

STATE OF MICHIGAN
COURT OF APPEALS

JEVON A. JOHNSON,

Plaintiff-Appellant,

v

MEMBERSELECT INSURANCE COMPANY,

Defendant-Appellee.

UNPUBLISHED

April 24, 2012

No. 302469

Wayne Circuit Court

LC No. 10-008846-CK

Before: WILDER, P.J., and O'CONNELL and WHITBECK, JJ.

PER CURIAM.

In this insurance contract case, plaintiff Jevon Johnson appeals as of right the trial court's order granting summary disposition to defendant MemberSelect Insurance Company. We affirm.

I. FACTS

A. UNDERLYING FACTS

The underlying facts of this case are not in dispute. On April 4, 2010, there was a fire at Johnson's apartment. At the time of the fire, Johnson had a rental insurance contract with MemberSelect. And on April 5, 2010, Johnson timely reported the fire to MemberSelect.

On April 8, 2010, Richard James, a MemberSelect Homeowner Claim Representative, gave Johnson a letter stating Johnson's obligation to submit a Sworn Statement in Proof of Loss and other proof of loss documents. The letter stated, in relevant part:

Please complete and return the information concerning your loss on the enclosed "Sworn Statement in Proof of Loss." You must return a completed Proof of Loss to me within sixty (60) days from the date of loss, or thirty (30) days from the date of this letter, whichever is later. Otherwise, your claim cannot receive further consideration.

The following checklist describes some of the information on the Proof of Loss. All items should be answered as carefully and specifically as possible. Any intentional misstatement on the Proof of Loss may result in the loss of your rights under your policy.

* * *

Read the representations printed on the Proof of Loss carefully. This attests to the truthfulness and completeness of your Sworn Statement and your recognition that the Insurance Company does not intend to surrender any of its rights under the policy by furnishing this document or by assisting you in its completion. It should be expressly Understood [sic] that no decision has yet been reached with respect to your claim.

After you have completed the Proof of Loss, sign the document before a Notary Public and return it to this office together with all of the documents you used to prepare it.

After the fire, Johnson authorized Gerald Kadzielewski, an employee of Blue Water Cleaning and Restoration, Inc., to determine if any of Johnson's belongings could be salvaged. After determining that "very little was salvageable," Kadzielewski told Johnson that he would contact MemberSelect. MemberSelect then directed Blue Water Cleaning and Restoration to prepare and submit an inventory of Johnson's destroyed or damaged property. Kadzielewski completed the inventory as directed.

On May 11, 2010, MemberSelect sent a letter to Johnson to schedule Johnson's examination under oath. In this letter, MemberSelect stated that Johnson was required to bring documents relating to the fire and insurance claim. In relevant part, MemberSelect requested Johnson provide a copy of the police or fire report, any photographs or videotapes of the apartment before or after the fire, any lease agreements, various financial records, telephone records, any original documents relating to the purchase of destroyed personal property, a detailed contents estimate, and all records supporting additional living expenses.

On May 28, 2010, Johnson attended the examination under oath. But Johnson did not produce the required documents. When MemberSelect asked for the documents, Johnson stated, "I didn't have anything." On June 1, 2010, MemberSelect, through its attorney, Daniel Fleming, sent Johnson a follow up letter, again requesting the required documentation. The letter did not mention the proof of loss materials. According to Fleming, on June 22, 2010, Johnson submitted a copy of his passport, a copy of his driver's license, some Social Security information, and an extension to file his 2009 income tax return. Johnson did not produce any of the other requested documentation.

On April 20, 2010, Johnson signed and had a notary notarize his Sworn Statement in Proof of Loss. According to Johnson, he handed his signed Sworn Statement in Proof of Loss to Kadzielewski, so that Kadzielewski could submit it to MemberSelect with his inventory. Around June 11, 2010, James requested that Kadzielewski send him the Sworn Statement in Proof of Loss and inventory. And on that same date, Kadzielewski sent Johnson's Sworn Statement of Proof of Loss and inventory to James at the address James had specified.

