

STATE OF MICHIGAN
COURT OF APPEALS

HEATH WILLIAMS AND OPUS
DEVELOPMENT, L.L.C.,

UNPUBLISHED
June 28, 2012

Plaintiffs-Appellants,

V

TRAVELERS PROPERTY & CASUALTY
COMPANY OF AMERICA,

No. 301454
Oakland Circuit Court
LC No. 2010-109014-CK

Defendant-Appellee.

Before: WHITBECK, P.J., and JANSEN and K. F. KELLY, JJ.

PER CURIAM.

Plaintiffs appeal by right an order denying plaintiffs' motion for summary disposition and granting summary disposition to defendant in this action for declaratory relief. We affirm.

I. FACTS

Plaintiffs, Heath Williams and Opus Development (a real estate company owned by Williams), owned property located at 2878 Orchard Lake Road in Keego Harbor, Michigan. The Orchard Lake Road property consists of commercial space on the first floor, two residential apartments on the second floor, and one apartment in the basement. On January 23, 2005, Rhonda Thompson, one of the second-floor tenants, allegedly slipped and fell on patch of black ice on a stairway in a common area of the property. According to the EMS report, as a result of the fall Thompson injured her ankle, hit her face against a wall, and was transported to the hospital.

On January 22, 2008, Thompson filed a premises liability action against plaintiffs. Williams received the complaint on March 17, 2008, and believed that he had given it to his attorney. However, Williams never responded to Thompson's complaint, resulting in a default judgment against plaintiffs. According to Williams, he was unaware of the default judgment until he received a letter from an attorney in November 2009 informing him of the default. Williams successfully moved to set aside the default judgment on February 23, 2010 and notified his insurance agent of Thompson's lawsuit on February 23, 2010.

On March 10, 2010, defendant indicated in a letter that it would not provide insurance coverage to plaintiffs for Thompson's claim against them. Defendant's letter indicated that

plaintiffs had failed to timely notify it of Thompson's lawsuit as required by the language of the insurance policy.¹ The letter explained that, as a result of the delay in notice, defendant had been "denied the opportunity to investigate the facts of loss, formulate a discovery plan, evaluate damages and investigate possible tender or subrogation activities." The letter also stated that the delay in notice "exacerbated the prejudice to [defendant]. [Defendant] has been denied the opportunity to formulate an appropriate Resolution Strategy or otherwise respond to any settlement demands."

On March 31, 2010, plaintiffs filed a complaint against defendant. The complaint requested that the trial court declare that the insurance policy required defendant to defend against Thompson's lawsuit and indemnify plaintiffs. The complaint alleged that plaintiffs notified defendant about the lawsuit "as soon as they were sure there would be one to defend." The complaint alleged that plaintiffs were not aware of Thompson's lawsuit until the default judgment was entered against them. On April 26, 2010, defendant filed its answer, in which it alleged that plaintiffs breached the insurance contract by failing to notify defendant of an "occurrence . . . as soon as practicable."

On August 13, 2010, plaintiffs filed a motion for summary disposition under MCR 2.116(C)(10). The motion argued that plaintiffs gave defendant notice of Thompson's lawsuit as soon as was practicable: 12 days after they realized the lawsuit would proceed after the default judgment was set aside. Plaintiffs also argued that defendant was not prejudiced by the delay, as it was still able to participate in discovery and settlement negotiations, and the scene of the accident itself had not changed since Thompson's slip and fall.

In response, defendant argued that it was prejudiced by plaintiffs' late notice of Thompson's lawsuit and moved for summary disposition under MCR 2.116(I)(2). Specifically, defendant argued that its investigation into the details of Thompson's lawsuit was prejudiced because 1) plaintiffs had made admissions regarding changed conditions at the location where Thompson fell; 2) there were no photographs taken of the location of Thompson's fall; and 3) there was no documentary evidence regarding the condition of the stairwell in which Thompson fell. Defendant also argued that the insurance policy required that plaintiffs notify defendant of any "occurrence" that "may result in a claim," and that plaintiffs were aware of Thompson's fall in 2005, and were aware of a complaint having been filed in 2008, but did not notify defendant until 2010.

The trial court denied plaintiffs' motion for summary disposition and granted defendant's motion for summary disposition. In its written order, the trial court found that that defendant provided persuasive evidence of prejudice, concluding that plaintiffs failed to provide "sufficient evidence [such] that reasonable jurors" could conclude that plaintiffs met their burden to show

¹ Specifically, the insurance policy required the insured to notify the insurer "as soon as practicable of an 'occurrence' or an offense which may result in a claim." The policy also specifies that "[i]f a claim is made or 'suit' is brought against any insured, [the insured] must . . . [i]mmediately record the specifics of the claim or 'suit' and the date received . . . [and n]otify [the insurer in writing] as soon as practicable."

that defendant was not prejudiced by the delay in notice. Specifically, the trial court concluded that plaintiffs had “not shown that the witnesses [to Thompson’s fall] recall the incident with sufficient detail, nor that the records of the police and the EMS are sufficiently detailed, [such] that the reasonable jurors could conclude that the defendant has not been prejudiced by the five-year delay.” Plaintiffs filed a motion to reconsider, which was also denied. Plaintiffs then appealed by right.

