STATE OF MICHIGAN

COURT OF APPEALS

AUDIOVISUAL EQUIPMENT & SUPPLIES, INC.,	UNPUBLISHED March 20, 2007
Plaintiff-Appellant,	
v	No. 270424 Wayne Circuit Court LC No. 05-514443-CK
HARLEYSVILLE LAKE STATES INSURANCE COMPANY and CORNISH, ZACK, HILL & ASSOCIATES, INC.,	
Defendants-Appellees.	

Before: Markey, P.J., and Murphy & Kelly, JJ.

PER CURIAM.

Plaintiff appeals as of right an order granting summary disposition in favor of defendant Cornish, Zack, Hill & Associates, Inc. ("CZH"). Plaintiff also appeals an earlier order granting summary disposition in favor of Harleysville Lake States Insurance Company ("Harleysville"). We affirm.

This case arises out of plaintiff's attempt to recover fire insurance benefits after a blaze at a warehouse leased by plaintiff in which plaintiff stored valuable goods and products during the course of its business. With respect to Harleysville, the circuit court granted summary disposition based on plaintiff's failure to commence the action within the two-year limitations period contained in the commercial general liability ("CGL") policy. Accordingly, summary disposition was granted pursuant to MCR 2.116(C)(7).[1]

[1] This Court reviews de novo a trial court's decision on a motion for summary disposition. *Kreiner v Fischer*, 471 Mich 109, 129; 683 NW2d 611 (2004). Similarly, we review de novo the legal question concerning whether the applicable statute of limitations bars a cause of action. *Ins Comm'r v Aageson Thibo Agency*, 226 Mich App 336, 340-341; 573 NW2d 637 (1997). MCR 2.116(C)(7) applies to a motion for summary disposition predicated on an argument that the action is time-barred. Under (C)(7), this Court must consider not only the pleadings, but also any affidavits, depositions, admissions, or other documentary evidence filed or submitted by the

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Plaintiff does not dispute that it commenced its action against Harleysville beyond the two-year limitations period. Indeed, the fire at the warehouse occurred on July 18, 2002, and plaintiff did not bring legal action against Harleysville until it filed this lawsuit on May 13, 2005. Rather, plaintiff first argues that the statute of limitations was tolled under MCL 500.2833(1)(q). MCL 500.2833(1)(q) provides that policies of fire insurance must specify that an action on the policy "may be commenced only after compliance with the policy requirements," that such an action "must be commenced within 1 year after the loss or within the time period specified in the policy, whichever is longer," and that "[t]he time for commencing an action is tolled from the time the insured notifies the insurer of the loss until the insurer formally denies liability." Here, Harleysville's policy did not contain a one-year limitations period, but rather, a less demanding provision that "[n]o one may bring legal action against us under this coverage part unless . . . the action is brought within *two years* after on which the direct physical loss or damage occurred." (Emphasis added.)

Plaintiff contends that because it gave a notice of claim/proof of loss to CZH, the independent insurance agency that sold plaintiff the CGL policy, the limitations period was tolled from that date forward. Specifically, plaintiff maintains that it gave verbal notice to CZH shortly after the fire occurred and written notice on July 18, 2003. Even assuming plaintiff's allegations are true, notice to CZH was insufficient to toll the limitations period. It is undisputed that CZH is an independent insurance agency that facilitated plaintiff's purchase of the CGL policy from Harleysville. It is well-established that when an insurance policy is "facilitated by an independent insurance agent or broker, the independent insurance agent or broker is considered an agent of the insured rather than an agent of the insurer." *West American Ins Co v Meridian Mut Ins Co*, 230 Mich App 305, 310; 583 NW2d 548 (1998), citing *Auto-Owners Ins Co v Michigan Mut Ins Co*, 223 Mich App 205, 215; 565 NW2d 907 (1997); see also *Harwood v Auto-Owners Ins Co*, 211 Mich App 249, 254; 535 NW2d 207 (1995).[2] CZH was not an agent

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parties. *Horace v City of Pontiac*, 456 Mich 744, 749; 575 NW2d 762 (1998). The contents of the complaint must be accepted as true unless contradicted by the documentary evidence. *Sewell v Southfield Pub Schools*, 456 Mich 670, 674; 576 NW2d 153 (1998). This Court must consider any documentary evidence in a light most favorable to the nonmoving party. *Herman v Detroit*, 261 Mich App 141, 143-144; 680 NW2d 71 (2004). If there is no factual dispute and reasonable minds cannot differ on the legal effect of the facts, whether a plaintiff's claim is time-barred or precluded by any other theory set forth in MCR 2.116(C)(7) is a question of law for the court to decide. *Farm Bureau Mut Ins v Combustion Research Corp*, 255 Mich App 715, 720; 662 NW2d 439 (2003); *Huron Tool & Engineering Co v Precision Consulting Services, Inc*, 209 Mich App 365, 377; 532 NW2d 541 (1995). However, if a factual dispute exists, summary disposition is not appropriate. *Id.*

[2] We note that *Harwood*, upon which *West American Ins* and *Michigan Mut Ins* are based, indicates that "*[o]rdinarily*, an independent insurance agent or broker is an agent of the insured, not the insurer." *Harwood, supra* at 254 (emphasis added). The term "ordinarily" is also used in the same context in *Mayer v Auto-Owners Ins Co*, 127 Mich App 23, 26; 338 NW2d 407 (1983). We conceive of scenarios in which the particular facts of a case may dictate that an insurance agent is indeed an agent of the insurer, but, as a matter of law, we do not find that to be the situation here.

of Harleysville, and thus, notice of the loss to CZH was insufficient to impute notice to Harleysville. Accordingly, plaintiff never provided Harleysville with the requisite notice to toll the limitations period.[3]

Plaintiff's reliance on Section VI, ¶ 5(d), of the Umbrella Policy is misplaced. That provision states, "notice given by or on behalf of the insured to our authorized agent, with particulars sufficient to identify the insured, shall be notice to us." This provision, however, is contained in the Umbrella Policy, not the CGL policy.[4] The circuit court did not err by granting summary disposition in favor of Harleysville under MCR 2.116(C)(7).

