LCourt of Appeals, State of Michigan

ORDER

L&M Brikho's Market Inc v Emerson-Prew Inc

Docket No. 269806

LC No. 04-418155 CK

Alton T. Davis
Presiding Judge

Bill Schuette

Stephen L. Borrello
Judges

On the Court's own motion, the November 13, 2007 opinion is hereby AMENDED. The opinion contained the following clerical error: the word "plaintiff" on page 4, first paragraph, last sentence, should be changed to "Grange". The sentence containing the error read:

"Therefore, the trial court abused its discretion in awarding plaintiff $4,416.65 in depositions costs."

The sentence should have read:

"Therefore, the trial court abused its discretion in awarding Grange $4,416.65 in depositions costs."

In all other respects, the opinion remains the same.

A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

NOV 29 2007
Date

Sandra Schultz Mengel
Chief Clerk

STATE OF MICHIGAN

COURT OF APPEALS

L&M BRIKHO'S MARKET, INC., d/b/a/ GATEWAY SUPERMARKET, LATIF BRIKHO and MARY BRIKHO,

Plaintiffs-Appellants,

v

EMERSON-PREW, INC., and OAKLAND INSURANCE AGENCY,

Defendants,

and

GRANGE INSURANCE COMPANY OF MICHIGAN, INC.,

Defendant-Appellee.

UNPUBLISHED
November 13, 2007

No. 269806
Wayne Circuit Court
LC No. 04-418155-CK

Before: Davis, P.J., and Schuette and Borrello, JJ.

PER CURIAM.

Plaintiffs appeal as of right an order of dismissal.[1] We affirm in part and reverse in part.

I. FACTS

Plaintiffs' supermarket experienced a power outage that caused a breakdown in the refrigeration, resulting in a severe loss of inventory. At the time of the outage, plaintiffs believed defendant Grange Insurance Company (Grange) insured the store. When plaintiffs asked Grange for insurance benefits, Grange denied plaintiffs' claim because plaintiffs did not have insurance

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[1] Although plaintiffs appeal the April 5, 2006 order dismissing Oakland Insurance Agency and Emerson-Prew, Inc., as parties to this action, this appeal pertains largely to the September 13, 2005 order dismissing Grange Insurance Company of Michigan.

coverage with them. According to Grange, plaintiffs' application for insurance with them was deleted from their files and had never properly been recorded in their system. Grange claimed that plaintiffs' insurance agent, Bruce Lys, had failed to follow the proper procedure to bind insurance coverage for the store. Plaintiffs filed suit against Grange, claiming that Grange was vicariously liable for Lys's actions and owed plaintiffs insurance benefits. Grange moved for summary disposition, and the trial court granted Grange's motion. Plaintiffs now appeal.

II. SUMMARY DISPOSITION

Plaintiffs first argue that the trial court erred when it granted summary disposition in Grange's favor. Specifically, plaintiffs argue that because they were issued an oral insurance binder from Grange through its agent, Lys, Grange is bound by the acts of its agent. We disagree.

A. Standard of Review

When reviewing a trial court's decision on a motion for summary disposition under MCR 2.116(C)(10), this Court reviews the record de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). MCR 2.116(C)(10) tests the factual support of a claim. *Id*. "On review, this Court must consider the record in the light most favorable to the nonmovant to determine whether any genuine issue of material fact exists that precludes entering judgment for the moving party as a matter of law." *Laier v Kitchen*, 266 Mich App 482, 486-487; 702 NW2d 199 (2005). "Review is limited to the evidence presented to the trial court at the time the motion was decided." *Laier*, *supra* at 487.

B. Analysis

An insurance binder is "'a contract of temporary insurance pending issuance of a formal policy or proper rejection by [the insurer].'" *Universal Underwriters Group v Allstate Ins Co*, 246 Mich App 713, 721; 635 NW2d 52 (2001), quoting *Blekkenk v Allstate Ins Co*, 152 Mich App 65, 68; 393 NW2d 883 (1986). "'A binder has generally been defined as a written instrument which is used when a policy cannot be immediately issued, to evidence that the insurance coverage attaches at a specified time and continues until the policy is issued or the risk is declined and notice thereof given.'" *Universal Underwriters Group Co*, *supra* at 721, quoting 43 Am Jur 2d, Insurance, § 219, p 204. A binder may be written or oral and founded upon words or deeds of an agent. *State Auto Mut Ins Co v Babcock*, 54 Mich App 194, 204; 220 NW2d 717 (1974).

The trial court granted Grange summary disposition based on its conclusion that it did not have any "liability" because no written binder of insurance was issued and because Lys failed to follow the proper procedures imposed by Grange to bind insurance coverage. As previously noted, a binder may be written or oral. *Id*. Therefore, the trial court erred in concluding to the contrary. However, the trial court's error does not require reversal because, as discussed below, its grant of summary disposition was proper.

The parties raise the issue of the existence of an agency relationship between Grange and Lys. However, we need not reach this issue because even if an agency relationship existed, Lys acted outside the scope of his authority. Therefore, Grange could not be bound by Lys's actions,

and summary disposition was properly granted. Generally, a principal is liable for the torts of his agent committed in the scope of the agency. *St Paul Fire & Marine Ins Co v Ingall*, 228 Mich App 101, 109; 577 NW2d 188 (1998). According to the agency agreement entered into between Oakland Insurance Agency (Lys's employer) and Grange, an agent can only bind insurance contracts in accordance with and subject to the limitations set forth by Grange. Grange had a binding authority limitation and it required that each application for insurance contain a 20 to 25 percent deposit, photographs of the property seeking to be insured, and certain financial information. The evidence showed that the application Lys submitted on plaintiffs' behalf exceeded the binding level authority permitted by Grange, and it did not contain a premium deposit or the financial information necessary to bind insurance coverage. Therefore, because the evidence showed that Lys did not follow the proper procedures for binding, and he did not act in accordance with and subject to the limitations set forth by Grange, Lys acted outside the scope of his authority. For that reason, even if an agency relationship existed, summary disposition was proper.

