2023 WL 6987149 (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.
June 12, 2023.

Erie County Clerk's Index No. 800994/2020

Brief for Respondent-Respondent

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***i TABLE OF CONTENTS**

***ii TABLE OF AUTHORITIES**

Cases:

PRELIMINARY STATEMENT

Defendant-Respondent, New York Central Mutual Fire Insurance Company ("NYCM"), by its attorneys, Rupp Pfalzgraf LLC, submits this brief in opposition to petitioners-appellants' appeal from the Order of the Hon. Raymond W. Walter, J.S.C, granted on August 2, 2022, and filed in the Erie County Clerk's Office on August 23, 2022 ("Order").

To determine the valuation of damages for a fire loss, the parties agreed to engage in appraisal pursuant to the terms of the insurance policy between NYCM and the petitioners-appellants. The court-ordered umpire issued an appraisal award that was fatally flawed as it awarded the petitioners-appellants an "actual cash value projected repair cost" in the amount of $612,982.18. The umpire stated that the award was not subject to depreciation because "there was no betterment to the building," it did not account for the policy deductible, and it was not subject to deduction for NYCM's previous actual-cash-value payments that totaled $370,700.52. Petitioners-appellants filed a motion to confirm the award and NYCM filed opposition.

In sum, the Order on that motion: (1) set aside the appraisal award and remanded it to the same umpire and appraisers; (2) ordered the umpire and at least one appraiser to agree to and provide separate distinct findings of actual cash value ***2** ("ACV"), replacement cost Value (RCV), the extent of the loss or damage, and the amount of the loss or damage; (3) ordered to exclude, for now, NYCM's previous payments and the subject policy's deductible, as they will be deducted after an agreed-upon decision; (4) ordered to have a decision agreed upon by two of the three parties within 45 days; (5) denied petitioners-appellants' request for interest, as it will be heard at a plenary trial; and (6) ordered NYCM and petitioners-appellants to each pay half of the umpire's fees.

COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

1. Where the umpire's first appraisal award ignored the policy provisions and unfairly prejudiced NYCM, was it proper to set aside that appraisal award?

Answer of the trial court: Yes.

2. Where the umpire's first appraisal award was set aside, not due to his integrity, was it proper to remand the appraisal award back to the same umpire?

Answer of the trial court: Yes.

***3** 3. After the petitioners-appellants demanded appraisal for damage sustained to their dwelling and the appraisal award regarding same was remanded by the trial court to the umpire in order to correct identified issues therein, and a valid appraisal award was issued pursuant to the subject insurance contract's appraisal provisions, should the issue of the valuation of the petitioners-appellants' dwelling claim be re-litigated via a plenary action?

Answer of the trial court: The trial court did not analyze this issue as the petitioners-appellants failed to raise this argument (which is the core of their appeal), before the trial court; however, the trial court denied the petitioners-appellants' petition to confirm the appraisal award and remanded the appraisal back to the umpire in order to correct identified issues with the appraisal award. Thereafter, a new appraisal award was issued pursuant to the trial court's order.

PROCEDURAL HISTORY AND STATEMENT OF FACTS

This matter emanates from an insurance claim related to a fire that occurred on January 9, 2019, at the petitioners-appellants' dwelling, located at 5 Morningside Court, East Aurora, New York, 14052 (“subject property”) (“subject loss”). (R. 82). Following the subject loss, petitioners-appellants made a ***4** claim for dwelling damage under their policy of insurance with NYCM bearing the policy number “4611657” (“subject policy”). (R. 82-83)

Subsequently, the petitioners-appellants submitted an insurance claim seeking RCV and ACV insurance coverage for the subject property. (R. 83). On March 29, 2019, following its investigation of the subject loss, NYCM issued payment, pursuant to the subject policy, in the amount of $351,190.88 for an ACV settlement for damage sustained to the subject property. *Id*.

In furtherance of NYCM's good-faith effort to further investigate the subject loss, on October 10, 2019, following NYCM's receipt of the updated estimate, it issued a second ACV payment to the petitioners-appellants, in the amount of $19,509.34, totaling $370,700.52, relative to the dwelling portion of their insurance claim. (R. 84).

Despite NYCM's ACV payments, the petitioners-appellants' insurance claim persisted due to discrepancies between the parties' adjusters relative to the amount of damages caused by the subject loss. (R. 84). On October 17, 2019, the petitioners-appellants demanded an appraisal of the subject loss solely related to the RCV and ACV of the subject property (dwelling) and landscaping losses. *Id*. Notably, the appraisal demand did not include the contents claim. *Id.*

***5** On November 11, 2019, NYCM, through its counsel, rejected the petitioners-appellants' demand for appraisal on the basis that: (1) the demand was untimely; (2) the loss scene was compromised due to the passage of time; and (3) the petitioners-appellants' nominated appraiser, Victor Battey, is not competent and/or disinterested in order to serve as their appraiser. *Id*.

