STATE OF MICHIGAN

COURT OF APPEALS

EVANSTON INSURANCE COMPANY,

Plaintiff-Appellee,

v

DANIEL C. JOHNS,

Defendant-Appellant.

UNPUBLISHED
December 7, 2010

No. 293742
Oakland Circuit Court
LC No. 2009-097089-CK

Before: CAVANAGH, P.J., and HOEKSTRA and GLEICHER, JJ.

PER CURIAM.

Daniel C. Johns appeals as of right from an order granting Evanston Insurance Company ("Evanston") summary disposition pursuant to MCR 2.116(C)(10) in this action for declaratory judgment. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Johns is the assignee of Evanston's insured, Solar Image DBA Midwest Abstract & Research & Blue Sky Title ("Blue Sky"). In 2007, Johns sued, among others, Dover, Inc. of Flint ("Dover") and Blue Sky. Blue Sky, a title insurance agency, handled a closing that involved the transfer of property by Dover to third parties. Johns had entered into a purchase agreement with Don Dover to sell the property. But before any sale was consummated, Johns' signature was forged on two quitclaim deeds that purported to transfer the property to Dover for $1.00. Johns averred that he had paid $1,950,000 for the property and had entered into an agreement to sell the property for $2,450,000. Having not closed on any sale to Dover, Johns was confused when he learned that his mortgage had been paid off. Upon learning that the property had been sold to third parties, Johns' attorney sent a letter to Blue Sky on May 3, 2006, stating in pertinent part:

> This letter shall constitute notice to you that my client is the fee simple owner of the subject property and has not executed any deed divesting his interest in the property. Further the purchase agreement between my client and Don Dover has expired and is null and void. Contact me at your earliest convenience so that we may meet at your office to determine a resolution to this matter.
>
> If I fail to hear from you within twenty-four hours, I'll be forced to take additional action.

Evanston had issued three "professional liability, bodily injury and property damage liability" insurance policies to Blue Sky: a policy covering September 23, 2005, to September 23, 2006, a policy covering September 23, 2006, to September 23, 2007, and a policy covering September 23, 2007, to September 23, 2008. In pertinent part, the policies provided:

> THE COVERAGE
>
> 1. Professional Liability and Personal Injury: To pay on behalf of the Insured the amount of Damages and Claim Expenses in excess of the deductible amount stated in the Declarations which the Insured shall become legally obligated to pay resulting from CLAIMS FIRST MADE AGAINST THE INSURED DURING THE POLICY PERIOD OR THE OPTIONAL EXTENSION PERIOD, IF PURCHASED, AND REPORTED IN ACCORDANCE WITH THE PROVISIONS OF CLAIMS 1., because of any:
>
> (a) act, error or omission in Professional Services rendered or that should have been rendered,
>
> * * *
>
> PROVIDED ALWAYS THAT:
>
> (a) such act, error, omission or Personal Injury happens subsequent to the Retroactive Date specified in the Declarations; and (b) prior to the effective date of this policy the Insured had no knowledge that such act, error, omission or Personal Injury occurred or had been committed.

Under CLAIMS, 1., the policy states:

> 1. Notice of Claim: if a Claim is made against the Insured, then the Insured shall immediately forward to the Company every written demand, notice, summons or other process received by the Insured or by their representatives. In any event, within sixty (60) days after the expiration of the Policy Period or the Optional Extension Period, if purchased, such Claim must be reported to the Company or to SHAND MORAHAN & COMPANY, INC., Ten Parkway North, Deerfield, Illinois 60015, on behalf of the Company.

"Claim" is defined in the policy as follows:

> Claim means a written demand received by the Insured for compensation for Damages, including the service of suit or institution of arbitration proceedings against the Insured.

"Damages" is defined as follows:

> Damages means the monetary portion of any judgment, award or settlement and does not include:

(a) punitive or exemplary damages, any damages which are a multiple of compensatory damages, or fines or penalties;

(b) the restitution of consideration or expenses paid to the Insured for services or goods;

(c) judgments or awards arising from acts deemed uninsurable by law.

Blue Sky did not forward the May 3, 2006, letter to Evanston or report it to Shand Morahan & Company, Inc. Johns sought to resolve this matter through negotiations with Dover.

