[DO NOT PUBLISH]

In the

United States Court of Appeals

For the Eleventh Circuit

No. 22-13881

Non-Argument Calendar

CONCORD AT THE VINEYARDS CONDOMINIUM ASSOCIATION, INC.,

Plaintiff-Appellee,

versus

EMPIRE INDEMNITY INSURANCE COMPANY,

Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Florida
D.C. Docket No. 2:21-cv-00380-SPC-KCD

Before WILSON, LUCK, and LAGOA, Circuit Judges.

PER CURIAM:

Empire Indemnity Insurance Company appeals the district court's order granting Concord at the Vineyards Condominium Association, Inc.'s, motion to compel appraisal and staying the case pending the appraisal process. This insurance contract dispute arises from Concord's first-party claim for property insurance benefits following Hurricane Irma under an insurance policy (the "Policy") issued to Concord for multiple buildings and structures in a condominium complex it owns in Naples, Florida (the "Property").

After Empire filed its appeal, we issued a jurisdictional question to the parties asking them to address whether we had jurisdiction to review the district court's order compelling appraisal and staying the case pending completion of the appraisal process. Then, during briefing in this appeal, this Court decided *Positano Place at Naples I Condominium Association, Inc. v. Empire Indemnity Insurance Co.*, 84 F.4th 1241 (11th Cir. 2023), in which this Court found that it lacked appellate jurisdiction over an interlocutory order that compelled appraisal and stayed the proceedings pending appraisal.

As explained below, we conclude that we lack jurisdiction over the district court's order compelling appraisal and staying the proceedings pending appraisal for the reasons stated in our decision in *Positano Place*. Accordingly, we dismiss this appeal.

I. BACKGROUND

We presume that the parties are familiar with the facts of the case and only discuss those facts necessary for resolution of the appeal. Empire issued the Policy to Concord for coverage of the Property. The Policy contains the following appraisal provision:

> **Appraisal**
>
> If we and you disagree on the value of the property or the amount of loss, either may make written demand for an appraisal of the loss. In this event, each party will select a competent and impartial appraiser. The two appraisers will select an umpire. If they cannot agree, either may request that selection be made by a judge of a court having jurisdiction. The appraisers will state separately the value of the property and amount of loss. If they fail to agree, they will submit their differences to the umpire. A decision agreed to by any two will be binding. Each party will:
>
> **a.** Pay its chosen appraiser; and
>
> **b.** Bear the other expenses of the appraisal and umpire equally.
>
> If there is an appraisal, we will still retain our right to deny the claim.

In September 2017, Hurricane Irma made landfall in southwest Florida. Following Hurricane Irma, Concord filed a first-party claim for property insurance benefits under the Policy the same month, claiming that the hurricane damaged its Property and that the damage was covered by the Policy. Empire investigated this

loss and estimated the reported loss at $444,518.66 and paid Concord $88,851.97 after applying the Policy's deductibles. More than two years later, on September 4, 2020, Concord submitted a quantification of its loss in the amount of $15,398,747.40. According to Concord, it disagreed with Empire's evaluation and engaged with its own consultants to evaluate the loss.

In May 2021, Concord, due to the disagreement between the parties as to the amount of loss, filed suit against Empire in federal court, alleging a single breach of contract claim. Empire filed an answer and affirmative defenses to the complaint, which included its denial of coverage of any additional damage beyond the $88,851.97 it had already paid Concord and various coverage defenses.[1] Then, in April 2022, Concord moved to compel appraisal under the Policy's appraisal provision and stay the proceedings pending the appraisal process. Empire opposed the motion, and the motion was referred to a magistrate judge.

The magistrate judge issued an order on August 10, 2022, granting Concord's motion to compel appraisal and stay the proceedings and rejecting all of Empire's arguments against ordering appraisal. The magistrate judge ordered the parties to "expeditiously conduct an appraisal," to file joint status reports every ninety days, and to notify the court when the appraisal process was completed.

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[1] During the underlying proceedings, Empire reinspected the Property, completing the reinspection on August 2021 and finalizing its report in April 2022.

Empire filed objections to the magistrate judge's order. The district court, however, overruled Empire's objections to the magistrate judge's order. Reviewing the magistrate judge's order for clear error, the district court explained that "[c]ompelling appraisal is not dispositive," as appraisal "will only supply a calculation of the amount of loss without determining whether Empire breached the contract or if Empire's defenses stand." The district court also explained the appraisal process is not remedial because it will not remedy the damages caused by Hurricane Irma; rather, it was "a form of alternative dispute resolution that sets a disputed loss amount" and was thus "but one step in this process, supplying an extra-judicial mechanism to calculate the amount of loss." And the district court rejected Empire's arguments over the timing of the appraisal and whether "certain minimal guidelines" should be imposed on the appraisal process.

