2023 WL 6987107 (N.Y.A.D. 4 Dept.) (Appellate Brief)
Supreme Court, Appellate Division, Fourth Department, New York.

Kim STANZ and Michael Stanz, Petitioners-Appellants,

v.

NEW YORK CENTRAL MUTUAL FIRE INSURANCE COMPANY, Respondent-Respondent.

No. CA 22-01481.
March 13, 2023.

Erie County Clerk's Index No. 800994/2020

Brief for Petitioners-Appellants

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***1** *QUESTION PRESENTED*

Question: Did the trial court err when it ordered Appellants Kim and Michael Stanz (collectively the "Insureds") and Respondent New York Central Mutual Fire Insurance Company (the "Carrier") to engage in another insurance appraisal, after the trial court had already set aside the first appraisal award as defective and invalid, rather than permit the Insureds to prosecute their insurance claims in a plenary action?

Answer: Yes.

***2** *PRELIMINARY STATEMENT*

On January 9, 2019, Appellants Kim and Michael Stanz (collectively the "Appellants" or "Insureds") suffered a catastrophic fire to their home - located at 5 Morningside Court, East Aurora, New York 14052 (the "Property") (the "Fire" or "Loss"). At the time of the Fire, Kim and Michael Stanz insured their home with Respondent New York Central Mutual Fire Insurance Company ("Respondent" or "Carrier" or "NYCM").

Last year, the parties engaged in an insurance appraisal, as codified in Insurance Law § 3404(e) and as further provided for in the insurance policy entered into between the Insureds and the Carrier (the "Policy"). During that initial appraisal, the Insureds believed the appraisal award was acceptable based on (i) their reading of the appraisal award and (ii) their independent appraiser's confirmation with the umpire as to the meaning of the appraisal award.

As such, the Insureds' petitioned the trial court to confirm the appraisal award. The Carrier opposed the motion to confirm and argued the award should be set aside due to alleged misconduct by the umpire (who was previously appointed by the trial court, pursuant to Insurance Law § 3408). The only motion in front of the trial court was Petitioner's motion to confirm.

By Order entered August 23, 2022 (the "Order"), the Hon. Raymond W. Walter, J.S.C., Ordered "that the appraisal award is set aside, and that the appraisal ***3** is remanded to Mr. Cohen [the umpire] and the appraisers (Victor Battey and Marc Palumbo) for further deliberations consistent with the policy requirements." (R. 7).

In other words, the Court disregarded that the only motion in front of it was the motion to confirm the appraisal award. Instead, despite finding sufficient grounds to set aside the appraisal award as defective and invalid, the trial court Ordered the parties to engage in further appraisal proceedings for a proverbial "do over." This was in error.

Accordingly, this appeal involves a single, simple question for the Court to decide: where the trial court found sufficient grounds existed to set aside an insurance appraisal award - through no fault of the Insureds - are the Insureds required to re-submit their claim to *another* appraisal? The Court of Appeals has already answered this question in resounding favor of the Insureds:

After an appraisal proceeding has terminated in an award and the award has been set aside, without any fault on the part of the insured, he need not submit to any further appraisement but may sue on the policy.... Having once, in good faith, undertaken to have an estimate of the amount of [an insured's] loss made by appraisers appointed pursuant to the terms of the policy, and the

appraisement having been defective and invalid, without fault on the part of the insured, [the insured] is not obliged to join in an attempt to have another appraisement, but may maintain [an] action [on the policy].

Gervant v. New England Fire Ins. Co., 306 N.Y. 393 (1954) (internal quotations omitted).

