STATE OF MICHIGAN

COURT OF APPEALS

IVY MORTGAGE CORPORATION,

Plaintiff-Appellant,

v

MICHIGAN BASIC PROPERTY INSURANCE ASSOCIATION and CERTAIN UNDERWRITERS SUBSCRIBING TO MORTGAGE BANKERS BOND NO. OC943/94-406-0068,

Defendants-Appellees.

UNPUBLISHED
November 12, 1999

No. 211750
Wayne Circuit Court
LC No. 97-721418 CK

Before: Whitbeck, P.J., and Saad and Hoekstra, JJ.

PER CURIAM.

Plaintiff, Ivy Mortgage Corporation, appeals as of right from the trial court's order granting summary disposition pursuant to MCR 2.116(C)(10) in favor of defendants, Michigan Basic Property Insurance Association ("Michigan Basic") and Certain Underwriters Subscribing to Mortgage Bankers Bond No. OC943/94-406-0068 ("Certain Underwriters"), and denying plaintiff's motion for summary disposition. We affirm.

In this insurance case, plaintiff, a mortgage company, provided a $32,000 residential mortgage refinance loan to Clinton Tabron on November 21, 1996. Unfortunately, fire had destroyed the residential home securing the loan on November 17, 1996, days before plaintiff and Tabron closed on the loan and plaintiff released the funds to Tabron. Because Michigan Basic, the party insuring the home, denied plaintiff's mortgagee's interest claim, plaintiff filed this suit seeking recovery from Michigan Basic or, in the alternative, under Certain Underwriters' errors and omissions policy issued to plaintiff.

On appeal, plaintiff first argues that the trial court erred when it granted Michigan Basic's motion for summary disposition because Michigan Basic, under the terms of its policy, is responsible for paying plaintiff's claim. Alternatively, plaintiff argues that Michigan Basic is estopped from denying plaintiff's claim because plaintiff relied, to its detriment, on Michigan Basic's confirmation of insurance. We review de novo a decision on a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

Summary disposition pursuant to MCR 2.116(C)(10) is properly granted when, "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." *Ardt v Titan Ins Co*, 233 Mich App 685, 688; 593 NW2d 215 (1999). This Court examines all relevant documentary evidence in the light most favorable to the nonmoving party to determine whether a genuine issue of material fact exists on which reasonable minds could differ. *Id.* Once the moving party produces evidence in support of its motion, the burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists. *Id.* If the opposing party does not establish the existence of a genuine issue of material fact, then summary disposition is properly granted. *Abbott v John E Green Co*, 233 Mich App 194, 197-198; 592 NW2d 96 (1998).

As a general rule, "the rights of insured parties are fixed at the time of the loss." *Kass v Wolf*, 212 Mich App 600, 605; 538 NW2d 77 (1995). To recover under an insurance policy, a beneficiary must have an insurable interest in the subject of the policy. *VanReken v Allstate Ins Co*, 150 Mich App 212, 219; 388 NW2d 287 (1986). "An insurable interest in property is broadly defined as being present when the person has an interest in property, as to the existence of which the person will gain benefits, or as to the destruction of which the person will suffer loss." *Madar v League General Ins Co of Newark, NJ*, 152 Mich App 734, 738; 394 NW2d 90 (1986), citing *Crossman v American Ins Co*, 198 Mich 304, 308-309; 164 NW 428 (1917). Insurance policies "founded upon mere hope and expectation and without some interest in the property," contravene public policy and are void. *Crossman, supra* at 308; see also *Allstate Ins Co v State Farm Mutual Auto Ins Co*, 230 Mich App 434, 438-439; 584 NW2d 355 (1998) (Public policy concerns include the desire to prohibit the use of insurance as a form of wagering and to prevent the creation of socially undesirable interests).

