**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLORADO**

Civil Action No. 16-cv-00450-DME-NYW

CONCEPT RESTAURANTS, INC.,

Plaintiff,

v.

TRAVELERS INDEMNITY COMPANY and
THE PHOENIX INSURANCE COMPANY,

Defendants.

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**ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT (Doc. 30)**

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In the spring of 2011, a large hail storm occurred in Boulder, Colorado, causing roof damage to the landmark Hotel Boulderado. Fortunately, the hotel owner, Plaintiff Concept Restaurants ("Concept"), had just obtained commercial property insurance from Defendant The Phoenix Insurance Company ("Phoenix").[1] But Concept and Phoenix disagreed about the amount of loss caused by the storm. So Concept sought a neutral appraisal as set forth in the insurance policy. After the appraisal panel determined the amount, Concept alleged newly discovered costs. Phoenix, however, declined to pay those costs, citing the binding appraisal process.

[1] Phoenix is a wholly owned subsidiary of Travelers Indemnity Company, the other Defendant in this case.

Concept then brought this lawsuit, and Phoenix has now moved for summary judgment on the grounds that the appraisal is binding and precludes litigation as to those matters within the scope of the appraisal. Concept has not offered anything beyond its complaint to show these "new" costs were not already considered in the appraisal, so there is no genuine dispute of material fact. Moreover, Phoenix is correct as to the preclusive nature of binding appraisals, and accordingly Defendants are entitled to judgment as a matter of law. Therefore, this Court GRANTS Defendants' Motion for Summary Judgment, (Doc. 30).

## BACKGROUND

Shortly before the storm struck, Phoenix issued commercial property insurance to Hotel Boulderado. The insurance policy covered "direct physical loss of or damage" for any "specified causes," which included windstorm or hail. (Doc. 31, Ex. A). On or about May 29, 2011, Hotel Boulderado suffered roof damage from a hail storm in Boulder, Colorado. Concept then filed a claim for coverage on December 14, 2011, and hired a restoration company called 1-Derful Roofing & Restoration ("Derful"), to examine the damage and estimate the repair cost. Derful estimated the repairs would cost $414,189.17. Phoenix also retained its own company, Palace Construction, to estimate the cost of repair or replacement, which arrived at the lower figure of $223,323.33. After that estimate, Phoenix made its own calculations, deducted for depreciation and the

policy deductible, and issued payment for $172,711.76. But this amount was too low for Concept's satisfaction.

The insurance policy had a mechanism for resolving disagreements about the amount of loss—the "appraisal" process. As set forth in the policy, under that process, the policyholder and insurer each name one appraiser, and then those two appraisers jointly determine an amount of loss. (Doc. 31, Ex. A) ("If we and you disagree on . . . the amount of loss, either may make written demand for an appraisal of the loss. In this event, each party will select a competent or impartial appraiser."). The amount awarded by this appraisal panel is *binding* on both parties under the terms of the policy. (Doc. 31, Ex. A) ("A decision agreed to by any two will be binding.").

That is what happened in this case. Concept demanded appraisal for the amount of loss caused by the hail storm. Then Concept and Phoenix each named an appraiser, and on March 4, 2013, that appraisal panel determined an amount of loss somewhere in the middle of the two parties' original estimates: $289,253.00. Phoenix promptly issued a supplemental payment to compensate Concept under that appraisal amount.

Concept later disputed the amount of the appraisal award, claiming that the panel did not sufficiently consider certain new costs discovered after the appraisal process. In particular, on October 22, 2013, Concept claimed that the City and County of Boulder, which had earlier rejected Concept's construction plan, was now imposing additional scaffolding, permitting, and traffic control requirements that were not considered during the appraisal process. On April 23, 2014, Phoenix declined to make further payment. It

argued that the appraisal award was binding and that the appraisers *did* address traffic control and scaffolding costs. Almost two years later, on January 20, 2016, Concept filed this lawsuit alleging three claims: (1) breach of contract, (2) bad faith breach of contract, and (3) statutory bad-faith denial of benefits under Colo. Rev. Stat. §§ 10-3-1115 and -1116.

