SIXTH DISTRICT COURT OF APPEAL
STATE OF FLORIDA

Case No. 6D23-1192
Lower Tribunal No. 2020-SC-048395-O

FIRST ACCEPTANCE INSURANCE COMPANY, INC.,

Appellant,

v.

AT HOME AUTO GLASS, LLC a/a/o PETRA JAMES,

Appellee.

Appeal pursuant to Fla. R. App. P. 9.130 from the County Court for Orange County.
Michael Deen, Judge.

June 9, 2023

STARGEL, J.

First Acceptance Insurance Company, Inc. ("First Acceptance") appeals a nonfinal order denying its motion to dismiss or compel appraisal.[1] To the extent First Acceptance seeks review of the denial of its motion to dismiss, we dismiss that portion of the appeal for lack of jurisdiction. *See Couto v. People's Tr. Ins. Co.*, 320 So. 3d 224, 225 n.1 (Fla. 3d DCA 2021). However, we have jurisdiction to review

[1] This case was transferred from the Fifth District Court of Appeal to this Court on January 1, 2023.

the denial of First Acceptance's motion to compel appraisal. *See* Fla. R. App. P. 9.130(a)(3)(C)(iv). For the reasons that follow, we reverse the denial of the motion to compel appraisal.

Background

On September 26, 2020, the insured hired At Home Auto Glass, LLC ("At Home"), to replace her vehicle's damaged windshield. The insured executed an assignment of benefits in favor of At Home, which in turn submitted charges to First Acceptance in the amount of $2,477.03. Upon receipt of At Home's invoice, First Acceptance invoked the appraisal clause in the policy, which provides:

> If we cannot agree with you on the amount of a loss, then we or you may demand an appraisal of the loss. Within 30 days of any demand for an appraisal, each party shall appoint a competent and impartial appraiser and shall notify the other party of that appraiser's identity. The appraisers will determine the amount of loss. If they fail to agree, the disagreement will be submitted to a qualified and impartial umpire chosen by the appraisers. The appraisers and umpire will determine the amount of loss. The amount of loss agreed to by both appraisers, or by one appraiser and the umpire, will be binding. You will pay your appraiser's fees and expenses. We will pay our appraisers fees and expenses. All other expenses of the appraisal, including payment of the umpire if one is selected, will be shared equally between us and you. Neither we nor you waive any rights under this policy by agreeing to an appraisal.

First Acceptance's correspondence stated that it had issued payment in the amount of $333.29, which it had determined was the "prevailing competitive price to repair

or replace the property," and attached a copy of the estimate used in determining the payment amount.

At Home then sued First Acceptance seeking to recover the invoiced amount in full. In response to the complaint, First Acceptance filed a "Motion to Dismiss, or in the alternative, Motion to Stay to Enforce Appraisal." At the hearing on First Acceptance's motion, At Home argued that based on the policy's definition of "loss," the phrase "amount of loss" in the appraisal provision only referred to the extent of the physical damage, not the monetary value of the repairs.[2] And because the extent of the physical damage was not in dispute, At Home argued that appraisal was not appropriate. At Home also raised arguments based on the prohibitive cost doctrine and the public policy behind section 627.725, Florida Statutes 2020.

Although the trial court declined to entertain At Home's public policy and prohibitive cost doctrine arguments, it agreed with At Home's interpretation of the terms "loss" and "amount of loss" as limited to physical damage:

> I'm limited to what a reasonable person—lay person would think this meant and the way I read it is, appraisal is only permissible if there's a disagreement as to the amount of loss. What does loss amount mean? Well, loss means in your policy, damage, and I don't see that there is a disagreement as to damage. So, I'm going to deny the motion to dismiss. I'm going to deny the motion to compel.

[2] The policy defines the term "Loss" as follows: "Loss means sudden, direct accidental damage or destruction. Loss does not include diminution of value."

Analysis

We review the interpretation of an insurance policy de novo. *Fla. Ins. Guar. Ass'n v. Branco*, 148 So. 3d 488, 491 (Fla. 5th DCA 2014). In construing an insurance policy, we must read the policy at a whole to give every provision its full meaning and effect. *Auto-Owners Ins. Co. v. Anderson*, 756 So. 2d 29, 34 (Fla. 2000); *see also Excelsior Ins. Co. v. Pomona Park Bar & Package Store*, 369 So. 2d 938, 941 (Fla. 1979) ("A reasonable interpretation of a contract is preferred to an unreasonable one." (citations omitted)).

First Acceptance argues, and we agree, that At Home's interpretation of the phrase "amount of loss" as limited to the extent of physical damage is unreasonable. *See Johnson v. Nationwide Mut. Ins. Co.*, 828 So. 2d 1021, 1025 (Fla. 2002) ("[W]hen the insurer admits that there is a covered loss, but there is a disagreement on the amount of loss, it is for the appraisers to arrive at the amount to be paid." (emphasis omitted) (quoting *Gonzalez v. State Farm Fire & Cas. Co.*, 805 So. 2d 814, 816 (Fla. 3d DCA 2000))); *State Farm Fire & Cas. Co. v. Licea*, 685 So. 2d 1285, 1288 (Fla. 1996) ("We interpret the appraisal clause to require an assessment of the amount of a loss. This necessarily includes determinations as to the cost of repair or replacement and whether or not the requirement for a repair or replacement was caused by a covered peril . . . ."); *Cincinnati Ins. Co. v. Cannon Ranch Partners, Inc.*, 162 So. 3d 140, 143 (Fla. 2d DCA 2014) ("[I]n evaluating the amount of loss, an appraiser is necessarily tasked with determining both the extent of covered

damage and the amount to be paid for repairs." (citation omitted)); *Citizens Prop. Ins. Corp. v. River Manor Condo. Ass'n, Inc.*, 125 So. 3d 846, 854 (Fla. 4th DCA 2013) ("The appraisers determine the amount of the loss, which includes calculating the cost of repair or replacement of property damaged . . . .").

