STATE OF MICHIGAN

COURT OF APPEALS

WILLIE ROBERTSON and PICCOLO ROBERTSON, Plaintiffs-Appellees, v ALLSTATE INSURANCE COMPANY, Defendant-Appellant.	UNPUBLISHED December 27, 2007 No. 274305 Wayne Circuit Court LC No. 06-615112-CK

Before: Saad, P.J., and Owens and Kelly, JJ.

PER CURIAM.

Defendant, Allstate Insurance Company, appeals a trial court order that denied, in part, its motion for summary disposition. For the reasons set for below, we reverse the trial court's denial of Allstate's motion for summary disposition.

II. Facts and Procedural History

This case arises out of an alleged theft of property from Willie and Piccolo Robertson's home in Detroit on July 19, 1999.[1] At the time of the property loss, Allstate had issued a homeowners insurance policy to plaintiff, Piccolo Robertson.[2] Plaintiff claims that Allstate wrongly refused to pay her benefits for the property loss.[3] The record shows that, after plaintiff reported the loss, Allstate claims representative, David Zimmer, wrote plaintiff a letter on August 30, 1999, and advised her that the terms of the policy require her, among other things, to submit a sworn proof of loss form within 60 days of the loss on July 19, 1999. Zimmer's letter indicates

[1] In the trial court, plaintiff claimed that break-ins occurred on several other occasions in 1998 and 1999, but the factual and legal issues raised on appeal relate only to whether plaintiff timely reported and adequately documented the loss she allegedly sustained on July 19, 1999.

[2] Though, in the trial court, the parties disputed whether the policy had lapsed when the theft occurred, neither party raises this issue on appeal.

[3] Because the policy was issued to Piccolo Robertson only, we refer to her as "plaintiff" throughout this opinion.

that he sent plaintiff a copy of the insurance policy and he set forth in his letter what steps plaintiff must take to make a claim for benefits. Zimmer's letter further states that he enclosed proof of loss forms and inventory loss forms with his correspondence. Zimmer also instructed plaintiff to send him a copy of the police report and to write down the items lost as well as a complete description of each item including size, model, brand, age, location of purchase, and purchase price and to include any receipts she may have.

Zimmer sent plaintiff a certified letter on September 29, 1999, and advised her that she did not submit the requested documents within 60 days as required by the policy. He reiterated that plaintiff must comply with the terms of the policy and asked plaintiff to send the requested documents no later than October 19, 1999. Zimmer's letter also indicates that he, once again, sent the same proof of loss and inventory forms he enclosed in his previous correspondence. According to Zimmer's affidavit, plaintiff failed to submit her proof of loss forms by the extended deadline. Accordingly, Allstate scheduled plaintiff and her husband, Willie Robertson, for an examination under oath, as permitted by the policy. In his affidavit, Zimmer averred that the Robertsons failed to appear for three scheduled examinations.

On February 14, 2000, Zimmer sent plaintiff a letter formally denying her claim for benefits for the July 19, 1999 loss. Zimmer explained that Allstate scheduled plaintiff and her husband's examinations under oath for November 23, 1999, and asked them to bring documents. The Robertsons failed to appear or submit the documents, so Allstate rescheduled the examinations for December 9, 1999. Again, the Robertsons failed to appear and failed to send Allstate the requested documents and, again, Allstate rescheduled the examinations for January 5, 2000. According to Zimmer's letter and affidavit, the Robertsons failed to appear or submit their documents and Allstate decided to deny plaintiff's claim for benefits because she failed to cooperate with Allstate's investigation of her claim.

Plaintiff filed a complaint on May 3, 2000. The record does not contain a copy of the complaint or any motion documents, but it appears that plaintiff sought to recover benefits for the theft on July 19, 1999. The record contains a copy of an order entered by the trial court on July 5, 2001, in which it granted Allstate's motion for summary disposition and dismissed the case without prejudice. No record evidence establishes the grounds on which the trial court dismissed the case, but the order states that the Robertsons "must appear for and give an examination under oath pursuant to the Allstate Insurance Company Policy [p]rovisions." On March 9, 2004, approximately two years and eight months after the first case was dismissed, plaintiff filed another complaint. The record contains only a copy of an amended complaint signed by plaintiff's counsel on November 22, 2005. The complaint alleges that, "despite repeated demands and compliance with all terms and conditions of the policy, [Allstate] has failed, refused and neglected to pay [p]laintiffs for their losses." The record does not contain a copy of any motion documents submitted in that case. However, the parties agree that the trial court again dismissed the case without prejudice on April 28, 2006, because Willie Robertson was not available to appear for trial.[4]

