

2007 WL 4927609 (E.D.Pa.) (Trial Motion, Memorandum and Affidavit)
United States District Court, E.D. Pennsylvania.

MAIDEN CREEK T.V. & APPLIANCE, INC., Plaintiff,
v.
GENERAL CASUALTY INSURANCE COMPANY, Defendant.

No. 05-667.
December 21, 2007.

Brief in Support of Petition to Modify Appraisal Award

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The Honorable [Harvey Bartle, III](#).

I. Background

This matter arises from a commercial fire insurance policy dispute. August 28, 2003, Plaintiff suffered fire damage to its commercial retail facility and business property located at 8261 Allentown Pike, Reading, Berks County, Pennsylvania. After a delay of more than a year and a half in paying certain aspects of the insurance claim, Plaintiff initiated the present suit by Complaint filed on or about February 14, 2005. Plaintiff's Complaint asserts claims for Breach of Contract, Bad Faith, pursuant to 42 P.S.C.A. §8371 and violation's of Pennsylvania's Unfair Trade Practices Consumer Protection Law. See Plaintiff's Complaint.

Defendant sought to have the disputed claim issues addressed through the Appraisal provisions of the insurance policy. By Order dated September 23, 2005, this Honorable Court issued a stay with respect to the litigation and directed that certain issues be addressed through the appraisal process as outlined in the insurance policy.

The appraisal for the Business Personal Property and Business Income loss issues proceeded with Gene Carey acting as the independent umpire. Plaintiff was represented by Robert Zackowski. Defendant's appraiser was John McHenry.

On or about October 27, 2007, a preliminary award was entered by Umpire Carey. See Exhibit 2. With the exception of the floor electronic items discussed below, the award did not consider several items which were the subject of previous agreement as between the party's appraisers. This is further confirmed by Mr. Carey's letter of August 10, 2007 which outlines the very limited scope of issues that he was addressing and which does not include any of the now disputed issues. See Exhibit 2a. By Petition filed November 20, 2007, Plaintiff sought to modify and/or appeal the umpire's award. The present Brief is filed in support thereof.

With respect to Appraisal, the policy provides, in part, as follows:

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 party 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. See Exhibit 1, page 16 of 29 (emphasis added).

II. Improper Reduction of Agreed Upon Claim Damages.

During the Appraisal process, Plaintiff was advised that Defendant's appraiser was seeking to reopen portions of the claim which had already been negotiated, agreed upon, and paid by General Casualty. Specifically, one aspect of Plaintiff's claim included smoke and water damage to various display electronics such as stereos, televisions, etc. Maidencreek President, Larry Sutton, and General Casualty adjuster, Stephen Esbenson, agreed upon a fair value for these damages which reflected a reduced sales price and the cost of extended warranties. Ultimately, Maidencreek and General Casualty agreed upon a damage value of \$27,557.22 and this amount was paid to Maidencreek. Maidencreek was then able to sell those items at a reduced cost.

Notwithstanding this agreement, Defendant's appraiser, John McHenry, argued vigorously that further reductions were warranted. Ultimately, the award of October 23, 2007 included a line item for the above-referenced damaged electronics and reflected an additional reduction in value of \$2,755. See Exhibit 2.

General Casualty's previous agreement and payment of this portion of the claim was confirmed by Defendant's prior counsel, Lee Janiczek, Esquire, in his email of September 3, 2004. See Exhibit 3. This email provided the first detailed breakdown of General Casualty's payments to Maidencreek, and indicated as follows:

Scott, as we discussed, the payments which have been made consist of;

...

\$50,000 for business property (in part to satisfy the \$27,557.22 reduction in sale price of the stock).

See Exhibit 3.

Defendant's claim log narrative, which is identified as a series of "Investigative Reports" equally confirms this agreement. Copies of the cited Investigative Reports are collectively set forth at Exhibit 4. Defendants "Third Investigative Report dated December 17, 2003, indicated as follows:

Stock:

On 12/10/03, the insured has submitted a spreadsheet outlining the wholesale cost and retail selling price of the smoke damaged HDTV televisions and electronic components. The retail selling price of the smoke damaged televisions and electronic components totals \$78,134.40 as detailed in the enclosed spreadsheet. I initially confirmed the quantities, wholesale and retail cost of the damaged stock during my two initial inspections of the property. The stock loss as confirmed totals \$27,557.22, which represents the cost (2% discount (loss) applied) to the damaged televisions, and the cost to purchase three year warranties on the televisions. **The insured has documented a stock loss in the amount of \$27,557.22.**

See Exhibit 4 (emphasis added).

Defendant's Fourth Investigative Report indicated as follow:

Stock:

On 12/10/03, the insured has submitted a spreadsheet outlining the wholesale cost and retail selling price of the smoke damaged HDTV televisions and electronic components. We have confirmed the retail selling price of the smoke damaged televisions and electronic components totaling \$78,134.40. **The stock loss as confirmed totals \$27,557.22.** The smoke and water damaged televisions were sold to retail customers at a 25% discount.

