

STATE OF MINNESOTA

COURT OF APPEALS

A-06-1478

Margaret Johnson,

Appellant,

vs.

Mutual Service Casualty Insurance
Company,

Respondent.

APPELLANT'S BRIEF AND INDEX

KATZ, MANKA, TEPLINSKY,
DUE & SOBOL, LTD.
Scott A. Teplinsky, # 161974
Amanda M. Furth, # 328467
225 South Sixth Street, Suite 4150
Minneapolis, MN 55402
(612) 333-1671

Attorneys for Appellant

LIND, JENSEN, SULLIVAN
& PETERSON
Paul C. Peterson, # 151543
Matthew S. Frantzen, # 332793
150 South Fifth Street, Suite 1700
Minneapolis, MN 55402
(612) 333-3637

Attorneys for Respondent

TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF AUTHORITIES	iii.
STATEMENT OF THE ISSUES	iv.
STATEMENT OF THE CASE	v.
STATEMENT OF THE FACTS	1
ARGUMENT	4
I. WHERE THE APPELLANT’S COMPLAINT CONTAINED A PLEA FOR JUST AND EQUITABLE RELIEF, THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT TO DISMISS THE ENTIRE CASE BASED ON THE STATUTE OF LIMITATIONS FOR AN ACTION FOR DAMAGES	4
1. Appellant’s Plea for Equitable Relief Meets the Notice Pleading Requirements of Minn. R. Civ. P. 8.01 (1988).	4
2. Appellant’s Appraisal Demand is a Form of Equitable Relief	6
3. The Statute of Limitations Governing an Action for Damages Does Not Apply to Appellant’s Equitable Relief Demand for Appraisal	7
II. WHERE THE APPELLANT’S COMPLAINT CONTAINED A PLEA FOR JUST AND EQUITABLE RELIEF, THE DISTRICT COURT ERRED IN DENYING HER MOTION TO STAY THE PROCEEDINGS AND COMPEL PARTICIPATION IN APPRAISAL WHEN THE MOTION TO COMPEL APPRAISAL WAS MADE WITHIN THE STATUTE OF LIMITATIONS GOVERNING THE SAME REQUEST	10
1. Participation in Appraisal is Compulsory Under the Law	11
2. Upon Appellant’s Motion to Compel Appraisal, the Court Should Have Ordered the Parties to Proceed	12

CONCLUSION 14
CERTIFICATION OF BRIEF LENGTH 16
INDEX TO THE APPENDIX 17

TABLE OF AUTHORITIES

<u>CASES:</u>	<u>PAGE</u>
<u>Barton v. Moore</u> , 558 N.W.2d 746, 749 (Minn. 1997).	4
<u>Continental Ins. Co. of New York v. Titcomb</u> , 7 F.2d 833, (1925).	6, 7
<u>Disbrow v. Creamery Package Mfg. Co.</u> , 104 Minn. 17, 115 N.W. 751 (Minn. 1908).	6
<u>Fabio v. Bellmo</u> , 504 N.W.2d 758, 761 (Minn. 1993).	4
<u>Fireman's Fund Ins. Co. v. Vermes Credit Jewelry, Inc.</u> , 185 F.2d 142, 145 (8 th Cir. 1950).	11
<u>Glidden Co. v. Retail Hardware Mut. Fire Ins. Co. of Minnesota</u> , 181 Minn. 518, 233 N.W.310 (Minn. 1930), affirmed 52 S.Ct. 69, 284 U.S. 151, 76 L.Ed. 214 (1931).	6, 7, 12
<u>Goeb v. Tharaldson</u> , 615 N.W.2d 800, 818 (Minn. 2000).	5
<u>Har Mar Incorporated v. Thorsen & Thorshov, Inc.</u> , 300 Minn. 149, 218 N.W.2d 751 (Minn. 1974).	7, 8, 9, 10
<u>Hughes v. Lund</u> , 603 N.W.2d 674 (Minn.App. 1999).	14
<u>Itasca Paper Co. v. Niagra Fire Ins. Co.</u> , 175 Minn. 73, 220 N.W. 425 (Minn. 1928).	6, 7
<u>Kavli v. Eagle Star Ins. Co.</u> , 206 Minn. 360, 288 N.W. 723 (Minn. 1939).	6, 7, 14
<u>Lubbers v. Anderson</u> , 539 N.W.2d 398, 401 (Minn. 1995).	4
<u>Lucas v. Medical Arts Bldg. Co.</u> , 207 Minn. 380, 291 N.W. 892 (Minn. 1940).	5
<u>Padco, Inc. V. Kinney & Lange</u> , 444 N.W. 2d 889, 891 (Minn. App. 1989).	5
<u>State by Cooper v. French</u> , 460 N.W.2d, 4 (Minn. 1990).	4
<u>St. Paul Surplus Lines Ins. Co. v. Life Fitness</u> , 2001 WL 588949 (Ramsey Co. Minn. 2001).	6
<u>Rathbun v. W.T. Grant Co.</u> , 300 Minn. 223, 230, 219 N.W.2d 641, 646 (Minn. 1974).	4
<u>Watson v. United Servs. Auto Ass'n</u> , 566 N.W.2d 683, 690 (Minn. 1997).	11
 <u>OTHER AUTHORITIES:</u>	
<u>Black's Law Dictionary</u> , 373 (Abridged 6 th ed., West 1991).	6
Minnesota Standard Fire Insurance Policy, M.S.A. § 65A.01.	3, 9, 10, 11, 12, 13, 14
Minn. Stat. §541.05.	8, 10
Minn. R. Civ. P. 8.01 (1988).	4, 6
Uniform Arbitration Act, § 572.08.	8
Uniform Arbitration Act, § 572.09(a).	8, 13

