

STATE OF MICHIGAN
COURT OF APPEALS

GM SIGN, INC.,

Plaintiff-Appellant,

v

AUTO-OWNERS INSURANCE COMPANY,

Defendant-Appellee.

UNPUBLISHED
October 11, 2012

No. 301742
Wayne Circuit Court
LC No. 10-000455-CK

Before: GLEICHER, P.J., and M. J. KELLY and BOONSTRA, JJ.

PER CURIAM.

This declaratory judgment action arises from an unwanted fax. In August 2007, 400 Freight Services, Inc., an Illinois business, transmitted a fax advertisement to plaintiff GM Sign, Inc., another Illinois corporation. GM Sign took offense. According to GM Sign, unsolicited “blast” faxes burden fax machines, congest facsimile traffic, and waste paper, ink and toner. GM Sign launched a class action lawsuit against 400 Freight in an Illinois state court seeking statutory and common law damages.

Defendant Auto-Owners Insurance Company, a Michigan corporation, insured 400 Freight and has defended the Illinois class action suit subject to a reservation of rights. GM Sign brought this declaratory judgment action against Auto-Owners seeking a declaration that 400 Freight’s policy of insurance requires Auto-Owners to continue defending 400 Freight and to indemnify 400 Freight in the event the class action lawsuit yields a damages award. The circuit court entered a declaratory judgment in favor of Auto-Owners, finding that a policy endorsement negated coverage for GM Sign’s claims. We affirm.

I. FACTS AND PROCEEDINGS

GM Sign’s class action complaint alleges that 400 Freight violated the Telephone Consumer Protection Act (TCPA), 47 USC 227, the Illinois Consumer Fraud and Deceptive Practices Act, 815 ILCS 505/2, and Illinois common law by sending unsolicited fax advertisements to at least 40 recipients. The Illinois class action case remains pending.

In January 2010, GM Sign filed this declaratory judgment action in the Wayne circuit court. The complaint avers that 400 Freight’s commercial general liability insurance policy requires Auto-Owners to defend 400 Freight and to afford coverage for any damages awarded in

the Illinois class action. GM Sign named 400 Freight as a defendant in this action, but 400 Freight has not appeared.

Auto-Owners answered GM Sign's complaint in March 2010, and approximately three months later filed a motion for summary disposition under MCR 2.116(C)(8). Auto-Owners asserted that a policy endorsement entitled "Exclusion – Violation of Statutes That Govern Emails, Fax, Phone Calls, or Other Methods of Sending Material or Information," precludes coverage. Auto-Owners identifies the endorsement by its number, 55296 (7-05). For convenience, we refer to it as the 7-05 endorsement. It reads as follows:

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

EXCLUSION - VIOLATION OF STATUTES THAT GOVERN E-MAILS, FAX, PHONE CALLS, OR OTHER METHODS OF SENDING MATERIAL OR INFORMATION

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART.

1. The following exclusion is added to SECTION 1 - COVERAGES, COVERAGE A. BODILY INJURY AND PROPERTY DAMAGE LIABILITY, 2. Exclusions:

Distribution Of Material in Violation of Statutes

"Bodily injury", or "property damage" arising directly or indirectly out of any action or omission that violates or is alleged to violate:

- (1) The Telephone Consumer Protection Act (TCPA), including any amendment of or addition to such law; or
- (2) The CAN-SPAM act of 2003, including any amendment of or addition to such law; or
- (3) Any statute, ordinance or regulation, other than the TCPA or CAN-SPAM Act of 2003, that prohibits or limits the sending, transmitting, communicating or distribution of material or information.

2. The following exclusion is added to SECTION 1 - COVERAGES, COVERAGE B. PERSONAL INJURY AND ADVERTISING INJURY LIABILITY, 2. Exclusions:

Distribution Of Material in Violation of Statutes

Arising directly or indirectly out of any action or omission that violates or is alleged to violate:

(1) The Telephone Consumer Protection Act (TCPA), including any amendment of or addition to such law; or,

(2) The CAN-SPAM act of 2003, including any amendment of or addition to such law; or

(3) Any statute, ordinance or regulation, other than the TCPA or CAN-SPAM Act of 2003, that prohibits or limits the sending, transmitting, communicating or distribution of material or information.