See Exhibit 4.

This was again repeated in the Fifth Investigative Report, the Seventh Investigative Report dated April 7, 2004 indicated as follows:

Stock:

We have confirmed the retail selling price of the smoke damaged televisions and electronic components totaling \$78,134.40. **The stock loss as confirmed totals \$27,557.22.**

See Exhibit 4.

This was subsequently repeated in the Eighth, Ninth, Twelfth, Fourteenth and Fifteenth Investigative Reports. The Tenth, Eleventh and Thirteenth Investigative Reports have not been produced by Defendant.

During the appraisal process, Plaintiff's counsel expressly requested that Defendant reconfirm this understanding and exclude this issue from the appraisal. Plaintiff's counsel letter of June 21, 2006, indicated as follows:

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Mr. Saltzman,

I am in receipt of a copy of Mr. McHenry's letter of May 5, 2006 which was copied to you. I am writing to object to McHenry's attempt to address issues of coverage which, under long standing Pennsylvania law, are well outside the scope of the appraisal process. **Moreover, Mr. McHenry is attempting to re-open issues which were the subject of express agreements between Maidencreek and General Casualty prior to the initiation of suit and the appraisal process. For instance, the parties expressly agreed on a reduced value for the damage retail inventory items with an agreed upon value of \$27,557.27. That specific amount was then paid to Maidencreek. Mr. McHenry now seeks to improperly reduce that amount by an additional ten percent as part of his appraisal evaluation.** By way of another example, the parties clearly agreed upon the calculation of lost rent. However, Mr. McHenry is not attempting to improperly "adjust" those determinations. **Moreover, his blatant attempt to suggest that significant portions of the claim are not payable after General Casualty has already issued payments and waived any such coverage issues is wholly improper and legally without basis.**

See Exhibit 5 (emphasis added).

No substantive response was ever received to the issues raised in their correspondence.

As such, Defendant clearly agreed to and paid the negotiated value. This was not the subject of any "disagreement" as required by the Appraisal provisions of the policy until after the appraisal process began. Therefore, this issue was outside the scope of the appraisal process and should not have been addressed. Moreover, clear principles of estoppel preclude Defendant from reopening such issues. Under Pennsylvania law, the doctrine of equitable estoppel is applied to "prevent a person from taking a position that is inconsistent with a position previously taken or acting differently than the manner in which that person induced another person by word or deed to expect." *Louis W. Epstein Family Partnership v. Kmart Corp.*, 828 F. Supp. 328, 343 (E.D.Pa.

1993), rev'd on other grounds, 13 F.3d 762 (3d Cir. 1994). Maidencreek negotiated and compromised its claim to the agreed upon value of \$27,755. Plaintiff's compromise should not be used against it as a starting point for further reductions.

During the parties' conference call with the Court on December 3, 2007, Defendant's counsel claimed that Plaintiff sought to address items which were purportedly agreed upon prior to the appraisal process. First, Defendant has failed to preserve any such issues as the thirty day period within which to appeal the award has long passed. Moreover, Plaintiff is aware of no such issues and Defendant never brought any such issues to Plaintiff's counsel attention during the appraisal process.

Defendant further suggests that the award is binding in that Robert Zackowski signed the award. This argument fails to appreciate the fact that this aspect of the claim was previously agreed upon and, therefore, did not fall within the authority and scope of the umpire in the first place. Certainly, the actions of three lay appraisers cannot be seen to supplant the legal scope and limitations of the appraisal clause of the policy. Moreover, a revised award has been prepared by Mr. McHenry which Mr. Zackowski has not signed. See Exhibit 6.

Wherefore, Plaintiff respectfully requests this Honorable Court to modify the Appraisal award and eliminate the reduction of \$2,577.00 which was improperly applied.

III. Cost to Prepare Inventory

Maidencreek's policy provides for the payment of expenses incurred in the compilation of inventories requested by General Casualty. Under the policy, **Additional Coverages** of the **Commercial Marketplace Policy**, Item m(1), the policy provides:

1. We will pay up to \$2,500 for expenses you incur in compiling inventories at our request to assist us in determining the amount of the loss covered by this policy.

See Exhibit 1, page 7 of 29.

Maidencreek employees spent hundreds of hours in preparation of the various inventories and supporting claim documentation. Additionally, Maidencreek utilized the services of its accounting firm, Reinsel & Company, Professional Services, and its attorneys to assist in the preparation and submission of its loss and in providing documents and analysis requested by General Casualty and its agents. General Casualty has not paid any benefits for this aspect of the claim. Copies of the relevant invoices are attached hereto as Exhibit 7 and include the following:

Inventory Preparation

Reinsel & Company, CPA Invoice, 7/30/04, \$1,235 Buzgon, Davis Law Office Invoice, 4,735.00
8/28/04, \$3,500 2,500.00

During his deposition, Mr. Esbensen acknowledged that General Casualty had determined that Maidencreek was entitled to claim preparation benefits:

Q. Did you determine that there were any additional payments due on any aspect of the claim after Mr. Janiczek's involvement in the claim?