STATEMENT OF THE ISSUES

1. Where the Appellant's Complaint contained a plea for just and equitable relief, did the District Court err in granting summary judgment to dismiss the entire case in favor of the Respondent?

The District Court held: In the Negative.

Minnesota Standard Fire Insurance Policy, Minn. Stat. § 65A.01

Glidden Co. v. Retail Hardware Mut. Fire Ins. Co. of Minnesota, 181 Minn. 518, 233 N.W.310 (Minn. 1930), affirmed 52 S.Ct. 69, 284 U.S. 151, 76 L.Ed. 214 (1931).

Har Mar Incorporated v. Thorsen & Thorshov, Inc., 300 Minn. 149, 218 N.W.2d 751 (Minn. 1974).

Lucas v. Medical Arts Bldg. Co., 207 Minn. 380, 291 N.W. 892 (Minn. 1940).

2. Where the Appellant's Complaint contained a plea for just and equitable relief, did the District Court err in denying her motion to compel appraisal when the motion to compel appraisal was made within the statute of limitations governing the same request?

The District Court held: In the Negative.

Minnesota Standard Fire Insurance Policy, M.S.A. § 65A.01

Minn. Stat. § 572.09

Glidden Co. v. Retail Hardware Mut. Fire Ins. Co. of Minnesota, 181 Minn. 518, 233 N.W.310 (Minn. 1930), affirmed 52 S.Ct. 69, 284 U.S. 151, 76 L.Ed. 214 (1931).

STATEMENT OF THE CASE

This lawsuit arose out of damages from a February 18, 2003 fire at the property at 661 Western Avenue, in the City of Saint Paul, in the State of Minnesota. The fire destroyed the property and the contents of such property. It is undisputed that Appellant Margaret Johnson (herein after referred to as "Appellant") owned said property. Further, Respondent Mutual Service Casualty Insurance Company (herein after referred to as "Respondent") insured the property for damage resulting from fire at the time of the loss.

A dispute between the parties arose over the amount of the loss. Respondent's fire insurance policy covering Appellant's property contained a provision for "Appraisal." It provided,

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....