According to Auto-Owners, this endorsement excuses it from having to indemnify 400 Freight in the event that GM Sign prevails.

Auto-Owners also filed in the circuit court an affidavit signed by Robert Jenks, an Auto-Owners underwriter. Jenks averred that 400 Freight had renewed its commercial insurance policy in 2006 and 2007, and that Auto-Owners mailed the 7-05 endorsement to 400 Freight on May 2, 2006.

GM Sign sought to compel discovery concerning the Jenks affidavit and to adjourn the hearing of Auto-Owners' summary disposition motion until discovery had been accomplished. The circuit court denied GM Sign's motion, reasoning:

This really does appear to be a (C)(8) motion, that's to be decided on the pleadings alone. If G.M. Sign survives the (C)(8) motion, then you get your discovery. Right now I am not satisfied that the issue, the so-called conflict of interest issue or reservation of rights issue, has any relevance to whether or not coverage is available to G.M. Sign for blast faxes. The motion to compel is denied. I'll hear the (C)(8) whenever it is scheduled.

In November 2010, the circuit court granted summary disposition to Auto-Owners, ruling that the exclusionary language contained in the 7-05 endorsement barred GM Sign's claims.

II. STANDARD OF REVIEW

This Court reviews de novo a circuit court's summary disposition ruling. *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). A court may grant summary disposition under MCR 2.116(C)(8) if "[t]he opposing party has failed to state a claim on which relief can be granted." A motion brought under subrule (C)(8) tests the legal sufficiency of the complaint based solely on the pleadings. *Corley v Detroit Bd of Ed*, 470 Mich 274, 277; 681 NW2d 342 (2004).¹ When deciding a (C)(8) motion, this Court accepts all well-pleaded factual allegations

¹ In contrast, a motion brought "under MCR 2.116(C)(10) tests the *factual* sufficiency of the complaint." *Maiden*, 461 Mich at 120 (emphasis supplied).

as true and construes them in the light most favorable to the nonmoving party. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). A party may not support a motion under subrule (C)(8) with documentary evidence such as affidavits, depositions, or admissions. *Patterson v Kleiman*, 447 Mich 429, 432; 526 NW2d 879 (1994). Summary disposition on the basis of subrule (C)(8) should be granted only when the claim “is so clearly unenforceable as a matter of law that no factual development could possibly justify a right of recovery.” *Kuhn v Secretary of State*, 228 Mich App 319, 324; 579 NW2d 101 (1998).

III. ANALYSIS

GM Sign asserts that Illinois law governs the interpretation of the Auto-Owners policy. Auto-Owners professes “indifferen[ce]” to whether this Court applies Michigan or Illinois law. “Illinois rules of insurance policy interpretation are substantially similar to those of Michigan.” *Royal Prop Group, LLC v Prime Ins Syndicate, Inc*, 267 Mich App 708, 714 fn 5; 706 NW2d 426 (2005). Under either state’s law, the 7-05 endorsement excludes coverage for the consequences of 400 Freight’s “blast” faxes.

Under Illinois law, “the general rules governing the interpretation of other types of contracts also govern the interpretation of insurance policies.” *Hobbs v Hartford Ins Co of the Midwest*, 214 Ill2d 11, 17; 823 NE2d 561 (2005). The “primary objective” of an Illinois court interpreting an insurance policy is to “ascertain and give effect to the intention of the parties, as expressed in the policy language.” *Id.* Unambiguous policy language is applied as written, “unless it contravenes public policy.” *Id.* “Although it is true that limitations on an insurer’s liability must be construed liberally in favor of the policyholder . . . the rule comes into play only where there is an ambiguity.” *Menke v Country Mut Ins Co*, 78 Ill2d 420, 424; 401 NE2d 539 (1980) (citation omitted).

