

IN THE COUNTY COURT OF THE
NINTH JUDICIAL CIRCUIT, IN
AND FOR ORANGE COUNTY,
FLORIDA

xxx--xx--GLASS, Co.
FINANCIAL GROUP, INC., d/b/a/
xxxx AUTO GLASS & SALES, INC.,

CASE NO. 0x-SC-xxxx

DIVISION 73

Plaintiff,

v.

XXXXXX MUTUAL
INSURANCE COMPANY,
Defendant.

**ORDER DENYING DEFENDANT'S MOTION
TO ARBITRATE AND DISMISS**

THIS CASE was heard upon Defendant's Motion to Compel Appraisal and Motion to Dismiss. The Court having heard argument and reviewed the court file contents as well as the documents and case law submitted, enters the following findings and orders:

1. The currently named Defendant has a sufficient identity of interest to have asserted its appraisal clause at an earlier point in litigation. After the Complaint was filed on June 1, 2006, an attorney for Defendant filed a boilerplate Answer in the name of XXXXX Mutual Insurance Company, which is the entity which (after four months, one Answer, two mediations and several discovery demands into the case) Defendant advised Plaintiff to amend its Complaint to correctly name. Thus, the court file supplies evidence that the correct entity has been represented and has been on notice for the entire pendency of this litigation, which has now proceeded for sixteen months.

2. In a manner which will be missed due to his retirement, Judge Thompson set out a veritable outline of cases involving post litigation waiver of arbitration clauses in the case of *Morrell v. Wayne Frier Manufactured Home Center*, 834 So.2d 395 (Fla. 5th DCA 2003). Judge Thompson's annotations include waivers found due to the following circumstances: *motion to transfer venue* (5th DCA 1981), *answer and counterclaim submitted without raising the issue of arbitration* (4th DCA 1977), *extensive discovery and failure to move for arbitration during one year of litigation* (4th DCA 1981), *answer filed and four months of litigation* ((2nd DCA 1992), *answer and cross claim filed without mentioning the arbitration issue* (4th DCA 1994), *answer filed without demanding arbitration* (3rd DCA 1977). These cases require a finding that the arbitration/appraisal clause has been waived.

3. Waiver of arbitration standards have been applied in appraisal cases, and therefore are applicable in the instant case, *Ari Mutual Insurance Company v. Hogen*, 734 So.2d 574 (Fla. 3rd DCA 1999).

4. This order is to be distinguished from a recent ruling in which the undersigned judge found that a plaintiff glass company failed to meet its burden of proof on the waiver of appraisal issue. In that case, plaintiff did not seek to argue post litigation waiver. In that case, plaintiff's counsel argued facts which were not in the record, which if true might have constituted a pre-litigation waiver. The only import of the findings in that case, is that a court cannot base its findings upon unsworn argument of counsel.

5. The ruling in this case is limited to the facts of this particular case.

Defendant's Motion to Compel Appraisal and Motion to Dismiss are Hereby DENIED.

DONE AND ORDERED this xxst day of October, 2007 in Chambers at Orlando, Orange County, Florida.

DEB SAMMONS BLECHMAN
Orange County Judge

I HEREBY CERTIFY that a true copy of the foregoing was furnished this ____ day of November, 2007 to; Xxx Xxxx, Esq., Xxxxxx, LLC, , 000 South Orange Avenue, Suite 100, Orlando, Fl. 32801; and to Xxx Xxx, Esq., P.O. Box 000000, Orlando, Fl. 32800-0000.

Judy Ball, Judicial Assistant