

STATE OF MICHIGAN
COURT OF APPEALS

THOMAS G. BRECHT,

Plaintiff-Appellant,

v

AUTO-OWNERS INSURANCE COMPANY,

Defendant-Appellee.

UNPUBLISHED

February 23, 1999

No. 203956

Oakland Circuit Court

LC No. 96-531583 CK

Before: Markman, P.J., and Bandstra and J. F. Kowalski*, JJ.

MEMORANDUM.

Plaintiff appeals as of right from the summary dismissal of his breach of contract action. MCR 2.116(C)(10). We affirm. This case is being decided without oral argument pursuant to MCR 7.214(E).

In *Lee v Auto-Owners Ins Co (On Second Remand)*, 218 Mich App 672, 675; 554 NW2d 610 (1996), a panel of this Court summarized the applicable legal principles as follows:

Michigan courts have consistently upheld policy exclusions barring recovery of benefits where the insured party releases a tortfeasor from liability without the insurer's consent, recognizing that such a release of liability destroys the insurance company's right to subrogation. *Flanary v Reserve Ins Co*, 364 Mich 73, 75; 110 NW2d 670 (1961); *Stolaruk v Central Nat'l Ins Co of Omaha*, 206 Mich App 444, 448-450; 522 NW2d 670 (1994); *Adams v Prudential Property & Casualty Ins Co*, 177 Mich App 543, 544-545; 442 NW2d 641 (1989); *Poynter v Aetna Casualty & Surety Co*, 13 Mich App 125, 128-129; 163 NW2d 716 (1968). A plaintiff's settlement with a negligent motorist or other responsible party destroys the insurance company's subrogation rights under the policy and bars the plaintiff's action for . . . benefits unless the insurer somehow waives the breach of the policy conditions. *Adams* at 544-545.

* Circuit judge, sitting on the Court of Appeals by assignment.

Plaintiff entered into the settlement agreement and executed the release on June 10, 1996. Viewing the record documentation in a light most favorable to plaintiff and granting plaintiff the benefit of every reasonable doubt, *Horn v Dep't of Corrections*, 216 Mich App 58, 66; 548 NW2d 600 (1996), an issue of fact exists with regard to whether plaintiff's counsel had a telephonic conversation with defendant's adjuster concerning settlement before the June 10, 1996, signing of the release. The adjuster denied that such a conversation occurred. Plaintiff's counsel indicated that the conversation occurred in early June, 1996. Because the settlement was reached on June 10, 1996, and the release was signed on that date, it can be reasonably inferred from counsel's representation that he informed the adjuster of his intent to settle plaintiff's claim against the underinsured motorist, that the conversation occurred before the settlement was reached and, hence, that it occurred before June 10, 1996.

Nevertheless, although a factual question may exist with regard to whether the telephonic conversation occurred, the documentation supplied by the parties does not demonstrate the existence of a genuine issue of material fact with regard to whether defendant waived noncompliance with the terms of the insurance contract. *Lee, supra* at 675. The contents of plaintiff's counsel's affidavit establishes only that the adjuster informed plaintiff's counsel of the prerequisites for qualifying for underinsured motorist coverage and that plaintiff's counsel indicated his intent to comply with those prerequisites. The affidavit contains no averments from which it can be inferred that the adjuster authorized or approved the terms of the settlement not yet reached by plaintiff or that the adjuster authorized the signing of the release or that the adjuster took any action or made any statements after being informed of the settlement that could be construed as waiving the breach of the insurance contract.

Likewise, plaintiff's promissory estoppel claim fails. The parties presented no documentation that the adjuster made any statements or undertook any actions from which the adjuster should have reasonably expected to induce plaintiff and his counsel to act in breach of the insurance contract by settling the claim and signing the release without defendant's prior written approval. *Mt Carmel Mercy Hospital v Allstate Ins Co*, 194 Mich App 580, 589-591; 487 NW2d 849 (1992).

Affirmed.

/s/ Stephen J. Markman
/s/ Richard A. Bandstra
/s/ John F. Kowalski