IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
EASTERN DIVISION

ACUITY, A MUTUAL INSURANCE COMPANY, Plaintiff, v. AKN LECLAIRE, LLC, Defendant.	*	3:20-cv-00099 ORDER GRANTING DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Before the Court is Defendant AKN LeClaire, LLC's Motion for Partial Summary Judgment filed on March 11, 2021. ECF No. 19. Plaintiff Acuity filed a Resistance to the Motion, ECF No. 24, and Defendant has replied, ECF No. 27. Neither party has requested oral argument, and the Court does not believe oral argument will substantially aid it in resolving the issue before the Court. Therefore, the matter is fully submitted.

I. FACTUAL AND PROCEDURAL BACKGROUND

Defendant owns a single-story pre-engineered metal building located in Bettendorf, Iowa. ECF No. 19-3 ¶¶ 1, 2. Plaintiff issued a Bis-Pak® commercial insurance policy to Defendant (Policy Number ZB0246) insuring the building for the effective dates of August 31, 2019, through August 31, 2020. *Id.* ¶ 3. The insurance policy contains the following insuring agreement:

> **PROPERTY COVERAGES.**
>
> We will pay for direct physical loss of or damage to Covered Property at the premises described in the Declarations caused by or resulting from any Covered Cause of Loss.

> **1. Covered Property**
>
> Covered Property includes Buildings as described under item a below
>
> . . . .
>
> a. **Buildings**, means the buildings and structures at the premises described in the Declarations
>
> . . . .
>
> **3. Covered Causes of Loss**
>
> Risks of Direct Physical Loss unless the loss is:
>
> a. Excluded in Property Exclusions; or
>
> b. Limited in paragraph 4, Limitations; that follow.

Id. ¶ 4. The policy also contains an appraisal provision, which provides:

> **2. Appraisal.**
>
> 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 and impartial appraiser. The two appraisers will select an umpire. If they cannot agree, either may request that selection be made by a judge of a court having jurisdiction. The appraisers will state separately the amount of loss. If they fail to agree, they will submit their differences to the umpire. A decision agreed to by any two will be binding. Each party will:
>
> a. Pay its chosen appraiser; and
>
> b. Bear the other expenses of the appraisal and umpire equally.
>
> If there is an appraisal, we will still retain our right to deny the claim.

Id. ¶ 5.

On April 7, 2020, Defendant's property suffered damage as a result of a hailstorm. *Id.* ¶ 6. A week later, Defendant submitted a claim to Plaintiff for property damage caused by the storm. *Id.* ¶ 7. Plaintiff retained an independent adjuster and an engineer to assist in investigating Defendant's claim. *Id.* ¶ 9. The following day, a representative of Plaintiff visited Defendant's property to document its condition. *Id.* ¶ 10.

On May 13, Plaintiff performed an inspection of Defendant's property and confirmed hail damage had occurred. *Id.* ¶ 11. Defendant disputed the findings of the May 13 inspection. *Id.* ¶ 12. On June 23, an engineering consultant for Plaintiff conducted a reinspection. ECF No. 5

¶ 15; *see* ECF No. 19-3 ¶ 13. On July 15, Plaintiff issued a payment to Defendant in the amount of $3,028.23 for damage to the property as a result of the hailstorm. ECF No. 19-3 ¶ 13.

On July 21, Defendant informed Plaintiff it intended to have someone inspect the property. ECF No. 5 ¶ 17. On October 5, Defendant provided Plaintiff with an engineering report that outlined additional damage caused by the storm and claimed damages totaling $925,000. *Id.* ¶ 18; ECF No. 19-3 ¶ 14. On October 16, Plaintiff requested a completed Sworn Proof of Loss from Defendant along with all supporting documentation. ECF No. 5 ¶ 19. That same day, Austin Nelson[1] e-mailed Scott Wittliff, a Property Claims Specialist for Plaintiff, writing: "I sent you a demand for this claim. You did not respond. I hardly consider that a good faith effort to settle my claim. Regardless, either send payment, engage conversation, or name your appraiser. Thanks." ECF No. 19-2 at 48; ECF No. 8 ¶ 3. On October 28, Nelson e-mailed Wittliff again, writing: "Are you going to pay my demand? If not then I'm going to invoke appraisal according to my policy." ECF No. 19-2 at 49.

