STATE OF MICHIGAN

COURT OF APPEALS

A.K. SMITH-RED CARPET KEIM REALTY,

Plaintiff-Appellee,

v

UNITED SOUTHERN ASSURANCE COMPANY,

Defendant-Appellant.

UNPUBLISHED
April 24, 1998

No. 199103
Cheboygan Circuit Court
LC No. 96-005740 CH

Before: Markey, P.J., and Bandstra and Markman, JJ.

PER CURIAM.

Defendant appeals by right a trial court order requiring defendant to defend and indemnify plaintiff pursuant to an error and omission insurance policy in a real estate purchaser's misrepresentation suit against plaintiff. We reverse.

Defendant first argues that it had no duty to defend and indemnify plaintiff against the Schwartzes' claim because the policy clearly and unambiguously excluded coverage of claims of which plaintiff was or should have been aware before the policy period and about which plaintiff misrepresented its knowledge. We agree. Interpretation of an insurance contract with clear language is a question of law, which is reviewed de novo. *Auto Club Ins Ass'n v Lozanis*, 215 Mich App 415, 418-419; 546 NW2d 648 (1996). "'Initially, in determining whether a[n insurance] policy applies, we first must determine whether the policy is clear and unambiguous on its face.'" *The Upjohn Co v New Hampshire Ins Co*, 438 Mich 197, 206; 476 NW2d 392 (1991), quoting *Metropolitan Property & Liability Ins Co v DiCicco*, 432 Mich 656, 665; 443 NW2d 734 (1989). "If the language of the policy is unambiguous, it must be considered 'in its plain and easily understood sense.'" *Id*. at 207, quoting *Metropolitan*, *supra* at 710. "[I]f a contract, however inartfully worded or clumsily arranged, fairly admits of but one interpretation it may not be said to be ambiguous or, indeed, fatally unclear." *Farm Bureau Mutual Ins Co of Michigan v Stark*, 437 Mich 175, 182; 468 NW2d 498 (1991), quoting *Raska v Farm Bureau Ins Co*, 412 Mich 355, 362; 314 NW2d 440 (1982).

The instant policy's coverage section delineates the scope of plaintiff's coverage as follows:

> We will pay those sums you become legally obligated to pay as damages caused by a professional incident, occurring subsequent to the Retroactive Date [2/1/82], for which a claim is first made and reported to us or our authorized agents during the policy period. Coverage does not apply to a professional incident occurring prior to the first date of the policy period if [the insured] knew or reasonably could have known that such a claim would be made. [Emphasis in original.]

This language clearly and unambiguously excludes from coverage all claims that plaintiff knew or should have known existed before the first date of the "policy period," i.e., February 1, 1996. The policy defines a "claim" as "the receipt by [the insured] of a written demand for money or services, naming [the insured] and alleging negligence or wrongdoing," a "professional incident" as "an act, error or omission resulting from professional services provided by you . . . for which a claim or potential claim is reported to us," and "professional services" as "the [insured's] rendering of or failure to render . . . services as . . . [a] real estate agent, broker, sales person, notary or appraiser." These definitions are clear and unambiguous; they do not invite different understandings of what elements constitute a claim, professional incident, or professional services under the policy. The policy potentially covers any written demand for money or services that alleges any negligence or other wrong, error or omission by plaintiff in its capacity as a real estate broker. Patrick's December 1995 letter to plaintiff alleged misrepresentation by plaintiff in its capacity as a real estate broker and expressly indicated that the Schwartzes would seek either money damages equaling the difference between the misrepresented property's contract price and its value without the canal frontage or recission of the contract. Therefore, Patrick's December 1995 letter falls within the policy's clear and unambiguous definition of a "claim" regardless of the legal validity of the position taken in that letter. Because plaintiff knew of the Schwartzes' claim by December 1995, before the February 1, 1996 beginning date of the policy under which plaintiff claimed coverage, we conclude that the policy clearly and explicitly excludes coverage of the Schwartzes' claim.

Defendant next argues that the trial court erred in ordering that defendant defend plaintiff against the Schwartzes' claim because plaintiff failed to comply with the policy's rules and conditions. We agree. Section VIII(1) of the policy clearly and unambiguously explains the following: "[Plaintiff] agree[s] not to sue us to recover under this policy unless [plaintiff] ha[s] first complied with all of its rules and conditions." Plaintiff received notice from Patrick already in October 1995 that plaintiff had misrepresented the extent of the McDowells' property to the Schwartzes, but plaintiff neglected to notify defendant of this at least potentially problematic "professional incident" until April 1996. Thus, plaintiff failed to give defendant notice of this matter "as soon as practicable," as required by policy condition VIII(8)(a). By failing to indicate the Schwartzes' potential misrepresentation claim on its February 1996 insurance policy renewal application, plaintiff also violated policy condition VIII(6), which entitles defendant to deny plaintiff's claims and cancel its policy "[i]f [plaintiff] . . . hide[s] any information pertinent to [its] insurability." Because plaintiff failed to abide by these policy conditions, we conclude that the clear language of section VIII(1) precludes plaintiff from suing defendant for coverage of the Schwartzes' claim.

Plaintiff argues that its alleged failure to comply with policy conditions would not preclude it from obtaining coverage for a claim because the policy provides for a supplemental extended reporting period even where defendant refuses to renew or cancels plaintiff's policy. According to policy section VI(1), these extended reporting periods apply only when defendant has denied renewal of or canceled plaintiff's policy, or when defendant has "offer[ed] conditional renewal of the policy under terms and conditions less favorable to [plaintiff]." Because no evidence exists that defendant triggered application of these extended reporting period provisions by canceling, denying renewal of, or offering less favorable terms concerning plaintiff's policy, these provisions are irrelevant.

We reverse and remand for entry of an order granting defendant summary disposition pursuant to MCR 2.116(C)(10). We do not retain jurisdiction.

/s/ Jane E. Markey
/s/ Richard A. Bandstra
/s/ Stephen J. Markman