MSI Building and Personal Property Coverage Form, Subd. E. Loss Conditions, Sec. 2. Appraisal (1994). (App. 58-121). As Appellant and Respondent disagreed on the amount of loss to Appellant's property, Appellant's counsel sent two written demands for appraisal, also naming an appraiser, to Respondent. Respondent responded with letters refusing to participate in the appraisal process. Based on Respondent's refusal to participate in Appraisal, Plaintiff initiated a lawsuit on August 30, 2005 in Ramsey County. (App. 126-

129). Plaintiff's initiation of a lawsuit was in an attempt to have a judge assigned and eventually bring a motion to compel Appraisal. On April 15, 2006, Appellant's counsel sent a letter to Respondent's counsel notifying him of Appellant's intent to request that a judge appoint an appraiser on their behalf if they did not choose one within 5 business days. (App. 135). On April 19, 2006, Respondent's counsel sent a letter indicating that if the court requires MSI to proceed with an appraisal, then MSI would provisionally appoint Jim Stoops at GAB or Tom Elert at LaMaster Construction, Inc. as its appraiser. (App. 136-137). Appellant filed her motion to stay the proceedings and compel Appraisal on May 11, 2006. (App. 138-146).

In the meantime, on April 13, 2006, Respondent filed a motion for summary judgment alleging that Appellant's failure to serve her Summons and Complaint within the two years of the date of loss barred her claims and required summary judgment in Respondent's favor under M.S.A. §65A.01. (App. 164 - 171).

The Honorable Edward J. Cleary, a Judge of Ramsey County, Second Judicial District, heard both Respondent's summary judgment motion and Appellant's motion for a stay of the proceedings and to compel Appraisal on May 25, 2006. Judge Cleary granted Respondent's motion for Summary Judgment and denied Appellant's motion to stay the proceedings and to compel participation in appraisal. (App. 184-188).

Appellant seeks reversal of the District Court rulings granting summary judgment in favor of Respondent and denying the motion for a stay of proceedings and compelling

participation in appraisal; which would allow Appellant to pursue the public policy favored and Respondent's policy's preferred remedy of appraisal to resolve the dispute.

STATEMENT OF THE FACTS

On February 18, 2003, a fire damaged the property at 661 Western Avenue, in the City of Saint Paul, in the State of Minnesota and the contents of such property. (App. 1-2). The damaged property and contents were owned by Appellant, Margaret Johnson (“Appellant”) and were operated as a free boxing gym for boys and girls. (App. 1-2). Respondent Mutual Service Casualty Insurance Company (“Respondent”) insured the property for damage resulting from fire at the time of the loss. (App. 3).

Respondent acknowledges that it was “given the opportunity to inspect the property immediately after the loss was reported to [them], inspecting the property on several occasions, including a meeting with a restoration contractor and subcontractors of [their] choosing thereby reaching an agreement with them on the scope and cost of the covered repairs from the fire.” (App. 4-5). Respondent estimated the damage to Plaintiff’s property at \$79,930.00. (App. 6-18). Appellant hired an independent contractor to prepare an estimate of the damage to the property. (App. 19-35). Wizard Service estimated the damage to Plaintiff’s property at \$213,330.25. (App. 19-35). Respondent acknowledges that it received a copy of Wizard Service’s initial estimate dated February 22, 2003. (App. 4-5). Respondent also acknowledges that after receiving notice of the Wizard Service estimate, it did not return to the property for any further inspections. (App. 4-5). Appellant chose to use her own contractor to repair the property. (App. 36-50). Respondent paid Appellant \$79,430.00 for the damage to the property. (Aff. 51-52).

Due to the dispute over the amount of the damage to the property, Appellant's attorney sent a written settlement demand to Respondent on October 28, 2004. (App. 53-54). Respondent refused to tender a settlement offer. (App. 55-57).

Respondent's fire insurance policy covering Plaintiff's property contained a provision for "Appraisal." It provided,

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....

MSI Building and Personal Property Coverage Form, Subd. E. Loss Conditions, Sec. 2. Appraisal (1994). (App. 58-121). As Appellant and Respondent disagreed on the amount of loss to Ms. Johnson's property, Appellant's counsel sent written demands for appraisal, also naming an appraiser, to Respondent on May 12, 2005 and again on August 3, 2005. (App. 122-123). Respondent sent letters on May 23, 2005 and August 15, 2005 refusing to participate in the appraisal process. (App. 4-5, 124-125).

Based on Respondent's refusal to participate in Appraisal, Appellant initiated a lawsuit on August 30, 2005 in Ramsey County. (App. 126-129). Appellant's Complaint asked for damages, as well as "just and equitable" relief. (App. 126-129). Respondent Answered on October 17, 2005. (App. 130-134).

