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Office of Consumer Affairs and Business Regulation
DIVISION OF INSURANCE

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Appeal by P.G. Realty Trust of a
Third Referee Fee for Services
Docket No. G2019-05

Decision and Order

By letter dated July 10, 2019, the P.G. Realty Trust (the “Trust”), pursuant to M.G.L. c. 175, §101B (“§101B”), petitioned the Commissioner of Insurance to review the charges of Robert Asci, the third referee in a reference proceeding that the Trust initiated to resolve a dispute between it and the Utica First Insurance Company (“Utica First”) about a claim for fire damages to rental property in Marlborough, MA. The matter was delegated to me as the Division of Insurance Administrative Hearings Officer.

With the July 10, 2019 letter, the Trust enclosed a copy of the reference award and a letter and itemized invoice listing his charges that Mr. Asci sent to counsel for each party to the reference proceeding. An order issued on November 15, instructing the Trust, by December 13, 2019, to submit for inclusion in the docket a complete record of the reference proceedings, including the documents initiating the reference, copies of all documents that the panel reviewed and, if available, transcripts of the testimony that it heard and its deliberations. The Trust was also ordered to file a memorandum, by December 31, 2019, stating each of its grounds for objecting to the third referee’s charges, and the record facts on which it relied to support those grounds. Utica First and Mr. Asci were ordered to submit memoranda responding to the Trust’s submission by January 17, 2020. A prehearing conference was scheduled for January 24, 2020; it was later rescheduled for January 29.

On December 13, 2019, the Trust, through its insurance agent, Glendon Nickerson, submitted a set of documents that the transmittal letter divided into three groups: documents that initiated the reference proceeding, the evidence list and documents submitted to the reference panel, and copies of e-mails exchanged by the panel members. On December 26, 2019, Mr. Nickerson, on behalf of the Trust’s counsel, sent a letter setting out the Trust’s objections to Mr. Asci’s fees. Utica First and Mr. Asci submitted their responses to the Trust’s objections on January 17.

The January 29 conference was convened for three purpose: 1) clarifying the procedures applicable to a petition for review under §101B; 2) ensuring that the record of the reference proceedings that the Trust submitted, that is the basis for the Commissioner’s review, was accurate and complete; 3) identifying any other disputed issues. On the first matter, the Commissioner’s statutory obligation is to review the third referee’s charges and approve or

disapprove them, in whole or in part. The goal of the review is to ensure that the charges, as reported, are accurately reported and are with a range of reasonableness in light of the issues that the panel was required to review. No party questioned or objected to those principles.¹

On the second matter, the Trust had not sent the December 13, 2019 submission to the other parties. Counsel for Utica First and Mr. Asci were therefore unable to confirm that it was accurate and complete and, after a brief review noted, among other things, that the exhibit list did not include documents that were entered into the record on the last day of the reference proceeding and included notes from an inspector that were not allowed in as an exhibit. Mr. Asci agreed to copy and deliver copies of binders containing, in order, the documents marked as exhibits during the reference proceeding to counsel for the Trust and Utica First by Friday, January 31. Counsel for Utica First and the Trust were to identify any objections to that record to Mr. Asci's counsel by 1:00 p.m. on Monday, February 3. If no objections were received; the record would be submitted to the Division on that day.

Because Utica First and Mr. Asci were unable to view the complete record before submitting responses to the Trust's arguments, they were given the option of supplementing their January 17 responses by February 7, 2020. On that date, counsel for Mr. Asci submitted an additional response, stating that Utica First had confirmed that the record in the binder he provided was complete, and that the Trust had raised no objections or concerns by the February 3 deadline. In reliance on that information, I conclude that the documents submitted on February 3, 2020 are an accurate and complete record of the reference proceeding that is the subject of the Commissioner's review. No party sought to add any additional documentation to that record.

The third issue disputed at the hearing arose from the Trust's request to stay this proceeding, on the ground that it had initiated litigation in the Superior Court for Essex County to vacate the entire reference proceeding. Both Mr. Asci and Utica First objected to the proposed stay.