On January 22, 2020, the petitioners-appellants commenced a special proceeding before the trial court seeking an order compelling NYCM to nominate an appraiser in order to proceed with the appraisal process pursuant to the subject policy. *Id*. On March 5, 2020, NYCM timely filed its answer and opposition to the petitioners-appellants' petition to compel appraisal and argued that Mr. Battey should be disqualified. *Id.*

Due to the impacts of the novel Coronavirus pandemic, oral argument was not held until September 17, 2021. (R. 85). The Court issued decision granting the petitioners-appellants' petition to proceed with the appraisal of the subject loss, pursuant to the terms of the subject policy, and denying NYCM's requests to disqualify Mr. Battey. *Id*. Following the Order, NYCM timely nominated Marc Palumbo as its appraiser, and as outlined in his Affidavit, the parties' appraisers substantially disagreed with their valuations of loss. *Id*.

***6** On November 22, 2021, citing to the disagreements between the parties' appraisers, the petitioners-appellants commenced a second special proceeding in order to renew their petition for the court to appoint an umpire, pursuant to the terms of the subject policy. *Id*. On December 15, 2021, NYCM filed motion papers to nominate one of its own proposed umpires. (R. 86).

On December 16, 2021, the petitioners-appellants filed their reply papers in further support of their petition for the Court to nominate one of their proposed umpires and their opposition papers relative to NYCM's cross-motion. *Id*. On March 1, 2022, the parties, through their counsel, virtually appeared for oral argument, wherein the Court nominated Howard Cohen to serve as the umpire for this appraisal and filed the corresponding Order on March 4, 2022. *Id*.

Subsequently, the parties engaged in the appraisal process with Mr. Cohen, and on March 19, 2022, Mr. Cohen issued an appraisal award was issued ("first appraisal award"). *Id*. The appraisal award disregarded the subject policy, New York legal authority, and this Court's previous orders by failing to provide depreciation, ACV, and RCV. *Id*. In fact, this directly contradicted the petitioners-appellants' original appraisal demand, wherein the petitioners-appellants demanded an appraisal of the subject loss solely related to the RCV and ACV of the subject property (dwelling) and surrounding landscaping losses. *Id*.

***7** The appraisal award, agreed to by Mr. Cohen and Mr. Battey, awarded the petitioners-appellants an "actual cash value projected repair cost" in the sum of $612,982.18. (R. 87). Additionally, the appraisal award, without any basis for doing so, improperly precluded NYCM from applying its previous ACV payments and/or the subject policy deductible. *Id*. On June 20, 2022, the petitioners-appellants commenced the proceeding to, among other things, confirm the fatally flawed appraisal award and NYCM filed opposition. *Id*.

On August 2, 2022, this Court heard oral arguments relating to the petitioners-appellants' petition to: (1) confirm an appraisal award; (2) provide interest from November 11, 2019; and (3) require NYCM to pay half of the umpire's fee application. (R. 304). NYCM timely opposed the petitioners-appellants' petition and requested that the matter be remanded to the umpire in order for the umpire to modify the appraisal award to correct errors therein and/or provide clarity. *Id*. On August 2, 2022, the Court informed the parties that the petitioners-appellants' petition was denied and that the matter would be remanded to the umpire to provide separate RCV, ACV, and depreciation calculations, as well as to provide clarity as to the application of NYCM's previous payments and the subject policy's deductible to the appraisal award. (R. 305). ***8** Additionally, the Court requested that NYCM prepare a proposed stipulated order memorializing same. *Id*.

The parties disagreed over the substance of the order. (R. 301, 304). Ultimately, the trial court issued its order on August 23, 2022, which remanded the first appraisal award back to the umpire. (R. 4). Notably, the petitioners-appellants sought to confirm the appraisal award and, only by letter, did they bring up the issue of seeking to litigate the appraisal, after the trial court had made their decision. (R. 301-303). Ultimately, the trial court issued its decision after oral arguments on August 2, 2022, which was signed and entered on August 23, 2022. (R. 4, 301). This Order remanded the first appraisal award back to the umpire. (R. 4).

There was mention of an issue with interest in the trial court. That issue was not brought up on appeal, as the trial court stated that it would be resolved at a later date as the appraisal process was not finished. (*See* petitioners-appellants' brief; R. 4). The plenary action was filed for the purpose of damage to contents, whereas at issue here is for the damage to the dwelling. *Id*. NYCM brings this to the Court's attention specifically to clear any confusion.

***9** As more fully discussed below, the trial court's order should be affirmed in its entirety. The petitioners-appellants' should not be able to rely on outdated case law, in order to profit from the subject loss by circumventing the subject policy, relevant

case law, and the New York Insurance Law for the appraisal process. Simply put, they asked for an appraisal and a valid binding appraisal was entered. NYCM issued payment and the petitioners-appellants cashed that check. Therefore, the dwelling claim already has been resolved.

STANDARD OF REVIEW ON APPEAL

The petitioners-appellant is challenging the order of the trial court, yet, curiously, they do not include the standard of judicial review that is applicable. As petitioners-appellant seems to have failed to include this in their brief, NYCM finds it necessary to enumerate it here. Considering the broad and deferential standard of review for appraisals, the standard of judicial view applicable here for the trial court is abuse of discretion. "Whereas arbitral awards are frequently before the courts for confirmation, judicial review of appraisals is rare." *Clark v Kraftco Corp.*, 323 F Supp 358, 360 (SDNY 1971). "Although there is no comparable statute for vacating or modifying an appraisal award, appraisal awards receive deferential judicial review that is similar - but not identical - to the standard of judicial review for arbitration awards." *See Clark v. Kraftco Corp.*, 323 F. Supp. 358, 360 (S.D.N.Y. 1971) ("[R]eview of appraisals is governed by ***10** different and broader standards [than the review of arbitration awards]." (citing *Cohen v. Atlas Assurance Co.*, 163 A.D. 381, 148 N.Y.S. 563 (App. Div. 1914))).