On October 30, Defendant returned an incomplete Sworn Proof of Loss form to Plaintiff. ECF No. 5 ¶ 20. On November 9, Plaintiff notified Defendant that the form was incomplete and did not comply with the terms and conditions of the insurance policy; Plaintiff requested Defendant resubmit a completed form. *Id.* ¶ 21. On November 24, Defendant resubmitted the Sworn Proof of Loss form and attached an estimate to repair the damages outlined in the October 5 engineering report. *Id.* ¶ 22; ECF No. 19-3 ¶ 15. That estimate included an itemized total of $1,262,813.53 in property damage as a result of the hailstorm. ECF No. 5 ¶ 22.

[1] None of the parties' filings identify who Austin Nelson is or what his relationship is to Defendant. Nelson's e-mail signature and address suggest he owns or is an employee of 33 Carpenters Construction, which the Court notes is the same company that prepared the itemized estimate submitted to Plaintiff on November 24 for damage to Defendant's property. *See* ECF No. 19-2 at 48. 33 Carpenters Construction also shares a business address with Defendant for the property at issue here, a fact of which the Court takes judicial notice.

On December 7, Plaintiff filed a First Amended Complaint seeking declaratory relief as to claimed interior, roof, concrete driveway, siding, and gutter/downspout damages to the property, citing various limitations, exclusions, or conditions in the policy language pertaining to coverage for any losses or damages under the policy.[2] ECF No. 5 ¶¶ 34–64. On December 28, Defendant filed its Answer to the Amended Complaint and Counterclaims. ECF No. 8. In its first counterclaim, Defendant alleges it made written demand to Plaintiff for an appraisal of the amount of loss resulting from the hailstorm and requests declaratory relief in the form of directing the parties to complete the appraisal process. *Id.* ¶¶ 53, 59, 78–84. Defendant also alleges counterclaims for breach of contract and bad faith. *Id.* ¶¶ 85–110.

On February 25, 2021, Magistrate Judge Celeste F. Bremer adopted the parties' joint Proposed Scheduling Order and Discovery Plan. ECF No. 16. Judge Bremer scheduled a jury trial in the matter to begin August 15, 2022. *Id.*

On March 9, 2021, counsel for Defendant e-mailed counsel for Plaintiff stating, in part:

> I wanted to follow up on our discussion of March 2 regarding the Acuity v. AKN LeClaire matter. There is clearly a disagreement regarding the amount of loss caused by the storm for which the policy provides guidance to resolve through the appraisal clause. My client has instructed me to reaffirm its written demand for an appraisal of the loss pursuant to the terms and conditions of the policy. Please confirm whether Acuity is agreeable to entering a stay of the lawsuit and moving forward with an appraisal to determine the amount of loss.

ECF No. 19-2 at 50.

On March 11, Defendant filed this Motion for Partial Summary Judgment seeking to compel compliance with the appraisal provision of the policy. ECF No. 19.

[2] Plaintiff filed its original Complaint on December 4, 2020. ECF No. 1. On December 7, the Court entered an Initial Review Order requiring Plaintiff to file an amended complaint to properly allege the parties' citizenship and the requisite amount in controversy for purposes of jurisdiction. ECF No. 4.

II. SUMMARY JUDGMENT STANDARD

Federal Rule of Civil Procedure 56(a) provides, "A party may move for summary judgment, identifying each claim or defense—or the part of each claim or defense—on which summary judgment is sought." Summary judgment is proper when the record, viewed in the light most favorable to the nonmoving party and giving that party the benefit of all reasonable inferences, shows there is no genuine issue of material fact and the moving party is therefore entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(a); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Harlston v. McDonnell Douglas Corp.*, 37 F.3d 379, 382 (8th Cir. 1994).

