STATE OF MICHIGAN

COURT OF APPEALS

EVANGELICAL PRESBYTERIAN CHURCH,

Plaintiff/Counter-Defendant-Appellant,

v

AMERICAN FIDELITY ASSURANCE COMPANY,

Defendant/Counter-Plaintiff-Appellee,

and

EXCESS REINSURANCE UNDERWRITERS AGENCY, INC.,

Defendant/Appellee,

and

GROUP HEALTH MANAGERS, INC.,

Defendant.

UNPUBLISHED
January 12, 2012

No. 299625
Wayne Circuit Court
LC No. 08-116317-CK

Before: MURRAY, P.J., and TALBOT and SERVITTO, JJ.

PER CURIAM.

Evangelical Presbyterian Church ("the Church") appeals as of right the trial court's order granting summary disposition in favor of American Fidelity Assurance Company ("AFA") in this breach of contract and negligent misrepresentation action. We affirm.

The Church is a religious organization with a partially self-insured employee benefit plan. As such, it pays claims up to a certain amount out of its own funds, and then purchases stop loss insurance for claims in excess of that amount. Michael Glodo was the Church's stated clerk and had supervisory responsibility over its benefits administration from 2001 to 2006.

For several years, the Church hired Group Health Managers, Inc. ("GHM") to shop for its stop loss coverage.[1] In doing so, GHM would advise Glodo of companies offering stop loss insurance and help guide the Church through the application process, including the completion of a disclosure statement.

On November 28, 2005, Excess Reinsurance, AFA's underwriter, sent GHM a renewal summary for the Church's stop loss policy for the proposed policy period of January 1, 2006 to December 31, 2006. The renewal summary required that the Church complete a disclosure statement within 15 days before the effective date of the policy "whose terms are incorporated herein." The renewal summary offered two options. The Church elected option one and Glodo signed the renewal summary as accepted on December 8, 2005.

A "Plan Sponsor Disclosure Statement and Contract Addenda" was provided to the Church, which requested in pertinent part:

> 1. Covered Persons who incurred charges over 50% of the Specific Deductible during the 12 months preceding the requested effective date, regardless of whether such charges were paid, pended or denied by the Plan Sponsor, and/or Covered Persons who are expected to incur charges in excess of 50% of the Specific Deductible in the next 12 months.
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> * * *
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> 4. Covered Persons who have a known diagnosis which might be expected to lead to a specific reimbursement and Covered Persons who have been diagnosed with any of the conditions listed on the attached page.[2]

The statement disclosed plan member ("PM") one and PM two and was signed by Glodo on December 8, 2005. Glodo testified that at the time he signed the disclosure statement it was blank. The statement, however, had claims data attached to it that had been provided to Glodo by either Church employee Janet Bain,[3] GHM and/or Highmark. Glodo explained that when GHM was the Church's TPA, GHM would obtain the necessary information from its claims system and complete the disclosure statement. After Highmark became the Church's TPA, Highmark would provide the claims information to the Church in a claims report, and the Church would then provide the information to GHM who would complete the disclosure statement.

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[1] For several years GHM worked as the third-party administrator ("TPA") for the Church and would receive, process and pay medical claims on the Church's behalf. Highmark, however, was the TPA for the Church for the 2006 policy year.

[2] One of the conditions listed was cancer.

[3] According to Glodo, Bain was the Church employee responsible for gathering information for the disclosure statement.

The Church completed an application/schedule for the excess loss policy with AFA for the 2006 policy year on January 19, 2006. Roy Neal, the owner of GHM and one of its sales representatives, signed the application as the Church's "Broker/Agent of Record." The excess loss insurance policy was issued by Excess Reinsurance on behalf of AFA effective January 1, 2006.

Thereafter GHM, on behalf of the Church, sent Excess Reinsurance requests for reimbursement for PM three and PM four. The claims were denied by Excess Reinsurance, on behalf of AFA, on April 23, 2007. The denial letters advised that neither PM three nor PM four were listed on the December 8, 2005, disclosure statement as required.

The Church filed a complaint against AFA, Excess Reinsurance and GHM on June 27, 2008, and a first and second amended complaint followed. The second amended complaint alleged breach of contract, negligent misrepresentation, and rescission against AFA; breach of contract, negligence,[4] negligent misrepresentation and rescission against Excess Reinsurance; and negligence, breach of fiduciary duty, negligent misrepresentation and rescission against GHM.

On November 17, 2009, AFA and Excess Reinsurance jointly filed a motion for summary disposition.[5] AFA claimed that it was entitled to summary disposition of the breach of contract claims against it because the Church failed to disclose medical and claims information for two of its plan members as required by the disclosure statement. AFA also asserted that the claim of negligent misrepresentation, based on its alleged vicarious liability for GHM's actions, should be dismissed because GHM was the Church's agent and not AFA's. AFA further alleged that contract rescission was an inappropriate remedy because there was no material breach of contract or detrimental reliance on a false material misrepresentation. Moreover, monetary damages were sufficient to compensate the Church for its alleged damages. The court agreed with AFA and granted summary disposition in its favor.