Abuse of discretion exists where: (1) a substantial right of an unsuccessful party is prejudiced; (2) a remedy has been impeded; and/or (3) serious inconvenience has been caused to a party. *See Steinleger v. Frankel*, 192 N.Y.S. 74, 77 (1922); *see also Int'l Ry. Co. v. Barone*, 246 A.D. 450, 451 (1935). Simply stated, an error that involves a disregard of the rule of law is an abuse of discretion and it is the duty of this Court to correct same. *See id.*

Here, the trial court simply ordered the umpire to fix his mistake, which he admits he made, regarding the appraisal award. (R. 4). The remand of the appraisal award, and the subsequent correction of it, is in accordance with the underlying terms of the insurance policy, agreed to by both parties, New York Legislature, and relevant case law. In contrast, the petitioners-appellants' sole argument in their brief is not supported by the underlying terms of the insurance policy, New York Legislature, or the relevant case law. (*See* petitioners-appellants' brief). The trial court did not abuse its discretion in setting aside the first appraisal award, neither did the trial court abuse its discretion in remanding the award back to the umpire. Therefore, regardless of whether this Court ***11** exercises its vested discretion to review the arguments and issues at hand in this case (which it should not, as this appeal is procedurally improper), this Court should resolve this matter by affirming the trial court's Order.

ARGUMENT

POINT I

PETITIONERS-APPELLANTS' APPEAL PROCEDURALLY IS IMPROPER AND SHOULD BE DENIED.

The sole argument of petitioners-appellants' brief is to allow them to proceed with plenary action instead of an appraisal for the valuation of dwelling damages relating to a fire loss at the insured premises. (*See* petitioners-appellants' brief). This issue was raised for the first time on appeal, as the trial court never heard this argument and the petitioners-appellants never asked for this. *Id*.

For reference, on August 2, 2022, oral arguments were heard, leading to a decision on the same day. (R. 4). Petitioners-appellants never raised this issue in any motion to the trial court, nor do any of the trial court's Orders contain it. (*See generally* R. 12, 56, 58, 4). Subsequently, when proposing the Order to effectuate the decision made on August 2, 2022, the petitioners-appellants' proposed order and accompanying letter, dated August 9, 2022, is the only time this issue was raised. (R. 301). The petitioners-appellants sole contention on ***12** appeal is unpreserved for appellate review inasmuch as they failed to raise that issue before the motion court. (R. 4, 301), *McGuire v McGuire*, 214 AD3d 1310 (4th Dept 2023) (*see* CPLR 5501 [a]; *see generally Ciesinski v Town of Aurora*, 202 AD2d 984, 985, 609 N.Y.S.2d 745 [4th Dept 1994]).

Further, the petitioners-appellants improperly cited facts outside of the Appellate Record, (s*ee* Appellant's brief, 5, 6, 8, 14, and 15), as well as included letters to the trial court judge which occurred after the final oral arguments for this order. (see R.at 6. Oral arguments concluded on August 2, 2022). Improperly including these letters solely was done to effectuate this appeal, as there was no other mention of a plenary action in lieu of appraisal by the petitioners-appellants to the trial court. Thus, this appeal is dead out of hand and the Court need not do anything further.

POINT II

THE TRIAL COURT CORRECTLY SET ASIDE THE APPRAISAL AWARD AND REMANDED IT TO THE UMPIRE.

For context, NYCM now turns to the defects contained in the first appraisal award. Mr. Cohen ignored and/or disregarded: (1) the petitioners-appellants' demand for appraisal of the RCV and ACV of the subject property's dwelling; (2) the Order; (3) the subject policy; and (4) the insurance industry ***13** standards for the appraisal process. (R. 86). Thus, the Court denied the petitioners-appellants' petition to confirm the first appraisal award in its entirety and Mr. Cohen was required to correct his misconduct. (R. 4).

A. Mr. Cohen Improperly Disregarded Pertinent Evidence.

The first appraisal award failed to provide depreciation and an ACV and RCV calculation, contrary to the subject policy, the petitioners-appellants' appraisal demand, and the Order. (R. 86). Rather, the first appraisal award provided an "actual cash value projected repair cost" in the amount of $612,982.18. (R. 87). In other words, Mr. Cohen took it upon himself to disregard pertinent evidence and steer an outcome for the appraisal award. Thus, the first appraisal award was not confirmed due to Mr. Cohen's "legal misconduct." *See* *Schmitt Bros. v. Bos. Ins. Co.*, 82 A.D. 234, 236 (1903); *see also* *Allstate Ins. Co. v. Kleveno*, 81 A.D.2d 648, 648, (1981).

