STATE OF MICHIGAN

COURT OF APPEALS

JIM CHRISTIE REAL ESTATE, INC.,

Plaintiff-Appellee/Cross-Appellant,

v

TIG INSURANCE COMPANY,

Defendant-Appellant,

and

CONTINENTAL CASUALTY COMPANY,

Defendant-Appellee/Cross-Appellee.

UNPUBLISHED
October 23, 1998

No. 199869
Wayne Circuit Court
LC No. 96-604639 CK

Before: Holbrook, Jr., P.J., and White and J. W. Fitzgerald,* JJ.

PER CURIAM.

Plaintiff, a real estate agency, filed a declaratory action against TIG Insurance Company (TIG) and Continental Casualty Company (Continental), seeking a declaration that they had a duty under their respective claims-made insurance policies to defend and indemnify plaintiff in the underlying circuit court action, filed November 9, 1994.

Defendant TIG appeals as of right from the circuit court's order denying its motion for summary disposition and declaring that plaintiff was entitled to a defense and indemnification from TIG. Plaintiff cross-appeals from the circuit court's grant of summary disposition to defendant Continental. We reverse the circuit court's denial of TIG's motion for summary disposition and the circuit court's grant of summary disposition to plaintiff, and affirm the court's grant of Continental's motion for summary disposition.

I

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* Former Supreme Court justice, sitting on the Court of Appeals by assignment.

TIG and Continental insured plaintiff under real estate agents and brokers professional liability policies at different times. Continental insured plaintiff for several successive years, ending on September 25, 1994. TIG insured plaintiff for the period of September 25, 1994 to September 25, 1995. Plaintiff acted as the listing agent of a newly constructed residential home in Dearborn, purchased by Mary Locke in November 1991. On November 9, 1994, Locke filed an action in circuit court, arising from her purchase of the Dearborn home. Plaintiff was served with the summons and complaint on January 30, 1995,

On or about May 18, 1993, before the underlying circuit court action was commenced, Locke had filed a complaint against plaintiff with the Michigan Department of Commerce, Bureau of Occupational and Professional Regulation, Commercial Enforcement Division (DOC complaint). Locke's DOC complaint was on a standardized DOC form that stated in pertinent part:

> INSTRUCTIONS TO COMPLAINANT: . . . .
>
> This Division has jurisdiction in only certain matters involving consumers and licensees in the area of occupational professions. It is suggested that you first contact the person or firm about whom you have a complaint to see if the matter can be settled. If this has been unsuccessful, you may want to consult an attorney to determine your civil options, file an action in Small Claims Court, or contact your Prosecutor. These may be done in conjunction with or instead of filing a complaint with this Department.
>
> * * *
>
> 13. Here is a list of professions we regulate. Indicate which profession your complaint is against.
>
> * * *
>
> [Locke checked "Real Estate Agent/Company"]
>
> * * *
>
> 15. Have you contacted the above named person or company in writing about your complaint?
>
> [Locke checked "Yes."]
>
> If yes, what was the result?
>
> [Locke responded:] Mr. Chappell [one of two of plaintiff's representatives named in the DOC complaint, the second one being Jeffery Longstreth] did send a letter to the sellers about the initial floor problem and did come to my home to try to meet with them; both Mr. Chappell and Mr. Longstreth came over to my home to see the problems along with the loan officer—but they did nothing!!

16. Did you file a claim with any other agency, or start civil or criminal action?

[Locke checked "Yes."]

If yes, where? [Locke responded:] Dept. of Labor & Commerce[,] State Atty Gen. & Congressman Dingell

Case # [Locke responded:] 21-93-0245-00

What is the current status of that claim? [Locke responded:] Unknown: have not heard from MR. Green (Dept. Labor) or Congressman Dingell: City of Dbn reinspected my home and then came back unannounced with a Mr. Be nnett [sic] to do a reinspect. Mr. Bennet was not happy with what he saw- Mr. A. Pizzino was with him; this was 5/4/9_ [illegible.]