Here, the November 17, 1996 date of loss is undisputed. Thus, the question becomes whether plaintiff had any rights to the home at that time. *Kass, supra* at 605. The trial court determined, and we agree, that plaintiff had no rights in the property as of that date. Plaintiff argues that it committed, in writing, to lend $32,000 to Tabron, using the home as security for the loan and relying on Michigan Basic's confirmation of insurance. Plaintiff suggests that based on this commitment, it suffered a pecuniary loss as a result of the fire that destroyed the home, and therefore plaintiff had an insurable interest in the home on the date of the fire.[1] However, the commitment did not create an insurable interest in the property. Deposition testimony established that although plaintiff had "committed" to lending Tabron money, Tabron had to satisfy certain conditions before plaintiff would lend him money. Further, the written commitment itself allowed plaintiff to cancel the commitment at any time if it concluded that Tabron no longer qualified for the mortgage. Thus, plaintiff had no interest in the property until after it closed on the loan and released the funds, which occurred days after a fire destroyed the home. Because plaintiff had no insurable interest in the property at the time of loss, the insurance policy is void. *Madar, supra* at 738. Plaintiff did not suffer a loss until four days later, November 21, 1996, when it loaned $32,000 to Tabron.[2] Had plaintiff not released the money to Tabron days after the fire, it would have suffered no loss from the destruction of the home.

Plaintiff's argument that it is entitled to collect under the insurance policy with Michigan Basic pursuant to one of the estoppel doctrines is without merit. Because plaintiff had no insurable interest, *VanReken, supra* at 219, recovery is prohibited, and estoppel may not be used to contravene Michigan contract law. See also *Moss v Union Mutual Ins Co of Providence*, 11 Mich App 334, 338; 161 NW2d 158 (1968), quoting *Agricultural Ins Co of Watertown, New York v Montague*, 38 Mich 548, 551 (1878) (The doctrine of waiver "is at war with the fundamental principles of insurance, which require that a person shall have an insurable interest before he can insure: a policy issued when there is no such interest is void, and it is immaterial that it is taken in good faith and with full knowledge. The policy of the law does not admit of such insurance, however willing the parties may be to enter into it").

Finally, plaintiff argues that if Michigan Basic is not liable to plaintiff, then Certain Underwriters is liable under the errors and omissions clause of an insurance policy it issued to plaintiff. We disagree. We review interpretations of insurance contracts de novo. *Nabozny v Pioneer State Mutual Ins Co*, 233 Mich App 206, 210; 591 NW2d 685 (1998).

We interpret an insurance contract in accordance with Michigan's well-established principles of contract construction. *Id*. An insurance contract must be enforced according to its terms, and an insurance company cannot be held liable for a risk it did not assume. *Id*. Further, a court cannot create ambiguity in an insurance policy where there is none; therefore, an unambiguous contract must be enforced as written. *Id*. However, if the insurance contract contains an ambiguity, it is construed to favor the insured. *Id*. A relevant term which is not defined by the insurance policy does not necessarily create an ambiguity, but must be interpreted in accordance with its commonly used meaning. *Id.* at 210-211. Finally, the parties' reasonable expectations must be considered when interpreting insurance policies. *Id.* at 211.

Because the Certain Underwriters' errors and omissions policy requires "[l]oss to the [plaintiff's] mortgagee interest in real property," no interpretation of the insurance contract can lead to liability for Certain Underwriters. Plaintiff had no interest in the home at the time of the loss, and therefore the event is outside the scope of coverage.

Affirmed.

/s/ William C. Whitbeck
/s/ Henry William Saad
/s/ Joel P. Hoekstra

[1] Plaintiff relies on an expansive reading of *Crossman, supra*. In *Crossman*, the defendant argued that the interest of an optionee to purchase realty is not insurable, but the *Crossman* Court determined that the insurance contract was valid and enforceable. *Id*. at 308, 311. Here, plaintiff likens the facts to *Crossman*, and seems to suggest that because the option in *Crossman* was conditional, as was plaintiff's commitment here, plaintiff has an insurable interest. We find *Crossman* distinguishable. In *Crossman*, the optionee had an enforceable right to buy the property for which he paid over $2,500, *id*., and therefore suffered a loss when fire destroyed the property. Here, plaintiff paid no consideration, had no enforceable right, and suffered no loss at the time that fire destroyed the property.

[2] It is immaterial that plaintiff acted under the belief that the home was still standing at the time it provided the money to Tabron.