In *Gervant*, the insured and defendant-insurer were required, pursuant to the subject policy, to engage in the appraisal process following a fire loss. *Gervant v. New England Fire Ins. Co.*, 306 N.Y. 393, 395 (1954). The parties were unable to agree as to the actual cash value of the property at the time of the loss or the amount of the loss and, pursuant to the provisions for an appraisal ***14** contained in the policy, each designated one appraiser. *Id*. Subsequently, the Court appointed an umpire. *Id*. An appraisal award was made and was signed by the umpire and the defendant-insurer's appointed appraiser, but not by the insured's appraiser. *Id*. The award merely set forth the determination of the actual cash value of the property as $15,000, and the amount of loss as $4,960, without any further itemization. *See* *id*. at 396.

The petitioners-insured then filed a motion to set aside the arbitration award, which alleged various acts of misconduct on the part of the umpire and that the appraisal award was unfair, improper, and was the result of a corrupt understanding between the umpire and the insurer's appraiser. *Id*. The principal issue raised by petitioners-appellants was that the umpire failed to consider all of the evidence. *Id*.

The Court of Appeals affirmed the appellate court and held that the umpire's award properly was set aside due to the umpire's misconduct. *See* *id*. at 398-400. Notably, the Court focused on the umpire's arbitrary refusal to admit evidence relating to actual cash value, despite the fact that evidence of such factors was directly presented to them by the insured's appraiser. *Id*. In doing so, the Court grounded its decision in the longstanding and fundamental legal precedent that an umpire is not free arbitrarily to disregard pertinent evidence presented by an ***15** appraiser; therefore, an umpire's refusal to hear such evidence is legal misconduct for which the award will be set aside. *Id.*

Similarly, in *Schmitt*, the appellate division held that an umpire's appraisal award was invalid, because he failed to consider in detail the evidence of the loss provided to him by the insured's appraiser. *Schmitt Bros. v. Bos. Ins. Co.*, 82 A.D. 234, 236 (1903). The Court found that: (i) the appraisal and award were not the result of investigation and judgment; (ii) the umpire engaged in misconduct; and (iii) the award improperly was valued. *Id*. at 238. Accordingly, the appraisal award was modified

in order to correct the umpire's misconduct and provide the "easily ascertainable" proper award, pursuant to the policy, to the insured. *Id*. at 239.

Here, the subject policy expressly provides, in relevant part, that an appraisal award will set the actual cash value, the replacement cost, the extent of the loss or damage and the amount of the loss or damage. (R. 150). The appraisers submitted evidence and/or valuations relative to the ACV, depreciation, and RCV values of the subject property, as detailed in the Palumbo Affidavit, in accordance with the subject policy, the petitioners-appellants' demand, and the Order. (R. 119). Nonetheless, Mr. Cohen disregarded this evidence and, in the first ***16** appraisal award, stated that the "building damage is a repair and therefore not subject to depreciation, as there was no betterment to the building." (R. 122).

Mr. Cohen's failure to provide a depreciation and ACV valuation was improper and contrary to the subject policy and the insurance-industry standards. (R. 123). In fact, the petitioners-appellants, through their appraiser, even requested that Mr. Cohen provide ACV and depreciation calculations following his receipt of the first appraisal award and noted that it was unusual that same were not provided in it. (R. 171).

Mr. Cohen's disregard of pertinent evidence led to his creation of a novel form of insurance valuation: "actual cash value projected repair cost." (R. 123). This term was not mentioned whatsoever in the subject policy and runs afoul of the insurance-industry standards of appraisal. (R. 124). In fact, this valuation improperly provided a RCV calculation without first analyzing whether the petitioners-appellants satisfied the conditions precedent for such an award. *Id*. Mr. Cohen's disregard of evidence also led to a complete mischaracterization of the applicability of depreciation for a real-property insurance claim. *Id*. Mr. Cohen erroneously claims that the first appraisal award was not subject to depreciation, because "there was no betterment to the building." (R. 125). However, the appraisal was required to provide an RCV and ACV valuation and ***17** analyzed substantial repairs to portions of the subject dwelling that had remaining useful service life; therefore, depreciation would have applied to these repairs. *Id*.

Additionally, Mr. Cohen disregarded pertinent evidence by unilaterally precluding NYCM from applying its previous actual-cash-value payments and the subject policy's deductible to the first appraisal award for "actual cash value projected repair cost." (R. 124). There is no support for Mr. Cohen's preclusion of NYCM's previous ACV payments and/or application of the subject policy deductible. Clearly, previous ACV payments should have been applied to an award titled "actual cash value projected repair cost." This example of misconduct was admitted by Mr. Cohen, when he, in direct contradiction of the first appraisal award, stated that "the award, as written and intended, does not restrict consideration by the parties of prior payments or any deductible." *Id*.

NYCM already had issued payment to the petitioners-appellants in the amount of $370,700.52. (R. 123). The first appraisal award was for $612,982.18. (R. 122). The first appraisal award, along with NYCM's previous payments, totaled $983,682.70, which substantially was in excess of the subject policy's dwelling coverage limit ($773,000). (R. 124). If the trial court confirmed the first appraisal award (which it did not) then NYCM would have been forced to pay $210,682.70 in excess of the subject policy's policy limit. *Id*. This patently was ***18** improper, did not satisfy the industry standards of the appraisal process, and was unsupported by the subject policy. Thus, the first appraisal award was not confirmed due to Mr. Cohen's (a non-party to the subject policy) disregard of pertinent evidence, which substantially prejudiced NYCM.