17. What do you hope will result from your filing of this complaint (Check one or more)

Resolved at the earliest opportunity through mediation

Problem corrected

Financial losses recognized in some manner (please indicate amount of loss)

Individual will listen to your concerns and work out a solution

Other

[Locke checked "financial losses recognized. . ." and indicated $6,000 as the amount lost. Locke also checked "Other" and stated:

> I want to be paid the commission that Jim Christie Real Estate's people got from the sellers for fraudulently selling me a house that they knowingly knew was damaged; and that I was not properly qualified to purchase.]

18. DETAILS OF YOUR COMPLAINT

[Locke responded]:

> The sellers 'claimed' the floor was damaged after I signed my purchase agreement and contacted the real estate agent to ask my permission to have the floor replaced prior to the closing of the house. The [real estate] agent, Mr. Chappell, said he would see that the floor had been replaced and that it was not necessary to accompany him. I went to the home two days after the closing and saw that the floor had not been

> properly done and immediately contacted Mr. Chappell and Mr. Longstreth. They came over to my home, saw the unsatisfactory job, wrote a note to the sellers that the floor was unsatisfactory, but did nothing else. When I contacted the sellers, they also said they were going to do nothing, and 'take us to court'.
>
> I was not informed by the real estate company that the house was only under a constructional assessment, and that within one month when the City of Dearborn reassessed the property [sic]; it was obvious that I never would have been able to afford this home at all. Now, I will have to sell it; but it is not up to code. I had my home independently inspected and a number of liscensed [sic] professionals have made me aware that the City of Dearborn should not have approved final inspection on this house, but the Clavas brothers [the sellers] are friends of Sam Mann, the head of the Dept. of Building and Safety. The house was final inspected only 11 days before closing.

By letter dated June 10, 1993, the DOC notified plaintiff of Locke's DOC complaint and requested a reply within fifteen days. Plaintiff timely replied. The DOC closed Locke's complaint on August 4, 1993.[1]

Subsequently, on November 9, 1994, Locke filed a complaint in circuit court against plaintiff, Jim Christie, and Chappell, Anthony, William and George Calvas, the owners and sellers of the subject property, who were also the builders of the residence; and two subcontracting companies. Locke's complaint alleged in pertinent part:

> 8. The subject matter of this dispute is the construction and sale of a new home located at . . .
>
> * * *
>
> 13. On September 21, 1991 and September 23, 1991 LOCKE, purchaser, signed a contract to purchase real estate . . . with CALVAS, sellers.
>
> 14. The sales agreement represents the property as being used and so in an 'as is' condition even though the house was newly constructed and never previously occupied.
>
> * * *
>
> 18. At the closing of the sale of the house, CALVAS made the following false representations:
>
> a. That to the best of their knowledge there are no major defects in the structure of the premises and the present condition of the furnace, cooling system if any, water heater, electrical and plumbing are in satisfactory working order.

19. Shortly after the closing the home was occupied by LOCKE and her family.

20. After occupying the house for a short period LOCKE noticed numerous defects in the construction of the house including but not limited to the defects listed in the attached Exhibit "C".

Locke's complaint alleged that, due to the defects in workmanship, she would incur repair costs in excess of $10,000; that her homeowners' insurance had been terminated; and that the Calvases, plaintiff, Chappell and Christie failed to inform her that the then current tax assessment on the house was a construction assessment, and that the assessments were increasing dramatically and would require an increase in Locke's monthly mortgage/escrow payments. Count I of Locke's complaint alleged that the Calvases, plaintiff, Chappel and Christie implicitly warranted that the newly constructed home would be reasonably fit for habitability as a personal residence and that their refusal to remedy the defects constituted a breach of implied warranty of fitness for a particular purpose/implied warranty of habitability. Locke requested as relief for this claim that the court rescind the purchase offer, return the purchase price and closing costs, or, alternatively, award over $10,000 in damages plus costs, interest, and reasonable attorney fees.

The second count of Locke's complaint alleged negligent construction against the Calvases and the subcontractors. The third count alleged violation of the Michigan Consumer Protection Act against all parties, through disclaiming or limiting the implied warranty of merchantibility and fitness for use by selling the house "as is" absent a prominent disclaimer; failing to reveal latent defects in the construction of the house and that the next assessment would substantially raise the property taxes; and by entering into a consumer transaction, the sale of the home, with the contract specifying "as is" but not affirmatively stating the warranties the buyer waives or requiring that the buyer specifically consent to the waiver. Locke further alleged that the Calvases, plaintiff, Chappell and Christie violated the Consumer Protection Act by having her sign the sellers/buyers affidavit for closing knowing the statement to be false; and by advertising the home as new construction but selling it as a used "as is" home and representing that the kitchen floor would be replaced before closing, among other things.