B. COMPLAINT AND ANSWER

Johnson filed a complaint against MemberSelect alleging breach of contract. Johnson alleged that MemberSelect breached the insurance contract by failing to: act fairly and

reasonably when investigating Johnson's claim; act in good faith; and timely pay Johnson's claims. Johnson also alleged that MemberSelect used unsupported defenses to delay or avoid paying Johnson's claim. Finally, Johnson alleged that MemberSelect violated MCL 500.2833(p) by failing to pay Johnson's claim within 30 days of receiving Johnson's proof of loss, and therefore, Johnson was entitled to an additional 12 percent interest pursuant to MCL 500.2006(4).

MemberSelect filed an answer to Johnson's complaint, denying that it breached the insurance contract or that it was dilatory in paying Johnson's claim. MemberSelect asserted the following relevant affirmative defenses: (1) Johnson failed to state a claim upon which relief can be granted; (2) Johnson did not fully comply with the investigation, concealed or intentionally misrepresented material facts during the investigation, and did not comply with the inventory provisions of the insurance contract; and (3) Johnson's claim was barred because Johnson did not submit a Sworn Statement of Proof of Loss as required by the insurance contract and law.

C. MOTION FOR SUMMARY DISPOSITION AND RESPONSES

MemberSelect moved for summary disposition, arguing that it provided Johnson ample notice of the proof of loss material requirements; however, despite this notice and the insurance contract's express proof of loss requirements, Johnson failed to submit the Sworn Statement in Proof of Loss and completed proof of loss materials within the required 60 days. Furthermore, MemberSelect pointed out that Johnson failed to provide other documentation as MemberSelect requested, which MemberSelect contended violated the insurance contract's provision requiring Johnson to cooperate with the investigation. Therefore, MemberSelect asserted that Johnson could not file suit against it because timely submitting those documents was a condition precedent to filing suit. Additionally, MemberSelect stated that Johnson's failure to file these documents "materially injured" MemberSelect's ability to investigate Johnson's claim.

Johnson responded, arguing that he had substantially complied with the terms of the insurance contract. Johnson pointed out that Kadzielewski submitted Johnson's Sworn Statement of Proof of Loss and inventory on June 11, 2010, the same day that James requested that information. Therefore, according to Johnson, any purpose of the proof of loss materials was satisfied. Johnson further contended that, at the very least, MemberSelect's motion for summary disposition was premature and should not be considered until after additional discovery. Additionally, Johnson argued that MemberSelect was estopped from claiming a proof of loss defense. Johnson asserted that James requested Kadzielewski to send him the proof of loss materials and inventory after the 60-day time period during which Johnson had to submit his proof of loss materials had expired. Furthermore, Johnson argued that after giving him the initial letter discussing the proof of loss requirements, MemberSelect never gave Johnson any further notice or reminder to submit the Sworn Statement of Proof of Loss and proof of loss materials. Johnson argued that "[e]ither the proof of loss was not that important or [MemberSelect] set a trap for [Johnson] by not reminding him that his sworn statement in proof of loss was not due until [after] June 5, 2010" Johnson contended that he did not purposefully refuse to comply with the insurance contract provisions.

MemberSelect replied, arguing that Johnson did not substantially comply with the insurance contract terms because Johnson failed to submit a timely Sworn Statement in Proof of

Loss. MemberSelect further argued that Johnson failed to prove that its actions estopped it from asserting a proof of loss defense. According to MemberSelect, it consistently asked Johnson to provide pertinent information about Johnson's claim; however, Johnson failed to provide the information. And MemberSelect contended that Johnson's failure to comply with the insurance contract terms was clearly willful.

D. TRIAL COURT'S RULING

After hearing oral arguments on MemberSelect's motion for summary disposition, the trial court granted the motion and dismissed the case. It reasoned that Johnson did not comply with the contract requirements because, even according to Johnson's version of events, neither Johnson nor Kadzielewski timely submitted Johnson's Sworn Statement of Proof of Loss and the proof of loss materials. Specifically, the trial court reasoned,

The contract is very clear indicating that the Proof of Loss must be submitted within 60 days of the loss. I don't think there's any disagreement here that that was not complied with. Even if we look at the affidavit of Mr. Kadzielewski, it indicates that it was submitted on June the 11th

* * *

The Court has reviewed the materials submitted and viewed it in a light most favorable to the non-moving party, and clearly here [Johnson] has not complied with the requirements of the contract not the statute and there are no genuine issues of material facts, therefore the motion is granted.

Johnson now appeals.