In a case with nearly identical facts, the Fifth District recently held that a determination of the amount of loss for appraisal purposes "necessarily includes determining both the extent of the covered damage and the monetary amount necessary to repair or replace the damaged property." *Mendota Ins. Co. v. At Home Auto Glass, LLC*, 348 So. 3d 641, 643 (Fla. 5th DCA 2022).[3] Similar to this case, in *Mendota*, At Home sought to avoid an appraisal by arguing that based on the policy's definition of the term "loss," the appraisal provision only applied where there was a dispute as to the amount of physical damage. *Id.* at 643. The Fifth District disagreed:

> Here, the appraisal provision references a lack of agreement as to "the amount of the loss." Although the policy definition of "loss" includes the term "physical damage to property," that does not mean that a determination of "the amount of the loss" is limited to a determination of the extent of physical damage. A determination of "the amount of the loss" necessarily includes determining both the extent of covered damage and the monetary amount necessary to repair or replace the damaged property. *See, e.g., Cincinnati Ins. Co. v. Cannon Ranch Partners, Inc.*, 162 So. 3d 140, 143 (Fla.

[3] The Fifth District also issued a corresponding opinion in a companion case, *Mendota Insurance Co. v. At Home Auto Glass, LLC*, 346 So. 3d 96 (Fla. 5th DCA 2022), which involved the same parties.

> 2d DCA 2014) ("Notably, in evaluating the amount of loss, an appraiser is necessarily tasked with determining both the extent of covered damage and the amount to be paid for repairs."). The trial court's overly-narrow interpretation of the term "the amount of loss" would render the appraisal provision meaningless and would ignore the other provisions in the policy that discuss "loss" in terms of cost to repair or replace. For example, the policy's Physical Damage Coverage provision for Payment of Loss provides that Mendota "may pay the loss in money or repair or replace the damaged or stolen property." Similarly, the Physical Damage Coverage provision for Limit of Liability provides that Mendota's limit of liability for a loss would not exceed the lesser of the "amount necessary to repair physical damage to an *insured auto* . . . ."

Id. at 643-44.

The analysis in *Mendota* applies equally here. At Home's narrow construction of the term "amount of loss" would render the appraisal provision meaningless and would ignore other sections of the policy that reflect the need to place a monetary value on the amount of a loss. On the other hand, First Acceptance's interpretation of the appraisal provision as including a determination of the amount of money to repair or replace the damaged property is consistent with legal precedent as well as the common understanding of the word "appraisal." *See Appraisal*, Merriam-Webster, https://www.merriam-webster.com/dictionary/appraisal (last visited May 25, 2023) (defining "appraisal" as "an act or instance of appraising something or someone; especially: a valuation of property by the estimate of an authorized person").

At Home attempts to distinguish *Mendota* because the definition of "loss" in the policies in *Mendota* did not include language excluding diminution of value. At Home argues that the inclusion of such language in the policy in this case indicates that monetary value is not considered as part of the definition of "loss." We disagree. The policy in this case defines "Diminution of value" as "the actual or perceived reduction, if any, in the fair market value of tangible property by reason of the fact that it has been damaged and repaired." This clearly refers to an overall reduction in the monetary value of the vehicle due to the vehicle having been damaged and repaired, not the cost to repair the damage in the first instance. Thus, the exclusion of diminution of value from the policy's definition of "loss" in no way means that the phrase "amount of loss" in the appraisal provision only refers to the extent of physical damage.[4]

At Home also reasserts its arguments under the prohibitive cost doctrine and based on the public policy behind section 627.428, Florida Statutes. Although the trial court declined to entertain either argument in the proceedings below, we note that both arguments have been soundly rejected by Florida courts in the context of windshield cases.[5] *See Progressive Am. Ins. Co. v. Hillsborough Ins. Recovery Ctr.,*

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[4] We also reject At Home's alternative argument that the appraisal provision is ambiguous and therefore should be construed against First Acceptance. *See Mendota*, 348 So. 3d at 644 (rejecting same argument because At Home's interpretation of the policy was not reasonable).

[5] Notably, section 627.428 was recently repealed by the Florida Legislature. Ch. 2023-15, § 11, at 16, Laws of Fla.

LLC, 349 So. 3d 965, 973 (Fla. 2d DCA 2022) (holding that prohibitive cost doctrine does not apply to contractually mandated appraisals and that appraisal provision did not violate the public policy behind section 627.428); *Mendota*, 348 So. 3d at 644 (rejecting same argument based on the public policy behind section 627.428); *Progressive Am. Ins. Co. v. Broward Ins. Recovery Ctr., LLC*, 322 So. 3d 103, 105 (Fla. 4th DCA 2021) (declining to extend prohibitive cost doctrine to appraisal provision in an auto insurance policy).[6]

For these reasons, we reverse the denial of First Acceptance's motion to compel appraisal and remand for further proceedings consistent with this opinion.

DISMISSED in part; REVERSED in part; REMANDED.

COHEN and MIZE, JJ., concur.

William J. McFarlane, III, and Joseph Clancy, of McFarlane Law, Coral Springs, for Appellant.

Earl I. Higgs, Jr., of Higgs Law, P.A., Orlando, for Appellee.

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

[6] At Home raises several additional tipsy coachman arguments, none of which warrant affirmance.