STATE OF MICHIGAN

COURT OF APPEALS

KANDASHA ANN GLENN,

Plaintiff-Appellant,

v

FIRST AMERICAN TITLE INSURANCE COMPANY,

Defendant-Appellee.

UNPUBLISHED
June 25, 2009

No. 285669
Oakland Circuit Court
LC No. 2007-084867-CK

Before: Owens, P.J., and Servitto and Gleicher, JJ.

PER CURIAM.

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

On or around October 20, 2006, plaintiff purchased a home located in the City of Pontiac ("Property"). At that time, plaintiff obtained a policy of title insurance on the Property issued by defendant in the amount of $31,500 ("Policy"). The Policy set forth a list of 29 covered risks and also several exclusions and conditions that limit the insurance coverage.

Plaintiff claims that, with no notice to her, approximately one week after purchasing the Property, the home was demolished pursuant to a demolition order issued by the City of Pontiac. Plaintiff then discovered that the Property had been listed on Pontiac's condemnation list, filed at the Building and Safety Department, since October 2005.

In January 2007, plaintiff tendered a claim under the Policy to defendant in the amount of $36,905.41. Plaintiff then commenced this lawsuit claiming breach of contract, breach of implied contract and negligence. The trial court granted defendant's motion for summary disposition and dismissed the case. The trial court found that the condemnation notice is not a "public record" as defined by the Policy, thus excluding plaintiff's claim from coverage. The trial court also found that the complaint failed to state a claim for implied contract and negligence.

On appeal, plaintiff first argues that the Policy exclusion that precluded recovery for any losses incurred through proper exercise of the government's police power is inapplicable because the notice of condemnation appeared in the public records at the policy date. Specifically,

plaintiff contends that "public records" consist of records beyond those found in the register of deeds and that the notice of condemnation was a public record since it was on file with the City of Pontiac's condemnation records when the policy was issued. Plaintiff further alleges that the second contractual exclusion, which precludes coverage for losses due to the existing structures not being constructed in accordance with applicable building codes, is inapplicable for the same reason.

This Court reviews a trial court's decision on a motion for summary disposition under the de novo standard of review. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). The proper interpretation of a contract, such as an insurance policy, is a question of law and likewise subject to review de novo on appeal. *Archambo v Lawyers Title Ins Corp*, 466 Mich 402, 408; 646 NW2d 170 (2002).

MCR 2.116(C)(10) provides for summary disposition when there is no genuine issue about 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 affidavits or other documentary evidence show that there is no genuine issue with respect to any material fact and that the moving party is entitled to judgment as a matter of law. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). In addition, all affidavits, pleadings, depositions, admissions, and other documentary evidence filed in the action or submitted by the parties are viewed in a light most favorable to the party opposing the motion.

> 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 pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists. . . . If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. [*Id*. at 362-363 (citations omitted).]

"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 General Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of a claim on the pleadings alone. *Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817 (1999). "All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant." *Id* at 119. The motion "may be granted only where the claims alleged are 'so clearly unenforceable as a matter of law that no factual development could possibly justify recovery.'" *Id.*, quoting *Wade v Dep't of Corrections*, 439 Mich 158, 163; 483 NW2d 26 (1992).

An insured's claims are lost if any exclusion in the insurance policy applies. *Hayley v Allstate Ins Co*, 262 Mich App 571, 574; 686 NW2d 273 (2005). Hence, exclusionary clauses in insurance policies shall be strictly construed in favor of the insured. *Id.* But a court must enforce an insurance contract in accordance with its terms to avoid holding an insurance company liable for a risk it did not assume. *Henderson v State Farm Fire & Casualty Co*, 460 Mich 348, 354; 596 NW2d 190 (1999). Therefore, when an exclusion in an insurance policy is clear and specific, the exclusion must be enforced. *Hayley, supra* at 574. Further, when

reviewing an exclusionary clause, the court should read the contract as a whole to effectuate the overall intent of the parties. *Id.* at 575.