***4** The portion of the trial court's Order directing further appraisal proceedings was not part of any pending motion before the trial court and, at any rate, is in direct contravention of the Court of Appeals' decision in *Gervant.* Therefore, for the reasons explained in greater detail below, the Insureds request that the Order be reversed to the extent it required the parties to re-engage in further appraisal proceedings. The Insureds must be allowed to pursue their claims in a plenary action for breach of the Policy. [1]

STATEMENT OF FACTS

Beginning on November 24, 2013, Kim and Michael Stanz insured their home, located at 5 Morningside Court, East Aurora, New York 14052 (the "Property"), through an insurance contract issued by NYCM and bearing the policy number 4611657 (the "Policy"). (R. 10, 16-17). On January 9, 2019, the Property was severely damaged by fire (the "Fire" or "Loss"). (R. 10). At the time of the Fire, the Policy was in full force and effect. (R. 10, 16-17).

In the aftermath of the Fire, NYCM acknowledged coverage under the Policy by issuing certain partial insurance payments to Plaintiffs, totaling $370,700.22. ***5** (R. 4-5). Those payments represented NYCM's unilateral calculation of the "actual cash value" ("ACV") of the damages to the dwelling and landscaping at the Property. (R. 4-5). To date, NYCM has not disclaimed coverage for the Fire, but merely dispute the amount of coverage to be provided for the resulting damage.

The Insureds, with the assistance of their public adjusters at National Fire Adjustment Co. Inc. ("NFA"), disputed NYCM's calculations of the damage. Accordingly, on October 17, 2019, the Insureds demanded that the dwelling and landscaping portions of their insurance claim be submitted to the "appraisal" process pursuant to the standard fire insurance policy codified in New York Insurance Law § 3404(e) and as otherwise provided for in the Policy. (R. 5). However, NYCM violated New York Insurance Law and the Policy by refusing to participate in the appraisal process. (R 14 at ¶¶ 10-18; R. 60-63).

On January 22, 2020, the Insureds commenced the special proceeding underlying this appeal (the "Special Proceeding"). In their petition, the Insureds sought an Order pursuant to the terms of the Policy and Insurance Law § 3408 (i) compelling appraisal of the dwelling and landscaping portions of their insurance claim and (ii) requiring NYCM to nominate an appraiser. (R. 14 at ¶¶ 10-18; R. 60-63; *see* Special Proceeding, Doc. 1). NYCM responded to the petition on March 5, 2020 (Special Proceeding, Doc. 14), and the Insureds replied on March 12, 2020 (Special Proceeding, Doc. 33). The trial court granted the Insureds' petition to ***6** compel appraisal, by Order of Hon. Paul B. Wojtaszek, filed October 1, 2021. (R. 5, 56-57).

While awaiting a decision on their petition to compel appraisal - and in light of the Policy's two-year contractual limitations period to bring suit - on January 6, 2021 (i.e., days before the two-year anniversary of the Fire), the Insureds commenced a plenary lawsuit in New York State Supreme Court, Erie County, captioned *Kim Stanz and Michael Stanz v. New York Central Mutual Fire Insurance Company*, Index No. 800147/2021 (hereafter, the "Plenary Action"). In that lawsuit, the Insureds seek to recover damages on all aspects of their insurance claim - including the dwelling and landscaping portions for which NYCM had refused to proceed with appraisal. (Plenary Action, Doc. 1).

Nearly five months after the trial court Ordered the parties to appraisal, the parties' respective appraisers reached an impasse and could not agree on a neutral third-party to serve as the "umpire" in the appraisal process. (*See* R. 5, 58-59). Accordingly, the Insureds petitioned the Court to appoint an umpire, pursuant to the terms of the Policy and Insurance Law § 3408. *Id.* By

Order of Hon. Raymond W. Walter, entered March 4, 2022, the trial court appointed its own nominee, Howard Cohen, Esq., to serve as the umpire in the appraisal. *Id.*

In May 2022, the umpire proposed an appraisal award to the parties' appraisers. (*See* R. 73-74). The Insureds believed the appraisal award was acceptable ***7** based on (i) their reading of the appraisal award and (ii) their independent appraiser's confirmation with the umpire as to the meaning of the appraisal award. Accordingly, the Insureds' appraiser executed the appraisal award on May 19, 2020. *Id.*