The final count alleged fraud, misrepresentation and non-disclosure against the Calvases, plaintiff, Christie and Chappell. Locke alleged that these defendants' factual misrepresentations, non-disclosure of facts, and failure to disclose the true condition of the house were material misrepresentations regarding the condition of the house; that she was induced by such misrepresentations to purchase property which was much less valuable than she was led to believe and which she otherwise would not have purchased; and that these defendants knew or should have known Locke would rely on their misrepresentations and non-disclosure of facts, and that Locke did rely on them in deciding to purchase the house. Locke requested judgment in an amount in excess of $10,000, plus costs, interest and statutory attorney fees, as well as treble damages for fraud.

TIG initially appeared and defended on plaintiff's behalf, but later withdrew its defense. Plaintiff notified Continental of the Locke complaint by letter dated March 28, 1995. Continental denied coverage. Plaintiff then filed this declaratory action.

A

TIG and Continental filed motions for summary disposition under MCR 2.116(C)(10), and plaintiff filed a cross-motion for summary disposition. The circuit court ruled that Locke's May 1993 DOC complaint did not, as a matter of law, constitute a claim under either of defendants' policies:

> . . .this Court must determine whether or not the filing made by Miss Locke in the Michigan Department of Commerce in June [sic May] of 1993 was a, quote-unquote, 'claim' as contemplated in the Continental Insurance policy, or the TIG policy, as a matter of fact.
>
> The Court will rule as a matter of law that it was not a claim, but rather a complaint against Christie's licensure. As outlined in the notice to Christie, possible sanctions included limitations on licenses, suspension of license, denial of renewal, revocation of license, a civil fine payable to the State, and probation.
>
> It is true that the Department of Commerce could also have required restitution, which could under some circumstances be considered a claim; however, the Department of the Commerce filing was later dismissed and those sanctions weren't ever assessed. Certainly no restitution. Therefore TIG Insurance Company must cover plaintiff for the underlying case pursuant to its 1994-95 policy.

II

TIG argues that the circuit court erred in denying its motion for summary disposition because Locke's DOC complaint, filed in 1993, constituted a "claim" under the plain language of the policy; Locke's 1994 lawsuit involved the same claim, alleged the same misconduct, and sought recovery of damages for the same injury; and Locke's claim was thus first made in 1993, prior to the effective date of the TIG policy.

Plaintiff responds that the DOC complaint cannot constitute a claim under the TIG policy because it was not a demand for money damages presented directly to plaintiff; and because the money Locke requested in the DOC complaint was plaintiff's real estate commission, and fee disputes are excluded from coverage under the TIG.

In the context of a summary disposition motion, a trial court may determine the meaning of a contract only when the terms are not ambiguous. *D'Avanzo v Wise & Marsac, PC*, 223 Mich App 314, 319; 565 NW2d 915 (1997). The initial question whether contract language is ambiguous is a question of law and if the language is unambiguous, its meaning is also a question of law. *Port Huron Education Ass'n v Port Huron Area School District*, 452 Mich 309, 323; 550 NW2d 228 (1996). We review questions of law de novo. *Brucker v McKinlay Transport, Inc, (On Remand)*, 225 Mich App 442, 448; 571 NW2d 548 (1997).

A

TIG's policy was a "claims made" policy under which coverage is provided regardless of the timing of the alleged error, omission, or negligent act, provided the misdeed complained of is discovered and the claim for indemnity is made within the policy period. *Stine v Continental Casualty Co,* 419 Mich 89, 97; 349 NW2d 127 (1984); *Pinckney Community Schools v Continental Casualty Co,* 213 Mich App 521, 525-526; 540 NW2d 748 (1995).

