STATE OF MICHIGAN

COURT OF APPEALS

SPE UTILITY CONTRACTORS, LLC,

Plaintiff/Counter-Defendant/Appellant,

v

ZURICH AMERICAN INSURANCE CO.,

Defendant/Counter-Plaintiff/Appellee,

and

FIFTH THIRD BANK,

Defendant.

UNPUBLISHED
October 23, 2012

No. 305613
St. Clair Circuit Court
LC No. 2008-002563-CK

Before: K. F. KELLY, P.J., and MARKEY and SERVITTO, JJ.

PER CURIAM.

Plaintiff, SPE Utility Contractors, LLC, appeals as of right the trial court's order granting defendant, Zurich American Insurance Co.'s motion to enforce the parties' settlement agreement and denying plaintiff's motion to set aside the same. We affirm.

Plaintiff is a utility contractor that performs all aspects of overhead and underground power line distribution throughout the United States. Plaintiff purchased several insurance policies from defendant Zurich American Insurance Co. (hereafter "defendant") in September 2006, including a multi-state worker's compensation insurance policy. The worker's compensation policy was an intermediate deductible policy which essentially required plaintiff to pay the first $75,000.00 of any claim that was filed against it in exchange for a greatly reduced premium. As a condition of the policy, plaintiff was required to post security with defendant in the form of a letter of credit issued by defendant Fifth Third Bank on plaintiff's behalf in the amount of $150,000.00.

In August 2007, defendant submitted a proposal to extend the multi-state worker's compensation policy which required plaintiff to execute a deductible agreement within 30 days. Plaintiff refused to execute the agreement, and defendant advised plaintiff in January 2008 that it

would be converting the policy to a guaranteed cost policy as a result, which would increase the premium by over $88,000.00 per year. Plaintiff terminated all polices with defendant effective March 1, 2008. When defendant thereafter drew $150,000.00 on the Fifth Third credit line, plaintiff initiated the instant lawsuit.

In an amended complaint, plaintiff asserted that in converting its worker's compensation policy from a intermediate deductible policy to a guaranteed cost policy and thereby increasing the premium, defendant breached the parties' insurance agreement. Plaintiff also sought a preliminary injunction preventing defendant from drawing on the Fifth Third line of credit. Defendant filed a counter-complaint, asserting that plaintiff breached the parties' insurance contracts by failing to pay premiums and cancellation fees owed on the various policies it purchased from defendant.

The parties engaged in discovery, during which defendant provided plaintiff with copies of several audits and statements it had prepared in determining the amount of premiums and cancellation fees it claimed plaintiff owed. It did not, however, provide the most recent audits, prepared on May 20, 2010, wherein it had given plaintiff two credits toward its premiums (totaling nearly $22,000.00) that plaintiff had applied for through the National Council of Compensation Insurance ("NCCI"). The parties attended facilitation and ultimately reached a settlement agreement on March 4, 2011, wherein they agreed to settle all claims in exchange for payment from defendant to plaintiff for $45,000.00. An email acceptance of the agreement to settle was exchanged between the parties and the facilitator. However, after several drafts of a written settlement agreement passed back and forth, plaintiff indicated that it wanted to retain the right to seek the NCCI credits from defendant. At that time, defendant moved to enforce the settlement agreement and plaintiff moved to have the agreement set aside. As previously indicated, the trial court granted defendant's motion and denied plaintiff's motion. This appeal followed.

The trial court's decision regarding the validity of a consent settlement agreement is reviewed for an abuse of discretion. *Lentz v Lentz*, 271 Mich App 465, 474–475; 721 NW2d 861 (2006). An abuse of discretion is found to have occurred "when the trial court's decision is outside the range of reasonable and principled outcomes." *Shawl v Spence Bros, Inc*, 280 Mich App 213, 222; 760 NW2d 674 (2008).

Plaintiff does not dispute that a settlement was reached. Rather, plaintiff's first argument on appeal is that defendant had a duty to disclose the amended audits showing the NCCI credits pursuant to MCR 2.302(E) and MCL 500.2008, and that a breach of said duties provides a basis for setting aside the settlement agreement.

This Court reviews issues of statutory interpretation de novo. *Houghton Lake Area Tourism & Convention Bureau v Wood*, 255 Mich App 127, 133; 662 NW2d 758 (2003). Interpretation of a court rule is a question of law that this Court also reviews de novo. *CAM Constr v Lake Edgewood Condominium Ass'n*, 465 Mich 549, 553; 640 NW2d 256 (2002).

