STATE OF MICHIGAN

COURT OF APPEALS

CARDINAL MERCIER BUILDING CORPORATION,

Plaintiff-Appellant,

v

MARY MARKUS, d/b/a, MARKUS INSURANCE AGENCY and JOHN A. MARKUS,

Defendants-Appellants.

UNPUBLISHED
April 16, 2002

No. 230025
Wayne Circuit Court
LC No. 99-917995-CK

Before: Zahra, P.J., and Neff and Saad, JJ.

PER CURIAM.

Plaintiff, Cardinal Mercier Building Corporation, appeals as of right from the trial court's order of dismissal following a grant of summary disposition to defendants, Mary Markus, d/b/a Markus Insurance Agency and John Markus. We affirm.

I. Facts and Procedural History

The Knights of Columbus Council No. 2723 owned and operated a meeting hall at 9632 Conant in Hamtramck through plaintiff, a non-profit corporation. The record reflects that defendants provided liquor liability insurance for the council since 1991. At various times during the 1990s, defendants also submitted proposals to procure and place property damage insurance for the building, but the council rejected those offers.

However, on February 4, 1997, defendants again offered the council a property damage insurance proposal through CNA Insurance Company. John Markus testified that he did not personally determine the value of the building, but determined the premium amount based on information provided by Edwin Magnotte, the council's treasurer. Though the amount of coverage was less than they previously maintained for the property, the council's board of directors, including Magnotte, Mark Dardzinski, and Thomas Jankowski, accepted the proposed policy with limit of $803,000 and an annual premium of $4019. The policy went into effect on February 27, 1997. On July 2, 1997, strong winds caused extensive damage to the building and its contents. According to plaintiff, the amount of damage exceeded $1 million.

On June 10, 1999, plaintiff filed a complaint setting forth claims of negligence and misrepresentation.[1] Specifically, plaintiff alleged that defendants breached their duty to use reasonable care in procuring an insurance policy that would fully protect plaintiff in the event of damage to the building and its contents. Plaintiff also claimed that John Markus falsely represented that the building would be adequately covered.

On June 8, 2000, defendants filed a motion for summary disposition pursuant to MCR 2.116(C)(10). Defendants argued that they owed no duty to plaintiff and, if a duty existed, that there is no genuine issue of material fact regarding whether defendant breached that duty. Further, defendants averred that no evidence established a misrepresentation made by defendant and that, if the insurance proposal constituted a statement, it amounted to a present statement of what a future contract might say, which could not form the basis of a valid cause of action. In response, plaintiff argued that defendants owed a duty to explain the terms and conditions of the policy because defendants had a "special relationship" with plaintiff, based on the length of their prior association. Moreover, plaintiff contended that a genuine issue of material fact exists regarding whether defendant's offer of insurance constituted a false representation.

Following oral argument on August 11, 2000, the trial court granted summary disposition to defendants and entered an order to that effect on September 11, 2000.

II. Analysis

This Court reviews a trial court's grant of summary disposition de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). As our Supreme Court has further explained:

> A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10), (G)(4). *Quinto v Cross & Peters Co*, 451 Mich 358; 547 NW2d 314 (1996). [*Maiden, supra* at 120.]

It is well-established that, in a negligence action, "[t]he threshold question, whether a duty exists, is a question of law solely for the court to decide." *Girvan v Fuelgas Co*, 238 Mich App 703, 711; 607 NW2d 116 (1999); *Harts v Farmers Ins*, 461 Mich 1, 6; 597 NW2d 47 (1999). Further, our Supreme Court has held that "except under very limited circumstances," an insurance agent owes no "affirmative duty to advise or counsel an insured about the adequacy . . . of coverage." *Harts, supra* at 2. Thus, as a general rule, "an agent's job is to merely present the product of his principal and take such orders as can be secured from those who want to purchase the coverage offered." *Id*. at 8.

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[1] According to the parties, plaintiff also filed a complaint in federal district court against CNA Insurance Company for wrongful adjustment.

However, a "special relationship" between the insured and its agent may give rise to a duty to advise under limited circumstances. *Id*. at 10. According to the *Harts* Court:

> [T]he general rule of no duty changes when (1) the agent misrepresents the nature or extent of the coverage offered or provided, (2) an ambiguous request is made that requires a clarification, (3) an inquiry is made that may require advice and the agent, though he need not, gives advice that is inaccurate, or (4) the agent assumes an additional duty by either express agreement with or promise to the insured. [*Id*. at 10-11.]

