

STATE OF MICHIGAN
COURT OF APPEALS

CLARENCE MITCHELL and BETTY MITCHELL,

UNPUBLISHED
April 25, 1997

Plaintiffs/Appellants/Cross-Appellees,

v

No. 193032
Genessee Circuit Court
LC No. 94-32408-CK

AUTO OWNERS INSURANCE COMPANY,

Defendant/Appellee/Cross-Appellant.

Before: Sawyer, P.J., and Murphy and Cavanagh, JJ.

PER CURIAM.

Plaintiffs, Clarence and Betty Mitchell, appeal as of right the trial court order granting defendant's motion for summary disposition. Plaintiffs' complaint alleged bad faith and breach of contract against defendant for failure to resolve a claim under a fire insurance policy issued by defendant. We affirm.

The trial court granted summary disposition to defendant pursuant to MCR 2.116(C)(10), based on the fact that plaintiffs had failed to complete the appraisal process prior to bringing the instant lawsuit. However, plaintiffs' arguments on appeal fail to address whether, based on documentary evidence properly presented below, summary disposition was proper. Our review of a trial court's decision with respect to a motion for summary disposition is de novo. *Steele v Dep't of Corrections*, 215 Mich App 710, 712; 546 NW2d 725 (1996). When reviewing a motion under MCR 2.116(C)(10), we consider the pleadings, affidavits, depositions, admissions, and other documentary evidence presented by the parties. If there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law, summary disposition is appropriate. *Weaver v University of Michigan Bd of Regents*, 201 Mich App 239, 241-242; 506 NW2d 264 (1993).

The insurance policy in this case, as well as MCL 500.2833; MSA 24.12833, mandated that, if the parties to the policy failed to agree on the value of property claimed damaged, the parties would submit to an appraisal process upon written notice of either party. Pursuant to its motion, defendant presented evidence that on September 15, 1994, it sent plaintiffs a letter indicating that Michigan House

and Window Cleaning had been enlisted by defendant to pick up and inspect personal property that plaintiffs claimed had been damaged. The letter indicated that this measure was being taken because the parties were unable to agree regarding the value of the property. The letter then directed plaintiffs to make arrangements to allow Michigan House and Window Cleaning to inspect the property, as the company had been unable to make contact with plaintiffs. The trial court found, and we agree, that this letter engendered plaintiffs' obligation under the policy to proceed with the appraisal process.

Plaintiffs presented no evidence that they made arrangements to allow Michigan House and Window Cleaning access to the personal property, nor that they selected their own appraiser as set forth in the policy. Indeed, even in the pursuit of this appeal, it appears that plaintiffs fail to recognize that they had an independent duty to select their own appraiser. Plaintiffs' failure to exhaust their administrative remedies under the policy acts to bar the instant lawsuit. See *Thermo-Plastics R & D, Inc v General Accident Fire & Life Assurance Corp, Ltd*, 42 Mich App 418, 422-423; 202 NW2d 703 (1972). Because plaintiffs failed to show any genuine issue of any material fact regarding their failure to follow the appraisal procedure mandated in their own policy and MCL 500.2833; MSA 24.12833, we conclude that summary disposition pursuant to MCR 2.116(C)(10) was proper.

On cross-appeal, defendant argues that the trial court erred in failing to award costs and fees for plaintiffs' filing of a frivolous action. A trial court's finding regarding whether a claim is frivolous or vexatious is reviewed for clear error. See *Dillon v DeNooyer Chevrolet Geo*, 217 Mich App 163, 169; 550 NW2d 846 (1996). That factual determination largely depends on the particular facts and circumstances of the claim involved. *Id.* We find that the trial court did not clearly err in denying defendant's motion for sanctions.

Affirmed. No taxable costs pursuant to MCR 7.219, neither party having prevailed in full.

/s/ David H. Sawyer
/s/ William B. Murphy
/s/ Mark J. Cavanagh