MCL 500.2008 provides:

> (1) Upon the written request of an insured, an insurer shall audit or cause to be audited an insured's payroll expenditures for the purpose of determining the proper worker's compensation insurance premiums. The written request of the insured shall include a statement that the insured has reason to believe that there has been not less than a 20% change in payroll expenditures and the reasons for that belief. The audit shall be completed within 120 days of the receipt of the written request, if all required information to complete the audit has been made available. Only 1 audit per calendar year conducted at the request of the insured is required under this subsection.
>
> (2) Except for a final audit, it is an unfair or deceptive act or practice in the business of insurance for an insurer to fail to complete a payroll audit which is required pursuant to the terms of a policy within 120 days after the date specified in the policy for the commencement of an audit, if all required information to complete the audit has been made available. It is an unfair or deceptive act or practice in the business of insurance if a final audit is not completed by an insurer within 120 days after the date of termination of the policy, if all required information to complete the audit has been made available.
>
> (3) An insurer shall pay on a timely basis to its insured any adjustment in a premium, any dividend, a retrospective premium adjustment, or any similar amount which is due. It is an unfair or deceptive act or practice in the business of insurance for an insurer to not pay these amounts on a timely basis . . .

First, as acknowledged by plaintiff, there is no requirement in the statute that the audits referred to therein be provided to the insured. Plaintiff has provided no authority suggesting the same. More importantly, the statute refers to audits requested by the insured, payroll audits which are required pursuant to the terms of a policy, and final audits. With respect to final audits, MCL 500.2008(2) states, "[i]t is an unfair or deceptive act or practice in the business of insurance if a final audit is not completed by an insurer within 120 days after the date of termination of the policy, if all required information to complete the audit has been made available." Plaintiff has identified no obligation that can be read into the statute to disclose an audit prepared in defense of a breach of contract action or in preparation to pursue a breach of contract action, as were the May 20, 2010, audits in the instant matter. Plaintiff's claim premised upon MCL 500.2008 thus fails.

Plaintiff's claim with respect to MCR 2.302(E) similarly fails. That rule provides:

> (1) Duty to Supplement. A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement the response to include information acquired later, except as follows:
>
> > (a) A party is under a duty seasonably to supplement the response with respect to a question directly addressed to
> >
> > > (i) the identity and location of persons having knowledge of discoverable matters; and

> (ii) the identity of each person expected to be called as an expert witness at trial, the subject matter on which the expert is expected to testify, and the substance of the expert's testimony.
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> (b) A party is under a duty seasonably to amend a prior response if the party obtains information on the basis of which the party knows that
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> (i) the response was incorrect when made; or
>
> (ii) the response, though correct when made, is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.
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> (c) A duty to supplement responses may be imposed by order of the court, agreement of the parties, or at any time before trial through new requests for supplementation of prior responses.
>
> (2) *Failure to Supplement.* If the court finds, by way of motion or otherwise, that a party has not seasonably supplemented responses as required by this subrule the court may enter an order as is just, including an order providing the sanctions stated in MCR 2.313(B), and, in particular, MCR 2.313(B)(2)(b).

Because the audits do not relate to identity, MCR 2.302(E)(1)(a) is inapplicable. Defendant's prior response(s) setting forth its calculation of damages based upon audits which set forth the premiums and cancellation fees owed it, offset by refunds owed to plaintiff, were not alleged to have been incorrect when made. Thus, MCR 2.302(E)(1)(b)(i) is also inapplicable. If the responses were correct when made and were no longer true, defendant would have a duty to supplement these responses under MCR 2.302(E)(1)(b)(ii) only if failure to amend the response was essentially a knowing concealment.

Assuming, without deciding, that the failure to amend was a knowing concealment, the same is no basis for setting aside the settlement agreement. First, if the trial court finds that a party has not supplemented responses as required by the court rule, it may "enter an order as is just, including an order providing the sanctions stated in . . . MCR 2.313(B)(2)(b)." MCR 2.313(B)(2)(b) provides that when a party fails to comply with discovery, a trial court may order sanctions including "an order refusing to allow the disobedient party to support or oppose designated claims or defense, or prohibiting the party from introducing designated matters into evidence . . ." Thus, were defendant found to have failed to comply with its duty to provide the amended audits, an appropriate sanction would arguably be to prohibit defendant from including the NCCI credits in its claim for damages or even from seeking damages on its counter-claim from plaintiff. This, because the parties settled the matter with defendant agreeing to pay plaintiff $45,000.00, is what defendant ended up doing. Defendant received absolutely nothing from plaintiff on its counter-claim.

Second, plaintiff initiated this lawsuit, seeking damages against defendant for breach of the parties' insurance contract, specifically, claiming that defendant wrongfully converted the

contract from an intermediate deductible endorsement to a guaranteed cost policy thereby increasing the premium on the policy approximately $88,000.00. Plaintiff never claimed that it was entitled to the NCCI credits in its complaint. Defendant then counter-claimed for breach of the parties' insurance contract, insisting that plaintiff breached the policy at issue, as well as other insurance policies, by failing to pay owed premiums and cancellation fees, but settled for nothing. Whatever amount of damages defendant was seeking, then, was irrelevant.

Along the same vein of knowing concealment, plaintiff contends that defendant's failure to disclose the amended audits constitutes an intentional/fraudulent misrepresentation which justifies setting aside the settlement. We disagree.

