

2701 Cropsey Ave. Assn. v Cambridge Fire Ins. Co.

2015 NY Slip Op 30536(U)

February 6, 2015

Supreme Court, Kings County

Docket Number: 509254/14

Judge: Debra Silber

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 9**

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**2701 CROPSEY AVENUE ASSOCIATION, An
Unincorporated Nonprofit Association,**

Petitioner,

-against-

CAMBRIDGE FIRE INSURANCE COMPANY,

Respondent.
-----X

DECISION/ORDER

Index No. 509254/14

Motion Seq. #1

Submitted: 1/29/15

HON. DEBRA SILBER, A.J.S.C.:

**Recitation, as required by CPLR §2219(a), of the papers considered in the review
of Petitioner’s petition for the appointment of an umpire pursuant to Insurance
Law § 3408**

Papers	Numbered
Notice of Petition and Exhibit Annexed	<u>1-7</u>
Order to Show Cause and Affidavits Annexed	<u> </u>
Answering Affidavits	<u> </u>
Reply Affidavits	<u> </u>
Other: _____	<u> </u>

Upon the foregoing cited papers, the Decision/Order on this Motion is as follows:

Petitioner moves, by Notice of Petition, pursuant to CPLR § 7601 and Insurance Law § 3408, for an order appointing an Umpire to conduct an appraisal and for such other relief as the court may deem proper. Despite the default of the respondent, the motion is denied, with leave to renew upon proper papers.

Petitioner, a condominium association, was issued a homeowner’s policy by respondent covering the period from September 1, 2012 to September 1, 2013.

Petitioner avers in its verified petition that, on October 29, 2012, while the policy was in effect, its property suffered a loss due to Superstorm Sandy. A claim number was

assigned by respondent for the loss which was a covered loss under the policy, but the parties are unable to agree upon the valuation of the damage.

The policy contains the following language:

"If we and you disagree on the amount of the loss, either may make a written demand for an appraisal of the loss. In this event, each party may select a competent and impartial appraiser. The two appraisers may select an umpire. If they cannot agree, either may request that the selection be made by a judge of a court having jurisdiction. The appraisers will state separately the amount of the loss. If they fail to agree, they will submit their differences to the umpire. A decision agreed to by any two [appraisers] will be binding. Each party will:

- a. Pay its chosen appraiser, and
- b. Bear the other expenses of the appraisal and umpire equally.

Insurance Law § 3408 provides:

§ 3408. Fire insurance; appraisal of loss; procedure for selection of umpire on failure to agree

(a) Whenever application shall be made for the selection of an umpire pursuant to the provisions relating to appraisals contained in the standard fire insurance policy of the State of New York it shall be made to a justice of the supreme court residing in the county or to a county judge of the county in which the lost or damaged property is or was located. The application shall be on five days' notice in writing to the other party. Any such notice in writing, when served by the insured, may be served upon any local agent of the insurer [emphasis added].

(b) The court shall, on proof by affidavit of the failure or neglect of the appraisers to agree upon and select an umpire within the time provided in such policy, and of the service of notice pursuant to subsection (a) hereof, forthwith appoint a competent and disinterested person to act as such umpire in the ascertainment of the amount of such loss or damage.

(c) In the event of a covered loss, whenever an insured or insurer fails to proceed with an appraisal upon demand of the other, either party may apply to the court in the manner provided in subsection (a) of this section for an order directing the other to comply with such demand. An appraisal shall determine the actual cash value, the replacement cost, the extent of the loss or damage and the amount of the loss or damage which shall be determined as specified in the policy and shall proceed pursuant to the terms of the applicable appraisal clause of the insurance policy and not as an arbitration. Notwithstanding the provisions of this subsection, an

appraisal shall not determine whether the policy actually provides coverage for any portion of the claimed loss or damage.

In support of the petition, petitioner has provided a verified petition, a copy of the insurance policy at issue and proof of service of the petition, as well as its response to respondent's Demand for a Statement of Damages, which includes an appraisal done by petitioner's appraiser.

However, petitioner has not provided proof it gave notice in writing to respondent of its intent to bring the instant proceeding. Moreover, petitioner has not provided "proof by affidavit of the failure or neglect of the appraisers to agree upon and select an umpire within the time provided in such policy." Also missing are the two appraisals to support the claim that both appraisals have been completed and are not in accord.

The provision which requires written notice of intent to bring an Insurance Law § 3408 action at least five days in advance is a condition precedent. This condition has not been met herein. Further, the plain wording of the applicable statute requires that it be supported by an "affidavit." A survey of all the published cases concerning Insurance Law § 3408 does not reveal even one where a verified petition was allowed to suffice for an affidavit. Moreover, every case which discusses the specifics of the affidavits submitted in support of an Insurance Law § 3408 motion makes reference to at least one affidavit submitted by an appraiser involved in the dispute to confirm that the two appraisers cannot agree on a third. See, e.g., *Andrews v Empire Co-operative Fire Insurance Company*, 276 AD 447 [4th Dept 1950]; *Later v Allstate Insurance Company*, 2010 NY Slip Op 30779(U) [Sup Ct Nassau Co]; *New York Career Inst. v Hanover Ins. Co.*, 6 Misc. 3d 734 [Sup Ct. NY Co 2005]; *Gansevoort Holding Corp. v Palatine Ins. Co.*, 11 Misc. 2d 518 [Sup Ct, NY Co. 1957]; *In re Appraisal of Loss & Damage*, 146 Misc. 449 [Cty Ct, Montgomery Co].

As such, petitioner has not made out a prima facie case for the relief requested under Insurance Law § 3408 and the petition is denied, with leave to renew on proper papers.

The foregoing shall constitute the Decision and Order of the Court.

Dated: Brooklyn, New York
February 6, 2015

ENTER:

db

Hon. Debra Silber, A.J.S.C.

Hon. Debra Silber
Justice Supreme Court

FILED
KINGS COUNTY CLERK
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