## LEGAL STANDARD

Summary judgment is proper if the movant demonstrates that there is "no genuine issue as to any material fact" and that it is "entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). If the movant carries this burden, the nonmovant "may not simply rest on its pleadings," but instead must "go beyond the pleadings" to establish a factual dispute. Alder v. Wal-Mart Stores, Inc., 144 F.3d 664, 671 (10th Cir. 1998). To accomplish this, "the facts must be identified by reference to affidavits, deposition transcripts, or specific exhibits," not just the complaint. Id. If these materials show no genuine dispute of material facts, then the movant will win summary judgment if the law gives the nonmovant no path to victory on those undisputed facts.

## DISCUSSION

Phoenix makes several arguments for summary judgment, but this Court is satisfied with the first: "binding" appraisals preclude litigation as to those matters within the scope of the appraisal. Concept demanded an appraisal with no restriction on scope, and the ultimate award was announced with no qualifications, limitations, or exceptions.

Moreover, Phoenix has offered evidence—undisputed by Concept except by reference to its own complaint—that the appraisers considered traffic control, scaffolding, and permitting costs in their award. So there is no genuine dispute that such costs were within the scope of the appraisal. Finally, having found that the appraisal award is binding, this Court rejects Concept's fallback argument that Phoenix waived reliance on the appraisal by issuing a supplemental post-appraisal payment for asbestos remediation. Accordingly, summary judgment for Defendants is proper.

A. Appraisal awards are binding as to those items in the scope of the appraisal

The appraisal provision in Concept's insurance policy states, "A decision agreed to by [the appraisers] will be binding." (Doc. 31, Ex. A). The Supreme Court of Colorado has also held that such appraisal awards are binding on the parties as to the amount of loss. See Wagner v. Phoenix Ins. Co., 348 P.2d 150, 152 (Colo. 1960). In Wagner, the court agreed with the insurer that an appraisal provision "amounted to an option offered to plaintiffs, and plaintiffs, having chosen to exercise that option, are *precluded from any suit* upon the policy and are bound by the award . . . ." Id. at 370 (emphasis added). When a party demands appraisal of the amount of loss, that party "irrevocably exercise[s] [its] option to determine that question as provided by the appraisal clause of the policy." Id. In other words, the party is "estopped by the appraisal award." Blum's Furniture Co. v. Certain Underwriters at Lloyds London, No. 11-20221, 2012 WL 181413, at *2 (5th Cir. Jan. 24, 2012) (unpublished). This Court has

reaffirmed that interpretation of Colorado law on multiple occasions. See Auto-Owners Ins. Co. v. Summit Park Townhome Ass'n, 129 F. Supp. 3d 1150, 1154 (D. Colo. 2015) (finding that an appraisal results in a "binding factual determination" as to the amount of loss); Tae Hyung Lim v. Am. Econ. Ins. Co., No. 13-cv-02063-CMA-KLM, 2014 WL 1464400, at *3 (D. Colo. Apr. 14, 2014) (unreported) ("Neither party is permitted to dispute the amount of loss once it has been determined.").

There is an exception, however, for matters outside the scope of the appraisal. See Laredo Landing Owners Ass'n, Inc. v. Sequoia Ins. Co., 2015 WL 3619205, at *2 (D. Colo 2015) (unpublished) (inviting parties to use the court to "resolve issues outside the scope of the appraisal"). When a matter is "beyond the scope of the appraisal," then it is subject to judicial review. See Auto-Owners Ins. Co. v. Summit Park Townhome Ass'n, 129 F. Supp. 3d 1099, 1104 (D. Colo. 2015). Typically, an issue is "beyond the scope" if it involves a legal construction of the insurance policy itself (rather than a factual determination), such as whether a particular building is "covered" under the policy. Id. But an issue also falls outside the appraisal's scope if the parties agreed on some limitation or restriction. See Laredo Landing Owners Ass'n, 2015 WL 3619205, at *2. Neither of those applies in this case. Instead, Concept suggests that an unanticipated factual issue would be beyond the scope if the appraisers never even considered it. This Court is not aware of a Colorado case expressly adopting that position, but even assuming it were true, Phoenix would still be entitled to summary judgment. Concept