B. Mr. Cohen Exceeded The Scope Of The Appraisal.

The appraisal award also was not confirmed because Mr. Cohen unilaterally acted and exceeded the scope of the appraisal. Here, the appraisal was limited to assess the ACV, RCV, and depreciation relative to the subject property's dwelling and landscaping damage. (R. 125). Instead, Mr. Cohen, without any authority or support, took it upon himself to preclude NYCM from applying previous ACV payments ($370,700.52) and the subject policy deductible ($1,000) to the appraisal award. (R. 124). Further, Mr. Cohen, instead of providing the three required valuations, only provided one valuation, a term that is not used once in the

subject policy. (R. 125). Thus, the appraisal award was set aside, because Mr. Cohen exceeded the scope of the appraisal. *See Allstate Ins. Co, v. Kleveno*, 81 A.D.2d 648, 648.

By way of illustration, in *Kleveno*, a total fire loss occurred to a property insured by Allstate Insurance Company ("Allstate"). *See id.* The insured ***19** made a claim for recovery pursuant to the subject policy and Allstate agreed to its liability; however, a dispute arose between the parties regarding the actual cash value of the destroyed premises. *Id*. The two appraisers failed to agree on actual cash value or amount of the loss and further failed to agree upon the designation of an umpire. *Id*. Thus, pursuant to the policy provisions, Allstate applied to the court for the appointment of an umpire, which application was granted. *See id.*

Petitioner's appraiser submitted a written report in which he concluded that the fair market value of the property before the fire loss was $43,500 using the cost method (which reflects replacement cost of a new building less depreciation) and $45,000 using the income capitalization method (based on earning capacity). *Id*. The insured's appraiser did not submit a written appraisal, but orally stated that the replacement cost of the residence was $220,000. *Id*. The court-appointed umpire appraised the property at $90,000. *Id*. Although the umpire agreed with Allstate's appraisal value, there were no comparable dwellings at that price ($45,000) in the same area. *Id*. Accordingly, the insured would be forced to build a new house, at a cost of $90,000, in order to put him in the same position as he was prior to the fire. *Id*. at 649. Allstate moved the Special Term with a motion to set aside the umpire's award; however, the court denied the motion, holding that: (i) this was not a case where the umpire refused to hear evidence presented by one of the parties; (ii) that the umpire had considered but rejected the opinions of both ***20** experts; and (iii) that it was not improper for the umpire to take a "common sense approach", which considered the alleged fact that the premises were over-insured and omitted depreciation, since residential structures normally appreciate in value. *Id*.

The Second Department reversed the trial court and set aside the umpire's determination and remitted the case to Special Term for the appointment of a new umpire, required to act in accordance with subject policy. *Id*. In other words, the insured's appraiser was not an arbitrator who was given sole authority to make a determination, rather, he was to act only in concert and in conjunction with one of the other appraisers. *Id*. The Court reasoned that the appraisal requirements imposed by the policy agreement were not complied with; therefore, the appraisal award should be set aside. *Id*. Further, the Court reasoned that under the policy, the coverage was limited to the actual cash value of the property at the time of the loss, but not exceeding the amount it would cost to repair or replace the property; therefore, the umpire's determination awarding value for a new house failed properly to reflect the actual loss. *Id*. Accordingly, the award was set aside, and the case remitted to the Special Term to appoint a new umpire. *Id*.

Put simply, an appraisal award should be set aside where an umpire: (1) unilaterally acts; (2) exceeds the scope of the appraisal; (3) does not value the ***21** differences in valuations between the appraisers pursuant to relevant insurance policy; and/or (4) awards an amount greater than the policy limit. *See id.* Here, this matter was substantially is analogous with *Kleveno*; therefore, the trial court followed that appellate precedent and set aside the first appraisal award on the basis of Mr. Cohen's misconduct.

Contrary to the subject policy's appraisal provision, Mr. Cohen unilaterally decided to not provide an ACV or RCV valuation and/or apply depreciation. (R. 125). Instead, Mr. Cohen created a new category of damages in the insurance industry. (R. 123). Additionally, Mr. Cohen unilaterally decided to preclude NYCM from applying previous ACV payments and/or the deductible to the first appraisal award. (R. 124). Mr. Cohen, like an arbitrator, clearly failed to act in conjunction with the other appraisers as both Mr. Palumbo and Mr. Battey submitted valuations that included calculations for ACV, depreciation, and RCV. (R. 125). Mr. Cohen exceeded the scope of appraisal as evidenced by both Mr. Palumbo's and Mr. Battey's dismay and confusion with the first appraisal award omitting an ACV, RCV, and depreciation calculation. *Id*.

Additionally, Mr. Cohen's first appraisal award exceeded the scope of the appraisal by precluding NYCM from applying previous ACV payments and/or the deductible to the appraisal award. (R. 124). This improper analysis not only ***22** exceeded the scope of the appraisal but, if the appraisal award was confirmed, then NYCM would have been forced to pay $210,682.70 in excess of the policy limit. (R. 125). Mr. Cohen admitted his misconduct by directly contradicting his incomprehensible decision in the first appraisal award: "The award, as written and intended, does not restrict consideration by the parties of prior payments or

any deductible." (R. 124). However, Mr. Cohen's backtracking, albeit correct, was a moot point as he already agreed to the first appraisal award with Mr. Battey, to the substantial prejudice of NYCM.