Thus, the district court ordered the parties to appraisal and stayed the case pending appraisal. The court stated that, within seven days of the conclusion of the appraisal process, the parties were directed to jointly notify it of "(a) what issues, if any, remain for the Court to resolve; (b) whether the stay needs to be lifted; and (c) how this action should proceed, if at all." Empire then moved to stay the district court's order pending Empire's interlocutory appeal, which the district court granted.

Empire timely appealed. During this appeal, we issued a jurisdictional question to the parties asking them to address whether we had appellate jurisdiction over an order that compelled

appraisal, stayed the case pending appraisal, and directed the parties to file status reports on the appraisal process. We also asked the parties to address whether orders compelling appraisal are treated the same as orders compelling arbitration for purposes of our appellate jurisdiction. We now resolve the jurisdictional question.

II. STANDARD OF REVIEW

We review *de novo* an order granting a party's motion to compel appraisal. *Positano Place*, 84 F.4th at 1247. And we review *de novo* our appellate jurisdiction. *Id.*

III. ANALYSIS

"We have a duty to assure ourselves of our jurisdiction at all times in the appellate process." *Thomas v. Phoebe Putney Health Sys., Inc.*, 972 F.3d 1195, 1200 (11th Cir. 2020). Thus, "before we can review the order compelling appraisal in this case, we must determine whether we have jurisdiction to do so." *Positano Place*, 84 F.4th at 1247.

For an order to be appealable, it "must either be final or fall into a specific class of interlocutory orders that are made appealable by statute or jurisprudential exception." *CSX Transp., Inc. v. City of Garden City*, 235 F.3d 1325, 1327 (11th Cir. 2000); *see* 28 U.S.C. §§ 1291–92. Section 1291 "provides us with appellate jurisdiction of final decisions of the district courts, while § 1292 provides for review of certain classes of interlocutory orders." *Positano Place*, 84 F.4th at 1248. Further, "for an order disposing of a request to compel arbitration, the FAA governs the appealability of such an order." *Id.*

For the reasons stated in *Positano Place*, we conclude that we lack jurisdiction over the order compelling appraisal and staying the proceedings pending the appraisal process. As an initial matter, the order compelling appraisal is not a final order reviewable under § 1291 because (1) the order contemplated further proceedings, (2) appraisal existed for the limited purpose of determining the amount of loss, and (3) "all issues other than those contractually assigned to the appraisal panel are reserved for determination in a plenary action." *Id.* (quoting *Citizens Prop. Ins. Corp. v. Mango Hill Condo. Ass'n*, 117 So. 3d 1226, 1230 (Fla. Dist. Ct. App. 2013)).

Next, the order compelling appraisal is not appealable under one of the classes of appealable, interlocutory orders under § 1292—specifically, § 1292(a)(1), which provides for review of orders "granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions." *Id.* at 1248–49, 1254. In *Positano Place*, we addressed a substantially similar appraisal order and found that the order was not an "explicit grant of an injunction." *See id.* at 1249. In finding so, we explained that: (1) the insured had "simply moved to compel appraisal" based on the insurance policy's appraisal provision, and had not moved for an injunction nor sought any injunctive relief in its operative complaint; (2) the district court had not made the requisite findings of fact and conclusions of law that normally support an order granting injunctive relief; and (3) based on how the district court characterized the appraisal order, it "did not intend to issue an injunction." *See id.* (quoting *Supreme Fuels Trading FZE v. Sargeant*, 689 F.3d 1244, 1247 (11th Cir. 2012) (Pryor, J., concurring)). We also

explained that "merely establishing that the order under consideration is a court order commanding or preventing an action, and enforceable by contempt, does not make it 'an injunction' under § 1292(a)(1)." *Id.* at 1250 (quoting *Alabama v. U.S. Army Corps of Eng'rs*, 424 F.3d 1117, 1128 (11th Cir. 2005)). Rather, "[t]he order must also give 'some or all of the substantive relief sought in the complaint,'" and "[t]he § 1292(a)(1) exception [to the final judgment rule] does not embrace orders that have no direct or irreparable impact on the merits of the controversy." *Id.* (quoting *U.S. Army Corps*, 424 F.3d at 1128–29). Critically, the order compelling appraisal "did not dispose of any of the claims or defenses in th[e] case" but "simply enforced the parties' contractually-agreed-to, extra-judicial mechanism to calculate the amount of loss as to claims made under" the insurance policy. *Id.* at 1251. We reasoned that the "appraisal process is not remedial" and that the result of that process did not entitle the insured to relief or judgment on its claims against the insurer related to the claims for property insurance benefits under the insurance policy. *Id.* The same holds true for the order compelling appraisal here, and, as such, we conclude that it is not the explicit grant of an injunction.

