STATE OF MICHIGAN

COURT OF APPEALS

ALLSTATE INSURANCE COMPANY,

Plaintiff-Appellee,

v

HAROLD HARRIS, ANGELA HARRIS and NORMA FORD, as Co-Personal Representatives of the Estate of GWENDOLYN HARRIS, Deceased,

Defendants-Appellants,

and

WILLIAM BEAUDOIN, SHARON BEAUDOIN, and CYNTHIA BEAUDOIN,

Defendants.

UNPUBLISHED
January 16, 1998

No. 199187
Oakland Circuit Court
LC No. 95-508486 CK

Before: Griffin, P.J., and Sawyer and O'Connell, JJ.

PER CURIAM.

Defendants appeal as of right from the declaratory judgment entered in favor of plaintiff and the order denying defendants' motion for reconsideration. We reverse and remand for further proceedings.

Defendants argue that the trial court improperly granted summary disposition in favor of plaintiff because plaintiff was estopped to deny coverage to William Beaudoin under a homeowners insurance policy. Defendants argue that plaintiff assumed Beaudoin's defense in the underlying tort action and did not give him adequate notice of its reservation of rights.

Approximately three weeks after the complaint was filed in the underlying tort action, plaintiff purportedly sent its insured, William Beaudoin, a letter which stated that plaintiff reserved its right to later disclaim any obligation under the policy on the grounds of three different policy exclusions. Four

months later, plaintiff allegedly sent another letter to William Beaudoin reaffirming its reservation of rights.

Plaintiff subsequently filed the present action seeking a declaratory judgment that its homeowners policy did not provide coverage for the liability asserted against William Beaudoin. Plaintiff then brought a motion for summary disposition pursuant to MCR 2.116(C)(10), arguing that Beaudoin was not insured under the policy and that the homeowners insurance policy's exclusions applied to each of the defendants. Defendants responded in part that plaintiff was estopped to deny coverage because it had assumed the defense of its insured and had failed to notify the insured of its denial of coverage. Defendants argued to the trial court that Beaudoin never received the reservation of rights letters. However, the trial court granted the motion and entered a declaratory judgment in plaintiff's favor. In denying defendants' motion for reconsideration, the trial court relied on the presumption that items properly addressed and placed in the mail reach their destination, *Crawford v Michigan*, 208 Mich App 117, 121; 527 NW2d 30 (1994), and stated that although it did not hold as a matter of law that Beaudoin had received notice, defendants had failed to satisfy the evidentiary burden of showing nonreceipt in opposing the motion for summary disposition.

The general rule is that an insurer may be estopped from denying coverage based on a policy exclusion when the insurer, with actual or constructive knowledge of a defense to its policy coverage, participates in the defense of the insured for an unreasonable time and fails to provide timely notice of its intention to disclaim liability. *Fire Ins Exchange v Fox*, 167 Mich App 710, 713-714; 423 NW2d 325 (1988); *Multi-States Transport, Inc v Michigan Mut Ins Co*, 154 Mich App 549, 553-554; 398 NW2d 462 (1986).

As recognized by the trial court, it is well established that items properly addressed and placed in the mail are presumed to reach their destination. *Lowry v Saginaw Specialty Co*, 128 Mich 246; 87 NW 194 (1901); *Crawford, supra*; *Auto-Owners Ins Co v Gallup*, 191 Mich App 181, 186; 477 NW2d 463 (1991). When receipt is denied, however, as in the instant case, a question of fact is raised as to whether the communication has in fact been mailed to the addressee. *Cuttle v Concordia Mut Fire Ins Co*, 295 Mich 514, 519; 295 NW 246 (1940); *Rousseau v Brotherhood of American Yeoman*, 186 Mich 101, 106; 152 NW 939 (1915). The question then becomes not whether the letter was in fact received, but whether the letter was in fact mailed. *Cuttle v Concordia Mut Fire Ins Co*, 290 Mich 117, 120; 287 NW 401 (1939). The presumption that a letter has been received depends on the addressor establishing by a preponderance of the evidence that the letter was sent, *Brown v Harris*, 139 Mich 372, 377; 102 NW 960 (1905), and the burden rests on the addressor to initially establish the fact that the letter was properly mailed. *Cuttle, supra*, 290 Mich at 120-121; *Barstow v Federal Life Ins Co*, 259 Mich 125, 129; 242 NW2d 862 (1932). As explained by the Court in *Ewing v Klatt*, 235 Mich 536, 540; 209 NW 838 (1926):

> [T]he general rule obtains that proof that a letter properly addressed was mailed with full postage paid raises a rebuttable presumption that it was received by the addressee, and when the original cannot be produced a proven copy is admissible to sustain the presumption. But such secondary evidence to establish the presumption is only competent when all essential preliminary facts entitling it to admission are shown.

> Defendant has not only failed to show that the letter was properly stamped, or full postage paid, but has shown it was not addressed to plaintiff. There is no proof plaintiff actually received it or had knowledge of its contents, and he testified he did not. No presumption of receipt arises under such circumstances. . .