The TIG policy provided in pertinent part:

> THIS IS A CLAIMS MADE POLICY AND UNLESS OTHERWISE PROVIDED HEREIN, THE COVERAGE OF THIS POLICY IS LIMITED TO LIABILITY FOR CLAIMS WHICH ARISE FROM THE RENDERING OF OR FAILURE TO RENDER PROFESSIONAL SERVICES SUBSEQUENT TO THE RETROACTIVE DATE STATED IN THE DECLARATIONS [1985] AND PRIOR TO THE CANCELLATION, TERMINATION, OR EXPIRATION DATE OF THE POLICY PERIOD AND WHICH ARE FIRST MADE AGAINST THE INSURED AND REPORTED TO THE COMPANY DURING THE POLICY PERIOD OR EXTENDED REPORTING PERIOD, IF ANY.
>
> * * *
>
> I. COVERAGES
>
> A. PROFESSIONAL SERVICES AND PERSONAL INJURY
>
> To pay on behalf of the **Insured** all sums in excess of the **Deductible** amount stated in the **Declarations** which the **Insured** shall become legally obligated to pay as **Damages** and to pay all **Claims Expenses** resulting from:
>
> (i) any **Claim** arising out of any negligent act, error, omission, or **Personal Injury** committed by the **Insured** in the rendering of or failure to render **Professional Services** for others.
>
> * * * *
>
> With respect to coverages A, B, and C above:
>
> (i) any negligent act, error, omission, or **Personal Injury** committed by the **Insured** in the rendering of or failure to render **Professional Services** for others must first occur during the **Policy Period** or after the **Retroactive Date** specified in Item 6 of the **Declarations**: and
>
> (ii) all **Claims** arising out of any negligent act, error, omission, or **Personal Injury** committed by the **Insured** in the rendering of or failure to render **Professional**

Services for others must first be made against the **Insured** and reported to the Company in writing during the **Policy Period** or **Extended Reporting Period**, if any.

* * * *

VII. DEFINITIONS

A. "CLAIM" shall mean:

a demand received by the **Insured** for money, including the service of suit or institution of arbitration proceedings against the **Insured**, alleging a negligent act, error, omission or **Personal Injury** of the **Insured** in the rendering of or failure to render **Professional Services**.

* * * *

VIII. EXCLUSIONS

A. THIS POLICY DOES NOT APPLY TO ANY CLAIM OR CLAIMS ARISING OUT OF:

* * * *

9. disputes involving an **Insured's** fee or charges or any personal profit or advantage to which the **Insured** is not legally entitled;

* * * *

20. any prior or pending litigation or to any **Claim** of which the **Insured** had previous knowledge or could have reasonably foreseen prior to the **Inception Date** of this **Policy**. [Emphasis in original.] [2]

B

We disagree with the circuit court's determination that because Locke's DOC complaint was closed without sanctions or restitution having been imposed against plaintiff, the DOC complaint did not constitute a claim under the TIG policy. The policy contains no requirement that a claim be successful to constitute a claim. A "claim" is defined as a demand received by the insured for money, including the service of suit or institution of arbitration proceedings against the insured, alleging a negligent act, error, omission or personal injury of the insured in the rendering of or failure to render professional services.

Locke's DOC complaint stated, in response to the question "what do you hope will result from your filing of this complaint," that Locke sought to have "[f]inancial losses recognized in some manner and that the amount of her loss was $6,000. Thus Locke's DOC complaint included a demand for

money and was not solely a complaint against Christie's licensure. We also conclude that the DOC complaint alleged "a negligent act, error or omission or personal injury of the insured in the rendering of or failure to render professional services," as required under the TIG policy. Locke's DOC complaint stated that Chappell sent a letter to the sellers regarding the initial floor problem and came to Locke's home to try to meet with the sellers, that both Chappell and Longstreth came to see the problems along with the loan officer, that Chappell told Locke that he would see to it that the floor was replaced, and that, when Locke was dissatisfied with the floor replacement job, Chappell wrote the sellers a note regarding the job having been done unsatisfactorily, "but did nothing else." These statements constitute allegations that Chappell and Longstreth negligently rendered or failed to render professional services in connection with Locke's purchase of the home. While the word "fraudulently" was used at one point in the complaint, the complaint clearly included allegations of negligent omission.

