STATE OF MICHIGAN

COURT OF APPEALS

GENERAL STAR NATIONAL INSURANCE COMPANY,

Plaintiff-Appellee/Cross-Appellee,

v

JAMES BOUDREAU and STATE APPRAISALS, INC.,

Defendants-Cross-Appellants,

and

FIFTH THIRD MORTGAGE-MI, L.L.C., FIFTH THIRD MORTGAGE COMPANY, and FIFTH THIRD BANK,

Defendants-Appellants,

and

AMERICAN HOME MORTGAGE ACCEPTANCE, INC., and FLAGSTAR BANK FSB,

Defendants

UNPUBLISHED
January 14, 2010

No. 287456
Oakland Circuit Court
LC No. 2006-079640-CZ

Before: Davis, P.J., and Fort Hood and Servitto, JJ.

PER CURIAM.

Defendants-appellants, Fifth Third Mortgage-MI L.L.C., Fifth Third Mortgage Company, and Fifth Third Bank (referred to collectively as "the Fifth Third defendants"), joined in their arguments by defendants/cross-appellants, James Boudreau ("defendant Boudreau"), and his company, State Appraisals, Inc. ("defendant State Appraisals") (collectively "the Boudreau

defendants"), appeal as of right an order granting plaintiff-appellee/cross-appellee General Star National Insurance Company's motion to amend judgment.[1] We affirm.

Defendants first argue that the trial court erred in granting plaintiff's motion for summary disposition because, in three separate Real Estate Appraisers Errors and Omissions Insurance Applications (referred to as "the 2004-05 application," "the 2005-06 application" and "the 2006-07 application"), question three[2] was limited to appraisal activities conducted within the last five years, as opposed to discipline received in the last five years, and regardless, any ambiguity should be construed against plaintiff. Defendants further assert that measuring the time between making the application and the date of the appraisal also comports with the type of risk to be measured because a claims-made policy insures against claims *made* during the policy term, not accrued during the policy term, and therefore, the appraisal date is the significant date. We disagree.

"This Court reviews de novo a trial court's decision on a motion for summary disposition." *Allen v Bloomfield Hills Sch Dist*, 281 Mich App 49, 52; 760 NW2d 811 (2008). A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). This Court reviews "a motion brought under MCR 2.116(C)(10) by considering the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party." *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). Summary disposition "is appropriate if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Id*. "There is a genuine issue of material fact when reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving party." *Allison v AEW Capital Mgmt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008).

This case involves the interpretation of an insurance contract, which is a question of law subject to de novo review. *Twichel v MIC Gen Ins Corp*, 469 Mich 524, 534; 676 NW2d 616 (2004). "Because insurance policies are contractual agreements, they are subject to the same rules of contract interpretation that apply to contracts in general . . . . An insurance policy is read as a whole, and meaning should be attributed to all terms. The contractual language is to be given its ordinary and plain meaning." *Sherman-Nadiv v Farm Bureau Gen Ins Co*, 282 Mich App 75, 78; 761 NW2d 872 (2008).

"If the language is clear and unambiguous, the insurance policy must be enforced as written." *Brown v Farm Bureau Gen Ins Co*, 273 Mich App 658, 662; 730 NW2d 518 (2007). "A provision in a contract is ambiguous if it irreconcilably conflicts with another provision, or

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[1] The original order, entered on March 19, 2008, granted plaintiff's motion for summary disposition and denied the Boudreau defendants' motion for partial summary disposition.

[2] The question stated: "The applicant has not been disciplined by any state licensing board or other regulatory agency as a result of appraisal activities within the past 5 years." The applicant was to answer true or false.

when it is equally susceptible to more than a single meaning." *Royal Prop Group, LLC v Prime Ins Syndicate, Inc*, 267 Mich App 708, 715; 706 NW2d 426 (2005). While this Court construes "the contract in favor of the insured if an ambiguity is found, this does not mean that the plain meaning of a word or phrase should be perverted, or that a word or phrase, the meaning of which is specific and well recognized, should be given some alien construction merely for the purpose of benefiting an insured." *Citizens Ins Co v Pro-Seal Serv Group, Inc*, 477 Mich 75, 83; 730 NW2d 682 (2007), quoting *Henderson v State Farm Fire & Cas Co*, 460 Mich 348, 354; 596 NW2d 190 (1999). "Whether a contract is ambiguous is a question of law." *Coates v Bastian Bros, Inc*, 276 Mich App 498, 504; 741 NW2d 539 (2007).