Here, the trial court ruled that coverage was excluded because the police power exclusion in the Policy applied to plaintiff's claims. That exclusion provides:

> In addition to the exceptions in Schedule B, you are not insured against loss, costs, attorney's fees and expenses resulting from: Governmental police power, and the existence or violation of any law or government regulation. This includes ordinances, laws and regulations concerning:
>
> a. building;
> b. zoning;
> c. land use;
> d. improvements on the Land;
> e. land division;
> f. environmental protection.
>
> This Exclusion does not apply to violations or the enforcement of these matters if notice of the violation or enforcement appears on Public Records at the Policy Date.

The Policy defines "public records" as "records that give constructive notice of matters affecting Your Title, according to the state statutes where you land is located." "Title" is defined as "the ownership of Your Interest in the Land." This Policy language is unambiguous: Public records are those records that give notice to matters affecting title under state law. Further, in Michigan, the Legislature has determined that the office of the county Register of Deeds is the proper place to record documents that give constructive notice of matters affecting title to real property. MCL 565.25 and 565.29.

As the trial court correctly noted, "drain commissioner records and circuit court judgments are public records in the colloquial sense, [but] they are not public records as defined by the title insurance policy." Similarly, records of the condemnation proceedings are available to the public but are not "public records" pursuant to the Policy as they do not relate to title to the Property and are not filed in the office of the county Register of Deeds. Therefore, because the facts related to the application of the exclusions are not disputed, summary disposition was properly granted in favor of defendant.[1]

[1] The trial court, having found that defendant was entitled to summary disposition based on the first exclusion, declined to address the second exclusion. We too find it unnecessary to determine whether summary disposition was appropriate based on the second exclusion given our holding that defendant was entitled to summary disposition for reason of the first exclusion.

Next, plaintiff argues that defendant was negligent because it had a duty to properly investigate the Property and to represent to her the outcome of that investigation, and that defendant breached this duty by failing to properly investigate the Property.

A plaintiff cannot maintain an action in tort for nonperformance of a contract. *Casey v Auto-Owners Ins. Co*, 273 Mich App 388, 401; 729 NW2d 277 (2006). To pursue a tort action arising out of a contract, a threshold question must be satisfied: Whether the defendant owed a duty to the plaintiff that was separate and distinct from the obligations contained in the contract. *Fultz v Union-Commerce Assoc*, 470 Mich 460, 467; 683 NW2d 587 (2004). The failure to properly perform a contractual duty does not give rise to an action in negligence unless the plaintiff alleges a violation of a duty separate and distinct from the duty imposed under the contract. *Id.* "If no independent duty exists, no tort action based on a contract will lie." *Id.*

In the present case, a review of the pleaded allegations reveals that the claim of negligence is premised on the failure to discover and/or disclose the condemnation notice. However, defendant's duty to provide title insurance and perform a title search was purely contractual. Plaintiff's negligence claim does not seek to enforce a duty separate and distinct from the parties' agreement. Accordingly, the trial court properly granted summary disposition of the negligence claim. *Fultz, supra.*

Finally, plaintiff alleges that defendant breached its implied contract of good faith because she had a legitimate expectation that defendant would treat her at arms length and would properly investigate the Property and would not misrepresent the condition of the Property.

Plaintiff did not allege that defendant breached a covenant of good faith and fair dealing in her complaint. Appellate review is generally limited to issues decided by the trial court. *Candelaria v B C Gen Contractors, Inc*, 236 Mich App 67, 83; 600 NW2d 348 (1999). Accordingly, the issue was not properly presented to the trial court for consideration and was not properly preserved for appeal.

A contract will be implied only if there is no express contract covering the same subject matter between the same parties. *Hudson v Mathers*, ___ Mich App ___; ___ NW2d ___ (Docket No. 280396, released March 19, 2009), slip op, p 4; *Liggett Restaurant Group, Inc v City of Pontiac*, 260 Mich App 127, 137; 676 NW2d 633 (2003); *Belle Isle Grill Corp v Detroit*, 256 Mich App 463, 478; 666 NW2d 271 (2003). In the instant case, it is not disputed that the Policy is a written, express contract. Further, the Policy covers the same subject matter as plaintiff's implied contract claim. Thus, plaintiff cannot assert a claim based on an implied contract. Summary disposition was properly granted to defendant.

Affirmed.

/s/ Donald S. Owens
/s/ Deborah A. Servitto
/s/ Elizabeth L. Gleicher