

**TENTATIVE RULINGS
SPECIAL SET LAW & MOTION CALENDAR**

Thursday, June 1, 2023, 8:30 a.m.

Courtroom 16 –Hon. Patrick M. Broderick

3035 Cleveland Avenue, Suite 200, Santa Rosa

PLEASE NOTE: Per order of the Court, any party or representative of a party must appear remotely through Zoom for this calendar, unless you request in person appearance by 4:00 p.m. the day before the hearing.

TO JOIN “ZOOM” ONLINE,

Courtroom 16

Meeting ID: 824-7526-7360

Passcode: 840359

<https://us02web.zoom.us/j/82475267360?pwd=M0o4WVRSaysydlU5VWhBZEK1MEhpdz09>

TO JOIN “ZOOM” BY PHONE,

By Phone (same meeting ID and password as listed above):

(669) 900-6833 US (San Jose)

PLEASE NOTE: The Court WILL NOT provide a court reporter for this calendar. If there are any concerns, please contact the Court at the number provided above.

1. SCV-271322 Leuschner v Nationwide Mutual Insurance Company

I. Appraisal and Stay

Defendant Nationwide Mutual Insurance Company (“Nationwide”) and Laura Buskirk (“Buskirk,” together “Defendants”) seek an order staying this action pending the completion of an appraisal. **The motion is GRANTED.** The action is stayed only as to the issue of the appraisal. The court has set a CMC for June 20, 2023, at 3:00 p.m., in Department 16, to review the appraisal proceedings.

Plaintiffs Paul Leuschner and Louise Leuschner (“Plaintiffs”) allege that after their home was damaged during a storm on October 24, 2020, when three large trees fell on it, Nationwide and its insurance adjuster, Buskirk, failed to timely find an appropriate rental, failed to continue to pay for a rental despite Plaintiffs’ home not being ready for occupancy, failed to pay for all repairs to their home, and that Buskirk was non-responsive to contractors causing the contractors to decline to work on Plaintiffs’ home. Plaintiffs allege that their policy with Nationwide requires it to pay for all damage caused by the trees falling on their house. The complaint alleges causes of action for breach of contract, breach of the covenant of good faith and fair dealing, financial elder abuse, and negligent misrepresentation.

1. Appraisal Clause

Defendants argue that Plaintiffs' policy requires an appraisal whenever there is a disagreement on the amount which would cover a loss. The appraisal clause states: "If you and we fail to agree on the amount of loss, 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 amount of loss. If the appraisers submit a written report of an agreement to us, the amount agreed upon will be the amount of loss. If they fail to agree, they will submit their differences to the umpire. A decision agreed to by any two will set the amount of loss." (Complaint, Exhibit 1, pg. 25.)

In addition, the policy states that no action can be brought against Nationwide unless there has been full compliance with the terms of the policy. (*Id.*, pg. 26.)

Federal Ins. Co. v. Superior Court (Mackey) (1998) 60 Cal.App.4th 1370 involved an arbitration clause and invoked the code of civil procedure requiring enforcement of arbitration agreements. Code of Civil Procedure section 1280, which defines the terms used throughout the California Arbitration Act (Code Civ. Proc., § 1280 et seq.), provides in pertinent part: "(a) 'Agreement' [to arbitrate] includes but is not limited to agreements providing for valuations, appraisals and similar proceedings and agreements" Thus, on its face, the statutory language defines arbitration agreements to include agreements for appraisals.

Defendants also cite *Appalachian Insurance Co. v. Rivcom Corp.* (1982) 130 Cal.App.3d 818, which involved a standard form of fire insurance as outlined by Insurance Code section 2071. Pursuant to this statutorily mandated form insurance contract, the policy in that case contained an appraisal clause, which provided: "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 umpire; and failing for 15 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." (*Id.*, at 821-822.)