Plaintiff's argument that the TIG policy's definition of "claim" requires that the demand for money be made and presented directly to the insured contravenes the language of the policy as written, which this Court must enforce. *Group Insurance Co v Czopek*, 440 Mich 590, 596-597; 489 NW2d 444 (1992). The TIG policy expressly states only that the demand be received by plaintiff, and there is no dispute that plaintiff received a copy of the DOC complaint shortly after Locke filed it in May 1993.

Plaintiff further argues that the DOC complaint was not a claim because it falls under the exclusion for disputes involving an insured's fee or charges (exclusion number nine).[3] We disagree.

Locke's DOC complaint alleged that plaintiff failed to properly address problems with the kitchen floor and failed to inform her of the constructional tax assessment, neither of which allegations regarded plaintiff's right to a commission from the sellers. Locke stated in her DOC complaint that her financial losses were in the amount of $6,000. The only reference to plaintiff's commission was Locke's statement that she wanted "to be paid the commission that Jim Christie Real Estate's people got from the sellers for fraudulently selling me a house that they knowingly knew was damaged; and that I was not properly qualified to purchase."

Jeffrey Longstreth's response to Locke's DOC complaint stated in pertinent part:

> 2. Mrs. Locke has filed a claim with the Department of Labor and Commerce, State Attorney General and Congressman Dingell as well as the City of Dearborn. She also had considerable conversations with the Sellers/Builders. Now, approximately one and one-half years after the closing, she is asking for our commission. It was the Sellers who were the licensed builders and who were responsible for the kitchen floor. The City issued a Certificate of Occupancy. I fail to see where Jim Christie Real Estate, Inc. or Gary Chappell are responsible for $6,000. I am also amazed that Mrs. Locke's 'financial losses' equal our commission. I doubt that a new kitchen floor would cost $6,000. Whether it did not [sic or] not, the floor was installed by licensed builders and approved by the City of Dearborn Building Department.

The fact that Locke chose to measure her damages for her complaints regarding the floor and the taxes by the amount of plaintiff's commission does not render her DOC complaint one involving

plaintiff's "fee or charges or any personal profit or advantage to which [plaintiff] is not legally entitled." We thus conclude that Locke's DOC complaint did not constitute a dispute over plaintiff's commission fee, and that TIG policy exclusion number nine did not exclude the claim from the policy's application.[4]

Locke's DOC complaint constituted a claim under the TIG policy definition, see *Pinckney, supra* at 525, 531-532; *Continental Casualty Co v Enco Assoc, Inc*, 66 Mich App 46, 50-51; 238 NW2d 198 (1975); the DOC complaint and the circuit court complaint alleged the same acts or omissions; and the DOC complaint was not filed during the policy period. Therefore, the circuit court action was not a claim first made during the policy period, and there was no coverage under TIG's policy.

We thus conclude that the circuit court erred in denying TIG's motion for summary disposition and ruling that plaintiff was entitled to a defense and indemnification from TIG in connection with Locke's circuit court action. We reverse the circuit court's denial of summary disposition to TIG and vacate that portion of the circuit court's order stating that TIG must defend and indemnify plaintiff.[5]

III

Plaintiff argues in its cross-appeal that the circuit court improperly granted summary disposition in Continental's favor. We disagree.

Continental's "claims-made" policy for the period from September 25, 1993 to September 25, 1994 provided in pertinent part:

> YOUR INSURANCE IS WRITTEN ON A 'CLAIMS-MADE' BASIS AND ONLY APPLIES TO THOSE CLAIMS FIRST MADE AGAINST YOU WHILE THIS INSURANCE IS IN FORCE. NO COVERAGE EXISTS FOR CLAIMS FIRST MADE AGAINST YOU BEFORE THE BEGINNING OR AFTER THE END OF THE POLICY PERIOD UNLESS AND TO THE EXTENT AN EXTENSION OF COVERAGE APPLIES.
>
> * * *
>
> IV. DEFINITIONS
>
> "**Claim"** means the receipt by **you** of a demand for money or services, naming **you** and alleging a **wrongful act**.
>
> * * *
>
> **"Wrongful Act"** means a negligent act, error or omission in the rendering of or failure to render **professional services.**
>
> *** * ***

C. Your Duties If There Is A Claim.

If there is a claim, you must do the following:

1. Notify us in writing as soon as possible through:

Victor O Schinnerer and Company, Inc. [address set forth]

The notice must be given to us immediately and within the **policy period** or within 60 days after its expiration or termination.