Plaintiff next argues that the circuit court erred by granting summary disposition in favor of CZH under MCR 2.116(C)(10).[5] We disagree.

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[3] Plaintiff argues that CZH forwarded the notice to Harleysville. However, there is insufficient evidence to create a factual dispute on that matter. Plaintiff relies on the affidavit of a company shareholder who averred that notice was sent to CZH, "which Harleysville admits that it received." There is no explanation, details, or other evidence with regard to this alleged admission and receipt of notice by Harleysville. This simply does not suffice, especially in the face of Harleysville's contention that notice was never received. Plaintiff's counsel suggested at the hearing on the summary disposition motion that Harleysville admitted receipt of the notice in its answer to the complaint. We have reviewed the pleadings and, in response to plaintiff's allegation that written notice was given to Harleysville, Harleysville neither admitted nor denied the assertion, leaving plaintiff to its proofs. We are also perplexed by plaintiff's statement in its brief that whether CZH actually conveyed the notice to Harleysville "is unanswered on the record." We conclude that plaintiff's argument on this issue lacks evidentiary and record support.

[4] We additionally point out that the language in the Umbrella Policy was not argued at the time of summary disposition, but instead the language of that policy was first raised as an issue in a "motion to vacate order of summary disposition."

[5] MCR 2.116(C)(10) provides for summary disposition where there is no genuine issue regarding any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law. A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the pleadings, affidavits, and other documentary evidence, when viewed in a light most favorable to the nonmovant, show that there is no genuine issue with respect to any material fact. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996), citing MCR 2.116(G)(5). Initially, the moving party has the burden of supporting its position with documentary evidence, and, if so supported, the burden then shifts to the opposing party to establish the existence of a genuine issue of disputed fact. *Quinto, supra* at 362; see also MCR 2.116(G)(3) and (4). "Where 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 [the] pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists." *Quinto, supra* at 362. Where the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. *Id.* at 363. "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). A court may only (continued…)

Plaintiff alleged fraud and misrepresentation against CZH. The circuit court granted summary disposition in favor of CZH, ruling that plaintiff had failed to demonstrate a genuine issue of material fact regarding any of its allegations against CZH. To establish a cause of action for fraud or misrepresentation, a plaintiff must prove (1) that the charged party made a material representation, (2) that the representation was false, (3) that when he or she made the representation, he or she knew it was false, or made it recklessly, without any knowledge of its truth or falsity, (4) that he or she made it with the intention that it should be acted upon by the other party, (5) that the other party acted in reliance upon it, and (6) that the other party thereby suffered injury. *Scott v Harper Recreation, Inc*, 444 Mich 441, 446 n 3; 506 NW2d 857 (1993); *Eerdmans v Maki*, 226 Mich App 360, 366; 573 NW2d 329 (1997). Plaintiff conceded in the circuit court that it could not set forth any evidence establishing the requisite elements of fraud or misrepresentation, i.e., that CZH made a false, material representation to plaintiff.

Plaintiff instead argues, just as it did to the circuit court, that there is an issue of fact regarding the exact duties CZH owed to plaintiff with regard to making a claim under Harleysville's policy. Specifically, plaintiff argues that CZH, as the independent insurance agency that sold plaintiff the CGL policy, might be liable for failing to either timely transmit the 2003 proof of loss to Harleysville[6] or to advise plaintiff that it must send the proof of loss directly to Harleysville. Plaintiff vaguely articulates its theory under principles of agency law and the concept of duty; however, a review of plaintiff's pleadings indicates that plaintiff never advanced such a claim, theory, or cause of action, and plaintiff did not properly seek to amend its complaint, nor does it raise an amendment issue on appeal. Reversal is unwarranted.[7]

Affirmed.

/s/ Jane E. Markey
/s/ William B. Murphy
/s/ Kirsten Frank Kelly

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consider substantively admissible evidence actually proffered relative to a motion for summary disposition under MCR 2.116(C)(10). *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999).

[6] This claim appears directly contrary to plaintiff's assertion on the statute of limitations issue that Harleysville was forwarded notice.

[7] We also note that even if we were to substantively consider plaintiff's argument, and assuming that plaintiff could legally proceed on an agency-duty theory, or some comparable tort principle, summary disposition would be proper because the CGL policy had been effectively cancelled before the fire, making any shortcomings by CZH relative to handling the notice of fire loss irrelevant. Plaintiff's arguments to the contrary are unavailing. We further note that it is unnecessary to address the jurisdictional argument presented by defendants in their appellate brief because a panel of this Court previously denied their motion to dismiss for lack of jurisdiction. *Audiovisual Equip & Supplies, Inc v Harleysville Lake States Ins Co*, unpublished order of the Court of Appeals, entered September 19, 2006 (Docket No. 270424).