In response to defendants' motion for summary disposition, plaintiff asserted two arguments to support its claim that a special relationship existed that gave rise to a duty by defendants to advise plaintiff about the adequacy and extent of coverage. First, plaintiff claimed that a special relationship arose because, for several years prior to the offer of insurance in this case, defendants provided plaintiff with liquor liability insurance and made prior offers to procure property damage insurance. While plaintiff correctly asserts that "the *Harts* case does not dismiss the length of the relationship in determining whether a 'special relationship' exist[s]," in *Harts*, our Supreme Court clearly ruled that the length of the relationship between an insured and an agent *is not a dispositive factor in determining whether a special relationship exists*. *Harts, supra* at 10. Thus, without more, under the test promulgated by the Supreme Court in *Harts*, plaintiff's claim regarding the existence of a long-term relationship is unavailing.

In response to the motion, plaintiff also asserted that, under *Harts*, plaintiff made an ambiguous request that required clarification. However, plaintiff failed to specifically set forth evidence of any inquiry that could be deemed an "ambiguous request" that may have triggered a duty to advise. Rather, in its response brief, plaintiff merely set forth the following: (1) Dardzinski's testimony that the policy applied to property damage, (2) John Markus' testimony that the request for insurance was solicited by Magnotte, (3) Magnotte's testimony that the offered premium and coverage amount were less than in their prior policy, (4) Jankowski's testimony that the policy would pay $750,000 if the building "blew up," and (5) Dardzinski's testimony that he is not a property insurance expert. None of this evidence establishes that plaintiff made an "ambiguous request" to defendants. Plaintiff points to *no* record evidence regarding any inquiry plaintiff made about the policy, such as a request for "full coverage" as hypothesized in *Harts*. *Harts, supra* at 10 n 11.[2] Because plaintiff failed to cite *any* relevant evidence to support its claim that a duty arose based on a special relationship, as the trial court correctly ruled, defendants were entitled to judgment as a matter of law.[3]

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[2] Further, the opinion evidence offered by plaintiff, that (1) Dardzinski testified that an agent should normally explain an insurance policy, (2) Jankowski testified that, in his opinion, defendants should have appraised the building, and (3) insurance educator William Morrison testified that an agent has a duty to explain a policy, is not sufficient to create a factual dispute to survive a motion for summary disposition. *DeSot v Auto Club Ins Ass'n*, 174 Mich App 251, 253; 435 NW2d 442 (1988).

[3] Because plaintiff failed to establish that defendants owed a duty to advise regarding the insurance policy, we also reject plaintiff's assertion that defendants negligently failed to explain that the "conditions, endorsement, riders and clauses" might reduce their coverage. Again,

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We also note that, as the trial court astutely observed, plaintiff's claim is further weakened by overwhelming evidence that the council board members clearly knew that the amount of coverage was far less than what they previously maintained on the building and that, after discussing it as a group, plaintiff nonetheless chose to buy the policy because they needed to save money on premiums, they did not plan to replace the building if it was ever destroyed, and they anticipated the possibility of closing it down altogether. Plaintiff presented no evidence to rebut this testimony, which clearly undermines their argument that defendants negligently failed to advise plaintiff regarding the adequacy of coverage.

Plaintiff contends that this case must be remanded because the trial court failed rule on its misrepresentation claim. However, we find it unnecessary to do so because, though the trial court declined to discuss the claim, it granted defendants' motion in its entirety under MCR 2.116(C)(10) and dismissed the case. Due to the lack of evidence offered by plaintiff, and thus plaintiff's failure to establish a genuine issue of material fact, the trial court's ruling was clearly correct.

Quite simply, plaintiff did not sustain its burden of establishing an issue of material fact in response to defendants' motion for summary disposition. Plaintiff merely asserted that the insurance proposal constituted a misrepresentation of the terms of the policy and that "the question left unresolved was whether the representation was false." Plaintiff offered no explanation and provided no documentary evidence to show that the proposal was false or that plaintiff received something other than what the proposal offered. It is well-established that "[w]here the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists." *Karbel v Comerica Bank*, 247 Mich App 90, 97; 635 NW2d 69 (2001), quoting *Quinto, supra* at 362. Accordingly, plaintiff's bare assertion that the offer constituted a false representation is clearly insufficient to survive defendants' motion for summary disposition.

Affirmed.

/s/ Brian K. Zahra
/s/ Janet T. Neff
/s/ Henry William Saad

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absent a special relationship, an agent has no duty to advise the insured about any coverage and it is "an insured's obligation to read the insurance policy and raise questions concerning coverage within a reasonable time after the policy has been issued." *Harts, supra* at 8 n 4, citing *Parmet Homes, Inc v Republic Ins Co*, 111 Mich App 140, 144; 314 NW2d 453 (1981).