As noted, defendants contend that the phrase "within the past 5 years" in question three modifies the noun phrase "appraisal activities" not the verb phrase "not been disciplined," in accordance with the "last antecedent rule." "The 'last antecedent' rule of statutory construction provides that a modifying or restrictive word or clause contained in a statute is confined solely to the immediately preceding clause or last antecedent, *unless something in the statute requires a different interpretation*." *Stanton v City of Battle Creek*, 466 Mich 611, 616; 647 NW2d 508 (2002) (emphasis added). Although this rule applies to statues, we observe that, strictly going by the structure of question three, defendants' argument is plausible. However, it is equally plausible that "disciplined . . . as a result of appraisal activities" should be read as a single, undivided phrase, which is then modified in its entirety by the phrase "within the past 5 years." The structure of question three, by itself, supports either plaintiff's or defendants' constructions.

It is the last part of the rule that ultimately undermines defendants' argument. Again, "the last antecedent rule does not apply if something in the statute's subject matter or dominant purpose requires a different interpretation." *Cameron v Auto Club Ins Ass'n*, 476 Mich 55, 72; 718 NW2d 784 (2006). Further, "[i]n interpreting contracts capable of two different constructions, we prefer a reasonable and fair construction over a less just and less reasonable construction." *Schroeder v Terra Energy*, 223 Mich App 176, 189; 565 NW2d 887 (1997). Looking at all of the questions together, it is clear that plaintiff's interpretation is more fair and reasonable because plaintiff's overall goal in asking the questions is to assess the risk. As plaintiff argues, the reference in question three to "appraisal activities" is to narrow the focus of the question – plaintiff is concerned only with discipline related to real estate appraisal work because such discipline is relevant to whether a real estate appraiser presents an acceptable underwriting risk. As plaintiff further argues, using defendants' interpretation means that an appraiser who is disciplined more than five years after he completed an erroneous appraisal will never be obligated to reveal the discipline imposed or answer "false" in response to question three.

Finally, although defendants argue that the fact that the policies were "claims made" policies supports their position, all three policies contain a prior acts provision, stating that the insurance does not apply "to any regular act, error, omission, or personal injury which occurred before" March 31, 2003. Therefore, while it may have been awkwardly worded[3], question three

[3] In fact question four has a similar awkward structure: "there have been no claims reported and/or pending which could result in a claim again the applicant within the past 5 years." Using
(continued…)

was not ambiguous in context, and its purpose was to determine whether defendant Boudreau had been disciplined in the past five years as a result of appraisal activities. Thus, because defendant was disciplined on December 27, 2001, his representations, stating that he had not been disciplined within the past five years, were false, because he made them on March 15, 2004, January 15, 2005, and December 3, 2005, respectively.

Even if we agreed with defendants and considered February 21, 2000 (the date of the appraisal) as the starting date of the five-year period, the March 15, 2004, and January 15, 2005, representations are still false[4], because we do not accept defendants' additional contention that the date on which defendant Boudreau *transmitted* the applications, rather than the date on which he *signed* the applications, is the appropriate date to deem the representation made. Defendants attempt to further support their position by arguing that the law does not allow remedies for misrepresentation unless a party relied on a representation, and therefore, plaintiff could not rely on Defendant Boudreau's representations until the transmissions dates, which were March 16, 2004, February 22, 2005, and February 6, 2006. We disagree.

Defendants cite no case law for the proposition that the transmittal date rather than the signing date is the appropriate date for this Court to consider. "A party may not leave it to this Court to search for authority to sustain or reject its position." *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 14; 672 NW2d 351 (2003). Regardless, by the plain language of the applications, defendant Boudreau was stating that, as of the date he signed them, the answers to questions one through four were "true." Even if plaintiff did not receive the applications until days or months after defendant Boudreau signed them, the applications still represented that the answers to the questions were "true" as of the date signed.

