VIRGINIA:

IN THE CIRCUIT COURT FOR THE CITY OF WINCHESTER

CRAUN, LLC,

Plaintiff,

v.

Case No.: CL21-78-00
CL21-78-01

ERIE INSURANCE COMPANY,

Defendant.

FINAL ORDER OF DECLARATORY JUDGEMENT

This case came before the Court for trial on November 10, 2021. The parties appeared by counsel: Andrew P. Hill, Esq., for the Plaintiff (Craun), and Gary R. Reinhardt, Esq., for the Defendant (Erie). A court reporter was present and duly sworn.

The following exhibits were admitted by stipulation and without objection: Plaintiff's exhibits 1-3 and 5-7 and Defendant's exhibits 1,4,6, and 10. Plaintiff presented testimony from Peter Gaetano from ClaimStar, Craun's public adjuster, and rested. Defendant presented testimony from Glen Cooper from Erie Insurance Company and rested. The matter was argued by counsel.

Plaintiff's complaint is in two counts. In Count I, Plaintiff seeks declaratory judgment regarding interpretation of the VA Code § 38.2-2105 required standard appraisal provision of an insurance policy. In Count II, if the Court agrees with Plaintiff's interpretation, Plaintiff seeks specific performance of the provision. Defendant's counterclaim is a declaratory judgment action seeking the contrary interpretation of the same insurance policy provision.

The question for the Court's determination is whether the appraisal mechanism applies to items determined to be excluded from coverage by the insurance company under the terms of the policy. For the reasons stated herein, the Court concludes that the appraisal mechanism does not apply to items determined to be excluded from coverage by the insurance company under the terms of the policy.

Facts

There is no dispute as to the facts of this case. On or about March 13, 2020, Craun sustained damage during a hailstorm to real estate that it owns at 1-40 Raleigh Court, Winchester, Virginia. Craun submitted a claim to its insurance company, Erie Insurance.

Craun claims the amount covered under the policy to be $408,929.94. Erie maintains the amount covered under the policy to be $154,775.16. Craun seeks to submit the entire dispute to appraisers under the standard appraiser language of the policy required by VA Code § 38.2-2105, set forth in Section X, page 68 of 73 of the policy, which provides that if

the parties cannot agree as to the actual cash value or the amount of loss, either party may make a written demand for an appraisal. Each side then names an appraiser, and the appraisers select an umpire to make a binding decision.

Erie concedes that a portion of the disputed amount is a disagreement as to the actual cash value or the amount of loss and should be submitted to appraisal. However, Erie maintains that a substantial portion of the amount Craun claims is excluded from coverage under the terms of the policy as not attributable to the March 13, 2020 hailstorm. Such excluded items include wear and tear, rot, and other long term wear. As these items are exclusions under the policy, Erie maintains the items should not be submitted under the appraisal process under the terms of the policy.

Analysis

While no Virginia state appellate court has construed the language of VA Code § 38.2-2105, the United States District Court for the Eastern District of Virginia has opined that "a plain reading of the statute compels the conclusion that the provision is triggered only when the parties disagree as to the amount of loss, not the existence of coverage." *HHC Assocs. v. Assurance Co. of America*, 256 F.Supp.2d. 505, 510 (E.D. Va. 2003). Craun appears to concede this point but argues that when the question includes both a dispute as to the amount of loss and a dispute as to what is covered, that appraisers are the proper arbiters of the entire dispute. The Court disagrees.

Each side cites the Fairfax Circuit Court case of *Coates v. Erie Ins. Exch. Co.*, 79 Va. Cir. 440 (Fairfax Cir. Ct. 2009) as persuasive authority in support of its position. However, an application of the principles set out in *Coates* does not resolve the issue before this Court. In *Coates*, "the parties have stipulated that the Event was covered under the insurance policy between the Coates and Erie. However, the parties disagree as to the extent of repairs required to correct the damage." *Coates*, 79 Va. Cir. at 442. "[I]t is undisputed that the electrical surge was the sole cause of damage to the Coates' home." *Coates*, 79 Va. Cir. at ___.

Coates favorably cites a line of cases out of Texas construing the same standard insurance policy regarding appraisers. "[I]n *State Farm Lloyds v. Johnson*, 290 S.W.3d 886 (Tex.2009)..., a hail storm damaged the policy holder's roof. A dispute arose as to whether appraisal was appropriate to determine which portions of the roof needed to be replaced under the policy. *Id.* at 887. The Supreme Court of Texas held that appraisal was the appropriate process not only for determining which portions of the roof were damaged, but also whether undamaged portions of the roof would need to be replaced in order to fix the damage caused by the event. *Id.* at 891. The court noted that 'causation relates to both liability and damages because it is the connection between them.' Id. at 891–892." *Coates*, 79 Va. Cir. at ___.

The Fairfax Circuit Court notes in *Coates* that *Johnson* distinguished an earlier Texas case of *Wells v. American States Preferred Insurance Company*, 919 S.W.2d 679 (Ct.App.Tex.1996), stating that in *Wells,* "different causes, a plumbing leak (a covered peril) and settling of the foundation (an excluded peril), were questions of causation for liability purposes and thus for the court, as opposed to the extent of damage caused by a

covered event which question was appropriate for the appraisal process. Id. at 892." *Coates*, 79 Va. Cir. at ___. [1]

In *Coates*, the exact question of *Johnson* was before the Fairfax Circuit Court. Here, the exact question of *Wells* is before this Court. Different causes, a hailstorm (a covered peril) and wear and tear, rot, and other long term wear (excluded conditions), were questions of causation for liability purposes, as opposed to the extent of damage caused by a covered event, which question was appropriate for the appraisal process.

This Court, finding all of the above cases to be persuasive, concludes that the appraisal mechanism does not apply to items declared excluded from coverage by the insurance company under the terms of the policy. Having so concluded on the relief requested in Count I of Craun's Complaint and in Erie's Counterclaim, the issue of specific performance in Count II of Craun's Complaint is moot.

Accordingly, it is ADJUDGED, ORDERED, DECREED, and DECLARED that the appraisal mechanism set forth in the policy does not apply to items determined to be excluded from coverage by Erie under the terms of the policy.

The Clerk is directed to send a copy of this order to the parties, who shall file such objections hereto as deemed advisable within ten days of their receipt of a copy of this order. This is a final order. The Clerk is directed to place this among the causes ended. Endorsement is dispensed with pursuant to Supreme Court Rule 1:13.

Enter this 15th day of November, 2021

Alexander R. Iden, Judge

A COPY TESTE:
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WINCHESTER CIRCUIT COURT

[1] Since *Coates*, *Wells*, and *Johnson* each arose in the context of a summary judgment motion in a contract action, the question before those courts was whether the court or appraisers would decide a particular issue. Here, as this is a declaratory judgment action, the question is one of construction of the terms of the policy. The parties agree that this Court cannot, in the posture of this case as a declaratory judgment action, make an actual determination of coverage. That determination must first be made by Erie, subject to later review by the Court in a subsequent contract action should Craun dispute the determination.