

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CV 2012-014396

05/02/2013

HONORABLE GEORGE H. FOSTER, JR.

CLERK OF THE COURT  
J. Polanco  
Deputy

GAYATHRI DEVI BALA, et al.

JEFFREY L RAIZNER

v.

HOMESITE INDEMNITY COMPANY, et al.

C ANDREW CAMPBELL

MITCHELL J RESNICK

**UNDER ADVISEMENT RULING**

The Court took under advisement the matter of the Defendants' Motion to Compel Appraisal. The Court has considered the motion, the response and the reply and the arguments of counsel. Based on the matters presented the Court finds as follows.

The Plaintiffs oppose the motion based on the argument that the case does not involve a matter of the amount of damage, but coverage. The Plaintiffs also argue that the Defendants' invocation of the appraisal clause is untimely and accordingly has waived the right to compel an appraisal. The Court disagrees with Plaintiffs' contentions.

The Plaintiffs cite Meineke for the proposition that the Defendants have waived the right to require an appraisal. As noted in that case, an appraisal provision is sufficiently similar to an arbitration provision such that a court may analyze the former as it would the latter. In doing so the Meineke court stated:

This court, in City of Cottonwood v. James L. Fann Contracting, held:

A court may consider an untimely demand for arbitration as a factor in its determination of repudiation. Unless the repudiation is clear, however, the court should not infer it. An allegation of repudiation based on unreasonable delay must include clear evidence of 1) prejudice suffered by the other party and 2) a demand for arbitration so egregiously

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untimely and inconsistent with an intent to assert the right to arbitrate that an intentional relinquishment can be inferred. Although a case may not present evidence sufficient to establish repudiation in this manner to the court, the trier of fact may still decide that a timely demand is a procedural condition to arbitration, and that a party's demand was untimely, and therefore conclude that that party forfeited its right to arbitrate.

[179 Ariz. at 192–93, 877 P.2d at 291–292](#) (citations and footnote omitted).

An arbitration provision is waived by conduct inconsistent with the use of the arbitration remedy; in other words, conduct that shows an intent not to arbitrate. [EFC Dev. Corp. v. F.F. Baugh Plumbing & Heating, Inc., 24 Ariz.App. 566, 569, 540 P.2d 185, 188 \(1975\)](#). Such conduct includes “preventing arbitration, making arbitration impossible, proceeding at all times in disregard of the arbitration clause, expressly agreeing to waive arbitration, or unreasonable delay.” *Id.*

The record in this case fails to prove that the demand for the appraisal was egregiously untimely. Unlike in Meineke the Defendants in this case sought an appraisal before filing its answer. Like Meineke the Defendants reserved in its answer the right to seek an appraisal. In its reply and at oral argument, the Defendants indicate that prior to the filing of the lawsuit by the Plaintiffs, Defendants sent to Plaintiffs a check for the amount of the damage determined by the Plaintiffs’ inspector. The reply fails to provide any proof of same. When questioned by the Court whether the Plaintiffs cashed the check, neither the Plaintiffs’ counsel nor Defense counsel knew the answer.

Normally the Court rejects arguments made for the first time in a reply. However, because the law appears to require a factual analysis to determine whether there has been a waiver of the appraisal clause, it seems prudent that the Court consider all the facts that impact on whether actions were taken by either side to forego the benefits of the contract or accept the benefits of it. The matter of the attempted payment of the claim and whether that payment was accepted is part of that analysis.

The Court finds that the Defendants shall, within 30 days of this order, file with the Clerk with a copy to this Division and opposing counsel, evidence of the payment made to the Plaintiffs by the Defendants and evidence of whether the check was cashed or returned. The Plaintiffs may within 5 days thereafter, file a copy of any evidence in rebuttal. Each party shall file an affidavit by a party establishing the foundation for any such evidence.

The foregoing ruling is all in accordance with the formal written Order signed by the Court on May 1, 2013 and filed (entered) by the Clerk on May 2, 2013.

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ALERT: The Arizona Supreme Court Administrative Order 2011-140 directs the Clerk's Office not to accept paper filings from attorneys in civil cases. Civil cases must still be initiated on paper; however, subsequent documents must be eFiled through AZTurboCourt unless an exception defined in the Administrative Order applies.