

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

Thomas and Carol Gordon :
 :
v. : No. 3:03cv1134 (JBA)
 :
Amica Mutual Insurance Co. :

**Ruling on Motion to Dismiss for Lack of Subject Matter
Jurisdiction [Doc. # 14]**

Defendant Amica Mutual Insurance Company ("Amica") has moved to dismiss the complaint of plaintiffs Thomas and Carol Gordon ("the Gordons") for lack of subject matter jurisdiction. For the reasons that follow, defendant's motion is denied.

I. Background

As a result of an over-pressurized water line, the basement of plaintiffs' home experienced substantial flooding on March 30, 2002, after which plaintiffs' home and personal property became contaminated by mold. Plaintiffs began experiencing medical symptoms, moved out of their home on August 25, 2002, and based on a physician's advice, have not returned home since.

Plaintiffs hold a homeowner's insurance policy with defendant Amica, and filed a claim under their policy seeking coverage for a total loss of their home and personal property, on grounds that their home and personal property could not be sufficiently remediated or repaired to allow them to return. While Amica accepted plaintiffs' claim in part and paid

\$83,962.05, it disputed plaintiffs' claims that they experienced a total loss under the policy and that further amounts are owed.

Plaintiff's homeowner's insurance policy includes an appraisal clause that provides for arbitration of disputes regarding the amount of the loss covered by the policy. Under the policy:

If you [the insured] and we [the insurer] fail to agree on the amount of the loss, either may demand an appraisal of the loss. In this event, each party will choose a competent appraiser within 20 days after receiving a written notice 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 or court of record in the state where the residence premises is located. The appraisers will separately set 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 will set the amount of the loss.

Amica Homeowner's Insurance Policy, Section I – Conditions [Doc. # 15, Ex. A] at 12, ¶ 6.

In accordance with this policy provision, the parties underwent the appraisal process, and the umpire selected by the appraisers rendered an award equal to the amount paid by Amica. Plaintiffs thereafter moved to set aside the award in state court.

Plaintiffs commenced this action on June 27, 2003, seeking a declaratory judgment that Amica is liable for the replacement value of their home and personal property, and for their additional living expenses from the date they moved out of their home. Plaintiffs also seek damages for breaches of the

contract's implied covenant of good faith and fair dealing, and for violations of the Connecticut Unfair Insurance Practices Act ("CUIPA") and the Connecticut Unfair Trade Practices Act ("CUPTA"). In its motion to dismiss, Amica argues that this Court lacks subject matter jurisdiction because the amount in controversy does not exceed \$75,000, and asks that this Court refrain from exercising its discretion to hear plaintiff's claim under the Declaratory Judgment Act, 28 U.S.C. § 2201, on grounds that there is no actual controversy between the parties that is appropriate for adjudication by this Court.

II. Discussion

A. Standard

A motion to dismiss under Rule 12(b)(1) is proper to contest the basis for the Court's subject matter jurisdiction. "A case is properly dismissed for lack of subject matter jurisdiction under Rule 12(b)(1) when the district court lacks the statutory or constitutional power to adjudicate it." Makarova v. United States, 201 F.3d 110, 113 (2d Cir. 2000). The plaintiff has the burden of proving by a preponderance of the evidence that subject matter jurisdiction exists. See id. (citing Malik v. Meissner, 82 F.3d 560, 562 (2d Cir. 1996)).

B. Amount in Controversy

Under 28 U.S.C. § 1332(a), diversity jurisdiction is conferred on district courts in all civil actions between

citizens of different states "where the matter in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs." Amica does not challenge diversity of citizenship, but argues that the amount in controversy does not exceed \$75,000 because it has already accepted plaintiffs' claim and "the parties have already agreed to resolve their differences regarding the extent and value of the plaintiffs' loss through appraisal in accordance with the terms of the contract of insurance." Def. Reply [Doc. # 20] at 1.