On April 15, 2006, Appellant's counsel sent a letter to Respondent's counsel notifying

him of Appellant's intent to request that a judge appoint an appraiser on their behalf if they did not choose one within 5 business days. (App. 135). On April 19, 2006, Respondent's counsel sent a letter indicating that if the court requires MSI to proceed with an appraisal, then MSI would provisionally appoint Jim Stoops at GAB or Tom Elert at LaMaster Construction, Inc. as its appraiser. (App. 136-137). Appellant filed her motion to stay the proceedings and compel Appraisal on May 11, 2006, alleging that Appraisal is compulsory under the policy and the law and that the Statute of Limitations barring an action for damages does not bar an action for Appraisal. (App. 138-146).

In the meantime, on April 13, 2006, Respondent filed a motion for summary judgment alleging that Appellant's failure to serve her Summons and Complaint within the two years of the date of loss barred her claims and required summary judgment in Respondent's favor under M.S.A. §65A.01. (App. 164-171).

The Honorable Edward J. Cleary, a Judge of Ramsey County, Second Judicial District, heard both Respondent's summary judgment motion and Appellant's motion for a stay of the proceedings and to compel Appraisal on May 25, 2006. (App. 184-188). Judge Cleary opined that Appellant's Complaint only included claims for damages. (App. 184-188). Judge Cleary granted Respondent's motion for Summary Judgment and denied Appellant's motion to stay the proceedings and to compel participation in appraisal. (App.184-188). Appellant Johnson's case was dismissed and she was denied her opportunity for an appraisal that would resolve her case. (App. 189).

ARGUMENT

I. WHERE THE APPELLANT'S COMPLAINT CONTAINED A PLEA FOR JUST AND EQUITABLE RELIEF, THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT TO DISMISS THE ENTIRE CASE BASED ON THE STATUTE OF LIMITATIONS FOR AN ACTION FOR DAMAGES.

In an appeal from summary judgment, this court must determine whether genuine issues of material fact exist and whether the district court erred in applying the law. State by Cooper v. French, 460 N.W.2d, 4 (Minn. 1990). The court must view the evidence in the light most favorable to the nonmoving party. Fabio v. Bellmo, 504 N.W.2d 758, 761 (Minn. 1993). "Any doubt as to whether issues of material fact exist is resolved in favor of the party against whom summary judgment was granted." Lubbers v. Anderson, 539 N.W.2d 398, 401 (Minn. 1995) (citing Rathbun v. W.T. Grant Co., 300 Minn. 223, 230, 219 N.W.2d 641, 646 (Minn. 1974)).

1. APPELLANT'S PLEA FOR EQUITABLE RELIEF MEETS THE NOTICE PLEADING REQUIREMENTS OF MINN. R. CIV. P. 8.01 (1988).

Minnesota Rule of Civil Procedure 8.01 provides for broad pleadings, known as notice pleadings. (1988). The Rule requires "a short and plain statement of the claim showing that the pleader is entitled to relief and a demand for judgment for the relief sought....[r]elief in the alternative or of several different types may be demanded." Minn. R. Civ. P. 8.01 (1988). "The primary function of notice pleading is to give the adverse party fair notice of the theory on which the claim for relief is based." Barton v. Moore, 558 N.W.2d 746, 749 (Minn. 1997). "A specific legal theory does not need to be stated if the pleadings contain factual notice of

the claim and a request for relief.” Padco, Inc. V. Kinney & Lange, 444 N.W. 2d 889, 891 (Minn. App. 1989). “Pleadings need not allege facts to support every element of a cause of action.” Goeb v. Tharaldson, 615 N.W.2d 800, 818 (Minn. 2000). In Lucas v. Medical Arts Bldg. Co. , the Court held that the Complaint was “not a model pleading, but found that “a cause of action is stated.” 207 Minn. 380, 386, 291 N.W. 892, 895 (Minn. 1940). The Lucas v. Medical Arts Bldg. Co. case states that a cause of action is sustained where the facts alleged, liberally construed, entitled plaintiff to any relief, either legal or equitable, though the plaintiff may have misconceived the nature of his cause or may have demanded inappropriate relief. Id.