Defendants argue on appeal that plaintiff's motion for summary disposition brought pursuant to MCR 2.116(C)(10) is defective because plaintiff never alleged by affidavit, deposition, or other documentary evidence that the reservation of rights letters were ever mailed to Beaudoin. Defendants maintain that they were not required to provide the lower court with further proofs regarding receipt in response to plaintiff's motion, because the motion itself was not supported by legally sufficient documentation. Accordingly, defendants argue that the presumption of delivery of a mail item cannot be made under the present circumstances. We agree.

In the instant case, in oral argument before this Court, counsel for plaintiff candidly admitted that it did not produce any proofs that the reservation of rights letters were mailed to Beaudoin. In the lower court, plaintiff did not provide any documentation that the letters purportedly sent to William Beaudoin were properly addressed, mailed, and marked with postage. Plaintiff's counsel argues that because the letters were written, it could be inferred that they were mailed. However, in light of the above-cited case law and the requirements of MCR 2.116(C)(10), this Court is not persuaded that such an inference can be made.

This Court reviews summary disposition decisions de novo. *G & A Inc v Nahra*, 204 Mich App 329, 330; 514 NW2d 255 (1994). This Court must examine the record in order to determine whether the prevailing party was entitled to judgment as a matter of law. *Id*. A motion for summary disposition under MCR 2.116(C)(10) tests the factual support for a claim. *Lash v Allstate Ins Co*, 210 Mich App 98, 101; 532 NW2d 869 (1995). In deciding such a motion, the trial court must consider the pleadings, depositions, affidavits, admissions, and other documentary evidence, MCR 2.116(G)(5), and must give the nonmoving party the benefit of every reasonable doubt. *Radtke v Everett*, 442 Mich 368, 373; 501 NW2d 155 (1993); *Rice* v *ISI Mfg, Inc*, 207 Mich App 634, 635-636; 525 NW2d 533 (1994).

In *SCC Associates Ltd Partnership v General Retirement System of City of Detroit*, 192 Mich App 360, 363-364; 480 NW2d 275 (1991), the Court held that a motion for summary disposition under MCR 2.116(C)(10) is defective if it is based on unsworn statements. The Court explained:

> Affidavits, depositions, admissions, or other documentary evidence in support of the grounds asserted in the motion must be filed with the motion. MCR 2.116(G)(3). The affidavits must be made on the basis of personal knowledge and must set forth with particularity such facts as would be admissible as evidence to establish or deny the grounds stated in the motion. *Durant v Stahlin*, 375 Mich 628; 135 NW2d 392 (1965). They do not resolve issues of fact. Their purpose is to help the court determine whether an issue of fact exists. Id. at 640, 645-647. Opinions, conclusionary denials, unsworn averments, and inadmissible hearsay do not satisfy the

court rule; disputed fact (or the lack of it) must be established by admissible evidence. *Remes v Duby (After Remand)*, 87 Mich App 534, 537; 274 NW2d 64 (1978).

MCR 2.116(G)(4) further addresses the requirements of a (C)(10) motion and the appropriate response:

> (4) A motion under subrule (C)(10) must specifically identify the issues as to which the moving party believes there is no genuine issue as to any material fact. When a motion under subrule (C)(10) is made *and supported as provided in this rule*, an adverse party may not rest upon the mere allegations or denials of his or her pleading, but must, by affidavits or as otherwise provided in this rule, set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, judgment, if appropriate, shall be entered against him or her. [Emphasis added.]

A party opposing a motion for summary disposition "has no obligation to submit any affidavit until the moving party submits a proper affidavit regarding a dispositive fact." *SCC, supra* at 364. If disputed facts are not established by admissible evidence in the (C)(10) motion in the first place, then the motion is defective and the opposing party need not respond with legally sufficient documentation.

In the instant case, plaintiff has not supported its (C)(10) motion with any admissible evidence regarding the disputed fact of mailing as required by the court rule. As previously noted, plaintiff submitted no proofs that the reservation of rights letters had been properly addressed to the insured with proper postage and placed in an appropriate post office receptacle. As recognized in *SCC, supra* at 366, "(I)t is incumbent upon the moving party to support its claim that no material issue of fact exists with affidavits, depositions, admissions, or other admissible documentary evidence." Plaintiff has not properly supported its (C)(10) motion and at this stage has not established by a preponderance of the evidence that the letters were mailed so as to permit the resultant presumption that the letters were received. Based on the current record, a genuine issue of material fact therefore exists regarding receipt of the reservation of rights letters by the insured and the issue of estoppel, thereby rendering summary disposition inappropriate. Our ruling is without prejudice to plaintiff renewing its motion on remand if supported by adequate documentary evidence.

In light of this Court's holding, we need not address defendants' other issues presented on appeal. Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Richard Allen Griffin
/s/ David H. Sawyer
/s/ Peter D. O'Connell