In examining the case, the appellate court stated that, as used in the Code of Civil Procedure, an agreement providing for an appraisal is included within the concept of agreements to arbitrate. (Code Civ. Proc., § 1280, subd. (a).) Under Code of Civil Procedure section 1281.2, a court shall order parties "to arbitrate the controversy if it determines that an agreement to arbitrate the controversy exists, unless it determines that: (a) The right to compel arbitration has been waived by

the petitioner; or (b) Grounds exist for the revocation of the agreement.” (*Appalachian, supra*, at 824.) The *Appalachian* court also noted that California courts have enforced appraisal clauses in fire insurance policies for almost 100 years. (*Ibid.*)

“This established and court-approved statutory procedure is challenged by [the insured], as depriving it of its right to jury trial. It must be kept in mind that the only thing that the appraisers do is to set the amount of loss under the policy. Even if the Appraisal Clause is specifically enforced, [the insured] retains its opportunity to pursue its separate civil action (case No. C 315254) against all defendants named and on all theories stated therein. If the provision for fixing the amount of loss is followed and [the insurer] does not pay the amount, [the insured] might maintain a separate action based on such failure.” (*Appalachian, supra*, at 825.)

As noted in the above authority, the subject appraisal clause is enforceable.

2. Breach of Contract

Plaintiffs argue that Defendants cannot enforce the appraisal provision in the insurance contract because they have breached that agreement. This argument is not persuasive. At this point, Plaintiffs have not proven their allegations.

In addition, Plaintiffs’ authority does not support finding that the appraisal provision should not be enforced due to Plaintiffs’ allegations. The cases cited only support the general rule that one who seeks to obtain relief under a contract must establish they complied with their own contractual obligations. The cited cases did not involve arbitration or appraisal agreements.

3. Waiver

a. By filing an answer

Plaintiffs argue that Defendants waived their contractual right to compel an appraisal because they filed an answer instead of a request for an appraisal. Plaintiffs cite CCP section 1281.7, which only states that a petition to compel an appraisal *may* be filed in lieu of an answer.

Moreover, Defendants’ actions have not been inconsistent with their intent to comply with the appraisal clause as they asserted their right to an appraisal as an affirmative defense, they objected to taking of depositions on this ground, and Defendants’ counsel attempted to work with Plaintiffs’ counsel to obtain the appraisal. (Braunstein decl., ¶¶2, 3, Exhibits A-C; Braunstein decl. in reply, ¶¶2, 3.)

b. By delay

Plaintiffs also argue that Defendants waived their right to compel an appraisal because they filed an answer, participated in discovery, and waited until six months prior to trial before attempting to invoke the appraisal provision. Plaintiffs argue that Defendants only now filed this motion because Plaintiffs have filed their motion for trial preference.

As noted in the previous section, Defendants have invoked the appraisal provision at every step of this action. (See (Braunstein decl., ¶¶2, 3, Exhibits A-C; Braunstein decl. in reply, ¶¶2, 3.) In addition, participating in discovery does support waiver because Defendants will ultimately have to litigate some issues.

4. Stay

CCP section 1281.4 requires the court, upon motion, to stay the action until an arbitration is had in accordance with the order to arbitrate or until such earlier time as the court specifies.

Defendants argue that a stay must be granted pending completion of an appraisal where the pending litigation involves issues of law or fact common to the arbitration, and the continuation of the proceedings in the trial court might disrupt the arbitration proceedings or render them ineffective.

Plaintiffs' reliance on *Farmers Ins. Exchange v. Superior Court* (1992) 2 Cal.4th 377, is misplaced. *Farmers* did not involve a stay pursuant to arbitration, but instead addressed whether an action should be stayed under the doctrine of "primary jurisdiction" pending an administrative action by the Commissioner of the Department of Insurance. (*Id.* at 381.) Here, there is no pending administrative action by the Commissioner of the Department of Insurance, or any other administrative body.

A stay of the action was not an issue in *Unetco Industries Exchange v. Homestead Ins. Co.* (1997) 57 Cal.App.4th 1459.