Analysis and Discussion

The Trust's July 10 petition challenged the third referee's charges, totaling \$2, 875, for 11.5 hours of panel discussions on June 25 and 26, 2019; it further alleged that the panel ignored a report from a construction estimator hired by the Trust.² In its December 26, 2019 letter, the Trust reiterates its position on Mr. Asci's charges for 11.5 hours of panel deliberation over two days, and adds further comments on the entire reference proceeding. It alleges that the Trust

¹ Chapter 175, §101B also refers to including in the Commissioner's decision findings of fact made pursuant to G.L. c. 175 §§100, 100A and 100B. Those three sections delineate the circumstances in which the Commissioner may appoint a third referee. Because the third referee in this case was selected by the referees chose by the insured and the insurer; no findings of fact under those sections need be made.

² I find no merit to the Trust's second comment on the reference proceeding in its July 10 petition. It asserts that the panel ignored a document it submitted, an architect's 26 page report estimating the building repair cost. The petition does not further identify the document, but a document matching that description appears on the reference proceeding exhibit list as Ex. 37. Utica First's January 17 memorandum addresses that exhibit, submitted on January 15, 2019, noting that the author of the report, after extensive testimony, could not provide the referees with the information they needed to establish the damages resulting from the fire. Utica First pointed out that the architect's testimony addressed costs for rebuilding the property based on the architect's drawings, without regard to the conditions at the time of the loss. On this record, it appears that the panel did not ignore the exhibit, but determined that it did not provide information relevant to its task, determining the costs of restoring the property to its pre-fire condition. In any event, the Trust does not link its assertion to any alleged problem with the third referee's invoice.

presented six witnesses and 43 pieces of documentary evidence, while Utica First neither called witnesses nor submitted evidence, asserts that a claim for lost rents did not require any action by the third referee and that the coverage under the Utica First policy for the cost of compliance with local building codes was not disputed. The Trust observed that the panel spent 11.5 hours calculating an increase to the replacement cost award while, at the same time, reducing the award for actual cash value (“ACV”).³ The Trust quantifies the reduction it seeks to the third referees bill solely in terms of the amounts charged for deliberations on June 25 and 26, 2019; it seeks no other reductions in connection with its additional challenges to the reference process.

The Trust’s arguments seeking disapproval of the third referee’s charges for two day of deliberations are not persuasive. The third referee’s invoice records that the reference proceeding required panel meetings for a one day site visit (6 hours) five days of testimony (41 hours), review of a subsequent claim for lost income (3 hours) and two days of deliberations (11.5 hours). In the course of those sessions, the panel received fifty marked exhibits relating to the Trust’s loss claims. The Trust proposes to remove from the invoice the time spent by the panel analyzing the documentary record and the statements from witnesses proffered by the Trust and Utica First. It offers no rationale for expecting a reference proceeding to reach a decision absent discussions to evaluate the entire evidentiary record. Particularly in light of the size of that evidentiary record, I am persuaded that 11.5 hours of deliberations is eminently within a range of reasonableness. I find no reason to disapprove the third referee’s charges for 11.5 hours of panel deliberations on June 25 and 26, 2019.

The Trust’s December 26, 2019 letter stated that the Trust had initiated a civil action in the Essex Superior Court seeking to vacate the reference award and asked to defer this proceeding until that case was concluded. At the prehearing conference, the Trust reiterated its request, and sought to submit for the record a copy of the Superior Court complaint.⁴ Utica First