III. ATTORNEY FEES & COSTS

Plaintiffs further argue that the trial court abused its discretion when it awarded Grange its requested attorney fees and cost. We agree in part.

A. Standard of Review

We review a trial court's award of attorney fees and costs for an abuse of discretion. *Windemere Commons I Ass'n v O'Brien*, 269 Mich App 681, 682; 713 NW2d 814 (2006). This Court reviews de novo a trial court's decision to grant or deny case-evaluation sanctions. *Elia v Hazen*, 242 Mich App 374, 376-377; 619 NW2d 1 (2000).

B. Analysis

Plaintiffs argue that the trial court abused its discretion because it granted Grange deposition costs even though Grange failed to file the depositions with the clerk. We agree.

MCL 600.2549 provides:

> Reasonable and actual fees paid for depositions of witnesses filed in any clerk's office and for the certified copies of documents or papers recorded or filed in any public office shall be allowed in the taxation of costs only if, at the trial or when damages were assessed, the depositions were read in evidence, except for impeachment purposes, or the documents or papers were necessarily used.

Unless the depositions in question were filed with the clerk, a party cannot recover deposition costs. *Morrison v East Lansing*, 255 Mich App 505, 522; 660 NW2d 395 (2003). Even if the depositions were used to resolve the case, the trial court lacks statutory authority to award

depositions costs if the depositions were not properly filed with the clerk. *Elia*, *supra* at 380-382.

After a review of the record, we find that the depositions at issue were not filed separately with the clerk, as required by MCL 600.2549.[2] *Morrison*, *supra* at 522. The depositions were not filed in any clerk's office and, thus, were not filed in accordance with MCL 600.2549. *Elia*, *supra* at 380-382. MCL 600.2549 "plainly and unambiguously demands that the cost of a deposition may not be taxed when the deposition has not been filed in a court clerk's office." *Rickwalt v Richfield Lakes Corp*, 246 Mich App 450, 465-466; 633 NW2d 418 (2001). Therefore, the trial court abused its discretion in awarding plaintiff $4,416.65 in depositions costs.

Plaintiffs further argue that the award of attorney fees was unreasonable. We disagree. The trial court "retains the authority to award a reasonable fee, regardless of the actual attorney fee incurred by the plaintiff." *Head v Phillips Camper Sales & Rental, Inc*, 234 Mich App 94, 114; 593 NW2d 595 (1999). When determining attorney fees, the trial court should consider: "'(1) the professional standing and experience of the attorney; (2) the skill, time and labor involved; (3) the amount in question and the results achieved; (4) the difficulty of the case; (5) the expense incurred; and (6) the nature and length of the professional relationship with the client.'" *Head*, *supra* at 114, quoting *Crawley v Schick*, 48 Mich App 728, 737; 211 NW2d 217 (1973). This list is not exclusive. A trial court may "adjust an attorney's fee in light of the results of the proceedings." *Head*, *supra* at 114.

The trial court did not abuse its discretion when it awarded Grange the requested attorney fees of $2,502.50, which includes 14.3 billable hours at a rate of $175 per hour. In light of the nature and complexity of this case, the requested fees were reasonable. Although plaintiffs argue that four of the hours claimed by Grange involved administrative work and should have been charged at a lesser rate, they fail to provide this Court with authority supporting their position that the work at issue should have been billed at a lower rate and that the rate was unreasonable. A court is permitted to award "a reasonable fee." *Head*, *supra* at 114. Here, because plaintiffs have failed to show that the attorney's fees were unreasonable, their claim must fail.

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[2] MCR 2.306(F)(3) provides specific filing requirements for deposition transcripts as follows:

> If a party requests that the transcript be filed, the person conducting the examination or the stenographer shall, after transcription and certification:
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> (a) securely seal the transcript in an envelope endorsed with the title and file number of the action and marked "Deposition of [name of witness]", and promptly file it with the court in which the action is pending or send it by registered or certified mail to the clerk of that court for filing;
>
> (b) give prompt notice of its filing to all other parties, unless the parties agree otherwise by stipulation in writing or on the record.

Plaintiffs also argue that the trial court abused its discretion when it awarded $70 in paralegal fees. We disagree.

MCR 2.626 provides:

> An award of attorney fees may include an award for the time and labor of any legal assistant who contributed nonclerical, legal support under the supervision of an attorney, provided the legal assistant meets the criteria set forth in Article 1, § 6 of the Bylaws of the State Bar of Michigan.

The paralegal meets the requirements of Article 1, § 6; she has an associate's degree and over seven years of experience as a paralegal. The billing invoice indicated that she performed non-clerical work that included a telephone conference with an expert witness and review and analysis of the file—work that would otherwise, in the absence of the paralegal, be performed by an attorney. The trial court did not abuse its discretion when it awarded Grange's request for paralegal fees.

Affirmed in part and reversed in part. We do not retain jurisdiction.

/s/ Alton T. Davis
/s/ Bill Schuette
/s/ Stephen L. Borrello