Margaret Johnson’s Complaint stated the facts of the loss of the property, established that the Respondent was the insurer for the property, laid out the dispute over the value of the damage to the property, and put the Defendant on notice for a claim for damages, as well as for legal and equitable relief. The Complaint was sufficient to put the Respondent on notice of Ms. Johnson’s claims for the unpaid portion of the damage to the property, as well as to provide them with notice that there was a dispute over the value of the damage to the property. As Respondent’s own insurance policy contained a clause requiring appraisal when a dispute over the amount of the loss occurred; Ms. Johnson had already demanded appraisal; and her Complaint requested equitable relief, thus Ms. Johnson’s Complaint was sufficient to establish factual notice of the claim and a request for relief, as in the Padco case. Here, like in Lucas, Ms. Johnson’s Complaint may not have been a model pleading, but it met the

requirements of Minn. R. Civ. P. 8.01 (1988).

2. APPELLANT'S APPRAISAL DEMAND IS A FORM OF EQUITABLE RELIEF

Appellant's Complaint dated August 30, 2005 includes pleas for both damages and for "just and equitable" relief. The parties acknowledge that Ms. Johnson's Complaint contained a plea for damages. However, a dispute exists relative to Ms. Johnson's plea for equitable relief. It has long been held that a party can seek both legal and equitable relief where the right to both arises out of the same cause of action and the same transaction. Disbrow v. Creamery Package Mfg. Co., 104 Minn. 17, 115 N.W. 751 (Minn. 1908).

Black's Law Dictionary defines "equitable relief" as "[t]hat species of relief sought in a court with equity powers as, for example, in the case of one seeking an injunction or specific performance instead of money damages." 373 (Abridged 6th ed., West 1991). Appellant Margaret Johnson is seeking equitable relief in the form of compelled appraisal.

Arbitration is recognized as an equitable remedy. St. Paul Surplus Lines Ins. Co. v. Life Fitness, 2001 WL 588949 (Ramsey Co. Minn. 2001). The words appraisal and arbitration are used interchangeably when discussing the procedure through which to resolve disputes over the amount of a fire loss. See Glidden Co. v. Retail Hardware Mut. Fire Ins. Co. of Minnesota, 233 N.W. 310 (Minn. 1930); Kavli v. Eagle Star Ins. Co., 206 Minn. 360, 288 N.W. 723 (Minn. 1939).; Itasca Paper Co. v. Niagra Fire Ins. Co., 175 Minn. 73, 220 N.W. 425 (Minn. 1928). Continental Ins. Co. of New York v. Titcomb held that a proceeding by appraisers and umpire to ascertain amount of damages is a common-law

arbitration. Continental Ins. Co. of New York v. Titcomb, 7 F.2d 833, (1925). Therefore, Appellant Johnson's demand for appraisal is akin to a demand for arbitration, a recognized equitable remedy.

3. THE STATUTE OF LIMITATIONS GOVERNING AN ACTION FOR DAMAGES DOES NOT APPLY TO APPELLANT'S EQUITABLE RELIEF DEMAND FOR APPRAISAL

Respondent MSI argues that they cannot be compelled to participate in appraisal because the initial request for appraisal was made after the two year fire loss statute of limitations for initiating a lawsuit for damages had run. Minnesota case law has long held that statutes of limitations requiring an "action" to be commenced within a prescribed time period were not intended to bar alternative dispute resolution measures provided for in a written contract.

As stated previously, the words appraisal and arbitration are used interchangeably when discussing the procedure through which to resolve disputes over the amount of a fire loss. See Glidden Co., 233 N.W. 310; Kavli, 288 N.W. 723; Itasca Paper Co., 175 Minn. 73, 220 N.W. 425 (Minn. 1928).