On June 20, 2022, the Insureds petitioned the trial court to confirm the appraisal award that had been signed by the umpire and their appraiser, pursuant to their understanding of the appraisal award. (R. 5-6). NYCM opposed confirmation of the appraisal award, and argued that:

> [T]he appraisal award fatally is flawed and should not be confirmed. Mr. Cohen unilaterally exceeded the scope of the appraisal process and arbitrarily disregarded pertinent evidence submitted by New York Central Mutual Fire Insurance Company's ("NYCM") appraiser, Marc Palumbo. Mr. Cohen ignored this Court's Order, binding New York legal authority, and the unambiguous terms of the subject policy and, in doing so, decided to invent a novel type of damages - "actual cash value repair cost." NYCM should not be forced to pay half of Mr. Cohen's fees related to the appraisal award where he failed properly to perform his duties as an umpire.

R. 82. Indeed, throughout NYCM's opposition papers, it repeatedly insisted the appraisal award could not be confirmed due to the umpire's "misconduct." (*See generally* R. 95-104). The purported umpire's misconduct was the only basis for NYCM's opposition. *See generally id.*

What is more, in opposition to the confirmation of the award, NYCM cited and relied on *Gervant v. New England Fire Ins. Co.*, 306 N.Y. 393 (1954), for the proposition that, "where a court after an appraisal proceeding has terminated in an ***8** award and the award has been set aside, without any fault on the part of the insured, the matter may be resolved in litigation rather than by way of appraisal." (Special Proceeding, Doc. 71 at 12-13).

Following oral argument on the petition to confirm the award, counsel for the parties each sent letters to the trial on the issue of Ordering further appraisal proceedings. (R. 276-78, 301-06). Included in the letter from the Insureds' counsel was the following: We submit that in the event that the Award is not confirmed, the insured should be granted the opportunity to litigate *de novo*. (Gervant v New England Fire Ins. Co., 306 N. Y. 393 ["Having once, in good faith, undertaken to have an estimate of the amount of his loss made by appraisers appointed pursuant to the terms of the policy, and the appraisement having been defective and invalid, without fault on the part of the insured, he is not obliged to join in an attempt to have another appraisement, but may maintain this action [on the policy]."") There is already an action pending seeking such relief. (# 800147/2021 - Erie County Supreme Court).

R. 302. Nevertheless, the trial court Ordered:

> that the appraisal award is set aside, and that the appraisal is remanded to Mr. Cohen and the appraisers (Victor Battey and Marc Palumbo) for further deliberations consistent with the policy requirements;

In other words, despite both parties citing case law establishing that the matter should not be remanded back to appraisal if the award were set aside - the trial court did just that, in violation of binding Court of Appeals precedent.

***9** Therefore, the Insureds respectfully request that this Court reverse the Order, insomuch as the trial court Ordered further appraisal proceedings. As succinctly stated by the Court of Appeals, "[a]fter an appraisal proceeding has terminated in an award and the award has been set aside, without any fault on the part of the insured, he need not submit to any further appraisement but may sue on the policy." *Gervant*, 306 N.Y. at 393.

PROCEDURAL HISTORY

The procedural history of this matter is more fully set forth in the statement of facts above. Therefore, for the sake of brevity, the Court respectfully is referred to the statement of facts for a complete recitation of the procedural history underlying this appeal.

This matter comes before the Court on appeal from the Order of the trial court, in which the trial court set aside an appraisal award, then remanded the parties back to redo the appraisal - rather than simply setting aside the award and permitting the Insureds to prosecute their claims for insurance proceeds in their already-pending Plenary Action. (*See* R. 1-8).

The Insureds submit that the trial court's Order was improper. Therefore, the Appellants request the Court reverse the trial court's Order to the extent it directed the parties to engage in further appraisal proceedings.