Similarly, a Michigan appellate court looks “to the language of the insurance policy and interpret[s] the terms therein in accordance with Michigan’s well-established principles of contract construction.” *Citizens Ins Co v Pro-Seal Serv Group, Inc*, 477 Mich 75, 82; 730 NW2d 682 (2007), quoting *Henderson v State Farm Fire & Cas Co*, 460 Mich 348, 353-354; 596 NW2d 190 (1999).

“First, an insurance contract must be enforced in accordance with its terms. A court must not hold an insurance company liable for a risk that it did not assume. Second, a court should not create ambiguity in an insurance policy where the terms of the contract are clear and precise. Thus, the terms of a contract must be enforced as written where there is no ambiguity.” [*Citizens Ins Co*, 477 Mich at 82, quoting *Henderson*, 460 Mich at 354.]

Thus, under both Michigan and Illinois law we enforce the plain language of the 7-05 endorsement, bearing in mind that clear and specific exclusionary language must be given effect.

The 7-05 endorsement to 400 Freight’s commercial general liability policy excludes coverage for “property damage . . . arising directly or indirectly out of any action or omission that violates or is alleged to violate” the TCPA or “any statute . . . other than the TCPA . . . that prohibits or limits the sending, transmitting, communicating or distribution of material or

information.” GM Sign has abandoned any claim that this language authorizes coverage of its TCPA claim. Instead, GM Sign focuses its appellate argument exclusively on whether the endorsement insures 400 Freight against the claims for common law conversion or violation of 815 ILCS 505/2.

GM Sign first asserts that an Illinois case, *Ins Corp of Hanover v Shelborne Assocs*, 389 Ill App 3d 795; 905 NE2d 976 (2009), is “directly on point” and compels coverage. *Shelborne*, a class action suit, also involved “blast faxes.” But the insurance policy at issue in *Shelborne* lacked the language contained in the 7-05 endorsement. Thus, we find *Shelborne* entirely irrelevant.

Nor do we accept GM Sign’s interpretation of the 7-05 endorsement as “strictly limited” to its TCPA claim. The unambiguous language of the endorsement bars coverage for property damage “arising directly or indirectly” from “any act or omission that violates *or is alleged to violate*” the TCPA. (Emphasis added). Illinois courts describe a similar phrase, “arising out of,” to mean “‘originating from,’ ‘having its origin in,’ ‘growing out of’ and ‘flowing from.’” *Maryland Cas Co v Chicago & North Western Transp Co*, 126 Ill App3d 150; 466 NE2d 1091 (1984), citing *Western Cas & Surety Co v Branon*, 463 F Supp 1208, 1210 (ED Ill, 1979).

GM Sign’s complaint avers 400 Freight’s act of faxing unsolicited advertisements to more than 40 unwilling recipients violated the TCPA. The faxing of the ads constitutes the “acts” that allegedly violated the TCPA. These acts are identical to the acts or omissions at the heart of GM Sign’s conversion claim, and also precisely overlap with the acts or omissions averred to have contravened 815 ILCS 505/2. “The essence of a TCPA fax-ad claim is that one party sends another an unsolicited fax advertisement.” *Valley Forge Ins Co v Swiderski Electronics, Inc*, 223 Ill2d 352, 364-365; 860 NE2d 307 (2006). Accordingly, the common law tort and Illinois consumer protection claims asserted in GM Sign’s complaint arise from the same conduct that underlies GM Sign’s TCPA claim. All three causes of action, regardless of their labels, originate in or flow from the same acts. Because the unambiguous language of the endorsement precludes coverage for damage arising from an action alleged to violate the TCPA, Auto-Owners bears no duty to indemnify 400 Freight should GM Sign prevail in the Illinois class action.

GM Sign next contends that Auto-Owners should be barred from asserting a coverage defense because it failed to advise 400 Freight of a conflict of interest arising under Illinois law. We do not find this argument persuasive.