Minnesota courts have held that a claim is not barred in arbitration solely because it would be barred pursuant to a statute of limitations if asserted in an action in court. In Har-Mar, Incorporated v. Thorsen & Thorshov, Inc., the Minnesota Supreme Court examined the issue of whether an arbitration proceeding fits the definition of the word "action," so as to be barred by a statute of limitations. Har-Mar, Incorporated v. Thorsen & Thorshov, Inc., 300

Minn. 149, 218 N.W.2d 751 (Minn. 1974). The Har Mar case related to a contract dispute. The Appellant in Har Mar argued that the six year statute of limitations, under Minn. Stat. §541.05, which referred to ‘bringing an action,’ barred an arbitration. The Court found that the common-law definition of the term ‘action’ restricted it to “the prosecution in a court of justice of some demand or assertion of right by one person against another.” Id. at 754. The Court determined that the word “action” was intended to be confined to judicial proceedings. Id. Because an arbitration is not a judicial proceeding, it was found that a statute of limitations was not intended to bar arbitration “solely because such claim would be barred if asserted in an action in court.” Id. at 755. The Court then examined the issue of “whether the right to compel arbitration, as distinguished from an action on the underlying claim, is barred.” Id. The Court held that “an action in district court to compel arbitration is an action arising ‘upon a contract’ and thus must be subject to the 6-year limitation prescribed by Minn. Stat. §541.05 (1).” Id. The court found that

Such a cause of action accrues upon a demand for arbitration by one party and a refusal by the other. Proof of these two conditions precedent to the birth of such a cause of action is required by the Uniform Arbitration Act, § 572.09(a) of which reads: ‘On application of a party showing an agreement described in section 572.08, and the opposing party’s refusal to arbitrate, the court shall order the parties to proceed with arbitration....’ It is thus clear that our 6-year limitation statute does not begin to run until there has been both a demand and a refusal to arbitrate.

Id. at 755-56 (Emphasis added). An arbitration proceeding is not barred solely because the applicable statute of limitations has run. Further, an action in a court to compel arbitration is governed by the statute of limitations, but the statute of limitations does not begin to run

until there has been both a demand and a refusal to arbitrate.

Minn. Stat. § 65A.01, Subd. 3 provides, “no suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity unless all the requirements of this policy have been complied with, and unless commenced within two years after inception of the loss.” Minn. Stat. § 65A.01, Subd. 3 (2004). However, there is no provision in the statute or in the insurance policy provided by Respondent MSI that provides a prescribed time period within which a policyholder must demand appraisal. As the Har Mar case held that an arbitration does not fit within the definition of an action, and one certainly cannot argue that an arbitration fits within the definition of a “suit,” the statute of limitations here cannot be found to require commencement of an appraisal within two years of the fire loss. Thus, Appellant’s demand for equitable relief of an appraisal cannot be found to be untimely based on the statute of limitations prohibiting an action for damages.

Appellant’s demand for equitable relief of appraisal is timely. Respondent MSI’s initial refusal to participate in appraisal was dated May 23, 2005. There is no language in the Minnesota Standard Fire Insurance Policy nor in MSI’s policy which specifically governs this case that provides a prescribed time period within which to compel appraisal after it has been refused. Therefore, one can look for an applicable statute of limitations to determine the time period within which a Plaintiff must bring her action to compel participation in appraisal. In the instant case, Margaret Johnson’s demand for equitable

relief seeking appraisal is an action to enforce a contract provision. So, one could look to the Minnesota statute of limitations governing contract actions. Minn. Stat. § 541.05, Subd. 1(1) states that “...the following actions shall be commenced within six years: (1) upon a contract or other obligation, express or implied, as to which no other limitation is expressly prescribed;....” Minn. Stat. § 541.05, Subd. 1(1), (2000). According to the Har Mar case, the statute of limitations would not begin to run until there has been both a demand and a refusal to participate in appraisal. 218 N.W.2d 751, at 755-56 (Minn. 1974). Therefore, the earliest date that a statute of limitations would begin to run is May 23, 2005. If Minn. Stat. § 541.05, Subd. 1(1) applies, Margaret Johnson would have until May 23, 2011 to bring an equity action demanding appraisal. If it is determined that Margaret Johnson’s equitable relief plea for appraisal is a “suit or action on [the fire loss] policy for the recovery of any claim,” Minn. Stat. § 65A.01, Subd. 3 applies. Therefore, Appellant Johnson would have two years from the date of Respondent MSI’s refusal to participate in appraisal to bring her action to compel appraisal. Thus, the statute of limitations would not bar her equitable action to compel appraisal until May 23, 2007 at the earliest. Appellant Margaret Johnson’s plea for equitable relief to compel appraisal is not barred by any possible statute of limitations.