[4] At the time, Mr. Robertson was confined to the Michigan Center for Forensic Psychiatry by a (continued…)

On May 26, 2006, plaintiff filed her complaint in this case. In the complaint, plaintiff alleged that, despite her compliance with the policy terms, Allstate refused to pay for her property losses. Plaintiff further asserted that Allstate failed to explain why it denied her claim for benefits and she also claimed that Allstate's conduct violates the Michigan Consumer Protection Act (MCPA).

Allstate filed a motion for summary disposition pursuant to MCR 2.116(C)(7), (8) and (10). Allstate argued that, under the terms of the homeowners insurance policy, any lawsuit must be brought within one year of the loss and plaintiff failed to do so. Allstate further asserted that plaintiff failed to comply with the policy terms and this justified Allstate's denial of her claim. With regard to plaintiff's claim under the MCPA, Allstate contended that plaintiff could not maintain a cause of action against an insurance company under the act. The trial court granted Allstate's motion on plaintiff's MCPA claim, but denied Allstate's motion on its remaining arguments.

II. Analysis

Allstate contends that the trial court erred when it denied its motion for summary disposition because plaintiff failed to file her complaint within the one-year limitations period set forth in the insurance policy.[5]

Plaintiff concedes that she did not timely file her complaint in this case, but she agrees with the trial court that the one-year limitations period was tolled. The trial court specifically ruled that the limitations period was equitably tolled after the court dismissed plaintiff's first

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judge in an unrelated criminal case.

[5] Allstate relied on MCR 2.116(C)(7) to support its argument that plaintiff's claim is barred by the one-year limitations period in the insurance policy. "This Court reviews the grant or denial of summary disposition de novo to determine if the moving party is entitled to judgment as a matter of law." *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Summary disposition is appropriate under MCR 2.116(C)(7) if a claim is barred by the statute of limitations:

> A defendant who files a motion for summary disposition under MCR 2.116(C)(7) may file supportive material such as affidavits, depositions, admissions, or other documentary evidence. MCR 2.116(G)(3); *Patterson v Kleiman*, 447 Mich 429, 432; 526 NW2d 879 (1994). If no such documentation is submitted, the court must review the plaintiff's complaint, accepting its well-pleaded allegations as true and construing them in a light most favorable to the plaintiff. *Ostroth v Warren Regency, GP, LLC*, 263 Mich App 1, 6; 687 NW2d 309 (2004). If the pleadings or other documentary evidence reveal that there is no genuine issue of material fact, the court must decide as a matter of law whether the claim is barred. *Holmes v Michigan Capital Med Ctr*, 242 Mich App 703, 706, 620 NW2d 319 (2000). [*Vance v Henry Ford Health System*, 272 Mich App 426, 429-430; 726 NW2d 78 (2006).]

complaint on July 5, 2001. The court opined that plaintiff's cause of action did not accrue until either Allstate or plaintiff refused to cooperate in conducting the examinations under oath. According to the trial court, there is an issue of fact for trial because plaintiff claims that Allstate refused to provide plaintiff with the opportunity to submit to an examination under oath, and Allstate claims that plaintiff failed to submit to an examination under oath.

We hold that the trial court erred when it ruled that the contractual limitations period was tolled during the gaps of time between plaintiff's complaints. While the trial court correctly noted that the first case was dismissed with the "proviso" that plaintiff and her husband submit to an examination under oath, the "proviso" did not change plaintiff's filing deadline under the insurance policy. The trial court's assertion is incorrect that plaintiff's "cause of action did not accrue until it was clear one or the other party refused to cooperate in the [exam.]" Rather, under the plain language of the contract, plaintiff's claim accrued when the theft occurred on July 19, 1999. Plaintiff had no legal or factual justification for waiting years to file her second and third complaints, even if she believed Allstate was uncooperative in setting up the examinations under oath; in the face of an unambiguous one-year statute of limitations, plaintiff should have refiled her lawsuit and dealt with Allstate through the litigation process.