Although defendant cites various dictionary definitions of "representation" and "presentation," "[a] 'representation,' . . . is statutorily defined as a 'statement as to past or present fact, made to the insurer by or by the authority of the applicant for insurance or the prospective insured, *at or before the making of the insurance contract* as an inducement to the making thereof.'" *Oade v Jackson Nat'l Life Ins Co*, 465 Mich 244, 252; 632 NW2d 126 (2001) (emphasis added). Thus, "[a]n insurer's evaluation of the likelihood of a factor increasing the risk of loss affects its decision to enter into a contract. A misrepresentation on an insurance application is material if, given the correct information, the insurer would have rejected the risk or charged an increased premium." *Montgomery v Fid & Guar Life Ins Co*, 269 Mich App 126, 129; 713 NW2d 801 (2005). "It is the well-settled law of this state that where an insured makes a material misrepresentation in the application for insurance, . . . the insurer is entitled to rescind the policy and declare it void ab initio. Rescission is justified without regard to the intentional nature of the misrepresentation, as long as it is relied upon by the insurer. Reliance may exist when the misrepresentation relates to the insurer's guidelines for determining eligibility for coverage." *Lake States Ins Co v Wilson*, 231 Mich App 327, 331; 586 NW2d 113 (1998). In this

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defendant's construction, this question would be asking whether any circumstances "could result" (implying a future event) in a claim "within the past 5 years," which is illogical.

[4] In addition, as will be discussed, defendant failed to update his answer to question four on the 2006-07 application, resulting in a misrepresentation on that application as well.

case, by the plain language of the application, if defendant has answered false to any of the questions, he was not eligible for the policy, and therefore, it is evident that plaintiff relied on the applications and the misrepresentations therein.

Finally, defendants advance a rather convoluted argument regarding the 2006-07 application, in which defendant Boudreau answered "true" to question four: "There have been no claims reported and/or pending circumstances which could result in a claim against the applicant within the past five years." Plaintiff's position is that, while this representation was true when defendant Boudreau signed the application on February 6, 2006, it became false before plaintiff issued the 2006-07 policy on March 21, 2006, and therefore, defendant Boudreau had a duty to update his representations. Defendants argue that, even if defendant Boudreau did have a duty to update[5], it is immaterial because, pursuant to the Michigan Amendatory Endorsement on the back of the 2005-06 policy, plaintiff had to give 45 days notice if it decided not to renew the policy. The 2005-06 policy expired on March 31, 2006, and 45 days before then was February 14, 2006. According to defendants, because plaintiff failed to give notice of nonrenewal, the 2005-06 policy was then automatically renewed on February 14, 2006. Thus, defendants conclude that if the court rescinds the 2006-07 policy, the parties are returned to the same position where they would have been: the second year policy is extended to cover the third year anyway. We are not persuaded by this argument.

It is true, as defendants point out, that "Section J. Nonrenewal" of the Michigan Amendatory Endorsement at the back of the 2005-06 policy states: "If the company decides not to renew this policy, forty-five days advance written notice shall be mailed or delivered to the named insured at the address shown in this policy. The notice shall include the reason for such nonrenewal." Nevertheless, as plaintiff points out, defendants' argument is flawed because all three contracts are void ab initio, and therefore, there is nothing to extend from one year to another. Further, even if this Court were to find that the second year policy is not void, it is still true that plaintiff could not have issued a nonrenewal notice based on a misrepresentation it did not know about.

Furthermore, the issue is not nonrenewal, but *cancellation*, which was allowable for "any material misrepresentation or non-disclosure or any fact which if known would affect insurability or cause this policy not to be issued by or with the knowledge of the Named Insured, or the Named Insured's Representatives." Section I(6)(b). Cancellation for any reason other than nonpayment of premiums required 30 days written notice. Section I(1)(b)(2). Thus, even if the 2005-06 policy automatically extended, it could still be canceled upon discovery of the misrepresentation. Therefore, for all of these reasons, the trial court did not err in granting plaintiff's motion for summary disposition and denying the Boudreau defendants' motion for partial summary disposition.

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[5] The trial court agreed with plaintiff that defendant Boudreau had a duty to update the answer to question four, and defendants seem to concede this point on appeal because they cite no contrary case law, but rather, they advance their "failure-to-give-notice-of-nonrenewal" argument. Moreover, at the motion hearing, the attorney for the Boudreau defendants conceded that under the law, defendants had a duty to update the application.

Defendants next argue that the affidavit of Betsey A. Magnuson, president of Herbert H. Landy Insurance Agency, plaintiff's underwriter, did not comply with Michigan law because it was not acknowledged nor sworn to before a notary, and therefore, the affidavit was incompetent for consideration by the trial court. According to defendants, without Magnuson's affidavit, there is no admissible evidence regarding plaintiff's reliance on the information contained in the applications and its subsequent decisions to issue the policies. We agree that the affidavit was invalid, however, the affidavit was not necessary for the trial court's decision, and therefore, defendants were not prejudiced.