***10** *ARGUMENT*

This appeal involves a single, simple question for the Court to decide: where the trial court set aside an insurance appraisal award - through no fault of the Insureds - are the Insureds required to submit to further appraisal proceedings?

Faced with this precise question, the Court of Appeals explained:

> Having once, in good faith, undertaken to have an estimate of the amount of [an insured's] loss made by appraisers appointed pursuant to the terms of the policy, and the appraisement having been defective and invalid, without fault on the part of the insured, [the insured] is not obliged to join in an attempt to have another appraisement, but may maintain [an] action [on the policy].

Gervant v. New England Fire Ins. Co., 306 N.Y. 393 (1954) (*quoting Aetna Ins. Co. v. Hefferlin*, 260 F. 695, 700 (9th Cir. 1919)).

Therefore, the Order should be reversed to the extent it remanded the parties back to appraisal, even after finding sufficient grounds existed to set aside the appraisal award the resulted from the parties' attempt at appraisal.

POINT I

NEITHER NEW YORK INSURANCE LAW NOR THE POLICY SUPPORT THE TRIAL COURT'S ORDER TO SUBMIT TO FURTHER APPRAISAL PROCEEDINGS UPON SETTING ASIDE THE APPRAISAL AWARD

In this case, the Insureds petitioned the trial court to compel NYCM to participate in the appraisal process, and the trial court granted that relief. (R. 57). Thereafter, the Insureds petitioned the trial court to appoint an umpire, which the ***11** trial court

also granted. (R. 59). Finally, the Insureds petitioned the trial court to confirm the appraisal award that had been signed by the court-appointed umpire and the Insureds' appraiser, but the trial court set aside the award. (R. 7).

However, rather than simply setting aside the appraisal award, the trial court took the extraordinary step of then Ordering the parties to undergo further appraisal proceedings. (R. 7). That was error, for at least two reasons.

First, neither the Policy nor the Standard Fire Policy provide a basis to direct parties to return to appraisal if the first attempt to appraise a loss is unsuccessful or otherwise is set aside. Specifically, the Policy provides for the appraisal process, as follows:
SECTION I - CONDITIONS

…

E. Appraisal

If you and we fail to agree on the actual cash value, the replacement cost, the extent of the loss or damage or the amount of the loss or damage, either may demand an appraisal of the loss. In this event, each party will choose a competent and impartial appraiser within 20 days after receiving a written request from the other. The two appraisers will choose an umpire. If they cannot agree upon an umpire within 15 days, you or we may request that the choice be made by a judge of a court of record in the state where the "residence premises" is located. The appraisers will separately set the actual cash value, the replacement cost, the extent of the loss or damage and the amount of the loss or damage. If the appraisers submit a written report of an agreement to us, the amount agreed upon will be the actual cash value, replacement cost, the extent of the loss or damage and the amount of the loss or damage. If they fail to agree, they will submit their ***12** differences to the umpire. A decision agreed to by any two will set the actual cash value, the replacement cost, the extent of the loss or damage and the amount of the loss or damage.

Each party will:

1. Pay its own appraiser; and

2. Bear the other expenses of the appraisal and umpire equally.

R. 35. Similarly, the Standard Fire Insurance Policy for the State of New York, set forth in Insurance Law § 3404(e) (the "Standard Fire Policy"), provides for appraisal as follows:

> Appraisal. In case the insured and this Company shall fail to agree as to the actual cash value or the amount of loss, then, on the written demand of either, each shall select a competent and disinterested appraiser and notify the other of the appraiser selected within twenty days of such demand. The appraisers shall first select a competent and disinterested umpire; and failing for fifteen days to agree upon such umpire, then, on request of the insured or this Company, such umpire shall be selected by a judge of a court of record in the state in which the property covered is located. The appraisers shall then appraise the loss, stating separately actual cash value and loss to each item; and, failing to agree, shall submit their differences, only, to the umpire. An award in writing, so itemized, of any two when filed with this Company shall determine the amount of actual cash value and loss. Each appraiser shall be paid by the party selecting him and the expenses of appraisal and umpire shall be paid by the parties equally.