II. MOTION FOR SUMMARY DISPOSITION

A. STANDARD OF REVIEW

Johnson argues that he substantially complied with the insurance contract because MemberSelect had the functional equivalent of the Sworn Statement in Proof of Loss, and Johnson timely submitted his Sworn Statement in Proof of Loss to MemberSelect's ostensible agent, Jerry Kadzielewski. Johnson also argues MemberSelect waived or was estopped from any right to claim a proof of loss defense because it failed to further request the Sworn Statement in Proof of Loss and other proof of loss materials, and it continued to communicate with Johnson after the due date for the proof of loss materials.

Although MemberSelect moved for summary disposition under MCR 2.116(C)(8) and MCR 2.116(C)(10), the trial judge decided the motion pursuant to MCR 2.116(C)(10). Where the trial court grants a motion for summary disposition brought pursuant to both MCR

2.116(C)(8) and (C)(10), and it is clear that the trial court looked beyond the pleadings, this Court “will treat the motions as having been granted pursuant to MCR 2.116(C)(10).”¹

A motion under MCR 2.116(C)(10) “tests the factual support of a plaintiff’s claim, and is reviewed by considering the pleadings, admissions and other evidence submitted by the parties in the light most favorable to the nonmoving party.”² “Summary disposition is proper if there is ‘no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law.’”³ “There is a genuine issue of material fact when ‘reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving party.’”⁴ On appeal, this Court considers only evidence properly presented to the trial court.⁵ This Court reviews de novo a trial court’s grant of a motion for summary disposition under MCR 2.116(C)(10).⁶ This Court also reviews de novo questions of contract interpretation.⁷

B. LEGAL PRINCIPLES

Generally, in a case with an insurance contract that contains the statutory language requiring proof of loss within 60 days, “the failure to file a signed and sworn proof of loss within sixty days of the loss bars recovery on a claim without regard to whether the insurer is prejudiced by such failure.”⁸ However, Michigan follows the substantial performance rule for insurance contracts.⁹ Substantial performance occurs “when all the essentials necessary to the full accomplishment of the purposes for which the thing contracted has been performed with such approximation that a party obtains substantially what is called for by the contract.”¹⁰

Moreover, in *Dellar v Frankenmuth Mut Ins Co*, this Court recognized that a defendant can waive or be estopped from presenting a proof of loss defense.¹¹ “A waiver is a voluntary

¹ *Kefgen v Davidson*, 241 Mich App 611, 616; 617 NW2d 351 (2000).

² *Lakeview Commons LP v Empower Yourself, LLC*, 290 Mich App 503, 506; 802 NW2d 712 (2010).

³ *Id.* (citation omitted).

⁴ *Id.* (citation omitted).

⁵ *Id.*

⁶ *Id.*

⁷ *Sweebe v Sweebe*, 474 Mich 151, 154; 712 NW2d 708 (2006).

⁸ *Dellar v Frankenmuth Mut Ins Co*, 173 Mich App 138, 145; 433 NW2d 380 (1988). See also *Helmer v Dearborn Nat’l Ins Co*, 319 Mich 696, 700; 30 NW2d 399 (1948); *Fenton v Nat’l Fire Ins Co*, 235 Mich 147, 150; 209 NW 42 (1926).

⁹ *Gibson v Group Ins Co*, 142 Mich App 271, 275; 369 NW2d 484 (1985).

¹⁰ *Id.*

¹¹ *Dellar*, 173 Mich App at 146-147.

relinquishment of a known right.”¹² Estoppel applies when a “(1) defendant’s acts or representations induced [the] plaintiff to believe that the limitations period clause would not be enforced, (2) [the] plaintiff justifiably relied on this belief, and (3) [the plaintiff] was prejudiced as a result of . . . reliance on . . . [a] belief that the clause would not be enforced.”¹³

C. THE CONTRACT LANGUAGE

The insurance contract at issue provides, in relevant part:

GENERAL DUTIES

A person claiming, or who may claim, any coverage under this policy must:

1. cooperate with and assist us in any matter concerning a claim or suit;

* * *

3. provide any written Proofs of Claim or Loss we require.