Here, similar to *Kleveno* (unlike *Gansevoort*), NYCM did not seek to set aside the first appraisal award simply on the basis of scorn. *Compare* *Allstate Ins. Co.*, 81 A.D.2d at 648 *with* *Gansevoort Holding Corp. v. Palatine Ins. Co.*, 170 N.Y.S.2d 171, 174 (1957), *aff'd*, 7A.D.2d 720 (1958). NYCM clearly demonstrated numerous examples of Mr. Cohen's misconduct that substantially prejudiced NYCM and warranted that the first appraisal award was set aside.

Lastly, the importance of separating the RCV and ACV calculations cannot be ignored. Recently, the Court of Appeals has held that "when parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms." *See* *J. D'Addario & Co., Inc. v. Embassy Indus., Inc.*, 20 NY3d 113, 118 (2012). In the context of an insurance policy, "an ***23** express condition precedent … must be literally complied with before the claimant may recover." *Sulner*, 224 A.D.2d at 205-206.

Accordingly, the trial court did not confirm the appraisal award, because Mr. Cohen had engaged in substantial misconduct by way of his disregard for pertinent evidence and exceeding the scope of the appraisal. Thus, the petitioners-appellants' motion was dismissed and the trial court ordered Mr. Cohen to modify the appraisal award in order to correct his misconduct and provided the "easily ascertainable" proper award, pursuant to the subject policy.

POINT III

PETITIONERS-APPELLANTS ARE NOT ENTITLED TO LITIGATE THEIR DWELLING CLAIM VIA PLENARY ACTION.

A. The Appraisal Award Is Binding.

As NYCM enumerated in the brief above, the misconduct of the umpire solely prejudiced NYCM. Petitioners-Appellants must agree to this point, as they filed a motion to compel the first appraisal award, arguing it was fair and correct. (R. 10). The trial court agreed with NYCM that this was not the case, set aside the first appraisal award, and directed the umpire to modify the award in accordance with the policy terms. (R. 4). In the absence of this misconduct, or in ***24** the alternative, when a court decides to set aside and remand the appraisal award to fix misconduct, that appraisal award should and will be sustained. NYCM notes that it must assert new arguments in order to oppose the petitioners-appellants' arguments that were not before the trial court.

By way of illustration, New York Insurance Law § 3404 states in relevant part as follows:

> "Notwithstanding any other provision of law to the contrary, the provisions of the appraisal clause set out on the second page of the standard fire policy and the provisions of section three thousand four hundred eight of this article, including determinations as to the amount of loss or damage rendered thereunder, shall be binding on all parties to the contract of insurance evidenced by the policy and may be enforced by either the insurer or the insured by application made pursuant to subsection (c) of section three thousand four hundred eight of this article."

New York Insurance Law § 3404(g).

It is well settled that if the provisions of an insurance contract are not subject to two reasonable interpretations, the insurance contract terms are unambiguous and "must be given their plain and ordinary meaning." *State Farm*, 9 A.D.3d 756 (3d Dep't 2004); *see also White*, 9 N.Y.3d 264, 267 (2007). In the context of an insurance policy, "an express condition precedent … must be literally complied with before the claimant may recover." ***25** *Sulner*, 224 A.D.2d 205, (1st Dep't 1996). "New York law permits parties to choose to be bound by an umpire's award." *Glicksman v N. Riv. Ins. Co.*, 86 AD2d 760 (4th Dep't 1982). "An appraisal proceeding […] is entitled to every reasonable intendment and presumption of validity, *provided the appraisers and umpire have substantially complied with the terms of the submission.*" *Glicksman v N. Riv. Ins. Co.*, 86 AD2d 760 (4th Dep't 1982). (emphasis supplied). "[One must] raise triable issues of fact sufficient to overcome the presumption of validity which [is] attached to the appraisal process." *Hemingway v State Farm Fire & Cas. Co.*, 187 AD2d 814, 815 (3rd Dep't 1992).

In *Ganesvoort*, the insured brought an action against the insurance company to recover for damages to the insured building as a result of a fire loss. *Gansevoort Holding Corp. v. Palatine Ins. Co.*, 170 N.Y.S.2d 171, 173 (1957), *aff'd*, 7A.D.2d 720 (1958). The parties agreed to an appraisal wherein their respective appraisers subsequently appointed an umpire due to disagreement. *Id*. The insured's appraisal was $176,548, the insurer's appraisal was $14,353, while the umpire's appraisal was $29,975. *Id*. at 174. The insured and its appraiser claimed that the umpire's award was the product of undue influence, due to the insurer's appraiser's comments, while also stating that they "do not question [the umpire's] integrity." *Id*.

***26** The court confirmed the appraisal award as valid while stating: "Their award should not be denied effect in the absence of clear and strong proof amounting to fraud, bad faith or misconduct." *Id*. "But, even more importantly, it must be held that the insured waived whatever objections it might have had when, with knowledge of these circumstances, it paid without protest its share of the umpire's fee and raised no question until after he had announced his award." *Id*. "To countenance such a withdrawal after the event by the defeated party would nullify the entire beneficent purpose underlying all appraisals and arbitrations." *Id*. at 175.