Ins. Law § 3404(e).

***13** As can be seen from the above-quoted language, neither the Policy nor the Standard Fire Policy provide for what is supposed to happen if an appraisal award is set aside by a reviewing court.

Notably though, both the Policy and the Standard Fire Policy only speak in terms of a *single* appraisal and a *single* award. (R. 35) ("If you and we fail to agree … either may demand an appraisal of the loss .... A decision agreed to by any two will set the actual cash value, the replacement cost, the extent of the loss or damage and the amount of the loss or damage.") (emphasis added); Ins. Law § 3404(e) ("*An* award in writing … shall determine the amount of actual cash value and loss.") (emphasis added).

Where the trial court found that sufficient grounds existed to set aside the appraisal award - there was no Policy-based or statutory-based basis for the trial court to remand the matter back for additional appraisal proceedings.

Second, in opposing the petition to confirm the award, NYCM argued the award should be set aside exclusively due to the "misconduct" of the court-appointed umpire. (R. 95). Specifically, NYCM argued that the umpire's misconduct included (a) his failure and/or refusal to receive and consider certain evidence put forward by NYCM's appraiser, and (b) his disregard or misunderstanding of the Policy language and basic principles of insurance. (*See generally* R. 95-104).

***14** Although the trial court's Order did not explicitly state why it was setting aside the appraisal award, simply put, the reason for vacating the appraisal award is not relevant to the issue of whether the remand was proper. However, the only reason put before the trial court was the alleged misconduct by the umpire. (*See generally* R. 95-104). Notwithstanding, the trial court inherently and necessarily found the appraisal award defective and invalid, for whatever reason, to justify setting aside the award.

Having vacated the appraisal award without any fault on behalf of the Insureds, the trial court should have simply permitted the Insureds to pursue their claims in the already-pending Plenary Action, rather than remanding the matter back to appraisal. *See Gervant*, 306 N.Y. at 393.

In fact, that point was put before the Court by both the Insureds and *NYCM.* For example, in light of NYCM's contentions about "misconduct" by the umpire, NYCM was the party to first cite to, and rely upon, *Gervant.* (Special Proceeding, Doc. 71 at 12-13).

Illustratively, in *Gervant*, after a fire loss, a court-appointed umpire and the insurer's appraiser agreed on an appraisal award. *Id.* The insured then sought to set aside the award on the basis of alleged "misconduct," because the umpire failed to consider certain evidence and made errors in computing the award. *Id.* On appeal, the Court of Appeals affirmed the decision to set aside the appraisal award and ***15** permitted the insured to pursue her claims in litigation. *Id.* at 400. The Court agreed the umpire committed "misconduct," but rejected the insurer's argument that "if the award was properly set aside, the Appellate Division should have directed a new appraisal under the policy and should not have left the plaintiff free to pursue her normal remedy of an action at law on the policy." The Court explained:

After an appraisal proceeding has terminated in an award and the award has been set aside, without any fault on the part of the insured, he need not submit to any further appraisement but may sue on the policy. Thus, as was said in *Aetna Ins. Co. v. Hefferlin* (260 F. 695, 700): 'Having once, in good faith, undertaken to have an estimate of the amount of his loss made by appraisers appointed pursuant to the terms of the policy, and the appraisement having been defective and invalid, without fault on the part of the insured, he is not obliged to join in an attempt to have another appraisement, but may maintain this action [on the policy].'"

Id. at 400.

Although NYCM was principally relying on *Gervant* for the proposition that the award should be set aside where misconduct occurred by the umpire - NYCM explicitly acknowledged in its opposition papers that "where a court after an appraisal

proceeding has terminated in an award and the award has been set aside, without any fault on the part of the insured, the matter may be resolved in litigation rather than by way of appraisal." (Special Proceeding, Doc. 71 at 12-13).