II. WHERE THE APPELLANT’S COMPLAINT CONTAINED A PLEA FOR JUST AND EQUITABLE RELIEF, THE DISTRICT COURT ERRED IN DENYING HER MOTION TO STAY THE PROCEEDINGS AND COMPEL PARTICIPATION IN APPRAISAL WHEN THE MOTION TO COMPEL APPRAISAL WAS MADE WITHIN THE STATUTE OF LIMITATIONS GOVERNING THE SAME REQUEST.

1. PARTICIPATION IN APPRAISAL IS COMPULSORY UNDER THE LAW.

It is undisputed that Appellant Margaret Johnson's property was insured by Respondent MSI on the date of the fire loss. MSI's policy generally insures Appellant for damage to the covered property caused by fire. Therefore, the policy is also governed, in part, by Minnesota Statutes Section 65A.01, known as the Minnesota Standard Fire Insurance Policy. Section 65A.01 covers all insurance contracts that provide coverage against fire loss in Minnesota. Fireman's Fund Ins. Co. v. Vermes Credit Jewelry, Inc., 185 F.2d 142, 145 (8th Cir. 1950). In its conformity clause, Section 65A.01 states that

[n]o policy or contract of fire insurance shall be made, issued or delivered by any insurer ... on any property in this state, unless it shall provide the specified coverage and conform as to all provisions, stipulations, and conditions, with such form of policy Any policy or contract otherwise subject to the provisions of [Section 65A.01] ... which includes either on an unspecified basis as to coverage or for a single premium, coverage against the peril of fire and coverage against other perils may be issued without incorporating the exact language of the Minnesota standard fire insurance policy, provided: Such policy or contract shall, with respect to the peril of fire, afford the insured all the rights and benefits of the Minnesota standard fire insurance policy and such additional benefits as the policy provides.

Minn. Stat. § 65A.01, subd. 1 (2004). Use of the statutory form contained within Section 65A.01 "is mandatory, and its provisions may not be omitted ... or waived." Watson v. United Servs. Auto Ass'n, 566 N.W.2d 683, 690 (Minn. 1997).

Section 65A.01 also has an "appraisal" provision. In pertinent part, Section 65A.01, Subd. 2a states

[i]n case the insured and this company ... shall fail to agree as to the actual cash value or the amount of loss, then, on the written demand of either, each shall select a competent and disinterested appraiser and notify the other of the appraiser selected within 20 days of such demand. In case either fails to select an appraiser within the time provided, then a presiding judge of the district court of the county wherein the loss occurs may appoint such appraiser for such party upon application of the other party in writing by giving five days' notice thereof in writing to the party failing to appoint. The appraisers shall first select a competent and disinterested umpire; and failing for 15 days to agree upon such umpire, then a presiding judge of the above mentioned court may appoint such an umpire upon application of party in writing by giving five days' notice thereof in writing to the other party. The appraisers shall then appraise the loss, stating separately actual value and loss to each item' and , failing to agree, shall submit their differences, only, to the umpire. An award in writing, so itemized, of any two when filed with this company shall determine the amount of actual value and loss....

Minn. Stat. § 65A.01, Subd. 2a (2004). Both the United States Supreme Court and the Minnesota State Supreme Court have held this appraisal provision to be compulsory. Glidden Co., 181 Minn. 518, 233 N.W. 310, affirmed 52 S.Ct. 69, 284 U.S. 151, 76 L.Ed. 214. The Minnesota Supreme Court held that “[i]t was never the intent of the statute that the arbitration was other than compulsory. If revocable there would be no actual or effective appraisal within the contemplation of the policy.... [The Legislature] did not provide something that either party through whim or caprice might disregard. And what it made was a definite procedure binding upon both parties in ascertaining loss.” Id., at 233, 312.

The policy of insurance written by Respondent MSI that covers this loss contains an appraisal provision that is very similar to the one in the Minnesota Standard Fire Insurance Policy. MSI's specific policy language provides,

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.

It is undisputed that Respondent MSI has refused to participate in the appraisal procedure provided for in their own policy, as well as in Section 65A.01. According to Glidden, participation in appraisal is compulsory. Respondent MSI cannot disregard Appellant Margaret Johnson's written demand for appraisal on its own whim. The legislature designed appraisal to be a definite procedure to ascertain the loss that is binding on both parties.

