STATE OF MICHIGAN

COURT OF APPEALS

MICHAEL REMAR,

Plaintiff-Appellant,

v

MADIGAN INSURANCE AGENCY, INC., d/b/a MADIGAN/PINGATORE INSURANCE SERVICES,

Defendant-Appellee.

UNPUBLISHED
November 22, 2005

No. 254825
Chippewa Circuit Court
LC No. 03-006717-CZ

Before: Gage, P.J., and Hoekstra and Murray, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting defendant's motion for summary disposition. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff sustained injuries when he was bitten by a brown recluse spider while staying at a motel owned by Catherine Trumbley and Wayne Trumbley. Plaintiff obtained a $350,000 default judgment against the Trumbleys. The Trumbleys and their business were insured by Citizens Insurance Company via a policy purchased through defendant. Citizens declined to pay the judgment on the ground that it never received proper notice of the lawsuit as required by its policy. Plaintiff filed a writ of garnishment against Citizens. In *Remar v Trumbley*, unpublished opinion per curiam of the Court of Appeals, issued June 3, 2003 (Docket No. 242779), we affirmed the trial court's grant of summary disposition in favor of Citizens.[1]

[1] Plaintiff argued that the trial court erred by granting summary disposition in favor of Citizens because a telephone call made by Catherine Trumbley to defendant was sufficient to provide Citizens with notice of the lawsuit. We rejected plaintiff's argument, finding that although a question of fact existed as to whether defendant was an agent of the Trumbleys or Citizens, reversal was not required because there was no genuine issue of material fact regarding the insufficiency of Catherine Trumbley's notice to defendant that a lawsuit had been filed. Slip op at 2-3.

Plaintiff filed a request and writ for garnishment against defendant, arguing that if Madigan/Pingatore was an agent for the Trumbleys, and if defendant received timely notice of the suit from the Trumbleys but failed to act to protect the Trumbleys' interests, then the Trumbleys had an "errors and omissions" claim against Citizens. In *Remar v Trumbley*, memorandum opinion of the Court of Appeals, issued June 15, 2004 (Docket No. 246500), we affirmed the trial court's grant of summary disposition in favor of defendant, noting that defendant held no money or property that belonged to the Trumbleys or owed any obligation to the Trumbleys, and that no evidence showed that plaintiff had received an assignment of any claim that the Trumbleys had against defendant. *Id*., slip op at 2.

Plaintiff filed the instant suit alleging that defendant breached its duty to timely inform Citizens that the Trumbleys had been sued, and that as a result of defendant's breach, a default judgment was entered against the Trumbleys and Citizens refused to indemnify the Trumbleys.[2] Defendant moved for summary disposition pursuant to MCR 2.116(C)(8), (9), and (10), arguing that plaintiff failed to state a claim on which relief could be granted because no evidence showed that the Trumbleys provided proper written notice of plaintiff's initial suit as required by the Citizens policy. The trial court granted defendant's motion pursuant to MCR 2.116(C)(8) and (9).[3] The trial court stated that although plaintiff had received an assignment of a claim from the Trumbleys, the Trumbleys had not suffered damages; therefore, plaintiff could not collect anything on their behalf.

We review a trial court's decision on a motion for summary disposition de novo. *Auto Club Group Ins Co v Burchell*, 249 Mich App 468, 479; 642 NW2d 406 (2001).

Plaintiff's assertion that defendant had a contractual duty to notify Citizens that the Trumbleys had been sued is completely unsubstantiated. Even assuming arguendo that such a duty existed and that it was breached, we conclude that plaintiff has not shown that the Trumbleys suffered damages as a result of any breach of duty by defendant. A default judgment was entered against the Trumbleys in the original action; however, plaintiff does not assert, and no evidence shows, that the Trumbleys have satisfied any portion of that judgment.[4] Plaintiff has not shown that the Trumbleys have sustained damages that are recoverable in an action for breach of contract. *Kewin v Massachusetts Mut Life Ins Co*, 409 Mich 401, 414; 295 NW2d 50 (1980). Plaintiff, as an assignee of the Trumbleys, does not have a justiciable claim against defendant. Summary disposition was proper. MCR 2.116(C)(8).

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[2] Plaintiff alleged without substantiation that the Trumbleys had assigned their cause of action against defendant to him.

[3] A motion for summary disposition under MCR 2.116(C)(9) tests the sufficiency of the defendant's pleadings, and is properly granted where the defendant has failed to state a valid defense to a claim. *Payne v Farm Bureau Ins*, 263 Mich App 521, 525; 688 NW2d 327 (2004). This decision analyzes the trial court's decision as if it had been made solely under MCR 2.116(C)(8).

[4] Plaintiff's reliance on *Stockdale v Jamison*, 416 Mich 217; 330 NW2d 389 (1982), overruled in *Frankenmuth Mut Ins Co v Keeley*, 433 Mich 525, 543; 447 NW2d 691 (1989), is misplaced.

Affirmed.

/s/ Hilda R. Gage
/s/ Joel P. Hoekstra
/s/ Christopher M. Murray