Moreover, were we to accept the trial court's position that the claim accrued when it became clear that one party or the other would not cooperate with setting up the examinations under oath, the evidence submitted supports our conclusion that the trial court erred. In response to Allstate's motion for summary disposition, plaintiff attached a letter from her attorney dated October 22, 2003, two years and three months after the dismissal of the first case. The letter states that plaintiff's counsel received a letter from Allstate adjuster David Zimmer in June 2001 in which Zimmer stated that Allstate was waiting for plaintiff to submit her sworn proof of loss statements. The letter further acknowledges that Allstate wanted plaintiff and her husband to submit to an examination under oath. Plaintiff counsel's letter states:

> It is my understanding that a Motion for Summary Judgment was granted in this matter for the reasons that our clients did not follow the appropriate procedure of filing a Sworn Statement. After reviewing the file it is also my understanding that you/Allstate Insurance Company was [sic] going to forward to our office a Sworn Statement Loss Form which our clients were to fill out and you wanted to take a Sworn Statement of our clients. To date that has not been done. At this time I am requesting that you forward the aforementioned document and set a date and time in which to take a Sworn Statement of our clients claim for loss.

Plaintiff incorrectly claims that this letter shows that Allstate failed to cooperate in setting up their examinations under oath. Not only does evidence establish that Allstate repeatedly set up examinations before it denied her claim, the letter shows that, for two years and four months, plaintiff failed to respond to Allstate's reiterated request for documents and failed to respond to Allstate's repeated wish to set up an examination under oath. Indeed, the letter reveals that plaintiff took no action to set up an exam or to submit the appropriate claims documentation for well over two years after the first case was dismissed. Instead, it shows that plaintiff allowed the limitations period to lapse and simply failed to act. In contrast, no evidence shows that Allstate failed to cooperate or otherwise interfered with any attempts by plaintiff to establish her claim.

Plaintiff's mere assertion that Allstate failed to cooperate is insufficient to justify her failure to timely file her lawsuits.

We also reject plaintiff's assertion that equitable tolling is appropriate on the grounds that Allstate acted fraudulently.[6] According to plaintiff, Allstate wrongly asserted that she failed to submit a sworn proof of loss and this somehow contributed to the delay in filing her complaints. The problem with plaintiff's position is that no evidence shows that she ever submitted a sworn proof of loss. The only evidence that remotely suggests that plaintiff sent any documents to Allstate is a letter dated August 27, 2004, in which plaintiff's counsel asserts that he enclosed property loss forms, receipts and police reports from the break-ins. Not only was this letter sent more than three years after the first lawsuit was dismissed, the letter does not indicate that plaintiff actually executed or sent a signed, sworn statement including the required information set forth in the policy. Further, though plaintiff and her husband submitted affidavits in which they stated that they sent personal loss documentation and receipts to Allstate, the affidavits were signed in September 2006, and they do not indicate that the Robertsons submitted signed, sworn statements including the information required by the policy. Plaintiff also attached two lists of miscellaneous property to her response to Allstate's motion for summary disposition. However, the lists are not dated, signed, or sworn. Accordingly, plaintiff failed to create an issue of fact to show that Allstate made any misrepresentation about her submission of a sworn proof of loss or that the alleged misrepresentation caused plaintiff to delay filing her complaints.

For the same reasons, we agree with Allstate that the trial court erred when it ruled that there is an issue of fact about whether plaintiff submitted a sworn proof of loss to Allstate. The homeowners policy states that plaintiff was required to submit a sworn proof of loss within 60 days after the property loss. With its motion for summary disposition, Allstate submitted letters from its adjuster, David Zimmer, to plaintiff stating that, despite numerous extensions of time, plaintiff repeatedly failed to submit her sworn proof of loss. The letters indicate that Zimmer sent plaintiff a copy of her insurance policy, loss forms, as well Zimmer's description of what information was needed to satisfy the proof of loss requirements of the policy. Allstate also submitted Zimmer's affidavit in which he reiterated that plaintiff did not submit a sworn proof of loss within 60 days of the alleged robbery, nor when he extended the deadline. The final denial of claim letter further informed plaintiff that Allstate could not investigate her claim because she failed to submit the documents required under the homeowners policy.