2. UPON APPELLANT'S MOTION TO COMPEL APPRAISAL, THE COURT SHOULD HAVE ORDERED THE PARTIES TO PROCEED.

As stated previously, Minnesota case law uses the words arbitration and appraisal interchangeably. Appraisal is a common law arbitration. Therefore, the Court should apply the rules of the Minnesota Uniform Arbitration Act.

The Minnesota Uniform Arbitration Act provides:

On application of a party showing an agreement [to arbitrate], and the opposing party's refusal to arbitrate, the court shall order the parties to proceed with arbitration, but if the opposing party denies the existence of the agreement to arbitrate, the court shall proceed summarily to the determination of the issue so raised and shall order arbitration if found for the moving party, otherwise, the application shall be denied.

M.S.A. § 572.09(a) (1984).

In the instant case, the parties agree that the applicable insurance contract and M.S.A. § 65.01 provide an arbitration contract that governs here. Therefore, upon Appellant's motion to compel participation in appraisal and demonstration of MSI's refusal to arbitrate, the Court should have approved Margaret Johnson's application.

Minnesota favors arbitration as a means of conflict resolution. Hughes v. Lund, 603 N.W.2d 674 (Minn.App. 1999). The purpose of an appraisal panel to ascertain the amount of the fire loss is to provide a plain, speedy, inexpensive and just determination of the extent of the loss. Kavli, 206 Minn. 360, 288 N.W. 723. Because appraisal is another word for arbitration and is "plain, speedy, inexpensive and just," is it also favored by Minnesota public policy. Id. Respondent MSI's refusal to participate in appraisal is an attempt to circumvent the intent of the legislature to provide a speedy and equitable procedure for resolving disputes of this nature. Respondent MSI should be compelled to participate in appraisal as a means to resolve this dispute, as is provided for in their own insurance policy, as well as the Minnesota Standard Fire Insurance Policy.

CONCLUSION

It is undisputed that Appellant Margaret Johnson was insured for fire loss by Respondent MSI on the date that her loss occurred. The parties disagreed on the amount of the loss. Under both the MSI's policy language and the language of the Minnesota standard fire insurance policy, the procedure to resolve such a dispute is participation in appraisal. Appellant drafted her Summons and Complaint seeking both monetary and equitable relief.

The form of equitable relief sought is appraisal. Minnesota case law demonstrates that Appellant's demand for appraisal is not presently barred by any applicable statute of limitations. Further, Minnesota statutes support that upon application to compel appraisal, the Court shall grant the application. Appraisal is an efficient, cost-effective, and speedy procedure that is designed to discourage litigation and encourage resolution of cases exactly like the one presently before the court. Appellant's motion to stay the proceedings and to compel participation in appraisal should have been granted and Respondent's motion for summary judgment should have been denied.

Respectfully Submitted,

Dated: 9/8/06



Amanda M. Furth, #0328467
Scott A. Teplinsky, #161974
KATZ, MANKA, TEPLINSKY,
DUE & SOBOL
225 S. Sixth Street, Suite 4150
Minneapolis, MN 55402
(612) 333-1671

STATE OF MINNESOTA

IN COURT OF APPEALS

A-06-1478

Margaret Johnson,

Appellant,

CERTIFICATION OF
BRIEF LENGTH

vs.

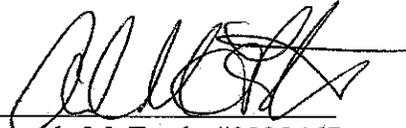
Mutual Service Casualty Insurance
Company,

Respondent.

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subs. 1 and 3, for a brief produced with a proportional font. The length of this brief is 4,154 words. This brief was prepared using WordPerfect 12.

Dated: _____

9/8/06


Amanda M. Furth, #0328467
Scott A. Teplinsky, #161974
KATZ, MANKA, TEPLINSKY,
DUE & SOBOL
225 S. Sixth Street, Suite 4150
Minneapolis, MN 55402
(612) 333-1671

Attorneys for Appellant

The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2) (with amendments effective July 1, 2007).