon. That response came on July 12, 2013, when Kongsli wrote: "It is widely known and accepted that the appraisal process is to resolve disagreed matters of *value of the property or the amount of loss.* To-date we have not received your estimate nor a contractor estimate supplied by your office. As we have no indication of your scope or estimate, we cannot enter the appraisal process. Furthermore, please reference our letter dated May 13th 2013.[2] [¶] **Appraisal is limited to determining the amount of damage, i.e., price, and does not apply to**

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[1] The record does not show, and the parties do not say, whether Travelers ever responded to Cohen's April 2013 letter.

[2] There is no May 13, 2013 letter in the record and outside of Kongsli's reference to such a letter, the parties do not mention it at all.

calculating the scope of damages, i.e, what is and what is not covered as an item of damage." (Original italics and bolding.)

Kongsli went on to state that "[a]t this time Travelers rejects your request for appraisal based on the discrepancies in scope. Travelers has reviewed multiple bids and has issued settlement for all claim-related damages based on the approved scope of repairs. As a contractor is able to facilitate the repairs based on the valuation and scope provided, we are rejecting the appraisal request. [¶] As previously noted in our last correspondence dated May 13th 2013, your office is now time barred from any further action. Based on the endorsement language within the policy of insurance, this claim is now time-barred from any further action. Also, your firm did not comply with the [policy] condition to give us prompt notice of any further outstanding item(s). Please note the reported date of loss of this claim was 05/01/2011. Again, please see our letter dated May 13th 2013 for further details on this. And please note, as such, this claim file remains closed."

Kongsli concluded that Travelers was "relying on portions of your policy we have reasonably concluded are applicable to the facts of the loss. We do not intend to waive, but rather expressly reserve our right to assert any other policy terms, conditions, exclusions, exceptions, or legal defenses to coverage we might later learn may be applicable to this loss."

Moghtader then filed a petition to compel arbitration (Code Civ. Proc., § 1281.2), which is the procedural vehicle for enforcing the appraisal provision of a homeowner's insurance policy. (*Alexander v. Farmers Ins. Co.* (2013) 219 Cal.App.4th 1183, 1186-1187 (*Alexander*).) Moghtader contended that this was nothing more than a dispute as to the amount of his loss from the fire and was therefore a proper subject for an appraisal. He also contended that various state insurance regulations estopped Travelers from asserting any policy-based defenses to his claim because Travelers: (1) never denied the Corona bid in writing, along with a detailed explanation of the reasons for such a denial (Cal. Code Regs., tit. 10, § 2695.7, subd. (b)(1)); and (2) did not pay or adjust the Corona bid (Cal. Code Regs., tit. 10, § 2695.9, subd. (d)).

Travelers opposed the petition, contending an appraisal was not proper on the following grounds: (1) this was a dispute over the scope of coverage, not the amount of loss, and was therefore not a proper subject for an appraisal; and (2) the existence of policy interpretation issues concerning whether Moghtader ever submitted a proper claim and, if so, whether he did so timely, also fell outside the scope of the appraisal process. The opposition was supported by a declaration from Kongsli, who stated that after reviewing multiple bids, he used an industry-standard estimation program to determine the settlement amounts approved in May 2011 and August 2012.

The trial court denied the petition without prejudice, finding that the Corona bid expanded the scope of loss beyond both parties' original conclusions and that policy interpretation issues existed concerning the timeliness and sufficiency of Moghtader's claim. Moghtader then sued Travelers for breach of contract, bad faith, and other causes of action related to the handling of Moghtader's claim. According to Moghtader, that separate action (LASC case No. BC531704) is still pending.

