

STATE OF MICHIGAN
COURT OF APPEALS

FARM BUREAU INSURANCE CO,

Plaintiff/Counter-Defendant- Appellee,

v

ESAM ASKER,

Defendant/Counter-Plaintiff- Appellant,

and

FAEEZA ASKER LARRY MIFSUD and
DONNA MIFSUD

Defendants.

UNPUBLISHED

June 2, 1998

No. 200483

Oakland Circuit Court

LC No. 94-488133 CZ

Before: Gribbs, P.J., and McDonald and Talbot, JJ.

PER CURIAM.

This case began as a declaratory action to determine Farm Bureau's obligations under a homeowner's insurance policy to defend and indemnify the Askers in a civil action brought against them by the Mifsuds. Although coverage was disputed, Farm Bureau conducted the defense of the Mifsuds' civil action under a reservation of rights. Eventually, the court ruled that coverage was not available under the policy. However, the court allowed Esam Asker ("Asker") to file a counter-complaint alleging that Farm Bureau conducted the defense negligently, in bad faith and contrary his interests. Following a jury trial and verdict on his counter-complaint, the court entered a judgment of no cause of action in favor of Farm Bureau. Asker appeals as of right. We affirm.

Asker argues that the trial court abused its discretion by refusing to allow him to call two attorneys, Norman Lippitt and Nazli Sater, who represented the Mifsuds in the civil action against Asker. Following Farm Bureau's objection, the court ruled that the proposed witnesses could not testify because they had not been included on Asker's witness list. Asker's attorney then explained that at the time the witness list was filed in the declaratory action, which was before the counter-complaint for bad faith was filed, he did not know that the Mifsuds' attorneys could provide material evidence.

He further argued that Farm Bureau's attorney was aware that Asker wanted to call these witnesses, yet she failed to object until trial. In response to Asker's suggestion that Farm Bureau would not be prejudiced, Farm Bureau's attorney responded that she became aware that Asker intended to call Sater and Lippitt after the discovery deadline and that the court had denied Farm Bureau's motion to extend discovery. Therefore, she had been unable to depose them. The court reaffirmed its earlier ruling, noting that Asker could have filed a motion to amend the list, but had failed to do so.

We recognize that Asker may not have recognized any reason to list Lippitt and Sater as witnesses until after the witness list was filed. However, defense counsel told the court that the events that made those witnesses material occurred in August and October, 1995. Trial occurred in December, 1996. Counsel did not offer an explanation for failing to move to amend the list before trial. He also did not suggest to the court the importance of the witness' testimony. *Jernigan v General Motors Co*, 180 Mich App 575, 584-585; 447 NW2d 822 (1989). Whether the witnesses should have been permitted to testify at trial was for the trial court to decide in the exercise of discretion. *Hayes-Albion Corp v Kuberski*, 421 Mich 170, 188; 364 NW2d 609 (1984). Under these circumstances, the trial court did not abuse its discretion.

We do not, however, believe the appeal was vexatious under MCR 7.216(C)(1)(a) and, accordingly, deny the appellee's request for actual attorney fees.

Affirmed.

/s/ Roman S. Gribbs
/s/ Gary R. McDonald
/s/ Michael J. Talbot