SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2002-023593 06/13/2003

HONORABLE JOHN A. BUTTRICK

CLERK OF THE COURT
C.I. Miller
Deputy

FILED: 06/17/2003

JAY EDWARD BOOTH MARK D SVEJDA

v.

FARMERS INSURANCE EXCHANGE, et al. DOUGLAS L IRISH

HEARING MINUTE ENTRY

8:40 a.m. This is the time set for hearing oral argument on Defendant's Motion to Dismiss. Plaintiff is represented by counsel, Mark Svejda and Howard Andari. Defendant is represented by counsel, Douglas Irish and Todd Coleman.

Marge Harcarik, Court Reporter, is present.

Argument is heard.

IT IS ORDERED taking this matter under advisement.

9:30 a.m. Matter concludes.

*** * ***

LATER:

Defendants (collectively "Farmers") move to dismiss Counts I, II, III, IV, V and VI of the Complaint filed in this action brought by an automobile policy holder ("Booth") against his insuror, Farmers, in connection with the repair of his truck following its theft and recovery. The core of Booths' claim is his assertion that Farmers should have paid him the diminution in value of the vehicle in addition to repairing it. Counts I and II seek a declaratory judgment and allege

breach of contract on that issue. Counts III – VI allege that various Farmers' Marketing slogans which purportedly trumpet Farmers' promise to "get you back where you belong" constitute fraud and negligence and seek damages and injunctive relief related to the use of those slogans. Specifically, Booth asserts that the slogans deceptively imply Farmers will pay the diminished value in situations like Booth's when, in fact, Farmers fails to do so.

The insurance contract in question contains an appraisal clause which binds the parties to an appraised amount of damages where they "do not agree on the amount of payment" to be made. Significantly, the policy also provides that Farmers "may not be sued unless there is full compliance with all terms of the policy. Appraisal . . . shall be a prerequisite to suit." Booth did not follow the appraisal process.

In addition, Farmers agreed only to "pay for loss" to Booth's truck. That "loss" was agreed to be the "amount which it would cost to repair . . . with other of like kind and quality."

But the decision to "total" or repair the vehicle is not subject to the appraisal clause. See Home Indem. Co. v. Bush, 20 Arizona. App. 355, 358-59 (1973) (appraisal clause held applicable only where insured and insurer "fail to reach some agreement as to the amount of loss"; no applicability where parties only dispute "the quality of the repairs").

However, the policy "like kind and quality" language does not support Booth's diminution in value theory. This issue was addressed directly in Johnson v. State Farm Mut. Automobile Ins. Co., 157 Ariz. 1 (App. 1988). There this same language was construed by the trial court to preclude the same kind of "restored . . . value" claim urged here by Booth. The Court of Appeals affirmed and found the policy language unambiguous. 157 Ariz. at 2.

Since all of Plaintiffs' claims stated in Counts I – VI are bottomed on the diminution in value theory, they are baseless under Arizona law and the motion must be granted; therefore,

IT IS ORDERED granting Defendant's motion to dismiss Counts 1 – VI of Plaintiff's Complaint.