DISCUSSION

1. *The Appraisal Process*

All fire insurance policies in California must include a provision that requires the parties to participate in an appraisal when they cannot agree on the actual cash value or amount of loss of covered items. (Ins. Code, §§ 2070, 2071.) Once an appraisal demand is made, each party selects a competent and disinterested appraiser, both of whom then select a neutral umpire. If the two appraisers cannot agree on the amount of loss, then the matter is submitted to the umpire and the vote of any two of those three will determine the issue. (§ 2071.) Unless the parties agree or it is otherwise provided, appraisals are informal, meaning there is no formal discovery and the rules of evidence do not apply. (*Ibid.*)

This appraisal provision is an agreement for contractual arbitration and is generally subject to the rules governing arbitration. (*Alexander, supra,* 219 Cal.App.4th

at pp. 1186-1187.) Although arbitrators in general have broad powers, appraisers do not. Their task is to determine the amount of damage resulting to various items submitted for their consideration. They may not resolve coverage questions, interpret policy provisions, or construe applicable statutory provisions. (*Id.* at p. 1187; *Kacha v. Allstate Ins. Co.* (2006) 140 Cal.App.4th 1023, 1032, 1036 [appraisal award vacated in part because appraisal panel awarded zero for some claimed items of fire damage, effectively determining those items were not covered by the policy].)

2. *The Trial Court's Order Was Appealable*

An order denying a petition to compel arbitration is appealable. (Code Civ. Proc., § 1294, subd. (a).) Despite this clear statutory command, Travelers contends the order denying Moghtader's petition to compel arbitration was not appealable because it was made without prejudice and contemplated that additional issues would be litigated. As proof, Travelers points to Moghtader's later filed separate lawsuit, which was ordered related to this action.[3]

Travelers cites only one decision to support this contention – *Topa Ins.Co. v. Fireman's Fund Ins. Companies* (1995) 39 Cal.App.4th 1331. *Topa* concerned the effect of an order involuntarily dismissing a cross-complaint without prejudice. The *Topa* court held that the dismissal order was merely final as to that action but did not preclude the insured from bringing an action based on a claim for further damages from the underlying coverage dispute. (*Id.* at p. 1336.)

We fail to understand how *Topa* could possibly apply here. Far more applicable decisions illustrate why. The court in *Sanders v. Kinko's, Inc.* (2002) 99 Cal.App.4th 1106, 1109-1110, overruled on other grounds by *Green Tree Financial Corp. v. Bazzle* (2003) 539 U.S. 444, held that an order denying a petition to compel arbitration without prejudice until class certification issues could be resolved was final and appealable because it effectively stayed any arbitration, thereby effectively defeating the benefits

[3] Travelers has asked us to take judicial notice of both Moghtader's complaint and the order deeming both actions related. We hereby grant that request for judicial notice.

provided by the arbitration agreement. Orders denying petitions to compel arbitration are also final and appealable even though more litigation is contemplated in a separate action. (*Otay River Constructors v. San Diego Expressway* (2008) 158 Cal.App.4th 796, 803.)

Instead, an order denying a petition to compel arbitration is not final and appealable only when it leaves open the possibility that arbitration of the parties' dispute could be ordered once the party seeking arbitration took certain procedural steps required by the arbitration provision. (*Fleur du Lac Estates Assn. v. Mansouri* (2012) 205 Cal.App.4th 249, 256-257.) That is not the case here, where Moghtader's petition to compel was denied because it involved issues that simply could not be covered as part of the appraisal process. Accordingly, we hold that the order denying Moghtader's petition to compel arbitration was appealable.

3. *The Trial Court Did Not Err Because Coverage and Policy Interpretation Questions Were At Issue*

The trial court shall order the parties to arbitrate a controversy if it determines that "an agreement to arbitrate *the* controversy exists." (Code Civ. Proc., § 1281.2, italics added.) A party cannot be required to arbitrate a dispute he has not agreed to submit to arbitration. (*Knutsson v. KTLA, LLC* (2014) 228 Cal.App.4th 1118, 1130.) This rule applies to contract terms that are required by statute. (*Freeman v. State Farm Mut. Auto. Ins. Co.* (1975) 14 Cal.3d 473, 479.) Because the essential facts of these proceedings are undisputed, we apply de novo review to the order denying the petition to compel arbitration. (*Robertson v. Health Net of California, Inc.* (2005) 132 Cal.App.4th 1419, 1425.)