II. STANDARD OF REVIEW

Both parties moved for summary disposition. Plaintiffs moved for summary disposition under MCR 2.116(C)(10). Defendant moved for summary disposition under MCR 2.116(I)(2). “This Court reviews the grant or denial of summary disposition de novo to determine if the moving party is entitled to judgment as a matter of law.”²

A motion under MCR 2.116(C)(10) tests the factual sufficiency of a complaint.³ Such a motion will be granted if, after viewing all pleadings, depositions, and other documentary evidence in the light most favorable to the nonmoving party, the evidence “fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law.”⁴ “Summary disposition is properly granted under MCR 2.116(I)(2) to the opposing party if it appears to the court that that party, rather than the moving party, is entitled to judgment.”⁵

III. ANALYSIS

Provisions in liability insurance contracts requiring the insured to give the insurer immediate or prompt notice of accident or suit are common, if not universal. The purpose of such provisions is to allow the insurer to make a timely investigation of the accident in order to evaluate claims and to defend against fraudulent, invalid, or excessive claims.⁶

The failure to comply with a notice requirement does not alleviate the insurer of its obligations under the insurance contract unless the insurer establishes that it was prejudiced by the insured’s failure to provide timely notice.⁷ Thus, the insurer bears the burden to establish that such prejudice exists.⁸ Although the existence of prejudice is generally a question for the jury, “it is

² *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

³ *Id.* at 120.

⁴ *Id.*

⁵ *Michelson v Voison*, 254 Mich App 691, 697; 658 NW2d 188 (2003) (citation and brackets omitted).

⁶ *Wendel v Swanberg*, 384 Mich 468, 477; 185 NW2d 348 (1971).

⁷ *Koski v Allstate Ins Co*, 456 Mich 439, 444; 572 NW2d 636 (1998).

⁸ *Id.*

one of law for the [trial] court when only one conclusion can be drawn from the undisputed facts.”⁹

In determining whether an insurer’s position has actually been prejudiced by the insured’s untimely notice, courts consider whether the delay has materially impaired the insurer’s ability: (1) to investigate liability and damage issues so as to protect its interests; (2) to evaluate, negotiate, defend, or settle a claim or suit; (3) to pursue claims against third parties; (4) to contest the liability of the insured to a third party; and (4) to contest its liability to its insured.¹⁰

The record in the instant case demonstrates that plaintiff Williams was aware that Thompson fell in January 2005 at plaintiffs’ property, but failed to notify defendant of the incident until February 2010. Plaintiff Williams also failed to notify defendant of the lawsuit filed by Thompson regarding the 2005 incident after receiving the complaint in March 2008. It was not until February 2010, when the default judgment entered against plaintiffs was set aside, that plaintiffs notified defendant about the lawsuit and the underlying circumstances supporting Thompson’s claim.

Defendant established that it was prejudiced by the five-year delay in notice regarding the slip and fall incident that occurred at plaintiffs’ property and the two-year delay in notice regarding the tort action instituted against plaintiffs in connection with that incident. Most importantly, defendant was deprived of an opportunity to investigate the incident properly, particularly in light of the sparse documentary record of the events surrounding Thompson’s fall. There are few records documenting the incident, and those documents that exist (the police activity log and EMS form) only provide brief descriptions of the incident. Plaintiff Williams did not document the conversation that he had with Thompson shortly after the incident occurred. There were no statements taken contemporaneously to the incident from Thompson, other tenants, plaintiff Williams, the EMS workers who transported Thompson to the hospital, or from the responding officers. Further, there are no photographs of the stairway or location as it appeared in January 2005. Had defendant received notice of the incident after it occurred, defendant would have had the opportunity to conduct its own investigation, including the opportunity to obtain photographs of the location as it appeared when the incident occurred and collect statements from witnesses (plaintiff Williams, other tenants, the EMS employees who transported Thompson to the hospital after the fall, the responding officer, and possibly Thompson) while the incident was fresh in their memories. Therefore, we conclude that defendant established that this passage of time prejudiced defendant.

Plaintiffs argue that since the default judgment was set aside, defendant now has the opportunity to participate in all stages of litigation. We disagree. Plaintiffs fail to consider that, as discussed above, the passage of time prejudiced defendant’s ability to investigate liability and damage issues. In sum, we conclude that the facts show that the passage of time has prejudiced

⁹ *Tenneco Inc v Amerisure Mut Ins Co*, 281 Mich App 429, 448; 761 NW2d 846 (2008).

¹⁰ *Id.* at 448-449 (citations omitted).

defendant regarding its ability to conduct an investigation and assess the claim from a standpoint that would best protect its interests. Accordingly, the trial court did not err by granting defendant summary disposition pursuant to MCR 2.116(I)(2).

Affirmed.

/s/ William C. Whitbeck

/s/ Kathleen Jansen

/s/ Kirsten Frank Kelly