Under a subset of Illinois insurance law known as the *Peppers* doctrine, “it is generally inappropriate for a court considering a declaratory judgment action to decide issues of ultimate fact that could bind the parties to the underlying lawsuit.” *Allstate Ins Co v Kovar*, 363 Ill App 3d 493, 501; 842 NE2d 1268 (2006). In *Maryland Cas Co v Peppers*, 64 Ill2d 187; 355 NE2d 24 (1976), the Illinois Supreme Court considered whether an insurance company owed a duty under a homeowners policy to defend claims arising from a shooting. *Id.* at 190. The shooting victim’s complaint asserted claims for intentional assault, negligence, and willful and wanton conduct. *Id.* at 193. The trial court found that the insured’s conduct had been intentional, and entered judgment in favor of the insurer. *Id.* at 191. The Supreme Court reversed, ruling that the finding of intentional conduct was “not proper in this declaratory judgment action.” The Court

explained: “This issue was one of the ultimate facts upon which recovery is predicated in the . . . personal injury action[.]” *Id.* Moreover, the Supreme Court explained, the trial court’s finding “create[d] a situation in which there is an unresolved conflict between the interests of the insured and the insurer.” *Id.* While the insured would benefit by a finding that he behaved only negligently, the insurer’s interest would be served by a determination that the shooting had been intentional. *Id.* Under this scenario, “serious ethical questions” prohibited an attorney from representing both the insurance company and the insured. *Id.* at 198.

The facts presented in this “blast fax” case do not implicate the *Peppers* doctrine. Resolution of the coverage issue decides no “ultimate facts” upon which recovery in the underlying class action lawsuit depends. Nor does the policy cover even one of GM Sign’s claims while withholding coverage from others. “[A]n insurer’s interest in negating policy coverage does not in itself create a sufficient conflict to excuse the insurer from conducting the defense.” *O’Bannon v Northern Petrochem Co*, 113 Ill App 3d 734, 739; 447 NE2d 985 (1983). Given that the plain language of the exclusion precludes coverage for all causes of action set forth in GM Sign’s class action complaint, we perceive no legal or factual basis for a conflict of interest.

Finally, GM Sign insists that by considering the Jenks affidavit, the circuit court converted Auto-Owners’ summary disposition motion brought under MCR 2.116(C)(8) to a motion brought under MCR 2.116(C)(10). GM Sign contends that once the circuit court entertained evidence beyond the pleadings, it should have granted GM Sign’s request for discovery concerning whether Auto-Owners timely provided 400 Freight with proper notice of the exclusion.

We agree with GM Sign that the circuit court erred by reviewing the Jenks affidavit as part of its consideration of Auto-Owners’ (C)(8) motion. We reiterate that “[a] motion under MCR 2.116(C)(8) may not be supported by affidavits, depositions, admissions, or other documentary evidence.” *Patterson*, 447 Mich at 432. However, under the circumstances the circuit court’s error qualifies as harmless. GM Sign never raised any issue concerning defective notice of the endorsement in its pleadings, and 400 Freight elected not to participate in the declaratory judgment action. Because the pleadings never placed at issue the propriety of notice to 400 Freight, the Jenks affidavit was entirely irrelevant and the circuit court had no reason to consider it. Moreover, GM Sign failed to present even a scintilla of evidence hinting at inadequate notice to 400 Freight. “An unsupported allegation which amounts solely to conjecture does not entitle a party to an extension of time for discovery, since under such circumstances discovery is nothing more than a fishing expedition to discover if any disputed material fact exists between the parties.” *Pauley v Hall*, 124 Mich App 255, 263; 335 NW2d 197 (1983). Despite that the circuit court erred by considering the immaterial affidavit, it correctly construed the policy language.

Affirmed. As the prevailing party, Auto-Owners may tax its costs pursuant to MCR 7.219.

/s/ Elizabeth L. Gleicher
/s/ Michael J. Kelly