The party "invoking the jurisdiction of the federal court has the burden of proving that it appears to a 'reasonable probability' that the claim is in excess of the statutory jurisdictional amount." Tongkook Am., Inc. v. Shipton Sportswear Co., 14 F.3d 781, 784 (2d Cir. 1994); see also Mehlenbacher v. Akzo Nobel Salt, Inc., 216 F.3d 291, 296 (2d Cir. 2000). If the jurisdictional facts are challenged, "the party asserting jurisdiction must support those facts with 'competent proof' and 'justify [its] allegations by a preponderance of evidence.'" United Food & Commercial Workers Union, Local 919, AFL-CIO v. CenterMark Prop. Meriden Square, Inc., 30 F.3d 298, 305 (2d Cir. 1994) (quoting McNutt v. General Motors Acceptance Corp., 298 U.S. 178, 189 (1936)); see also Mehlenbacher, 216 F.3d at 296. If plaintiff's pleadings do not establish the amount in controversy, it is appropriate to "look outside those pleadings to other

evidence in the record." United Food, 30 F.3d at 305.

Plaintiff's claimed damages include loss of personal property, loss of dwelling, and living expenses associated with loss of use. While Amica has paid plaintiffs \$83,962.05, plaintiffs' loss claim is well in excess of the \$75,000 necessary to invoke the jurisdiction of this court. For example, plaintiffs have pointed to an appraisal conducted by LWK, Inc., a personal property appraisal firm hired by Amica, that valued their personal property in excess of \$300,000. See LWK Inc. Contents Inventory [Doc. # 19, Ex. 1]. Applying the policy's limitation of liability to \$159,150 in personal property loss, see Amica Homeowner's Policy No. 621106-2314 [Doc. # 1, Ex. A] at 1, and subtracting Amica's allocation of \$37,836.57 of its \$83,962.05 payment to personal property coverage, plaintiffs' claim exceeds \$120,000 in personal property loss alone.

Amica's jurisdictional argument ultimately rests on its position that plaintiffs are required under the homeowner's policy to pursue their claim through an appraisal process. This argument goes to the merits of plaintiff's claim, however, and is independent of the amount in controversy that confers jurisdiction on this court. It is well settled that the defendant's defenses have no bearing on the amount in controversy, and that the "sum claimed by the plaintiff controls if the claim is apparently made in good faith." St. Paul Mercury

Indem. Co. v. Red Cab Co., 303 U.S. 283, 288 (1938); see also Scherer v. Equitable Life Assurance Society of U.S., 347 F.3d 394, 397 (2d Cir. 2003); Zacharia v. Harbor Island Spa, Inc., 684 F.2d 199, 202 (2d Cir. 1982). As the Second Circuit has explained, "[w]ere such defenses to affect the jurisdictional amount, . . . 'doubt and ambiguity would surround the jurisdictional base of most diversity litigation from complaint to final judgment[, and i]ssues going to a federal court's power to decide would be hopelessly confused with the merits themselves.'" Scherer, 347 F.3d at 397 (quoting Zacharia, 684 F.2d at 202). Because defendant's challenges to the merits of plaintiff's claim may not be used in calculating the jurisdictional amount, the Court concludes that plaintiffs have sufficiently alleged an amount in controversy in excess of \$75,000, conferring jurisdiction under 28 U.S.C. §1332(a).

C. Declaratory Judgment

Because the policy provides that the amount of plaintiffs' loss will be established through the appraisal process, Amica argues that there is no actual controversy between the parties that is appropriate for adjudication, and that therefore the court should decline to hear plaintiff's claim under the Declaratory Judgment Act. The Declaratory Judgment Act, 28 U.S.C. § 2201(a), provides that "[i]n a case of actual controversy within its jurisdiction, . . . any court of the

United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such." The permissive language of the statute confers "a broad grant of discretion to district courts to refuse to exercise jurisdiction over a declaratory action that they would otherwise be empowered to hear." Dow Jones & Co., Inc. v. Harrods Limited, 346 F.3d 357, 359 (2d Cir. 2003) (citations omitted). Among the factors to be considered in determining whether to exercise the discretion to render a declaratory judgment are the following: (1) "whether the judgment will serve a useful purpose in clarifying or settling the legal issues involved;" (2) "whether a judgment would finalize the controversy and offer relief from uncertainty;" (3) "whether the proposed remedy is being used merely for procedural fencing or a race to res judicata;" (4) "whether the use of a declaratory judgment would increase friction between sovereign legal systems or improperly encroach on the domain of a state or foreign court;" and (5) "whether there is a better or more effective remedy." Dow Jones, 346 F.3d at 359-60 (citations and internal quotation marks omitted).