Nevertheless, at oral argument on the Insureds' petition to confirm the appraisal award, the trial court made a ruling from the bench to set aside the appraisal ***16** award and remand this matter back for another appraisal. Accordingly, in the context of discussing the scope of the proposed order, the Insureds' then-counsel sent a letter to the trial court stating:
We submit that in the event that the Award is not confirmed, the insured should be granted the opportunity to litigate *de novo.* (Gervant v New England Fire Ins. Co., 306 N. Y. 393 ["Having once, in good faith, undertaken to have an estimate of the amount of his loss made by appraisers appointed pursuant to the terms of the policy, and the appraisement having been defective and invalid, without fault on the part of the insured, he is not obliged to join in an attempt to have another appraisement, but may maintain this action [on the policy]."") There is already an action pending seeking such relief. (# 800147/2021 - Erie County Supreme Court).

R. 302.

Despite the fact that both of the parties in this case cited the *Gervant* decision for the proposition that New York precedent does not permit the matter to be remanded for another appraisal - coupled with the binding nature of the *Gervant* decision - it was error for the trial court to disregard that authority and remand the matter to a second appraisal anyway.

Therefore, the Insureds request that the Court reverse the Order to the extent it remanded the parties back to further appraisal proceedings after setting aside the original appraisal award.

***17 POINT II**

REVIEWING COURTS IN NEW YORK, AND ELSEWHERE, HAVE CONSISTENTLY HELD THAT WHERE AN APPRAISAL FAILS, THE INSUREDS ARE PERMITTED TO PURSUE THEIR CLAIMS IN A SEPARATE ACTION ON THE INSURANCE POLICY

Numerous other courts in New York State, and elsewhere, have reviewed this issue, and reached the same conclusion as in *Gervant.* Those courts have, over the last 125+ years, consistently held that when an appraisal award (or, as it was referred to in ages past, insurance "arbitration award")[2] is set aside without the fault of the insured, then the insured is not required to re-submit their dispute to another appraisal. Rather, they are permitted to pursue their claim(s) in a plenary action on the policy. The following case law is further determinative of the issue presented.

In *Delmar Box*, the Court of Appeals examined a petition to compel appraisal and was faced with the task of distinguishing between an insurance appraisal and an arbitration. *Delmar Box*, 309 N.Y. at 63. While that specific issue is not implicated here, in rendering its decision, the Court of Appeals distinguished between arbitration and insurance appraisal through a comparison that is directly applicable to the issue here:

> ***18** the vacatur of an arbitration award invariably results in a new arbitration, whereas after an appraisal award has been set aside without any fault on the part of the insured, he is not required to submit to any further appraisement but is free to litigate the issues in an action at law on the policy.

In re Delmar Box Co., 309 N.Y. at 64 (citations omitted).

In *Kiernan v. Dutchess County Mut. Ins. Co.*, 150 N.Y. 190 (1896), the Court of Appeals affirmed a decision to set aside an appraisal award where the insurer's appraiser exhibited such control and heavy bias over the appraisal proceedings as to have effectively denied the insured a fair and impartial appraisal. Nevertheless, the Court did *not* hold that the proper remedy after setting aside the award was to remand the matter for a new appraisal; instead, the Court affirmed the lower court's order that permitted the insured to recover on its complaint for damages. *Id.* at 193.

In *Bradshaw v. Agricultural Ins. Co.*, 137 N.Y. 137 (1893), after a fire loss at the insured's property, the claim went to appraisal where the appraisers agreed on an award. The insured then sued to set aside the award and recover "at law," claiming he was pressured by the insurer into appointing an appraiser who was not disinterested. On appeal, the Court of Appeals found for the insured and set aside the appraisal award. However, the Court did *not* hold that the proper remedy after setting aside the award was to remand the matter for a new appraisal. Rather, the Court affirmed the trial court's judgment against the insurer on the insured's claims under the policy.