Because appraisers are not empowered to resolve coverage questions, interpret policy provisions, or construe applicable statutory provisions, the appraisal provision in Moghtader's policy cannot be construed to compel arbitration of such issues. Moghtader contends that coverage is not at issue because there is no dispute that the damage to his deck was covered by his policy.

Although Kongsli's June 13 letter was not a model of clarity, it did state that Travelers refused to submit to an appraisal based on discrepancies in the scope of repair, noting that the appraisal process was not proper concerning "what is and what is not covered as an item of damage." When viewed in light of all the circumstances, the only reasonable inference from this letter is that Travelers refused to cover costs related to the steel support beams that Moghtader claimed were required by a change in city building codes.[4] This raised a coverage issue that falls outside the scope of the appraisal process.[5]

We next consider the existence of policy interpretation and regulatory construction issues. All doubts concerning whether a particular dispute is covered by an arbitration agreement are resolved in favor of compelling arbitration. (*Network Capital Funding Corp. v. Papke* (2014) 230 Cal.App.4th 503, 511.) In performing its duty to determine whether a party has a contractual duty to arbitrate a particular dispute, a court is required to examine and, to a limited extent, construe the underlying agreement. (*City of Los Angeles v. Superior Court* (2013) 56 Cal.4th 1086, 1096.) In deciding a petition to compel arbitration, the trial court does not decide whether the plaintiff's causes of action have merit, although some factual questions considered in deciding the application may overlap those raised by the merits of the moving party's claim for relief. (*Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Cal.4th 394, 412.)

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4 In connection with this, we note the following policy provisions: (1) Coverage Provision 12.a., which allows Moghtader to use a certain portion of his policy limits to cover renovation costs required by ordinance or law; and (2) Exclusion A.1., which states that repair costs imposed by ordinance are excluded except for those allowed by Coverage Provision 12.a. Although Travelers never cites these provisions, they are directly applicable to the issues in dispute and are beyond the purview of the appraisal process.

5 Moghtader contends that the existence of non-appraisable issues should not prevent an appraisal from going forward as to issues that are appraisable. However, there appears to be no meaningful dispute as to the cost of repairing the deck to its original state. Instead, the dispute focuses on coverage for vertical support beams that Moghtader says are required by new city building codes and that Travelers refuses to pay.

Travelers contends that Moghtader's claim for the increased code compliance costs was properly rejected because it was brought beyond the policy's one-year time limit and was also incomplete. Moghtader does not dispute that these policy interpretation questions raise issues that fall outside the appraisal process. Instead, he contends that the trial court should have found that Travelers could not rely on those contract defenses because it violated certain state insurance regulations governing the manner in which it responded to his claim.

In essence Moghtader wants to convert an agreement to appraise valuation disputes into an agreement to also resolve policy interpretation disputes by having the trial court resolve the latter when ruling on a petition to compel arbitration. In short, even if a court were to eventually resolve those factual disputes in Moghtader's favor, that ruling does not retroactively convert the policy's appraisal provision into an agreement to cover those disputes in the first instance.

Finally, Moghtader contends the trial court erred by staying his petition pursuant to Code of Civil Procedure section 1281.2, subdivision (c), which applies only when an action or proceeding is pending that raises issues related to those at stake in the petition to compel arbitration. We disagree. Although Travelers cited a decision that applied subdivision (c) in its trial court points and authorities, it did so in an apparent attempt to stretch the rule to apply to other *issues* regardless of whether another action was pending. The trial court's written order does not mention subdivision (c) or state that it was staying the petition to compel. Instead, the trial court denied the petition without prejudice. Given this, as well as the absence of a reporter's transcript of the hearing on Moghtader's petition, we presume that the trial court did not apply subdivision (c). (*Foust v. San Jose Construction Co., Inc.* (2011) 198 Cal.App.4th 181, 187.)[6]

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6 By our opinion we do not intend to adjudicate the merits of any of the issues present in Moghtader's separate lawsuit. (LASC case No. BC 531704.)

DISPOSITION

The order denying without prejudice Moghtader's petition to compel arbitration is affirmed. Respondent shall recover its appellate costs.

RUBIN, ACTING P. J.

WE CONCUR:

FLIER, J.

GRIMES, J.