

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

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CA 22-01481

PRESENT: SMITH, J.P., CURRAN, BANNISTER, OGDEN, AND NOWAK, JJ.

IN THE MATTER OF KIM STANZ AND MICHAEL STANZ,
PETITIONERS-APPELLANTS,

V

MEMORANDUM AND ORDER

NEW YORK CENTRAL MUTUAL FIRE INSURANCE COMPANY,
RESPONDENT-RESPONDENT.

DUKE HOLZMAN PHOTIADIS & GRESENS LLP, BUFFALO (THOMAS D. LYONS OF
COUNSEL), FOR PETITIONERS-APPELLANTS.

RUPP PFALZGRAF, LLC, BUFFALO (BRANDON SNYDER OF COUNSEL), FOR
RESPONDENT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Raymond W. Walter, J.), entered August 25, 2022. The order, among other things, set aside the appraisal award and remitted the matter for further deliberations.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating that part of the first ordering paragraph remitting the matter to the court-appointed umpire and the appraisers for further deliberations consistent with the insurance policy requirements, and by vacating the second through fourth ordering paragraphs in their entirety, and as modified the order is affirmed without costs.

Memorandum: Petitioners are the owners of a residence that was insured by respondent against loss or damage caused by fire. In early 2019, petitioners' home was damaged in a fire. Petitioners submitted a claim under their policy with respondent, and respondent, after conducting an investigation, issued actual cost value payments to petitioners totaling approximately \$370,000. Dissatisfied with this outcome, petitioners demanded an appraisal of the loss with respect to, inter alia, the replacement cost value and actual cost value of the home, pursuant to the terms of the insurance policy and Insurance Law § 3404 (e). Respondent initially rejected petitioners' demand for an appraisal.

Petitioners thereafter commenced this proceeding seeking, inter alia, to compel respondent to participate in an appraisal. Supreme Court granted the petition to compel appraisal, and each party nominated an appraiser. The court thereafter appointed an umpire to work with the dueling appraisers and, after the umpire issued an

appraisal award, petitioners moved for, inter alia, an order confirming the award. Respondent opposed the motion, contending that the award should not be confirmed due to errors made by the umpire. The court, inter alia, set aside the appraisal award. Petitioners appeal, as limited by their brief, from the order insofar as it remitted the matter to the umpire and the appraisers for further deliberations consistent with the requirements of the insurance policy.

Initially, we conclude that petitioners' contention that the court erred in remitting the matter for further appraisal proceedings is preserved for our review because petitioners specifically advanced that argument before the motion court (*cf. McGuire v McGuire*, 214 AD3d 1310, 1310 [4th Dept 2023]; see generally CPLR 5501 [a]; *Ciesinski v Town of Aurora*, 202 AD2d 984, 985 [4th Dept 1994]). On the merits, we agree with petitioners that the court erred in remitting the appraisal to the umpire and appraisers for further deliberations. It is well settled that "after an appraisal proceeding has terminated in an award and the award has been set aside, without any fault on the part of the insured[s], [they] need not submit to any further appraisal but may sue on the policy" (*Gervant v New England Fire Ins. Co.*, 306 NY 393, 400 [1954]; see *Matter of Delmar Box Co. [Aetna Ins. Co.]*, 309 NY 60, 64 [1955]; see generally *Aetna Ins. Co. v Hefferlin*, 260 F 695, 700 [9th Cir 1919]). Here, it is undisputed that the court set aside the appraisal award due to errors made by the court-appointed umpire—i.e., not due to any fault of petitioners. Consequently, the court could not properly compel petitioners to participate in further appraisal proceedings (see *Gervant*, 306 NY at 400). Indeed, we note that petitioners are now entitled to pursue a plenary action in Supreme Court seeking full recovery on their insurance claim under the policy (see *id.*; see generally *Kaiser v Hamburg-Bremen Fire Ins. Co.*, 59 App Div 525, 526, 531 [4th Dept 1901], *affd* 172 NY 663 [1902]; *Uhrig v Williamsburg City Fire Ins. Co.*, 101 NY 362, 366 [1886]). We therefore modify the order by vacating that part of the first ordering paragraph remitting the matter to the umpire and appraisers. We further modify the order by vacating the second through fourth ordering paragraphs in their entirety.