"In considering a motion for summary judgment the court does not weigh the evidence, make credibility determinations, or attempt to discern the truth of any factual issue." *Great Plains Real Estate Dev., L.L.C. v. Union Cent. Life Ins. Co.*, 536 F.3d 939, 944 (8th Cir. 2008) (quoting *Morris v. City of Chillicothe*, 512 F.3d 1013, 1018 (8th Cir. 2008)). Rather, the court determines whether there are any disputed issues concerning the existence of material facts and, if so, whether those disputes are genuine. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251–52 (1986); *see also Wilson v. Myers*, 823 F.2d 253, 256 (8th Cir. 1987) ("Summary judgment is not designed to weed out dubious claims, but to eliminate those claims with no basis in material fact.").

III. ANALYSIS

The Declaratory Judgment Act provides, in pertinent part, that "[i]n a case of actual controversy within its jurisdiction, . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declarations." 28 U.S.C. § 2201(a). "In the context of a declaratory judgment

action, an 'actual controversy' exists if, 'the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.'" *Fed. Ins. Co. v. Sammons Fin. Grp., Inc., et al.*, 595 F. Supp. 2d 962, 971 (S.D. Iowa 2009) (quoting *Maryland Cas. Co. v. Pac. Coal & Oil Co.*, 312 U.S. 270, 273 (1941)). Defendant asserts an actual controversy exists in this case because Plaintiff refused to proceed with the appraisal process provided for in the insurance contract even after receiving a written demand for appraisal from Defendant. The Court agrees.

In this case, there is no dispute the hailstorm of April 7, 2020, caused some damage to Defendant's property. It is also not disputed that the appraisal provision of the insurance policy at issue provides a mechanism to resolve disputes between the parties relating to the amount of the loss resulting from the storm. What is disputed in this case is the amount of loss and the extent of the damage caused by the storm and whether Defendant has properly invoked the appraisal provision at issue.

"An appraisal is a supplementary arrangement to arrive at a resolution of a dispute without a formal lawsuit." *Cent. Life Ins. Co. v. Aetna Cas. & Sur. Co.*, 466 N.W.2d 257, 260 (Iowa 1991). "[I]t serves as an inexpensive and speedy means of settling disputes over matters such as the amount of loss and value of the property in question." *Id.* The process is "favored by both the Iowa legislature and the Iowa Supreme Court as a means for narrowing disputes that may ultimately have to be resolved in litigation." *Walnut Creek Townhome Ass'n v. Depositors Ins. Co.*, 913 N.W.2d 80, 89 (Iowa 2018) (quoting *Terra Indus., Inc. v. Commw. Ins. Co. of Am.*, 981 F. Supp. 581, 605 (N.D. Iowa 1997)). The Iowa Supreme Court has held "[p]rovisions for

appraisal of an insurance loss . . . are valid and binding on the parties." *Id.* (citing 6 J. Appleman & J. Appleman, Insurance Law and Practice §§ 3921, 3924 (rev. 1972)).

"The construction and interpretation of insurance policies is a question of law for the court." *Johnson v. Farm Bureau Mut. Ins. Co.*, 533 N.W.2d 203, 206 (Iowa 1995). "Insurance policies are contracts between the insurer and the insured and must be interpreted like other contracts, the object being to ascertain the intent of the parties." *Talen v. Emps. Mut. Cas. Co.*, 703 N.W.2d 395, 407 (Iowa 2005). "When the words of an insurance contract are unambiguous, the intent of the parties is determined by the language of the policy itself." *Mod. Equip. Co. v. Cont'l W. Ins. Co.*, 355 F.3d 1125, 1128 (8th Cir. 2004). "The plain meaning of the insurance contract generally prevails." *Boelman v. Grinnell Mut. Reins. Co.*, 826 N.W.2d 494, 501 (Iowa 2013).