An agreement to settle a pending lawsuit is a contract and is governed by the legal principles applicable to the construction and interpretation of contracts. *Michigan Mut Ins Co v Indiana Ins Co*, 247 Mich App 480, 484; 637 NW2d 232 (2001). A contract to settle a lawsuit requires a meeting of the mind on all essential terms of the agreement and an offer and unambiguous acceptance of these essential terms. *Kloian v Domino's Pizza L.L.C.*, 273 Mich App 449, 452-453; 733 NW2d 766 (2006). "A meeting of the minds is judged by an objective standard, looking to the express words of the parties and their visible acts, not their subjective states of mind." *Kamalnath v Mercy Memorial Hosp Corp*, 194 Mich App 543, 558; 487 NW2d 499 (1992).

Settlements should not be upset because of any hesitation or secret reservation on the part of either party. *Meyer v Rosenbaum*, 71 Mich App 388, 393; 248 NW2d 558 (1976). "Under usual contract principles, plaintiff is bound by the settlement agreement absent a showing of mistake, fraud, or unconscionable advantage." *Plamondon v Plamondon*, 230 Mich App 54, 56; 583 NW2d 245 (1998). In order to set aside an agreement for fraudulent misrepresentation, plaintiff must prove that "(1) defendant made a material representation; (2) the representation was false; (3) defendant knew, or should have known, that the representation was false when making it; (4) defendant made the representation with the intent that plaintiff rely on it; (5) and plaintiff acted on the representation, incurring damages as a result." *Foreman v Foreman*, 266 Mich App 132, 141; 701 NW2d 167 (2005).

With respect to the first element, the material representation that plaintiff asserts defendant made was with respect to the audits it provided. Plaintiff contends that defendant misrepresented that it had provided plaintiff with accurate information regarding audits in accordance with their duty under MCR 2.302(E). However, as previously stated, the earliest date to which we can impute knowledge of the NCCI credits to defendant is May 20, 2010. There is no indication that plaintiff deposed any of defendant's employees after that date or, more importantly, that defendant was relying upon any of the audits at all, including the May 20, 2010 one, during settlement negotiations. Again, defendant was seeking monies from plaintiff and settled for nothing, ultimately *paying* plaintiff in settlement of the case.

Even if defendant can be said to have made a material representation regarding the audit, the remaining elements of fraudulent misrepresentations cannot be met. As pointed out by defendant, (5) above, reliance by plaintiff on defendant's representation and/or silence regarding the credits was patently unreasonable. Plaintiff applied for the credits. Plaintiff admits that the process required it to apply for the credits, and that it did not advise defendant that it had applied

for the same. Plaintiff thus knew the date on which it had applied, knew the potential that the credits existed, and presumably had access to NCCI to verify if the credits had been approved. Plaintiff also had access to all prior audits and statements provided by defendant and was aware that the credits were not included on the audits. While plaintiff may have been considering the credits and the fact that it may have been entitled to offsets in the premiums defendant claimed were due to it, the time for discussing this issue was when settlement negotiations were taking place—not when drafting the agreement memorializing their settlement. Plaintiff, in fact, admits in its appeal brief that "[d]uring the negotiation of the settlement agreement, SPE attempted to exclude from the agreement, a credit for worker's compensation insurance that was available to contractors in the state of Florida through . . . NCCI. Zurich objected claiming that the NCCI credit was included in the settlement." Thus, whether the credits were to be excluded from settlement was, in fact, discussed during negotiations.

Plaintiff was provided with the following confirmation of the parties' agreement:

> This is to confirm that you have both informed me of your respective clients' agreement to settle the above referenced matter as follows: $45,000 payment by Zurich representing a full final and complete settlement of the claims and counterclaims that have been pled or could have been pled in the above referenced matter, mutual releases and agreement to maintain the multi-state workers' compensation policy as a guaranteed cost policy . . .

Plaintiff's counsel responded, "I confirm." There is no ambiguity in "full final and complete" nor is there ambiguity in "claims and counterclaims that have been pled or could have been pled." Plaintiff cannot now try to have the agreement set aside because of any change of heart or secret reservation. *Meyer v Rosenbaum*, 71 Mich App at 393.

Further, while plaintiff contends that concealing the May 20, 2010, audit somehow gave defendant an advantage during settlement negotiations, is it undisputed that plaintiff was the one who applied for the credits. According to plaintiff, it did not advise defendant it was applying for the credits. It was aware at all times that it may be qualified for the credits and, having received previous audits, was aware that the same were not accounted for in prior amounts sought by defendant. And, after all, a settlement agreement is a compromise of a disputed claim. *Reicher v SET Enterprises, Inc*, 283 Mich App 657, 664; 770 NW2d 902 (2009). Plaintiff, in agreeing to settle, knew it would not be getting all of the relief to which it felt it was entitled. That is the nature and purpose of settling a claim.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Jane E. Markey
/s/ Deborah A. Servitto