This Court reviews a trial court's decision on a motion for summary disposition de novo.[6] AFA's motion for summary disposition was brought pursuant to MCR 2.116(C)(10). "A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint."[7] "[A] party may move for dismissal of a claim on the ground that there is no genuine issue with respect to any material fact and the moving party is entitled to judgment as a matter of law."[8] "[A] court must examine the documentary evidence presented and, drawing all reasonable inferences in favor of the

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[4] The negligence claim against Excess Reinsurance was based on the assertion that it was vicariously liable for the actions of GHM.

[5] MCR 2.116(C)(10).

[6] *Dextrom v Wexford Co*, 287 Mich App 406, 416; 789 NW2d 211 (2010).

[7] *Nastal v Henderson & Assoc Investigations, Inc*, 471 Mich 712, 721; 691 NW2d 1 (2005).

[8] *Dextrom*, 287 Mich App at 415.

nonmoving party, determine whether a genuine issue of material fact exists."[9] A genuine issue of material fact exists "when reasonable minds could differ as to the conclusions to be drawn from the evidence."[10]

The Church contends that the trial court erred in dismissing the claim against AFA for negligent misrepresentation, based on its allegation that AFA was vicariously liable for GHM's actions, because GHM was AFA's agent. We disagree.

"Although an insurance policy is a contractual agreement between the insurer and the insured, an insurance agent typically acts on behalf of the parties to facilitate the sale and execution of the policy."[11] "When such an agreement is facilitated by an independent insurance agent or broker, the independent insurance agent or broker is considered an agent of the insured rather than an agent of the insurer."[12] An insurance agent is considered independent if they are able to "place insurance with various companies."[13]

Glodo testified that for several years, including the 2006 policy year, it worked with GHM to renew its stop loss insurance. While the Church argues that GHM was AFA's agent through the renewal process, Glodo testified that GHM was working on the Church's behalf and GHM's role was to provide him with information from various companies offering stop loss coverage and help guide the Church through the application process, including the completion of a disclosure statement. Therefore, the evidence supports that GHM was an independent insurance agent.

The evidence also demonstrates that the Church was aware that AFA considered GHM the Church's agent. The renewal statement, which was signed and accepted by Glodo, states that any "[b]roker involved in any communications with Excess Reinsurance and/or [AFA] is/are at all times acting solely as the agent(s) of [the Church] and not the agent(s) of Excess Reinsurance or [AFA]." As such, the Church's argument that GHM was AFA's agent has no merit.

The Church asserts that while GHM was not technically appointed to be an agent for AFA as prescribed by Michigan law, it should have been appointed because it was an "insurance producer" acting as an agent for AFA, making AFA vicariously liable for GHM's actions. An insurance producer, which is more commonly known as an insurance agent, "shall not act as an agent of an insurer unless the insurance producer becomes an appointed agent of that insurer. An insurance producer who is not acting as an agent of an insurer is not required to become

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[9] *Id.* at 415-416.

[10] *Id.* at 416.

[11] *Genesee Foods Servs, Inc v Meadowbrook, Inc*, 279 Mich App 649, 654; 760 NW2d 259 (2008).

[12] *West American Ins Co v Meridian Mut Ins Co*, 230 Mich App 305, 310; 583 NW2d 548 (1998).

[13] See *Mate v Wolverine Mut Ins Co*, 233 Mich App 14, 20-21; 592 NW2d 379 (1998).

appointed."[14] Because GHM was not acting as AFA's agent, appointment was unnecessary, and AFA is not vicariously liable for GHM's actions.[15]

The Church also argues that the trial court improperly found that Neal was the Church's broker/agent of record. Neal in his individual capacity was appointed to be an agent to sell AFA's products, and also signed the Church's stop loss policy application as its "Broker/Agent of Record." Since the Church had an ongoing relationship with GHM and worked with several of its representatives, we find that Neal signed the application as a representative of GHM. This error, however, does not change this Court's finding that GHM was not an agent of AFA. Thus, the trial court appropriately dismissed the negligent misrepresentation claim against AFA based on vicarious liability.

Next, the Church challenges the trial court's dismissal of its negligent misrepresentation claim based on the Church's assertion that AFA made a material misrepresentation. Specifically, the Church claims that AFA represented through its "application and policy language" that it would comply with Michigan law and only sell insurance through an appointed agent, but failed to do so.[16] We disagree.

"In a negligent misrepresentation action, the plaintiff must prove that 'a party justifiably relied to his detriment on information provided without reasonable care by one who owed the relying party a duty of care.'"[17]

MCL 500.1208a, on which the Church relies, states that:

> An insurance producer shall not act as an agent of an insurer unless the insurance producer becomes an appointed agent of that insurer. An insurance producer who is not acting as an agent of an insurer is not required to become appointed.