and Phoenix did not agree on any subject-matter restrictions, and the allegedly unconsidered costs were, in fact, considered by the appraisers.

B. The scope of this appraisal included traffic control, permitting, and scaffolding costs

Concept alleges that after the appraisal process concluded, "the City and County of Boulder required additional items that were not anticipated during the appraisal process." (Am. Compl., Doc. 29, ¶27). Those "additional items" appear to be scaffolding, permitting, and traffic control requirements—which increase the cost of construction. (Letter from Concept to Phoenix, Doc. 31, Ex. P).[2] Concept now sues to recover for those additional costs. But the appraisal, which is binding as to all matters within its ambit, was unlimited in scope and the appraisers *did* consider those items which Concept claims were "not anticipated."

At the outset, Concept argues that scaffolding, traffic control, and permitting could not have been within the scope of the appraisal because those costs—covered under the policy's "Ordinance or Law" provision—could not be *paid* until after the appraisal. But that conclusion flouts the insurance policy language itself, and conflicts with persuasive

[2] Concept offers nothing more specific than the abstract reference to scaffolding, permitting, and traffic control. There is no evidence that more precisely identifies what the City and County of Boulder actually required, or what Concept means exactly when it says "scaffolding/permit/traffic control costs." (Doc. 31, Ex. P). There is no documented correspondence from or to the City and County of Boulder, or even any affidavits memorializing in-person meetings or explaining the requirements.

case law. The policy provides, "We will not *pay* for increased construction costs under [Ordinance or Law] coverage . . . [u]ntil the property is actually repaired or replaced[.]" (Doc. 31, Ex. A) (emphasis added). This language only says that *payment* will not be made until the repairs are made, not that the amount of loss cannot be determined before such payment is due. Moreover, case law from other jurisdictions generally holds that costs due upon repair or replacement (like these Ordinance or Law costs) are appraisable. See, e.g., SR Int'l Bus. Ins. Co. v. World Trade Ctr. Properties, LLC, 445 F. Supp. 2d 320, 333 (S.D.N.Y. 2006) ("As an initial matter, although actual replacement is a condition precedent to collecting replacement proceeds, it is not a condition precedent to valuing hypothetical replacement cost."); Unetco Indus. Exch. v. Homestead Ins. Co., 57 Cal. App. 4th 1459, 1468, 67 Cal. Rptr. 2d 784, 789 (1997) ("While appraisal generally covers the amount of loss, replacement cost of real property may be appraised."). Thus, Concept's claim that "Ordinance or Law" costs are not appraisable is rejected.

Having concluded that the so-called "additional items" here were appraisable, the next question is whether they were actually appraised. In other words, the issue is whether scaffolding, traffic control, and permitting were within the scope of the appraisal. In answering that question, it should first be noted that, when Concept demanded appraisal, it proposed no limitation on the scope of issues to be considered by the appraisers. (Doc. 31, Ex. F). Moreover, the appraisers certified that they "ha[d] heard and seen all of the evidence offered by both the insured and insurance company"

and determined the "amount of loss" without offering qualifications, restrictions, or exceptions. (Doc. 31, Ex. N).