As noted, in response to Allstate's motion, plaintiff and her husband submitted their own affidavits in which they each stated that they "suffered all of the alleged losses contained in the receipts and personal loss documentation supplied to Allstate . . . ." However, the affidavits fail

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[6] To establish fraud, a party must show: "(1) the defendant made a material representation; (2) the representation was false; (3) when the defendant made the representation, the defendant knew that it was false, or made it recklessly, without knowledge of its truth and as a positive assertion; (4) the defendant made the representation with the intention that the plaintiff would act upon it; (5) the plaintiff acted in reliance upon it; and (6) the plaintiff suffered damage." *Belle Isle Grill Corp v Detroit*, 256 Mich App 463, 477; 666 NW2d 271 (2003), quoting *M & D, Inc v McConkey*, 226 Mich App 801, 806; 573 NW2d 281 (1997).

to establish when plaintiff submitted the documentation or whether it was within the period mandated by the policy. The affidavits also fail to indicate whether the documentation included a signed, sworn proof of loss with the information described in the policy. And, as noted, the lists of property plaintiff attached to her response brief give no indication of when or if they were sent to Allstate, the lists do not set forth the information outlined in the policy, and they are not signed or sworn as required by the contract. Further, while plaintiff repeatedly claims that she submitted documentation of her loss, she never specifically claims that she submitted a *signed and sworn* proof of loss *within 60 days of the loss*. For these reasons, the trial court erred when it ruled that there is an issue of fact about whether plaintiff timely filed a sworn proof of loss.

The trial court also ruled, however, that plaintiff's failure to timely file a sworn proof of loss does not preclude her claim because Allstate failed to show that it was prejudiced by the failure. However, the cases cited by the trial court to support its holding are inapposite. Both *Koski v Allstate Ins Co*, 456 Mich 439; 572 NW2d 636 (1998) and *Kermans v Pendleton*, 62 Mich App 576; 233 NW2d 658 (1975) involved a notice of suit provision without a specific time limit. As this Court explained in *Kermans, supra* at 581-582:

> Mere delay in giving the required notice does not result in a forfeiture since such provisions have been interpreted to require notice within a reasonable time. Prejudice to the insurer is a material element to be considered in determining whether notice is reasonably given, and the insurer has the burden to demonstrate such prejudice. [Citations omitted.[7]]

Here, the sworn proof of loss provision required plaintiff to file her documents within 60 days. Our case law states that, regardless of prejudice, the failure to timely submit a sworn proof of loss acts as a bar to recovery if a specific deadline is set forth in the policy. *Dellar v Frankenmuth Mut Ins*, 173 Mich App 138, 145; 433 NW2d 380 (1989); *Reynolds v Allstate Ins Co*, 123 Mich App 488, 332 NW2d 583 (1983).[8]

Moreover, if Allstate were required to establish prejudice, the unfairness to Allstate is apparent from the record. Allstate had no way to timely investigate or verify plaintiff's insurance claim without some information regarding what property was stolen or damaged.

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[7] It appears from the trial court's order that, although the substantive claims involve the loss on July 19, 1999, the court treated plaintiff's alleged property losses from July 23, 1999 and October 27, 1999 as viable claims. However, it is undisputed that Allstate did not receive notice of those claims until years after the alleged thefts occurred. Plaintiff's lack of notice was patently unreasonable under our case law and, therefore, we reject any suggestion that plaintiff may recover for these subsequent losses.

[8] An exception may apply if the insured establishes waiver or estoppel, but plaintiff does not raise those claims here. Regardless, plaintiff has not established waiver or estoppel because no evidence shows that (1) plaintiff timely filed something that could be construed as the functional equivalent of a proof of loss, (2) plaintiff did not have a copy of her insurance policy or lacked information about what documentation Allstate needed, or (3) plaintiff was taking other steps to establish her claim.

Further, plaintiff later wanted to claim property losses on multiple other occasions and, without some timely sense of what losses occurred on the date in question, July 19, 1999, Allstate would have no way to examine or sort out each claim. Moreover, though the trial court ruled that Allstate failed to mention plaintiff's failure to submit her proof of loss documents in its denial letter and that this shows a lack of prejudice, we disagree. Zimmer specifically cited plaintiff's failure to cooperate with the investigation and her failure to submit proper documentation as a reason for the denial.

For these reasons, the trial court should have granted Allstate's motion for summary disposition.[9] The trial court's denial of Allstate's motion for summary disposition is, therefore, reversed.

/s/ Henry William Saad
/s/ Donald S. Owens
/s/ Kirsten Frank Kelly

[9] Because, for the reasons stated, we hold that the trial court should have granted summary disposition to Allstate, we need not address Allstate's remaining ground for reversal.