A. Mr. Janiczek and I reviewed a limited amount of documents. And indicated that a supplemental claim may be warranted; a supplemental claim payment may be warranted.

Q. Do you know what aspects of the claim that related to?

A. Claim preparation was one item. I can't recall the rest.

Q. The claim preparation, are you referring to the clause in the policy that provides a limited --

A. Reimbursement.

Q. -- reimbursement for claims preparation? Do you recall off the top of your head how much that is?

A. I don't recall.

See Exhibit 8, pages 101-103.

Plaintiff's appraiser, Robert Zackowski, confirms that Defendant's appraiser, John McHenry, agreed that this aspect was payable. This was documented in Mr. Zackowski's submission to the umpire which indicated as follows:

It is agreed between the appraisers that the insured's cost for document preparation has exceeded the \$2,500.00 limit, (Exhibit 2 page 7 of 29 and Exhibit 9). The insured is therefore entitled to payment of \$2,500.00 under this coverage.

See Exhibit 10, portion of Zackowski appraisal submission to Umpire Carey.

Mr. Zackowski has re-confirmed this understanding in his Affidavit which is set forth at Exhibit 9 and in his correspondence directed to John McHenry dated December 13, 2007. See Exhibit 6.

In view of this agreement, the issue of Inventory Preparation Expenses was not addressed during the appraisal process and was not included in the preliminary award. (Exhibit 2).

As of this date, General Casualty has not paid any sums under the Inventory Preparation Expense coverage. Maidencreek submits that it is entitled to that coverage in the amount of \$2,500.

Valuable Papers & Records

Under Optional Coverages of the **Commercial Marketplace Policy** (Exhibit 1, page 26 of 29) **Item 4a & d**, coverage is extended to pay for the cost to research lost information on "Valuable Paper and Records" for which duplicates do not exist. The policy provides in part as follows:

- a. You may extend the insurance that applies to Business Personal Property to apply to direct physical loss or damage to "Valuable Papers and Records" that you own, or that are in your care, custody or control caused by or resulting from a Covered Cause of Loss. This Optional Coverage includes the cost to research lost information on "Valuable Papers and Records" for which duplicates do not exist.

See Exhibit 1, page 26 of 29.

Maidencreek TV & Appliance, Inc. has Valuable Paper and Records coverage as reflected on the Declarations page of the policy with limits of \$25,000.00. (See Exhibit 1, first page).

During the claims process, Maidencreek advised General Casualty that its corporate records had been damaged and subsequently discarded by General Casualty's contractor. Plaintiff was provided with a quote of \$1,400 for the reconstruction of the corporate records and documents.

General Casualty has never paid any sums for these records. According to Mr. Zackowski's Affidavit (Exhibit 9), the payment of this sum was agreed to by Defendant's appraiser, John McHenry. As such, it was not addressed during the appraisal process and is not reflected in any regard in the award. As such, Plaintiff, Maidencreek, submits that it is entitled to payment for this coverage and expense. If necessary, additional supporting documentation can be provided. However, to Maidencreek's knowledge, it has never been requested.

IV. Mathematical Errors

Plaintiff's Petition also requested the correction of a mathematical error by which the total award was understated by the sum of \$3,158.62. During the Court's conference call of December 3, 2007, Defendant's counsel acknowledged that this was correct. In the event that Defendant should contradict that position, Plaintiff reserves the right to submit additional argument.

V. Sanctions

Federal Rule of Civil Procedure 11(c) provides that the Court may impose appropriate sanctions where a party has asserted specious defenses or positions during litigation. In the present instance, Plaintiff has been required to incur wholly unnecessary attorney's fees and costs in pursuing aspects of the claim which are clearly agreed upon and payable. As such, Plaintiff respectfully requests this Honorable Court award said costs and fees as against Defendant.

VI. Conclusion

Based upon the foregoing, Plaintiff respectfully requests this Honorable Court to amend the award as follows:

a. Correction of mathematical error in the award total	\$3,185.62
b. Eliminate the offset/credit for the floor electronics.	\$2,755.00
c. Add payment for the Valuable Papers Coverage.	\$1,400.00
d. Add payment for the Inventory Preparation Cost (policy limit).	\$2,500.00
e. Award attorney's fees and costs to Plaintiff for the filing of the Petition and Brief.	To be provided

Plaintiff reserves the right to include Defendant's conduct during the appraisal process and in opposition to this Petition as further evidence in support of its extra-contractual claims.

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