Applying the Dow Jones factors, Amica argues that a

declaratory judgment would not finalize the controversy, and would serve no useful purpose, because the parties have already contractually agreed to settle their dispute through the appraisal process. Amica also contends that by bringing the declaratory judgment action, the plaintiffs are engaging in 'procedural fencing' and improperly circumventing the required appraisal process. Finally, Amica notes that plaintiffs may challenge the appraisal award through an action in state court pursuant to Connecticut General Statute § 52-418, a proceeding that would be encroached by this court's entry of a declaratory judgment.

Since the briefing on this motion was completed, the plaintiffs have brought to the court's attention the decision of Connecticut Superior Court Judge Beach vacating the appraisal award pursuant to Conn. Gen. Stat. § 52-418(a)(3)¹, based on the

¹ Conn. Gen. Stat. § 52-418 provides:

(a) Upon the application of any party to an arbitration, the superior court for the judicial district in which one of the parties resides or, in a controversy concerning land, for the judicial district in which the land is situated or, when the court is not in session, any judge thereof, shall make an order vacating the award if it finds any of the following defects: (1) If the award has been procured by corruption, fraud or undue means; (2) if there has been evident partiality or corruption on the part of any arbitrator; (3) if the arbitrators have been guilty of misconduct in refusing to postpone the hearing upon sufficient cause shown or in refusing to hear evidence pertinent and material to the controversy or of any other action by which the rights of any party have been prejudiced; or (4) if the arbitrators have exceeded their powers or so imperfectly executed them that a mutual, final and definite award upon the subject

umpire's failure to disclose ex parte conversations with one party to the case and informal consultation with non-parties. Plaintiffs' position, however, is that the appraisal clause of the policy is irrelevant to the legal claim on which they seek declaratory judgment. They frame the issue as a legal dispute over what is covered under the policy, rather than a factual dispute over the appraisal value of the loss. Plaintiffs have claimed a "total loss" of their property because they contend that their home and personal property cannot be remediated or repaired sufficiently to allow them to be exposed to it, in light of their doctors' advice and the particular medical sensitivities of members of their family. Plaintiffs' measure of the sufficiency of the remediation of the mold contamination, unlike Amica's, accounts for the individualized circumstances of the homeowners.

So framed, the court concludes the issue is appropriate for resolution by declaratory judgment. What plaintiffs seek is a determination of whether a total loss has occurred under the policy if the property cannot be restored to meet the needs of the homeowners, or whether, as Amica argues, the policy and applicable law require only that the property be restored to pre-loss condition, without reference to the particularized medical

matter submitted was not made.

needs of the inhabitants. The issue here, therefore, is not whether plaintiffs' claim is subject to appraisal, but what legal standard should be applied under the policy in determining the amount of the loss.² Although Amica may be correct in its view that plaintiffs must arbitrate a disputed amount of loss through the appraisal process,³ who decides the amount of loss is the secondary question. Neither the appraisal process provided under the contract nor the misconduct claim under Conn. Gen. Stat. § 52-418 would settle the dispute over the appropriate standard for measuring the loss.

Because the issues and relief sought in plaintiffs' action in state court to vacate the appraisal award due to misconduct

²Plaintiffs argue that their claim is not subject to appraisal because they experienced a "total loss." Amica challenges the conclusion that plaintiffs' loss constituted a total loss, and argues any exception to the general applicability of a policy's appraisal clause exists only where the property has been completely destroyed and no longer exists. It is not necessary to decide whether the appraisal clause should be enforced in order to resolve defendant's jurisdictional argument. Whether or not plaintiffs experienced a total loss depends on which legal standard for determining the sufficiency of the remediation is applied. It is this core dispute over the appropriate legal standard that is the basis for this court's exercise of jurisdiction.

³Although the Connecticut Superior Court has vacated the appraisal award pursuant to Conn. Gen. Stat. § 52-418, the statute provides that "[i]f an award is vacated and the time within which the award is required to be rendered has not expired, the court or judge may direct a rehearing by the arbitrators." § 52-418(b). The parties have not advised the Court whether such a rehearing has been ordered.

are distinct from those pursued in this action, a declaratory judgment would not encroach on the state court's domain. A declaratory judgment clarifying the appropriate standard would provide a final resolution to the core dispute between the parties, and is therefore an appropriate exercise of this court's jurisdiction.

III. Conclusion

For the foregoing reasons, the defendant's motion to dismiss for lack of subject matter jurisdiction [Doc. # 14] is DENIED.

IT IS SO ORDERED.

/s/

Janet Bond Arterton, U.S.D.J.

Dated at New Haven, Connecticut, this 20th day of January, 2005.