The appraisal provision at issue in this case requires a party invoking it to "make written demand for an appraisal of the loss. In this event, each party will select a competent and impartial appraiser." ECF No. 19-3 ¶ 5. This language does not specify a timeline for when a party shall make a written demand after a disagreement as to the amount of loss or when a party must select an appraiser. Thus, if read literally, the appraisal provision would permit a party to make a demand for appraisal at any point after a disagreement as to the loss amount. Many courts have interpreted such a provision to require that "the demand be made within a 'reasonable' time." *Terra Indus., Inc.*, 981 F. Supp. at 597 (collecting cases).

Defendant argues it made multiple written demands for appraisal of the amount of loss from the hailstorm but Plaintiff refused to participate. Defendant contends it invoked the appraisal provision when Nelson e-mailed Wittliff on October 16, 2020. That e-mail stated, in part, "either send payment, engage conversation, or name your appraiser." ECF No. 19-2 at 48.

Plaintiff contends this e-mail plainly did not demand an appraisal nor did it identify a competent and disinterested appraiser selected by Defendant. Instead, Plaintiff argues, this e-mail *invited Plaintiff* to invoke the appraisal provision. Defendant also contends it invoked the appraisal provision in Nelson's e-mail to Wittliff dated October 28, 2020. This second e-mail stated, "Are you going to pay my demand? If not then I'm going to invoke appraisal according to my policy." ECF No. 19-2 at 49. Again, Plaintiff contends this written communication did not invoke the appraisal provision because Nelson simply suggested that Defendant *might* invoke the provision. Defendant next contends it invoked the appraisal provision, when, on March 9, 2021, defense counsel e-mailed Plaintiff's counsel stating Defendant "ha[d] instructed [defense counsel] to reaffirm [Defendant's] written demand for an appraisal of the loss pursuant to the terms and conditions of the policy." ECF No. 19-2 at 50. Plaintiff contends this written demand for appraisal did not invoke the provision because Defendant did not identify an appraiser. Further, Plaintiff contends that even if this third e-mail did comply with the terms of the provision, it was too late because Defendant had already waived enforcement of the provision by participating in this lawsuit.

The Court concludes the March 9, 2021 e-mail from defense counsel clearly invoked the provision.[3] The e-mail unequivocally expresses Defendant's demand for an appraisal as to the amount of loss that occurred as a result of the hailstorm. Even if the e-mail did not invoke the provision, Defendant's counterclaim seeking declaratory judgment on the issue of appraisal did. *See* ECF No. 8 at 15–17, 19–20. The plain language of the appraisal provision does not require a party to identify an appraiser at the time the provision is invoked or at any specified time. Thus,

[3] The Court need not decide whether either of the e-mails between Nelson and Wittliff constituted a written demand for an appraisal because Defendant made other written demands that clearly and unequivocally invoked the appraisal provision.

Plaintiff's argument that Defendant has not made sufficient written demand for appraisal because it does not identify an appraiser fails. Having concluded Defendant made a satisfactory written demand for appraisal, the Court turns to whether Defendant's demand for appraisal was timely made or whether Defendant waived its right.

"[W]hen appraisal is not demanded until after suit is filed, the question is whether the demand for appraisal was waived or instead was made within a reasonable time after impasse was reached." *Terra Indus., Inc.*, 981 F. Supp. at 599. Plaintiff bears the burden of establishing its claim that Defendant waived its right to demand appraisal. *See id.* ("[W]hen considering waiver of other provisions of an insurance contract, the Iowa Supreme Court has required the party asserting waiver to bear the burden of proof.") (citing *Met-Coil Sys. Corp. v. Columbia Cas. Co.*, 524 N.W.2d 650, 654 (Iowa 1994); *Am. Guarantee & Liab. Ins. Co, v. Chandler Mfg. Co.*, 467 N.W.2d 226, 228 (Iowa 1990)).

