STATE OF MICHIGAN

COURT OF APPEALS

ROSE AREVALO,

Plaintiff-Appellant,

V

AUTO CLUB INSURANCE ASSOCIATION,

Defendant-Appellee.

UNPUBLISHED
May 18, 2010

No. 289863
Wayne Circuit Court
LC No. 07-725592-NF

Before: MURPHY, C.J., and K.F. KELLY and STEPHENS, JJ.

PER CURIAM.

Following a hearing on cross-motions for summary disposition, the trial court issued an order granting defendant's motion. Plaintiff appeals as of right. We reverse and remand.

Plaintiff's 2005 Cadillac Escalade was stolen from in front of her house. Defendant, who insured the vehicle, rescinded the policy after asserting that plaintiff falsely represented that she was the principal driver. Defendant maintains that plaintiff's son, Josue Garcia, was the principal driver.

Following the theft, plaintiff and Garcia each provided a sworn examination under oath (EUO). Plaintiff attested that she lent the car and her keys to Garcia but that he would have to first ask. She said she used to drive another car, acquired after the Escalade, "all the time" and that the Escalade would be at home when she did so. She negotiated the lease on the Escalade, registered it in her name and was responsible for its maintenance. She attributed excessive mileage on the car to driving around a lot, explaining that she usually drove the Escalade to work, 20 minutes away, drove her children back and forth, and did errands. She also said that someone might have taken the Escalade to Chicago once. Plaintiff explained that Garcia paid the monthly lease payment "[s]o that he could use it. He helped me with that." However, the vehicle payment was made by direct withdrawal from her bank account. Garcia continued to give plaintiff the money after the car was stolen. She paid for the insurance on the Escalade. She acknowledged that Garcia used the car for work when "I didn't need the car, because sometimes he would work at night, then I would let him use the car."

At her subsequent deposition, plaintiff testified that she was the principal driver of the Escalade but that Garcia used it from time to time. She testified that she took care of maintenance. Further, she denied a deal whereby Garcia would get the car and be responsible for payments while she would be responsible for the insurance.

In his EUO, Garcia indicated that both he and plaintiff would drive the Escalade, and that he was helping her pay for it and she was paying for the insurance. He said he sometimes gave her only $500, "[w]hatever I could give." He always had to ask permission to use the vehicle and noted there was only one set of keys. Explaining the high mileage, he indicated he used the vehicle for work and school, describing long work hours, and that "*we* were always in Detroit" because plaintiff owned houses there. Garcia said he had never purchased auto insurance himself given that it would have expensive based on his age. He said that in exchange for helping to pay for the vehicle, he "was going to be able to drive" it. Although he also used another vehicle, he said he usually used the Escalade.

In his subsequent deposition, Garcia said he was helping plaintiff financially, giving her about $500 to $600 a month for whatever she needed. He also said that plaintiff was to be the principal driver, and that he only occasionally used the vehicle for school and work. In his subsequent affidavit, he claimed he was given permission to use the Escalade "occasionally" and that he did not ever drive it on a regular basis. However, defendant established that Garcia was ticketed a number of times while driving the Escalade, and that he had an accident with the vehicle.

Since matters extraneous to the pleadings were considered, we will review this matter as if the motion were granted pursuant to MCR 2.116(C)(10). See *Lewis v LeGrow*, 258 Mich App 175, 192; 670 NW2d 675 (2003). Such a motion tests whether there is factual support for a claim and may be granted only when except as to the amount of damages, there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. The Court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted in a light most favorable to the nonmoving party. *Id.* Courts are not permitted to assess credibility. *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994). Moreover, courts are to be liberal in finding genuine issues of material fact. *Lash v Allstate Ins Co*, 210 Mich App 98, 101; 532 NW2d 869 (1995). "However, if, on the basis of the evidence presented, reasonable minds could not differ, then the motion for summary disposition should be granted." *Vermilya v Dunham*, 195 Mich App 79, 83; 489 NW2d 496 (1992).

Plaintiff argues that summary disposition should have been denied because there was an issue of fact regarding whether she was the *principal* driver of the vehicle. Defendant focuses on whether Josue was a *regular* driver of the vehicle, referencing the policy provision requiring that an insured provide updated information when someone becomes a regular operator. We note that defendant's letter rescinding the policy expressly said that rescission was based on the conclusion that Garcia was the "principal" driver. When a reason is given for denying insurance coverage, the insurer will sometimes be restricted from presenting an alternative theory to support the denial. Specifically, this Court has explained:

> "Waiver . . . is bottomed on the doctrine of estoppel." *Ruddock v Detroit Life Ins Co*, 209 Mich 638, 653; 177 NW 242 (1920). This Court has stated that, generally, "once an insurance company has denied coverage to an insured and stated its defenses, the company has waived or is estopped from raising new defenses." *Lee v Evergreen Regency Cooperative*, 151 Mich App 281, 285; 390 NW2d 183 (1986). The *Lee* Court indicated that the doctrine may not be used to broaden policy coverage to protect an insured against risks not included in the policy or expressly excluded from the policy. This restriction is based on the rule

that the insurer should not be required, through waiver and estoppel, to cover a loss for which no premium was charged. *Id.*

Exceptions to the general rule have been made in cases within two broad classes:

> The first class involves companies which have rejected claims of coverage and declined to defend their insured in the underlying litigation. In these instances, the Court has held that the insurance company cannot later raise issues that were or should have been raised in the underlying action. These cases are closely akin to the principle of collateral estoppel. . . .
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> The second class of cases . . . involves instances where the inequity of forcing the insurer to pay on a risk for which it never collected premiums is outweighed by the inequity suffered by the insured because of the insurance company's actions. The insurance company has either misrepresented the terms of the policy to the insured or defended the insured without reserving the right to deny coverage. ([*Lee*, 151 Mich App] at 286-287 (citations omitted).)