We also have appellate jurisdiction over "orders that have the practical effect of granting or denying injunctions and have 'serious, perhaps irreparable, consequence.'" *Id.* (quoting *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 287–88 (1988)). In *Positano Place*, we summarized the requirements for such orders as follows: (1) "if the relief sought is not actually an injunction, then it must have the practical effect of an injunction"; and (2) "the

appellant must show that the interlocutory order of the district court 'might have a serious, perhaps irreparable, consequence, and that the order can be effectually challenged only by immediate appeal.'" *Id.* at 1252 (quoting *United States v. City of Hialeah*, 140 F.3d 968, 973 (11th Cir. 1998)). Applying those requirements in *Positano Place*, we found that the order compelling appraisal did not have "serious, perhaps irreparable, consequence" such that it was effectively challengeable "only by immediate appeal." *Id.* We noted that the order did *not* entitle the insured to judgment on its claims against the insurer. *Id.* Additionally, we explained that "while the appraisal process is binding on the parties as to the *amount* of the loss, [the insurer] can still pursue its defenses of coverage denials as a whole and to specific buildings owned by [the insured] in the district court once the appraisal process concludes." *Id.* And we stated that if the insurer was "unsuccessful in the district court following the conclusion of the appraisal proceedings, it can still obtain relief upon review after trial by appealing any final judgment against it—meaning that the order is not effectively challengeable only by immediate appeal." *Id.*

Here, too, the district court's order does not have "serious, perhaps irreparable, consequence" such that it is effectively challengeable "only by immediate appeal." Rather, the order here (1) compelled the parties to submit their disagreement on the *amount of loss* issue to an appraisal in accordance with the Policy, (2) stayed the case pending completion of the appraisal process, and (3) required the parties to file a joint status reports detailing the status of the appraisal process and the need for any further proceedings in

the district court. The order, however, does *not* entitle Concord to judgment on its claims against Empire. Indeed, the appraisal process will only supply a calculation of the amount of loss without determining whether Empire breached the Policy, and Empire will be able to pursue its coverage defenses once the appraisal process concludes. And if Empire does not succeed in the district court after the appraisal proceedings, it can still obtain relief upon review after trial by appealing any final judgment against it—meaning that the order is not effectively challengeable only by immediate appeal. *See id.* We thus do not have appellate jurisdiction over the order on this basis.[2]

Finally, as we explained in *Positano Place*, "even assuming for the sake of argument that the order compelling appraisal here fell within the definition of arbitration for purposes of the FAA, we still lack appellate jurisdiction over the district court's order." *Id.* at 1255. Indeed, the order compelling appraisal is not a final order, meaning that it is not appealable under 9 U.S.C. § 16(a)(3), which provides that an appeal may be taken from "a final decision with respect to an arbitration." And because 9 U.S.C. § 16(b)(3) specifically states that "an appeal may not be taken from an interlocutory order . . . compelling arbitration" and because § 16(b)(1) makes "an

[2] In its reply brief, Empire makes several arguments criticizing our recent *Positano Place* decision. But under this Court's prior precedent rule, "a prior panel's holding is binding on all subsequent panels unless and until it is overruled or undermined to the point of abrogation by the Supreme Court or by this court sitting *en banc*." *United States v. Archer*, 531 F.3d 1347, 1352 (11th Cir. 2008).

interlocutory order . . . granting a stay" pending referral of arbitrable issues to arbitration not immediately appealable, "we lack appellate jurisdiction over the order compelling appraisal even if appraisal were to be considered arbitration for purposes of the FAA." *Positano Place*, 84 F.4th at 1255.

IV. CONCLUSION

For all these reasons, we conclude that the district court's order compelling appraisal and staying the proceedings pending appraisal is an interlocutory order that is not immediately appealable under either § 1292(a)(1) or the FAA. We therefore dismiss the appeal for lack of appellate jurisdiction.

APPEAL DISMISSED.