CCP section 1281.4 provides: "If the issue which is the controversy subject to arbitration is severable, the stay may be with respect to that issue only." Here, the parties are required to participate in an appraisal process in order to determine the value of Plaintiffs' loss. However, this value does not, in and of itself, determine the outcome of the other allegations in this action.

Here, Plaintiffs are 94 and 89 years old and in poor health. Therefore, this court should avoid any unnecessary delays.

5. Conclusion and Order

The motion is GRANTED. The parties are ordered to participate in the appraisal process as specified in the subject policy. The action as to that issue *only* is STAYED pending resolution of the appraisal. In order to avoid delay, the parties are ordered to select their appraisers within 5 days of this order. The court will set a CMC for June 20, 2023, at 3:00 p.m., in Department 16, to review the progress of the appraisal proceedings.

Defendants' counsel is directed to submit a written order to the court consistent with this ruling and in compliance with California Rules of Court, Rule 3.1312.

II. Motion for Preference

Plaintiffs move for preference pursuant to CCP section 36. **The court will consider the current trial date of September 8, 2023 to be firm and will expect the parties to proceed on that date.** The motion is otherwise DENIED.

Plaintiffs are over the age of 70 and their health is such that preference is necessary to prevent prejudicing their interest in the litigation. (Miller decl., ¶¶3-6.)

In opposition, Defendants argue that their motion to compel appraisal moots Plaintiff's motion for trial preference. However, as noted above, the court has determined that the action will only be stayed as to the issue of the value of Plaintiffs' loss. Discovery may proceed with respect to other issues.

Defendants again argue that the entirety of the action should be stayed. However, they fail to provide facts demonstrating their conclusions that proceeding on issues not subject to the appraisal would disrupt the appraisal process and render an appraisal ineffective.

Defendants also argue that limiting this action to an appraisal is in Plaintiffs' best interests. Clearly, Plaintiffs are in the best position to determine what is in their best interest. Moreover, the appraisal only deals with the value of the loss. While that value will affect other aspects of the case, the determination of the value of Plaintiffs' loss will not necessarily cause Plaintiffs' other causes of action to be moot.

Defendants also complain that Plaintiffs' motion for preference is merely a litigation tactic in order to avoid the appraisal clause in the subject insurance policy. In light of the ruling on the motion to compel appraisal, this argument is moot.

They also argue that the motion is pointless because trial is already set within 120 days. Section 36(f) states that "[u]pon the granting of such a motion for preference, the court shall set the matter for trial not more than 120 days from that date."

In addition, Defendants argue that Plaintiffs have not demonstrated that their health mandates a preferential trial setting. Defendants note that the motion is based upon Plaintiffs' counsel's declaration wherein she states "on information and belief, Mr. Leuschner's prognosis is poor due to his advanced age and medical conditions. Upon information and belief, Mr. Leuschner suffers from numerous health conditions including cancer and cardiac issues as he has had heart surgery. His weakness and mobility is such now that he must use a walker."

Plaintiffs' counsel also states: "On information and belief, Mrs. Leuschner's prognosis is poor due to her advanced age and medical conditions. Upon information and belief, Mrs. Leuschner suffers from numerous health conditions including kidney problems, requiring dialysis three times per week, as well high blood pressure, which requires medication to stabilize."

Defendants argue that these ailments are insufficient to establish good cause to advance the trial date. Defendants provide evidence from recent deposition testimony indicating that Mr. Leuschner's bladder cancer has been removed, his triple bypass was 4-5 years ago, and that Mr. Leuschner is still healthy enough to drive. (See Haevernick Decl., ¶ 8, Ex. 3 (Deposition of David Leuschner), p. 193:13-18, 201:1-202:6.)

With respect to Ms. Leuschner, Defendant argues that she testified that she feels healthy enough to live at home (as opposed to in assisted living). (See Haevernick Decl., ¶ 7, Ex. 2 (Deposition of Louise Leuschner), p. 47:10- 12.)

This matter is currently set for trial on September 8, 2023—99 days from the date of the hearing on this motion. The court will consider the current trial date to be firm and will expect the parties to proceed on that date. The motion is otherwise DENIED.