***19** In *Uhrig v. Williamsburg City Fire Ins. Co.*, 101 N.Y. 362 (1886), the Court of Appeals explained:

> The plaintiff had entered into an arbitration and was not bound to enter into a new one while that was pending, and if that one failed from the fault of the defendant, he had discharged his whole duty under the arbitration clause and was not bound to enter into a new arbitration agreement. The plaintiff having once consented to arbitrate, if the arbitration failed and came to an end, from the fault of the defendant, the arbitration clause could not stand in the way of this action."

Id. at 366.

In *New York Mut. S&L Ass'n v. Manchester Fire Assur. Co.*, 94 A.D. 104 (4th Dept. 1904), this Court explained: "An action may be maintained to set aside the [appraisal] award, and, in the event of accomplishing that result, to recover for the actual loss sustained." *Id.* at 107.

In *Kaiser v. Hamburg-Bremen Fire Ins. Co.*, 59 A.D. 525 (App. Div. 4th Dept. 1901), a*ff'd* *Kaiser v. Hamburg-Bremen Fire Ins. Co.*, 172 N.Y. 663 (1902), this Court explained:

> This is an action to set aside an award made by appraisers appointed pursuant to the arbitration clause contained in a standard insurance policy and to recover on the policy for a fire loss. The referee found that the plaintiff's signature to the appraisal agreement was procured through fraud and that, consequently, said agreement and the award made thereunder were void and should be vacated and set aside.

***20** *Id.* at 526. Accordingly, this Court explained that "it must be that the property owner may have an action to set aside the award and recover his damages." *Id.* at 531.

In *Strome v. London Assurance Corp.*, 20 A.D. 571 (2d Dept. 1897), following a fire loss, the claim was submitted to appraisal, and an award was entered. The insured sued to set aside the award and collect under the policy. On appeal, the Court affirmed that the award was properly set aside. *Id.* at 573-74. However, the Court did *not* require the matter to be re-submitted to appraisal. *Id.* Instead, the lower court permitted the insured to proceed on its claims under the policy, and the appellate division affirmed. *Id.*

As can be seen from the above-discussed decisions, for more than the last 125+ years, New York Courts have consistently set aside appraisal awards and permitted the insureds to recover on their claims in actions on the policy - rather than requiring claims to be re-submitted to appraisal. *See also, e.g., Mizrahi v. National Ben Franklin Fire Ins. Co*., 37 N.Y.S.2d 698, 703 (Civ. Ct. Kings Cnty. 1942) ("The Court is inclined to believe that … 'the failure of an appraisement through the conduct of the appraisers, without the fault of the insured, interposes no impediment to his right to recover on his policy.'"); *Coon v. Nat'l Fire Ins. Co*., 126 Misc. 75 (Jefferson Cnty. Sup. Ct. 1925).