[*South Macomb Disposal Authority v American Ins Co (On Remand)*, 225 Mich App 635, 695-696; 572 NW2d 686 (1997).]

Here, the equities favor plaintiff. Regardless of whether plaintiff was a principal or a regular driver, defendant had assumed the risk of paying for a theft, a risk that is principally based upon the place where the car is garaged. Any inequity in requiring defendant to pay on the risk of theft for which it collected premiums is outweighed by the inequity suffered by plaintiff in losing the benefit of the insurance she paid for. In this regard, it is noted that defendant was not being asked to pay on a risk it did not assume.

Therefore, we focus on whether there is a material question of fact regarding who was the principal driver of the insured vehicle. We find that there is such a question and reverse the trial court's contrary determination. While there was conflicting testimony from the plaintiff, she never admitted that Garcia was the principal driver. She consistently testified that he and her other sons had to request permission to use the vehicle for which there was just one set of keys. While Garcia used the word "we" relative to who purchased and selected the automobile, he too stated that he had to request permission to drive the car. Garcia did testify that he made contributions toward the lease payments, and plaintiff said that Garcia was making payments so that he could use the car. However, she further said that Garcia continued to pay her the money after the car was stolen, which could support his claim that he was *generally* providing plaintiff with money and that the money was not specifically for the vehicle. The combined testimony could be construed to mean that he was paying the car payment as part of an agreement that he could use the car but not as part of an agreement that he was entitled to principal use. To the extent there were inconsistencies in plaintiff's testimony, they gave rise to a credibility issue that could not be determined on summary disposition.

Garcia's claim in his deposition that he only used the Escalade occasionally was contradicted by his EOU, as well as evidence regarding his tickets and accident. Moreover, his account of the extent of his use in the EOU was subsequently contradicted. An affidavit cannot be used to create an issue of fact where it contradicts prior sworn deposition testimony. *Casey v Auto-Owners Ins Co*, 273 Mich App 388, 396; 729 NW2d 277 (2006). The same principal would logically apply to the EOU and the use of a deposition or affidavit to contradict it. However, while this evidence may have supported the conclusion that he was a principal driver, the trier of fact would have to weigh his testimony against plaintiff's testimony. Given the need for this determination, there was a genuine issue of material fact regarding whether plaintiff was the *principal* driver of the Escalade.

Plaintiff also argues that defendant could not provide an application or any evidence to show a misrepresentation or concealed fact. Further, she asserts that even if there was a misrepresentation or a concealed fact, the contract provided no penalty.

The Conditions section of the insurance policy provides in pertinent part:

> 14. **CHANGE OF ADDRESS OR RATING CONDITIONS**
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> If the information used to develop the policy premium changes, **we** may adjust **your** premium during the policy term. The **Principal Named Insured** must inform us within 30 days of any changes related to the following:
>
> * * *
>
> d. the operators who regularly drive **YOUR CAR**, including newly licensed family members.
>
> * * *
>
> 16. **DECLARATIONS**
>
> By accepting this Policy the **Principal Named Insured** agrees that:
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> a. the statement on the Declaration Certificate and in the application for this Policy are his/her own; and
>
> b. this policy is issued in reliance upon the truth of those representations; and
>
> c. this policy form, the Declaration Certificate and any endorsements include all agreements existing between the **Principal Named Insured** and **us** or any of **our** agents relating to this insurance.
>
> * * *
>
> 20. **CONCEALMENT OR FRAUD**

> This entire Policy is void if any **insured person** has intentionally concealed or misrepresented any material fact or circumstance relating to:
>
> a. this insurance;
>
> b. the Application for it.

Curiously, nothing in the policy itself required plaintiff to indicate that Garcia was a regular or principal driver when plaintiff first secured the insurance policy on the Escalade. However, paragraph 16 states that the policy is issued in reliance on the truth of representations made in the application and on the declarations certificate. Although defendant could not provide an application, the declarations certificate identified plaintiff as the principal driver. Should the trier of fact conclude that Garcia was the principal driver, it must also determine, as a question of fact, whether this was an intentional misrepresentation.

Plaintiff argues that the policy does not provide any penalty for the failure to provide accurate information. However, in *Raska v Farm Bureau Mut Ins Co of MI*, 412 Mich 355, 362; 314 NW2d 440 (1982), the Court stated: "Yet if a contract, however inartfully worded or clumsily arranged, fairly admits of but one interpretation it may not be said to be ambiguous or, indeed, fatally unclear." An unambiguous contract must be enforced as written. *Henderson v State Farm Fire & Cas Co*, 460 Mich 348, 353-354; 596 NW2d 190 (1999). When this contract is read as a whole, it imposes a penalty for the failure to give accurate information. Paragraph 20, regarding concealment or fraud, is in the same "Conditions" section of the policy that requires truthful information. It provides that the contract may be voided for intentionally concealing or misrepresenting any material fact. Thus, if the trier of fact finds that Garcia was the principal driver, that plaintiff misrepresented that she was the principal driver, and that this was intentional, the unambiguous language in the policy would allow defendant to void it.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ Kirsten Frank Kelly
/s/ Cynthia Diane Stephens