IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

PRESCOTT MILL CONDOMINIUM ASSOCIATION,	)	
Plaintiff,	)	
v.	)	Case No. 20 C 6944
MID-CENTURY INSURANCE COMPANY,	)	Judge Joan H. Lefkow
Defendant.	)	

ORDER

Plaintiff Prescott Mill Condominium Association's motion to compel appraisal and stay (dkt. 16) is granted. The status hearing set for 8/18/21 is reset to 11/3/21 at 9:30 a.m. See statement.[1]

STATEMENT

Prescott Mill Condominium Association (Prescott), a condominium association governing a twenty-five-building condominium complex, brought this action against Mid-Century Insurance Company (Mid-Century), its insurer, seeking damages for breach of an insurance policy. (Dkt. 1).[2]

According to the complaint, in May 2019, wind and hail damaged the roofs and siding of Prescott. (*Id.* at 2.) Prescott had an insurance policy with Mid-Century that covered the replacement cost for the damage. (*Id.*)

Prescott submitted a claim under the policy. (*Id.*) Mid-Century's adjuster, Dennis Wheeler, and Prescott's retained public adjuster, Ron Cooper, inspected the property. (*Id.*) Wheeler informed Cooper that the repair estimate would likely include complete roof replacement on all units but only partial siding replacement. (*Id.*) Wheeler also told Cooper that

[1] This court has jurisdiction over the action under 28 U.S.C. § 1332. Venue is proper under 28 U.S.C. § 1391(b)(2). Both parties apply Illinois law, and so will the court.

[2] A breach of contract claim accompanied by a request for equitable relief is typically what plaintiffs plead in cases where motions to compel appraisal are brought. *See, e.g.*, *Runaway Bay Condo. Ass'n* v. *Phila. Indem. Ins. Cos.*, 262 F. Supp. 3d 599, 600 n.1 (N.D. Ill. 2017). The court construes Prescott's request for "further relief, general or special, . . . in equity" in its prayer for relief accompanied with a breach of contract claim as sufficient to state that it seeks judicial enforcement of an appraisal clause under the policy.

Mid-Century would not cover "overhead and profit," a damage component under the policy that covered "increased fee, charge or cost attributable to a general contractor's profit and overhead" if the insured had "incurred and paid for them and they are reasonable." (*Id.* at 3.)

Wheeler estimated $1,038,173.16 in damages for replacement cost value of the roofs, part of the siding, and soft metal repairs, but no overhead and profit. (*Id.*) Mid-Century issued a $627,545.05 payment to Prescott for the actual cash value for the roof, and a contractor began replacing the roofs. (*Id.*) Once the job was complete, Prescott submitted a certification of completion to Cooper that included an invoice for $722,259.33, which included overhead and profit. (*Id.* at 4.) Wheeler refused to issue payment for overhead and profit, however, claiming that Cooper had agreed at inspection that overhead and profit was not warranted. (*Id.*)

Wheeler issued a revised damage estimate for $1,203,347.50, though, that incorporated certain additions to the roof damages estimate. (*Id.*) In that estimate, Wheeler maintained that he and Cooper had agreed that overhead and profit were not warranted. (*Id.* at 4–5.)

While the roofs were being repaired, Prescott ordered "Itel reports" to find matching siding. (*Id.* at 3) No matches were found, so Prescott's board president sent a letter to Cooper informing him that all siding would need to be replaced. (*Id.* at 3–4.) Wheeler requested a copy of the repair contractor's siding work estimate. (*Id.* at 5.)

Cooper submitted a repair estimate from Prescott's building consultant for $2,486,764.00. (*Id.*) That estimate included the overhead and profit for roof work and the replacement of all siding. (*Id.*) In the end, Mid-Century refused to pay for overhead and profit and full siding replacement. (*Id.*)

After filing the complaint and once settlement discussions "broke down" (dkt. 22 at 5), Prescott demanded appraisal of the damage under section E(2) of the policy. (Dkt. 16 at 4.) Section E(2) states that "if we and you disagree on the amount of loss, either may make a written demand for an appraisal of the loss." (Dkt. 1-1 at 79.) Mid-Century declined to go forward with appraisal. (Dkt. 16 at 4.)

