STATE OF MICHIGAN

COURT OF APPEALS

DARWIN BURNETT and YVONNE BURNETT,

Plaintiffs-Appellants,

v

CITIZENS INSURANCE COMPANY OF AMERICA,

Defendant-Appellee.

UNPUBLISHED
February 18, 2000

No. 210737
Genesee Circuit Court
LC No. 95-040329-NZ

Before: O'Connell, P.J., and Murphy and Jansen, JJ.

PER CURIAM.

In this action against their homeowners insurance carrier, plaintiffs appeal as of right from an order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(8) and (10).[1] We affirm.

The central question in this case is whether plaintiffs are entitled to recover replacement cost benefits under their homeowners insurance policy without actually replacing, or rebuilding their cabin, which was destroyed by fire. Plaintiffs claim that, under this Court's decision in *Pollock v Fire Ins Exchange*, 167 Mich App 415; 423 NW2d 234 (1988), they are entitled to an award of replacement cost benefits even though they did not repair, replace, or rebuild their cabin. We disagree.

In *Pollock*, the plaintiff's home was damaged by fire. The plaintiff filed a claim of loss with the defendant insurance company. The defendant denied the claim. The defendant also refused to appoint an appraiser, causing the plaintiff to file suit against the defendant. Twenty-five months after the plaintiff filed her claim, the defendant paid the plaintiff $30,000 ($20,000 for the structure and $10,000 for contents). *Id*. at 416. The replacement cost of the house was appraised at $52,445. The plaintiff sought the replacement cost value even though she had not repaired, replaced, or rebuilt her house. The defendant argued that the policy required that the house be actually repaired or replaced before replacement cost benefits were paid. This Court held that the defendant's lack of good-faith processing of the claim hindered the plaintiff from complying with the condition of repairing or replacing the house. *Id*. at 421-422. The Court noted that the defendant "did as much as possible to hinder plaintiff and delay or prevent the payment of the claim." *Id*. at 422. The Court held that, under those

circumstances, the defendant was precluded from asserting the policy condition as a defense to payment of replacement cost.

The instant case is distinguishable from *Pollock*. First, there is no evidence that defendant refused to deal with plaintiffs. On the contrary, after plaintiffs filed their claim of loss, the parties engaged in negotiations regarding the replacement cost of the cabin. Defendant offered to settle the claim for $240,000 before the lawsuit was filed. Additionally, defendant made partial payments to plaintiffs within a short time after plaintiffs filed their claim of loss. Defendant also paid plaintiffs the policy limit for the actual cash value of the property ($127,000) within fourteen months of the loss, unlike the insurer in *Pollock*, who took over two years to reimburse the plaintiff for the actual cash value of the property.

In short, there is no evidence in this case that defendant's conduct hindered or prevented plaintiffs from repairing, replacing, or rebuilding their cabin. In *Pollock*, the Court stated that, had the insurer worked with the insured to allow them to repair or replace the building, rather than attempting to hinder any payment of the claim, "a different result might be called for." *Id*. at 422. Plaintiffs never presented any evidence to indicate that they were unable to replace the cabin because of defendant's alleged misconduct. To the contrary, it appears from the record that plaintiffs did not replace the cabin because they simply lost interest in doing so. Therefore, *Pollock* does not provide a basis for exempting plaintiffs from the requirement that they actually replace or rebuild the cabin before being eligible for replacement cost benefits.

Moreover, in *Smith v Michigan Basic Property Ins Ass'n*, 441 Mich 181, 183; 490 NW2d 684 (1992), our Supreme Court held that the insureds could not recover replacement cost absent actual repair or replacement, where the insurer denied coverage on the basis of arson and fraud, but where a jury found that no arson or fraud occurred. The insurer's denial of the claim was made in good faith, and the assertion of its defense no longer prevented the insureds from actually replacing the house. *Id*. at 190. Under those circumstances, *Pollack* was not followed. *Id*. at 189. However, the insurer would be required to pay replacement cost after the case if the insured actually repaired or replaced the home. *Id*. at 197.

In this case, plaintiffs are not prevented from repairing or replacing the cabin. The trial court held that plaintiffs may, within one year of this Court's decision on appeal, opt to replace the cabin, in which case defendant will be required to pay replacement cost benefits. Under these circumstances, we conclude that the trial court properly granted summary disposition under MCR 2.116(C)(10).

Plaintiffs also argue that the trial court erred in refusing to award them 12% interest under the Uniform Trade Practices Act (UTPA), MCL 500.2006(1); MSA 24.12006(1). This interest rate "is a penalty to be assessed only against insurers who procrastinate in paying meritorious claims." *O.J. Enterprises, Inc v Insurance Co of North America*, 96 Mich App 271, 271; 292 NW2d 207 (1980). Because the evidence indicates that the claim in this matter was reasonably in

dispute, the trial court did not err in denying plaintiffs' request for 12% interest. *Arco v AMICO (On Second Remand, On Rehearing)*, 233 Mich App 143, 148-149; 594 NW2d 74 (1998); *Norgan v American Way Ins Co*, 188 Mich App 158, 164; 469 NW2d 23 (1991).

Affirmed.

/s/ Peter D. O'Connell
/s/ William B. Murphy
/s/ Kathleen Jansen

[1] Although the trial court did not expressly state under which court rule it was granting the motion, the record indicates that the motion was granted pursuant to MCR 2.116(C)(10). Therefore, our review is de novo to determine whether any genuine issue of material fact exists that would prevent entering judgment for defendant as a matter of law. *Morales v Auto-Owners Ins Co*, 458 Mich 288, 294; 582 NW2d 776 (1998).