* * *

DUTIES UNDER PART I AND PART III

In the event of property loss, you must:

* * *

3. make a list of all damaged or destroyed property, showing in detail: quantities, costs, Actual Cash Value and amount of loss claimed;

4. send to us within 60 days after loss, a Proof of Loss signed and sworn to by the insured person, including:

- a. the time and cause of loss;
- b. the interest of insured persons and all others in the property;
- c. Actual Cash Value and amount of loss to the property;
- d. all encumbrances on the property;
- e. other policies covering the loss;

¹² *Id.* at 146, quoting *Dahrooge v Rochester-German Ins Co*, 177 Mich 442, 451-452; 143 NW 608 (1913).

¹³ *McDonald v Farm Bureau Ins Co*, 480 Mich 191, 204-205; 747 NW2d 811 (2008).

- f. changes in title, use, occupancy or possession of the property; and
- g. if required, any plans and specifications of the damaged buildings or fixtures.

There is no dispute that the deadline for submission of the proof of loss materials and Johnson's Sworn Statement in Proof of Loss was June 5, 2010 (60 days after the fire). And there can be no dispute that Johnson did not submit the requisite materials by that date.

D. SUBSTANTIAL PERFORMANCE

The purposes of the proof of loss materials are "to defend against fraudulent, invalid, or excessive claims."¹⁴ The proof of loss materials requirement allows an insurance company to determine the amount of the claim and its liability within 60 days of the loss.¹⁵ In this case, the purposes of the proof of loss materials were not met by MemberSelect's investigation. Most significantly, MemberSelect did not receive timely information about Johnson's alleged amount of loss because Johnson did not submit an inventory until after the 60 days had passed. Johnson also failed to provide MemberSelect with a detailed contents estimate and related documents, despite MemberSelect's repeated requests for the information. Therefore, MemberSelect did not know the extent of its potential liability and could not defend against excessive claims.¹⁶ Additionally, MemberSelect did not have Johnson's signature attesting to his alleged loss, which would make it more difficult for MemberSelect to defend against potential future fraud.

Moreover, Kadzielewski was not MemberSelect's ostensible agent. In order to have an ostensible agency relationship, a plaintiff must reasonably believe that the agent had authority, the belief must be generated by the principal's acts or omissions, and the plaintiff must not be guilty of negligence.¹⁷ MemberSelect hired Kadzielewski to conduct an inventory. But there is no indication that Kadzielewski or MemberSelect ever represented to Johnson that Kadzielewski was acting on behalf of MemberSelect. In fact, Johnson authorized Kadzielewski to inspect his apartment *before* MemberSelect hired Kadzielewski to prepare an inventory. Therefore, Johnson's submission of his Sworn Statement in Proof of Loss to Kadzielewski does not constitute substantial compliance with the proof of loss terms in the insurance contract.

E. WAIVER

MemberSelect did not waive its proof of loss defense. The only evidence that Johnson presents to show that MemberSelect waived this right is that MemberSelect did not further request the proof of loss materials in communications it had with Johnson after the April 8, 2010 letter stating Johnson's obligations under the contract. This does not show that MemberSelect

¹⁴ *Dellar*, 173 Mich App at 145.

¹⁵ *Id.* at 145-146.

¹⁶ *Id.* at 145.

¹⁷ *Zdrojewski v Murphy*, 254 Mich App 50, 66; 657 NW2d 721 (2002).

intentionally waived its right to timely proof of loss materials and Sworn Statement in Proof of Loss. In fact, MemberSelect specifically stated that it did “not intend to surrender any of its rights under the contract . . . by assisting [Johnson] in its completion.”

F. ESTOPPEL

MemberSelect is not estopped from presenting a proof of loss defense. Admittedly, MemberSelect did not insist Johnson comply with the insurance contract by reminding Johnson of his obligations. However, MemberSelect was under no obligation to remind Johnson of his duties under the contract. The insurance contract clearly stated that Johnson was required to submit the proof of loss materials within 60 days. Additionally, four days after the fire, MemberSelect informed Johnson that he was *required* to submit the proof of loss materials and the Sworn Statement in Proof of Loss within 60 days of the fire. MemberSelect also warned Johnson that if he failed to submit the materials his claim “cannot receive further consideration.” Johnson received this notice, which made it clear that he was required to comply with the proof of loss requirements. There is no evidence that MemberSelect intentionally misled Johnson, and therefore, MemberSelect is not estopped from presenting its proof of loss defense.

We affirm.

/s/ Kurtis T. Wilder

/s/ Peter D. O'Connell

/s/ William C. Whitbeck