Here, the petitioners-appellants contend that the previous misconduct of the umpire bestows upon them the right to undermine the entire process. (*See* petitioners-appellants' brief).

> "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 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."

Id. Of course, only after the misconduct was corrected, did they invoke this so-called "binding Court of Appeals precedent" to pursue plenary action instead of ***27** submitting to the appraisal. (R. 4, 301, 304). Indeed, allowing the petitioners-appellants to nullify the appraisal, simply because they found the award inadequate, would undermine the entire purpose and process set out in the statute. They have not raised a single issue of misconduct about the appraisal award after it was corrected. (*See generally* R. 10, 301; petitioners-appellants' brief). This is simply because there are no issues of misconduct remaining. As depicted in the statute and case law above, the petitioners-appellants have not raised any triable issues of fact sufficient to overcome the presumption of validity which is attached to the appraisal process, therefore, the corrected appraisal award is binding.

The petitioners-appellants want their cake and to eat it too. They were stopped from making a profit and now are upset with the appraisal award. Petitioners-appellants demanded appraisal and got what they wanted. The appraisal award is proper under the policy. Now, after setting the award, they cashed their check and want to pursue more litigation and/or appeals, which is a waste of resources.

***28 B. Petitioners-Appellants Rely On A Severe Misinterpretation Of The Law.**

The petitioners-appellants cite *Gervant v New England Fire Ins. Co.*, 306 NY 393 (1954) throughout their brief, while insisting that this case creates a "binding Court of Appeals precedent" that only the insured may move for plenary action whenever there is misconduct involving appraisal awards, regardless of which party the misconduct hinders, or what the misconduct is. (*See* petitioners-appellants' brief).

> "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 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."

Id. The petitioners-appellants wholly miss the mark on this argument, to the point that their entire brief should be viewed as a farce. First, the petitioners-appellants moved to confirm the first appraisal award, claiming there was no misconduct, and that the appraisal should stand. (R. 10). After, and only after, the trial court ordered to set aside and remand the first appraisal award, did the petitioners-appellants bring forth their concerns for plenary action instead of an appraisal. (R. 301, 304). This was not brought as a motion, rather, in a letter to the judge ***29** after the decision was made to deny the motion to confirm the first appraisal award.

As put forth in the excerpt from their brief above, the petitioners-appellants are talking from both sides of their mouths. Specifically, trying to simultaneously argue that there was no misconduct with the proceeding, particularly misconduct harmful to themselves, while also arguing they should be entitled to set aside the arbitration in favor of plenary action because there was misconduct, in general. This argument stems solely from the dissatisfaction of the petitioners-appellants not getting their way, believing the appraisal award to be inadequate. "[E]xcept as tending to establish misconduct, we think that inadequacy, pure and simple, cannot be considered as a ground for setting aside such an appraisement." *Strome v London Assur. Corp.*, 20 AD 571, 572 (2nd Dep't 1897).

Further, many of the cases cited by petitioners-appellants seem to disagree with their stance (see below), including *Strome*, cited above. "It is well established that every reasonable intendment is in favor of an award made by appraisers who have acted pursuant to the terms of the clause of a policy such as there is in this case, and that an award will be sustained, even though it does not conform to what would have been the judgment of the court." ***30** *Aetna Ins. Co. v Hefferlin*, 260 F 695, 699 (1919). "The right of a party to have appraisers receive all pertinent evidence offered is a fundamental procedural right to which [the party] was entitled, and its denial by the umpire and the company's appointed appraiser has been characterized as 'misconduct, in a legal sense' which is sufficient under the above authorities to set aside the award in equity." *Gervant v New England Fire Ins. Co.*, 306 NY 393, 400 (1954). "It is manifest that the Appellate Division based its determination on the rule that an umpire and one appraiser *are not free to disregard, arbitrarily*, pertinent evidence presented by the other appraiser, and that a *flat refusal* on their part to hear such evidence is condemned by authorities in this State as legal misconduct for which the award will be set aside." *Id*. At 399. There is no unequivocable right for the insured to abandon the appraisal process and pursue plenary action. In the absence of misconduct, or in the alternative, when a court decides to set aside and remand the appraisal award to fix misconduct, that appraisal award should and will be binding.

Again, it is not the presence of misconduct, in general, that allows the insured to set aside the appraisal award. Rather, when the misconduct is unfavorable to a party, that party may move the court to set aside the appraisal award. Setting aside the appraisal award does not equate to pursuing plenary action. Further, petitioners-appellants do not claim that the umpire disregarded or refused to hear their evidence. (*See generally* petitioners-appellants' brief). They ***31** do not claim that they have been

subjected to an unfavorable position. *Id*. They do not allege, in any way, that the umpire's remanded appraisal award does not conform to the policy standards, nor that there is misconduct involved with it. *Id*. The petitioners-appellants have not raised any viable arguments to set aside the appraisal award, particularly where they accepted the check from the new appraisal award and cashed it.

It is clear that the trial court set aside and remanded the first appraisal award to the same umpire because said umpire did not follow the policy requirements with his first appraisal award, and it prejudiced NYCM, greatly. Therefore, with the umpire acting in accordance with the policy terms, viewing all pertinent evidence offered, and absent any misconduct, the remanded appraisal award should not be set aside and it should be binding on all the parties involved.