Johns sued Dover, among others, and added Blue Sky as a defendant on December 21, 2007. On March 7, 2008, Blue Sky sent Evanston notice of the lawsuit. Evanston denied the claim. Pertinent to this appeal, Evanston regarded the May 3, 2006, letter as a claim that had not been timely reported and concluded that the May 3, 2006, letter had provided Blue Sky with knowledge of the error or omission before the effective date of the 2007 policy in effect at the time the notice was sent. In granting summary disposition, the trial court appears to have concluded that the May 3, 2006, letter was not a claim, but that the letter "placed Blue Sky on notice that something was amiss, and perhaps Blue Sky would be liable for damages to someone."

Decisions on motions for summary disposition and questions regarding the proper interpretation and application of an insurance policy are reviewed de novo. *Grosse Pointe Park v Mich Mun Liab & Prop Pool*, 473 Mich 188, 196; 702 NW2d 106 (2005).

> A motion under MCR 2.116(C)(10) tests the factual support for a claim. The court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence. MCR 2.116(G)(5). Summary disposition should be granted if, except with regard to the amount of damages, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. [*Babula v Robertson*, 212 Mich App 45, 48; 536 NW2d 834 (1995) (citations omitted).]

Johns initially contends that the May 3, 2006, letter was not a claim. We agree. In *Rory v Continental Ins Co*, 473 Mich 457; 703 NW2d 23 (2005), our Supreme Court held that unambiguous insurance policies must be enforced as written even if seemingly unreasonable. The Court stated:

> We hold, first, that insurance policies *are* subject to the same contract construction principles that apply to any other species of contract. Second, unless a contract provision violates law or one of the traditional defenses to the enforceability of a contract applies, a court must construe and apply unambiguous contract provisions as written. We reiterate that the judiciary is without authority to modify unambiguous contracts or rebalance the contractual equities struck by the contracting parties because fundamental principles of contract law preclude such subjective post hoc judicial determinations of "reasonableness" as a basis upon which courts may refuse to enforce unambiguous contractual provisions. [*Id*. at 461 (emphasis in original).]

Thus, the unambiguous provisions in the insurance policy at issue must be enforced as written.

The policy requires indemnification for liability arising from a claim made during the policy period that is based on an "act, error or omission in Professional Services rendered or that should have been rendered". "Claim" is defined by the policy to mean "a written demand received by the Insured for compensation for Damages", and "damages is defined to mean "the monetary portion of any judgment, award or settlement." The May 3, 2006, letter would be a "claim" covered by the 2005 policy if it contained a demand for compensation for any judgment, award or settlement.

The letter requested the opportunity to discuss "a resolution", and stated that additional action would be taken if there was no timely response. The demand in this letter was not for compensation. Based on the letter, it could have been interpreted that Johns was seeking to have Blue Sky cooperate in reaching a resolution that would have looked to Dover for compensation. The mention of additional action absent a resolution could have been an explanation of what would occur, as opposed to a threat against Blue Sky. Notably, Johns looked to Dover for resolution between May 16, 2006, and February 2007. Because of the ambiguities in the letter, we find that it cannot be construed as a claim within the meaning of the policy and Johns was not required to notify Evanston of the 2005 letter.

In contrast, the claim that was actually made in 2007 was properly denied. The policy provided that a claim first made against an insured during a policy period or an optional extension period would be covered if

> (a) such act, error, omission or Personal Injury happens subsequent to the Retroactive Date specified in the Declarations; and (b) prior to the effective date of this policy the Insured had no knowledge that such act, error, omission or Personal Injury occurred or had been committed.

Blue Sky notified Evanston of the lawsuit filed against it on March 7, 2008. The policy in effect at that time was the 2007 policy, which had an effective date of September 23, 2007. The trial court properly concluded that Blue Sky had knowledge of its act, error, or omission before September 23, 2007, based on the May 3, 2006, letter. At that time, Blue Sky was aware that it had been involved in a closing in which it had accepted a forged deed under suspect circumstances. The closing resulted in Johns' mortgage being paid off even though he was not present at the closing. The deed inexplicably indicated that Johns had conveyed the property to Dover for $1.00. Given its involvement in the April 28, 2006, closing just days before it received the May 3, 2006 letter, Blue Sky would have known of its act, error, or omission. Accordingly, there was no coverage under the policy for Blue sky's March 7, 2008, claim.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Joel P. Hoekstra
/s/ Elizabeth L. Gleicher