MCR 2.116(G)(6) provides: "Affidavits, depositions, admissions, and documentary evidence offered in support of or in opposition to a motion based on subrule (C)(1)-(7) or (10) shall only be considered to the extent that the content or substance would be admissible as evidence to establish or deny the grounds stated in the motion." "For a document to constitute a 'valid affidavit,' it must be: '(1) a written or printed declaration or statement of facts, (2) made voluntarily, and (3) confirmed by the oath or affirmation of the party making it, taken before a person having authority to administer such oath or affirmation.' Thus, . . . a document that is not notarized is not a 'valid affidavit.'" *Detroit Leasing Co v City of Detroit*, 269 Mich App 233, 237; 713 NW2d 269 (2005), quoting *Holmes v Michigan Capital Medical Center*, 242 Mich App 703, 711; 620 NW2d 319 (2000). Out-of-state affidavits must also be taken before a notary or other individual authorized to administer oaths. See MCL 600.2102(4), MCL 565.262(a). Thus, it is clear that, lacking notarization, Magnuson's affidavit was not valid and should not have been considered by the trial court.

Nonetheless, where affidavits considered in determining a motion for summary disposition violate the court rules, there must be a showing of prejudice due to the noncompliance or any error is harmless. *Hubka v Pennfield Twp*, 197 Mich App 117, 119-120; 494 NW2d 800 (1992), rev'd on other grounds 443 Mich 864 (1993). As plaintiff points out, the words of the applications themselves plainly state that the answers to questions one through four determined whether a policy would be issued, that is, "for you to be eligible for this program, the response to questions 1-4 below must all be 'true." Further, defendant Boudreau signed an attestation clause, which noted that: "IT IS AGREED THAT THIS FORM SHALL BE THE BASIS OF THE CONTRACT. SHOULD A POLICY BE ISSUED IT WILL ATTACH TO THE POLICY . . . . I declare that the information submitted herein is true to the best of my knowledge and becomes a part of my Professional Liability application. I understand that an incorrect or incomplete statement could void my protection." (Emphasis in original.) As discussed above in Issue I, "[a] misrepresentation on an insurance application is material if, given the correct information, the insurer would have rejected the risk or charged an increased premium." *Montgomery*, 269 Mich App at 129. In this case, by the plain language of the application, if defendant had answered false to any of the questions, he would not be eligible for the policy, and therefore, if he made a false statement, the policy could be voided. Therefore, it is evident that plaintiff relied on the application process to decide whether to issue a policy and Magnuson's affidavit was not necessary to prove this point.

Finally, defendants argue that the policies should not be voided ab initio as they relate to the Fifth Third defendants because these defendants are innocent third parties who relied upon the policies. Defendants further assert that because plaintiff could have easily verified the veracity of defendant Boudreau's statements regarding his disciplinary history by going on the

Department of Labor and Economic Growth's web site, plaintiff should be estopped from now attempting to rely on defendant Boudreau's alleged misrepresentations in seeking rescission. We disagree.

"The 'innocent third party' rule prohibits an insurer from rescinding an insurance policy because of a material misrepresentation made in an application for no-fault insurance where there is a claim involving an innocent third party." *Sisk-Rathburn v Farm Bureau Gen Ins Co*, 279 Mich App 425, 430; 760 NW2d 878 (2008). Defendants acknowledge that this rule applies only in the context of no-fault automobile insurance, but argue that it should be extended to situations such as the case at bar on public policy grounds. We decline the invitation to extend the rule, finding that that protecting mortgage lenders from financial harm does not rise to the same level of pressing public policy concerns as protecting members of the general public from injuries inflicted by uninsured motorists. Thus, plaintiff is entitled to rescind its insurance policies based on the material misrepresentations therein. *Lake States*, 231 Mich App at 331.

Defendants' estoppel argument is also unpersuasive because "an insurer does not owe a duty to the insured to investigate or verify a policy applicant's representations or to discover intentional material misrepresentations." *Manier v MIC Gen Ins Corp*, 281 Mich App 485, 490; 760 NW2d 293 (2008). Even if plaintiff had such a duty, defendant Boudreau himself claimed, in his answer to plaintiff's complaint and at his deposition, that he was unable to locate his disciplinary history online at the time he filled out the 2004-05 application, and therefore, he cannot now assert that such information was readily available at the relevant time.

Affirmed.

/s/ Alton T. Davis
/s/ Karen M. Fort Hood
/s/ Deborah A. Servitto