Likewise, countless Courts outside of New York have also held that when an insurance appraisal award is set aside, the proper course is for the insured to sue on ***21** the policy - not to be subjected to *another* appraisal. *See Aetna Ins. Co. v. Hefferlin*, 260 F. 695, 700 (9th Cir. 1919) ("Nor do we think that it was the duty of the assured to submit to a second appraisement of the loss. Having once, in good faith, undertaken to have an estimate of the amount of his loss made by appraisers appointed pursuant to the terms of the policy, and the appraisement having been defective and invalid, without fault on the part of the insured, he is not obliged to join in an attempt to have another appraisement, but may maintain this action."); *see, e.g., Harris v. Am. Modern Home Ins. Co.*, 571 F. Supp. 2d 1066, 1081 (E.D.M.O. 2008) ("Where the plaintiff has, in good faith, complied with the terms of the policy, 'and is not chargeable with the failure of the appraisers to make a valid appraisal, his right of action on the policy would seem to be complete.'"); *Steiner v. Middlesex Mut. Assur. Co*., 44 Conn. App. 415 (Appeals Ct. 1997) (appraisal award vacated, matter remanded to trial court to determine amount of loss; no second appraisal); *Gregory v. Pawtucket Mut. Fire Ins. Co.*, 58 R.I. 434, 442 (1937) ("the court, in its discretion, may, after setting aside the arbitration or award, proceed in the same suit to adjudicate on its merits the whole controversy between the parties, instead of ordering a new arbitration or appraisal or requiring the complainant, against his will, to fight out the controversy, on its merits, in proceedings at law."); *Norwich Union Fire Ins. Soc. v. Cohn*, 68 F.2d 42, 45 (10th Cir. 1933) ("when [the appraisal] has been done, [the insured] has complied with the terms of his contract, ***22** and if the award fails without his fault, he may bring his action on the policy without seeking or consenting to further appraisals."); *Home Ins. Co. v. M. Schiff's Sons*, 103 Md. 648, 661 (1906) ("As there is no evidence in the present case tending to connect the assured with the failure of the appraisement or to show a want of good faith on their part, the failure of the appraisement interposes no obstacle to their right to recover the full amount of their loss."); *Western Assurance Co. v. Decker*, 98 F. 381 (8th Cir. 1899) ("If the appraisement falls through by disagreement of the appraisers without any fault of the insured, he has discharged his covenant, and satisfied the requirements of the policy, and may then resort to the courts to have his damages assessed."); *cf. Carroll v. State Farm Lloyds*, 2017 U.S. Dist. LEXIS 172171, at 7-8 (S.D.T.X. 2017) ("Where, as here, the appraisal award has not been set aside, the appraisal process settles the issue of damages and, upon full and timely payment, 'estops the insured from bringing a breach of contract claim against the insurer.'").

Therefore, it is beyond well settled New York law, and indeed across the Country, that insurance appraisal is a one-time affair. If an appraisal award is subsequently set aside - so long as the basis for setting aside the award is not the insured's own, direct conduct - then the proper course is *not* to require the parties to endure yet another attempt at appraisal. Rather, the only proper course is to permit the insured(s) to pursue their claims in an action on the policy.

***23** In this case, at the time of the trial court's Order, the Insureds already had an action for breach of the Policy pending, i.e., the Plenary Action. Further, because of the delays occasioned in even getting an order compelling appraisal in the first place, and to preserve the statute of limitations, the Insureds already made claims in the Plenary Action for the same aspects of their insurance claim(s) that were then subjected to the appraisal process.

Now, with the trial court having found that sufficient cause existed to set aside the appraisal award - the only proper course was to permit the Insureds to proceed with their claims in the Plenary Action. *See Gervant*, 306 N.Y. at 393.

Therefore, for all of the reasons set forth herein, and based upon all of the authority discussed above, the Insureds request that this Court reverse the Order of the trial court to the extent it remanded the parties *back* to appraisal after setting aside the original appraisal award.

*24 *CONCLUSION*

For the foregoing reasons, Appellants Kim and Michael Stanz respectfully request that this Court reverse the Order of the trial court to the extent it remanded the parties back to appraisal after setting aside the original appraisal award, and award such other and further relief as the Court deems just and proper.

Dated: Buffalo, New York

March 13, 2023

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Footnotes

1 There is an already-pending action for the Carrier's breach of the Policy (captioned as *Kim Stanz and Michael Stanz v. New York Central Mutual Fire Insurance Company*, Erie County Index No. 800147/2021) (hereafter, the "Plenary Action").

2 Today, the terms "appraisal" and "arbitration" have distinct legal meanings when it comes to the insurance estimating process that occurred in this case. *In re Delmar Box Co.*, 309 N.Y. 60, 63 (1955). However, while some cases cited herein refer to "arbitration", when read in context of the case, the precedent clearly implicates and refers to an insurance appraisal.