More to the point, the appraisers actually *did* consider scaffolding, permitting, and traffic control costs. The evidence shows that the appraisers exchanged notes on potential traffic control and scaffolding costs in some detail. In one e-mail, one of the appraisers specifically asked how the scaffolding costs were estimated, and invited further deliberation on the costs and labor rates for traffic control. (Doc. 31, Ex. L). In another e-mail, he proposed specific details for a scaffolding plan, and offered comparisons for different traffic control plans, each with different costs and timelines. (Doc. 31, Ex. M). The appraisers considered permitting costs too by relying upon estimates by outside companies, Palace Construction and B&M Roofing, which incorporated the cost of permits and fees. (Estimate by Palace Construction, Doc. 31, Ex. D at 6) (listing "Permits and fees" among considered costs); (Proposal from B&M Roofing, Doc. 31, Ex. 8) (listing the "applicable city or county building permit fee" as part of its price).

Against this evidence, Concept offers no contrary exhibits, affidavits, or other documents aside from its complaint.[3] In considering a motion for summary judgment, after the movant (Phoenix) has offered evidence that no genuine dispute of material fact exists, the nonmovant (Concept) must come forward with some evidence "beyond the

[3] Concept does submit some exhibits into evidence, (Doc. 41), but none of those exhibits contradict the evidence showing that scaffolding, traffic control, and permitting costs were considered by the appraisers.

pleadings" to establish a disputed fact. Alder v. Wal-Mart Stores, Inc., 144 F.3d 664, 671 (10th Cir. 1998). Concept has failed to do so here. Thus, this Court finds no genuine dispute that the alleged "additional items"—traffic control, scaffolding, and permitting—were actually within the scope of the binding appraisal. Accordingly, the appraisal is binding as to those matters.[4]

C. The asbestos payment did not waive reliance on the appraisal award

Even if the appraisal is otherwise binding, Concept argues, Phoenix is estopped from relying on it here because Phoenix made a post-appraisal payment to Concept for asbestos remediation. The evidence on this question is sparse. It appears that, *after* the appraisal process concluded, Concept reported that it discovered asbestos on the insured property and made a claim to Phoenix for remediation costs. (Doc. 31, Ex. U, ¶28-29). Unlike the scaffolding, traffic control, and permitting requirements, the remediation of asbestos was not part of the appraisal—the issue had not even been reported by the time of the appraisal. On July 18, 2014, Phoenix paid the remediation claim (Doc. 31, Ex. S). The question is whether, by that payment, Phoenix waived any reliance on the otherwise binding appraisal award.

[4] Concept also argues common-law and statutory bad-faith denial of benefits, with a request for attorney fees, costs, and additional damages pursuant thereto. But it is not bad faith when the insurer reasonably relies on existing case law in denying a claim. See Pham v. State Farm Mut. Auto. Ins. Co., 70 P.3d 567, 572-73 (Colo. App. 2003). As already discussed, the insured was correct in concluding the appraisal was binding and that the supplemental claim for scaffolding, traffic control, and permitting was already considered by the appraisers. Thus, Defendants are entitled to summary judgment as to the bad-faith claims.

Concept has the burden to prove waiver or estoppel of this kind. See Cont'l W. Ins. Co. v. Jim's Hardwood Floor Co., 12 P.3d 824, 828 (Colo. App. 2000). But it has failed to satisfy that burden here. It cites no authority for its argument that a supplemental payment for an unrelated claim re-opens the appraisal award for litigation, and offers no evidence of its own to support its contention. The evidence available to this Court shows that the asbestos remediation claim was entirely unrelated to the issues considered in the appraisal, i.e., the amount of loss caused by the hail storm. And Concept offers no basis to conclude that payment of a claim for a matter not appraised waives matters that were appraised. Accordingly, this Court rejects the waiver argument.

**CONCLUSION**

For the foregoing reasons, Defendants' Motion for Summary Judgment, (Doc. 30), is hereby GRANTED.

Dated this 2nd day of December, 2016.

BY THE COURT:

*s/ David M. Ebel*

U. S. CIRCUIT COURT JUDGE
DISTRICT OF COLORADO