* * *

L. Legal Action Limitation

You may not bring any legal action against us concerning this policy until:

1. **you** have fully complied with all the provisions of this policy . . .

It is undisputed that plaintiff did not notify Continental of Locke's DOC complaint or Locke's subsequent lawsuit until March 28, 1995,[6] well after plaintiff's last Continental policy had expired on September 25, 1994, and well after sixty days had passed from the last policy's expiration. Nor had plaintiff extended the coverage period of the Continental policy. Thus, plaintiff failed to comply with the notice provisions of the policy.

We reject plaintiff's argument that it gave Continental notice of Locke's suit as soon as was reasonably possible and thus its claim is preserved under MCL 500.3008; MSA 24.13008 and *Stine v Continental Casualty Co*, 419 Mich 89, 105; 349 NW2d 127 (1984). It cannot reasonably be said that it was not reasonably possible to give notice to Continental within the time prescribed by the policy. Thus, the circuit court did not err in granting Continental's motion for summary disposition.

We affirm the circuit court's grant of summary disposition in Continental's favor, and reverse the circuit court's grant of summary disposition to plaintiff and denial of summary disposition to TIG.

/s/ Donald E. Holbrook, Jr.
/s/ Helene N. White
/s/ John W. Fitzgerald

[1] By letter to Locke dated August 4, 1993, which was carbon copied to plaintiff, the DOC informed Locke that the file had been closed and

> The Department was unable to substantiate sufficient evidence of a violation of PA 299 of 1980, as amended, after investigation of the allegation(s) made. The respondent is not legally responsible for the condition of the kitchen floor or for informing you of a tax assessment.

* * *

> THIS ACTION DOES NOT PRECLUDE YOU FROM CONSULTING AN ATTORNEY TO DISCUSS OTHER AVENUES OF LEGAL REDRESS WHICH MAY BE AVAILABLE TO YOU.

[2] The TIG policy exclusions included an exclusion for claims arising out of "a dishonest, **fraudulent**, criminal or malicious act or omission or **deliberate misrepresentation** committed by, at the direction of, or with the knowledge of the Insured; however, this **Exclusion** shall not apply to any **Insured** who did not commit, participate in, or have knowledge of any of the acts described", but plaintiff does not argue on appeal that this exclusion applies.

[3] Plaintiff apparently reasons that the DOC complaint concerned a commission and therefore there was no coverage under the policies and no duty to notify the insurance companies of the complaint. The logic of this argument is not clear to us. Assuming the DOC complaint was an excluded claim under the TIG policy because it concerned a dispute involving a fee, it does not follow that it was not a claim under the policy's definition of "claim."

[4] The DOC's letter notifying Locke of the closing of her complaint, which was carbon copied to plaintiff, stated that "The respondent is not legally responsible for the condition of the kitchen floor or for informing you of a tax assessment," without any reference to the commission plaintiff received from the sellers.

[5] In light of this conclusion, we need not address TIG's claim that coverage is excluded by policy exclusion number twenty. See page 10, *supra*.

[6] On March 28, 1995, Jeffrey Longstreth sent a letter to plaintiff's Continental agent stating in pertinent part:

> Tom Geibush of Associated Claims Enterprises has requested that I notify you of a pending claim.
>
> The claim is the result of a house we sold and closed on November 15, 1991. I was served a summons on January 30, 1995 regarding said home. As Transamerican Insurance Group is my current insurer, they are handling the investigation of the claim and my representation. During the period of time from November of 1991 until the summons, there was a written inquiry from the Michigan Department of Commerce and responses. They ultimately closed the case.
>
> I also had an inquiry from an attorney a couple of years ago, but he informed me he would not take the case.
>
> The end result was that I had not been notified of any pending lawsuit. Since 3 ½ years have passed since the closing, I did not anticipate any legal action.

Claims Consultant Cyndy Ruby wrote plaintiff on April 18, 1995 and notified plaintiff that Continental denied coverage for the Locke lawsuit on the grounds that the claim was not made against plaintiff during the policy period and because plaintiff did not report a claim to Continental within the policy period or within sixty days of the expiration of the policy, as the policy required.