C. The Trial Court's Order Gives Plain Meaning To The New York Legislature And Relevant Case Law.

The petitioners-appellants are not directly challenging the appraisal award itself, they are directly challenging the trial court's determination to remand the appraisal back to the umpire, instead of allowing or ordering them the right to pursue plenary action. (*See* petitioners-appellants' brief). Further, they insist, albeit by citing aged case law an innumerable about of times, that the Court of ***32** Appeals has a "binding precedent" allowing the petitioners-appellants to pursue plenary action instead of the prescribed manner in Insurance Law § 3404. *Id*. Petitioners-appellants severely are mistaken as to the meaning of "binding precedent," the case law surrounding this issue, as well as the relevant New York Statutes.

"New York public policy favors an appraisal proceeding over a trial on damages." *Amerex Group, Inc. v Lexington Ins. Co.*, 678 F.3d 193, 199 (2d Cir 2012), citing SR Int'l Bus. Ins. Co. v. World Trade Ctr. Props. LLC, No. 01 Civ. 9291, 2004 U.S. Dist. LEXIS 25642, 2004 WL 2979790, at *3 (S.D.N.Y. Dec. 1, 2004), citing S. & E. Motor Hire Corp. v. New York Indem. Co.., 255 N.Y. 69, 72 (1930) (internal quotation marks omitted); *see also In re* Penn Cent. Corp. (Consol. Rail Corp.), 56 N.Y. 2d 120, 127 (1982); In re Delmar Box Co. (Aetna Ins. Co.), 309 N.Y. 60, 63, (1955). It is well settled that if the provisions of an insurance contract are not subject to two reasonable interpretations, the insurance contract terms are unambiguous and "must be given their plain and ordinary meaning." *State Farm Mut. Auto Ins. Co. v. Glinbizzi*, 9 A.D.3d 756, 757 (3d Dep't 2004); *see also White v. Continental Cas. Co.*, 9 N.Y.3d 264, 267 (2007). In the context of an insurance policy, "an express condition precedent … must be literally complied with before the claimant may recover." *Sulner v. G.A. Ins. Co. of N.Y.*, 224 A.D.2d 205, 205-206, (1st Dep't 1996). "In case the insured and this

***33** 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[.]" New York Insurance Law § 3404(e). "The provisions of the appraisal clause […] including determinations as to the amount of loss or damage rendered thereunder, shall be binding on all parties to the contract of insurance evidenced by the policy." New York Insurance Law § 3404(g).

In *Penn Cent. Corp.*, the parties agreed to be bound by an appraisal agreement as to the issue of the valuation of funds that should be allocated to each party. *Penn Cent. Corp. v Consol. Rail Corp.*, 56 NY2d 120, 123 (1982). When Penn Central Corp. ("Penn") moved pursuant to CPLR § 7601 to confirm the appraisal agreement award, Consolidated Rail Corp. ("Conair"), moved to dismiss this motion on the grounds that it has a right to litigate the valuation after the appraisal. *Id*. at 128. The Court fully and succinctly articulates the purpose of appraisals, to the point that it may speak for itself:
The argument is based on the assumption that the Legislature does not favor the informal methods employed by appraisers and is only willing to permit confirmation and the entry of judgment when the court "oversees the proceedings, and assures that due process safeguards are afforded to the parties".[…] The legislative history, however, does not indicate any ***34** hostility or suspicion of the accepted practice in appraisals [.][…] But when, as here, the only dispute between the parties concerns a question of valuation which they have agreed to submit to a panel of appraisers for a nonjudicial and expeditious determination there is no reason why the award should not be confirmed in a special proceeding and the matter finally resolved as the parties obviously intended when they made the agreement.

Id. at 129.

Although, in *Penn*, the parties agreed to submit to an appraisal agreement, here, the parties were forced into an appraisal agreement under the applicable statutes and the insurance policy. (R. 150). It is clear that both case law and the applicable statutes not only prefer appraisals for the valuation of damages, but necessitate it. The New York Legislature specifically enumerated the fire insurance contracts and the appraisal process that it deemed most appropriate. *See* NY CLS Insurance Law § 3404 and § 3408. This eliminates the need of the courts to decide whether appraisals or plenary action is needed for the valuation of damages between an insurer and the insured for fire losses. To blatantly disregard the New York Legislature for case law that, as the petitioners-appellants appropriately described it, is 125 years old, as well as outside of the courts of New York, is nothing short of absurdity, mockery, and a significant waste of time. (*See* petitioners-appellants' brief, 20). Therefore, the trial court did not err with its decision to remand the appraisal award back to the umpire to modify the award, the ***35** trial court's order should be affirmed, and the appraisal award should be binding on all parties.

CONCLUSION

As discussed in the above brief, the trial court correctly denied the petitioners-appellants' petition in its entirety. The trial court's decision to set aside the first appraisal award and remand it back to the appraiser was proper when considering the factual circumstances surrounding the case, the terms of the insurance policy, the New York Insurance Statutes, and relevant case law. The petitioners-appellants should not be able to pursue plenary action as the subsequently modified appraisal award is binding on all parties. Put simply, the trial court's Order should be affirmed in all respects.

Dated: June 12, 2023

Buffalo, New York

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