³ The added assertions in the Trust’s December 26, 2019 letter fare no better than the July 10 allegation about the panel’s review of a document that the Trust submitted. In response to its contention that Utica First called no witnesses and submitted no evidence, Utica First pointed out, in its January 17 memorandum, that it had submitted the damage report from its consultant, Page Property Consulting, LLC (“Page”) (Exhibit 6), photographs taken by Page and by a Utica First investigator between February 3, 2016, the day of the fire, and February 12 (Exhibits 7A and B), additional photographs taken in 2018 both before and during the reference proceeding (Exhibits 7C and 7D), a document from Page comparing its cost estimates to the Trusts’ claimed costs (Exhibit 13), and additional cost estimates from Page dated August, 2018 (Exhibits 31and 32). Mr. Page also testified before the panel. The Trust’s claim for lost rents was first presented to the panel in February, 2019 and, as with any other aspect of the reference additional photographs taken in 2018 both before and during the reference proceeding (Exhibits 7C and 7D), a document from Page comparing its cost estimates to the Trusts’ claimed costs (Exhibit 13), and additional cost estimates from Page dated August, 2018 (Exhibits 31and 32). Mr. Page also testified before the panel. The Trust’s claim for lost rents was first presented to the panel in February, 2019 and, as with any other aspect of the reference proceedings, was considered by all members of that panel. The Trust’s assertion that it required no action by the third referee is simply incorrect. The dollar value of coverage available under the Utica First policy for repairs required to comply with local building codes was not disputed; the panel’s task was to determine what aspects of the cost estimates submitted by the Trust reflected code upgrades that were not recoverable under the policy. In his February 7 response, Mr. Asci responds to the Trust’s position on the relationship between replacement costs and ACVs, noting that the panel, concurrent with its decision increasing the replacement loss cost for the Trust’s property, also reexamined the depreciation factor that should be applied. That revised depreciation factor reduced, rather than increased the ACV loss associated with the Trust’s claim. It does not constitute a mathematical error by the referees.

⁴ Neither with its petition for review, nor at any subsequent time in the course of this proceeding, did the Trust file a formal motion to stay accompanied by a memorandum offering legal support for such a request. At the prehearing conference, it contended that its reference to the Superior Court case in the December 26, 2019 letter was

and Mr. Asci objected to the Trust's request for a stay in their January 17, 2020 responses; their counsel objected to entering a copy of the complaint in the civil action to the record in this proceeding.

The Trust's petition for review was initiated pursuant to §101B, which instructs the Commissioner to review the third referee's charges and, after due hearing, to approve or disapprove them and "to forthwith communicate" that decision to the parties. The Trust now, by requesting to stay this proceeding, seeks to prevent a decision from issuing, on the grounds that it has filed a civil action in the Essex Superior Court to vacate the entire award. The Trust offers no legal support for its request but, at the hearing, expressed concern that a decision approving the third referee's charges would require it to pay its share, even though it is challenging the entire reference procedure. The Trust misunderstands the relationship between the Commissioner's decision on a third referee's charges and the Trust's litigation challenging other aspects of the reference proceeding. The Commissioner's decision is limited to reviewing the documentation related to the reference proceeding, and determining whether the referee's charges are accurately reported and are with a range of reasonableness. The concluding statement in §101B states that with respect to those matters the Commissioner's decision is final and conclusive.

G.L. c. 175, §101C, however, provides that "payment of the compensation or expenses, or both, of any referee shall not in any case preclude the insured or the company from contesting the validity of the award." Read together, a decision on a §101B petition effectively removes questions about the mathematical accuracy of a third referee's invoice or the charges for the reference services from reconsideration in a civil action contesting other aspects of the reference proceeding itself. Section 101B does not authorize the Commissioner to issue orders relating to payment of the third referee's charges; disputes arising in connection with the obligations of the insured or the insurer to pay the approved charges must be resolved in another forum.

For the above reason, the Trust's request to stay this proceeding is denied.

Conclusion

The charges submitted by the third referee, Robert Asci, in a reference proceeding on a claim by the P.G. Realty Trust submitted to the Utica First Insurance Company for property losses relating to a fire that occurred on February 3, 2016, as presented on invoice No. 18019, dated July 3, 2019, are hereby approved.

Dated: March 3, 2020

Jean F. Farrington
Administrative Hearing Officer and
Counsel to the Commissioner

sufficient to put the parties on notice. Despite no formal motion from the Trust, Mr. Asci and Utica First both objected to the requested stay. On February 24, the Division received a letter from the Trust reiterating its request for a stay, again asserting that a decision approving the third referee's fees would obligate it to pay before a decision issues in the Essex County Superior Court action. The Trust attached to its letter copies of invoices from Paul Domenici, the referee selected by the Trust, and a copy of the complaint filed in Essex County, in which Utica Mutual is the sole defendant. Absent any timely substantive argument from the Trust, this issue requires no further discussion.