As found above, GHM was an independent insurance agent and was not acting as AFA's agent. As such, AFA did not violate Michigan law by failing to appoint GHM as its agent. Additionally, there is no language in the insurance application or policy warranting that AFA would only sell insurance through a legally appointed agent. As such, there was no misrepresentation by AFA and the trial court appropriately dismissed the Church's claim against AFA for negligent misrepresentation.

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[14] *King v State*, 488 Mich 208, 210 n 1; 793 NW2d 673 (2010); MCL 500.1208a(1).

[15] MCL 500.1208a(1).

[16] The Church's brief on appeal alleges that all of the elements for a claim of innocent misrepresentation have been established, however, the Church's second amended complaint alleges negligent misrepresentation against AFA.

[17] *Roberts v Saffell*, 280 Mich App 397, 407 n 2; 760 NW2d 715 (2008) (citation omitted).

The Church further asserts that the trial court erred when it found that there was no breach of contract by AFA because the disclosure statement was not incorporated by reference into the policy and it was not required that the disclosure statement be accurate. We disagree.

The disclosure statement was incorporated by reference into the stop loss policy. "The primary goal in interpreting contracts is to determine and enforce the parties' intent."[18] When interpreting a contract, this Court must "first look to a contract's plain language. If the plain language is clear, there can be only one reasonable interpretation of its meaning and, therefore, only one meaning the parties could reasonably expect to apply."[19] "Where one writing references another instrument for additional contract terms, the two writings should be read together."[20]

The disclosure statement, which is titled "Plan Sponsor Disclosure Statement and Contract Addenda," references the stop loss policy and states that:

> Before [Excess Reinsurance] issues an excess policy on behalf of [AFA], [Excess Reinsurance] requires [the Church] to disclose details on all Covered Persons who meet the following criteria.

The statement then provides five categories of individuals that require disclosure. Additionally, the statement advises that by signing the disclosure statement:

> [The Church] acknowledges that if subsequent information becomes known which if known prior to the issuance of this Contract would have affected the rates, deductibles, terms, or conditions for coverage hereunder, [AFA] has the right to revise the rates, deductibles, terms or conditions as of the effective date. . . . [The Church] further acknowledges . . . that [the] information will be used by [Excess Reinsurance and AFA] in evaluating and determining the acceptability of [the Church's] risk and that no coverage shall be provided for any charges incurred by a person listed on the form unless specifically agreed to in writing.

The stop loss policy in turn references the disclosure statement. The non-disclosed losses provision advises that benefits would not be paid if the Church failed to disclose required information. As such, because the policy and disclosure statement reference each other, the evidence supports that the disclosure statement was incorporated by reference into the stop loss policy.[21]

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[18] *Old Kent Bank v Sobczak*, 243 Mich App 57, 63; 620 NW2d 663 (2000).

[19] *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 61; 664 NW2d 776 (2003).

[20] *Forge v Smith*, 458 Mich 198, 207; 580 NW2d 876 (1998).

[21] *Id*.

The Church argues that the disclosure statement was not incorporated by reference into the insurance policy because it was not physically attached to the policy. The policy states that the contract between the Church and AFA includes any attachments to the policy and does not indicate that physical attachment is required. Also, the evidence shows that the disclosure statement was mailed to GHM with the Church's policy. As such, the Church's argument must fail.

The evidence also demonstrates that it was required that the disclosure statement be accurate. The Church contends that since it made a reasonable inquiry into the individuals to be disclosed, accuracy of the disclosure statement was not required. By signing the disclosure statement, the Church warranted that the list of disclosed individuals was "complete and accurate" and "after reasonable inquiry" "nothing [had] been omitted." While the disclosure statement mentions "reasonable inquiry," it also states that:

> If claims are submitted for any Covered Persons who meet the criteria outlined above in numbers 1 through 5 as of the date of this statement, and this Covered Person was not disclosed to [Excess Reinsurance] on this form, then no coverage will be provided for charges incurred by that Covered Person by [AFA].

As such, the language of the disclosure statement does not support that "reasonable inquiry" would excuse the Church from disclosing all required individuals.

Additionally, the policy in which the disclosure statement is incorporated into does not provide for reimbursement of claims for non-disclosed persons if the Church makes a reasonable inquiry into their identities. The non-disclosed losses provision of the policy states that if the Church fails to disclose any information on a covered person when it applies for the policy, then the Church will not be reimbursed for their claims. Therefore, the evidence supports that the disclosure statement was required to be accurate, and the Church's claims for breach of contract against AFA were appropriately dismissed.

Finally, the Church contends that the trial court erred in determining that rescission was an inappropriate remedy. We disagree. "In order to warrant rescission of a contract, there must be a material breach affecting a substantial or essential part of the contract."[22] Because AFA did not make a misrepresentation and did not breach its contract with the Church, rescission is not an appropriate remedy.

Affirmed.

/s/ Christopher M. Murray
/s/ Michael J. Talbot
/s/ Deborah A. Servitto

[22] *Omnicom of Mich v Giannetti Inv Co*, 221 Mich App 341, 348; 561 NW2d 138 (1997).