Prescott moves to compel an appraisal, as provided in the policy, to resolve its disagreement with Mid-Century over the covered loss amount on (1) overhead and profit relating to the roof repair and (2) full siding replacement. "Illinois courts view appraisal clauses as analogous to arbitration clauses and hold that both types of clauses are valid and enforceable in a court of law." *70th Ct. Condo Ass'n v. Ohio Sec. Ins. Co.*, No. 16 CV 07723, 2016 WL 6582583, at *4 (N.D. Ill. Nov. 7, 2016).

First, regarding the overhead and profit issue, Mid-Century does not dispute (dkt. 20 at 8) that under the policy this expense can be included in the loss amount if it is "reasonable" (dkt. 20 at 4 (quoting dkt. 1-1 at 153)). The amount of this loss is therefore a question for appraisal. *See Runaway Bay Condo. Ass'n*, 262 F. Supp. 3d at 604 (concluding that "issues of overhead and profit are appropriately addressed via appraisal"); *Windridge of Naperville Condo. Ass'n* v. *Phila. Indem. Ins. Co.*, No. 16 C 3860, 2017 WL 372308, at *3 (N.D. Ill. Jan. 26, 2017) ("determining whether a general contractor is needed, in which case profit and overhead is part

of the loss, or whether a single tradesman can do the work . . . . is a question proper for appraisal").

Mid-Century argues, however, that this issue should not be sent to appraisal because Prescott waived its ability to invoke appraisal by delaying its appraisal request. (Dkt. 20 at 5–9.) Mid-Century's waiver argument is not persuasive. Not only is waiver disfavored, *see Lundy* v. *Farmers Grp., Inc.*, 750 N.E.2d 314, 319 (Ill. App. Ct. 2001), but also Prescott's "prompt[ ]" demand for appraisal following a break down in settlement discussion early in this litigation is not consistent with an abandonment of its right to invoke appraisal (dkt. 22 at 5). And, contrary to Mid-Century's position, the fact that the roofs have been repaired does not preclude an appraiser from determining independently whether overhead and profit in this instance is reasonable based on the scope of the work required to do that job. Mid-Century does not explain how reviewing the damage firsthand could materially affect that determination. Accordingly, there has been no waiver. The parties' disagreement as to the amount of loss is appropriate for appraisal.

Second, for the siding replacement issue, a "dispute regarding whether there are matches available for the siding . . . , and thus whether [Mid-Century] must replace or pay to replace the siding on" undamaged sides "is a dispute regarding loss amount." *Windridge of Naperville Condo. Ass'n* v. *Phila. Indem. Ins. Co.*, No. 16 C 3860, 2018 WL 1784140, at *5 (N.D. Ill. Apr. 13, 2018), *aff'd* 932 F.3d 1035 (7th Cir. 2019). Mid-Century also does not dispute that replacing undamaged siding can be covered under the policy. (Dkt. 20 at 10).

Mid-Century contends, rather, that appraisal is unnecessary because Cooper and Wheeler already agreed on the loss amount. (*Id*.) According to Wheeler's affidavit, he and Cooper "agreed that if siding to one of the elevations of a building at the Property were damaged, the entire elevation would be replaced, but if there was a second elevation damaged, we agreed to harvest siding from the first elevation being replaced to be used on the second elevation." (Dkt. 20-1 at 3.)

Prescott counters that Illinois law bars public adjusters, like Cooper, from "'agree[ing] to any loss settlement without the insured's knowledge and consent[.]'" (Dkt. 22 at 10 (quoting 215 Ill. Comp. Stat. 5/1590(k)).) Prescott also does not concede the accuracy of Wheeler's recollection of an agreement and further notes that, contrary to the purported agreement, it "has clearly taken the position since November 2019 that" all sides need to be included in the loss and replaced. (*Id.* at 9 n.4, 11.) Given that Cooper cannot bind Prescott as a matter of law without Prescott's consent and Prescott maintains that the purported agreement is contrary to the position that it has taken early in the dispute and through litigation, there is not sufficient evidence to find that this loss dispute should not be submitted to appraisal.

For these reasons, Prescott's motion to compel appraisal and stay is granted. The parties' dispute will be submitted to appraisal in accordance with the terms of the policy. The action is stayed pending the outcome of appraisal.

Date: August 4, 2021

Joan H. Lefkow

U.S. District Judge Joan H. Lefkow