Under Iowa law, waiver is "the voluntary or intentional relinquishment of a known right." *Scheetz v. IMT Ins. Co. (Mut.)*, 324 N.W.2d 302, 304 (Iowa 1982) (quoting *Travelers Indem. Co. v. Fields*, 317 N.W.2d 176, 186 (Iowa 1982)). "Waiver can be shown by the affirmative acts of a party, or can be inferred from conduct that supports the conclusion waiver was intended." *Id.* "When the waiver is implied, intent is inferred from the facts and circumstances constituting the waiver." *Id.* Here, Defendant did not expressly waive its right to invoke the appraisal provision. Thus, the Court must examine the facts and circumstances to determine whether it can infer that Defendant intended to waive its right to an appraisal. *See id.*

"The issue of waiver is generally one of fact for the jury . . . . When the evidence is undisputed, however, the issue is one of law for the court." *Id.* "Other courts have recognized that waiver is usually a matter of fact, but that the court may determine whether appraisal has

been waived as a matter of law, at least in part as a matter of practicality, because the question arises at the preliminary stages of litigation." *Terra Indus., Inc.*, 981 F. Supp. at 602. In determining whether a party has waived appraisal, courts consider "the timeliness of the demand in light of the circumstances as they existed at the time the demand was made" and "whether there would be any prejudice to the other party resulting from the delay in demanding an appraisal." *Id.*

Although the fact that litigation has begun is a relevant factor in determining whether Defendant waived its right to an appraisal, *Terra Indus., Inc.*, 981 F. Supp. at 602, in this case, it was not the party now asserting a right to appraisal that filed suit, but rather, the party refusing to participate. Defendant made clear it was pursuing an appraisal at its first opportunity, i.e., when it filed its Answer to Plaintiff's Amended Complaint and Counterclaims. *See* ECF No. 8 at 15–17, 19–20. Further, the Court notes that only four months passed between the time Plaintiff filed its complaint and Defendant's next written demand for an appraisal. The fact that Defendant complied with the Court's procedural rules rather than subjecting itself to a default judgment should not be held against it. Thus, the Court concludes Defendant made its demand for appraisal within a reasonable time.

Additionally, no prejudice will result to Plaintiff because little has occurred in this action since its filing. It is true, some deadlines agreed to by the parties have passed. *See* ECF No. 16. But Defendant made an unequivocal, written demand for appraisal at the start of the litigation and reaffirmed its demand again before any deadlines passed. Thus, the Court concludes Defendant has not waived its right to appraisal by responding to Plaintiff's suit.

The Court holds the parties shall participate in and be bound by the contractually required appraisal process. Such process may include a decision regarding the factual causation of the

disputed damages if necessary to determine the amount of loss from the hailstorm of April 7, 2020. *See Walnut Creek Townhome Ass'n*, 913 N.W.2d at 91 ("[W]e . . . hold appraisers may decide the factual cause of damage to property in determining the amount of the loss from a storm."). Any issues of coverage under the policy are reserved for the Court. *Id.* at 94 ("Coverage issues are for the court."). This matter is stayed pending completion of the appraisal process. *See Terra Indus., Inc.*, 981 F. Supp. at 587 (citing court's inherent power to stay a matter in order to control its docket); *see also North Glenn Homeowners Ass'n v. State Farm Fire & Cas. Co.*, 854 N.W.2d 67, 72 (Iowa Ct. App. 2014) ("[W]here a party has demanded an appraisal, the process should go forward with other judicial determinations waiting until after the process has been completed.").

IV. CONCLUSION

Based upon the foregoing, Defendant's Motion for Partial Summary Judgment (ECF No. 19) as to Count I of Defendant's Counterclaims (ECF No. 8) is GRANTED. The parties shall expeditiously participate in the appraisal process as outlined in the policy. This action is STAYED to allow the parties to pursue an appraisal of Defendant's property. The parties shall submit a joint status report to the Court within ninety (90) days. Upon completion of the appraisal process, the parties shall file an appropriate notice with the Court.

IT IS SO ORDERED.

Dated this 17th day of May, 2021.

Robert W. Pratt

ROBERT W. PRATT, Judge
U.S. DISTRICT COURT