STATE OF MICHIGAN

COURT OF APPEALS

CLIFTON STERLING,

Plaintiff-Appellee,

v

AUTO-OWNERS INSURANCE CO.,

Defendant-Appellant.

UNPUBLISHED
May 21, 2002

No. 230919
Genesee Circuit Court
LC No. 97-061853-CK

Before: Smolenski, P.J., and Neff and White, JJ.

PER CURIAM.

Defendant appeals as of right the circuit court's order granting plaintiff partial summary disposition and a final order awarding interest to plaintiff. We reverse and remand.

I

Defendant Auto-Owners Insurance Company insured a rental property owned by plaintiff, at 1312 Minnesota in Flint. A fire occurred in the dwelling on February 3, 1997. Defendant paid plaintiff $16,050, representing the actual cash value (ACV) of the dwelling.

By letter to defendant's claim representative dated June 18, 1997, plaintiff's adjuster informed defendant that plaintiff had purchased a replacement property for $35,000.00, and requested $19,950 in replacement costs under the policy, i.e, the difference between the policy limit of $35,000.00 and the $16,050.00 ACV defendant had paid plaintiff for the dwelling. Attached to plaintiff's letter was a warranty deed signed and dated June 11, 1997, for a property at 1529 Hamilton in Flint, stating a $35,000.00 purchase price.

Defendant responded with a denial letter dated July 1, 1997, stating:

> Thank you for your letter regarding the above captioned loss.
>
> On page nine of the policy under "How Losses Are Settled" it states "We will pay no more than (a) The cost to repair or replace the damaged property with property of like kind or quality . . " Since the dwelling at 1312 Minnesota was repaired, we would not owe for the replacement of this dwelling with another dwelling.
>
> I must therefore deny your claim for buying a replacement building.

Plaintiff's complaint alleged breach of contract and entitlement to interest under the uniform trade practices act, MCL 500.2006,[1] for defendant's failure to timely pay benefits. Plaintiff alleged that the February 3, 1997 fire at the dwelling had caused more than $10,000 worth of damage, and that all conditions precedent to recovery under the policy had occurred. Defendant's affirmative defenses included that plaintiff had been paid in full for his losses.

Plaintiff filed a motion for partial summary disposition under MCR 2.116(C)(8) and (C)(10), stating that the 1312 Minnesota dwelling had been destroyed by fire, that he replaced the property by purchasing another dwelling, that defendant's letter denying plaintiff's replacement claim cited an inapplicable provision of the insurance policy, i.e., a personal property provision, and that case law prohibited defendant from denying plaintiff's replacement cost claim for any reason other than stated in its denial letter, quoting *Smith v Grange Mutual Fire Ins*, 234 Mich 119, 122; 208 NW 145 (1926):

> This court has many times held, and it must be accepted as the settled law of this State, that, when a loss under an insurance policy has occurred and payment refused for reasons stated good faith requires that the company shall fully apprise the insured of all of the defenses it intends to rely upon, and its failure to do so is, in legal effect, a waiver, and estops it from maintaining any defenses to an action on the policy other than those of which it has thus given notice.

Plaintiff further argued that his replacement claim was governed by the policy's "How Losses are Settled" provisions and particularly § 2(d)(3), which state in pertinent part:

> HOW LOSSES ARE SETTLED
>
> 1. Loss to the following types of property will be settled at the actual cash value of the damaged property at the time of loss. Actual cash value includes deduction for depreciation.
>
> **Personal property**

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[1] MCL 500.2006 provides:

> (1) A person must pay on a timely basis to its insured, an individual or entity directly entitled to benefits under its insured's contract of insurance . . . 12% interest, as provided in subsection (4), on claims not paid on a timely basis. Failure to pay claims on a timely basis or to pay interest on claims as provided in subsection (4) is an unfair trade practice unless the claim is reasonably in dispute.
>
> * * *
>
> (4) When benefits are not paid on a timely basis the benefits paid shall bear simple interest from a date 60 days after satisfactory proof of loss was received by the insurer at the rate of 12% per annum, if the claimant is the insured or an individual or entity directly entitled to benefits under the insured's contract of insurance. . . .

Structures that are not buildings

* * *

We will pay no more than:

(a) the cost to repair or replace the damaged property with property of like kind and quality; or

(b) the limits of liability of this policy.

2. Under **Dwelling** and Other Structures Coverages:

(a) How a loss to the dwelling or other structure will be settled will depend on how the amount of insurance relates to the full replacement cost. In determining full replacement cost, do not include the cost of excavations, underground pipes, wiring and drains, foundations or other supports below the surface of the ground and inside the foundation walls.

(b) If, at the time of loss, the amount of insurance for the dwelling or other structure in this policy is 80% or more of the full replacement cost, we will pay the full cost to repair or replace the damaged part of the dwelling or other structure, without deduction for depreciation.

(c) If, at the time of loss, the amount of insurance for the dwelling or other structure in this policy is less than 80% of the full replacement cost, we will pay the larger of the following amounts:

(i) the actual cash value of the damaged part of the dwelling or other structure; or

(ii) the amount of the loss multiplied by the ratio of the amount of insurance on the dwelling or other structure to 80% of its full replacement cost.

(d) But, we will pay under (b) or (c) no more than the smallest of the following:

(1) the limit of liability in this policy for the dwelling or other structure;

(2) the cost to replace the damaged dwelling or other structure with equivalent construction for equivalent use on the same premises; or

(3) the amount actually spent for necessary repair or replacement of the damaged dwelling or other structure.

* * *

> (f) You may disregard these replacement cost loss settlement provisions and make a claim on an actual cash value basis. If you do, you may make further claim within 180 days after the loss for any additional cost you incur in replacing the damaged property. [Emphasis added.]

The circuit court granted plaintiff's motion for partial summary disposition, relying on *Smith, supra*, and awarded plaintiff $19,950. The court also granted plaintiff's subsequent motion for 12% interest under MCL 500.2006. This appeal ensued.

II

Defendant argues that its denial letter was clear enough to apprise plaintiff that his replacement cost claim was denied because he had already repaired the dwelling. Defendant admits that its denial letter did not cite the proper policy provision, but argues that it is not required to cite *any* policy provision in denial letters.

This Court reviews the circuit court's grant of plaintiff's motion for partial summary disposition de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 314 (1996). A motion under MCR 2.116(C)(10)[2] tests the factual support for a claim. *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999).

> In presenting a motion for summary disposition, the moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists. Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in the pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists. If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. [*Smith, supra*, quoting *Quinto v Cross & Peters Co*, 451 Mich 358, 362-363; 547 NW2d 314 (1996). Citations omitted.]

We agree with defendant that the circuit court's ruling was based on *Smith* alone, and that *Smith* is distinguishable. The plaintiff in *Smith, supra*, insured buildings on her farm property with the defendant insurer. After a fire destroyed part of the property, the plaintiff was criminally charged with burning the buildings with intent to defraud the insurance company. 234 Mich at 121. The trial court directed a verdict of acquittal in part because the prosecution had failed to show the issuance of a legal insurance policy; apparently the president of the company had not signed the policy. *Id.* at 121-122. After the criminal proceedings concluded, the plaintiff brought suit seeking coverage under the policy, eventually a judgment in her favor was awarded,

[2] On appeal, plaintiff argues this Court should affirm under MCR 2.116(C)(10), and cites legal authority pertinent to that sub-rule alone.

and the defendant's motion for new trial was denied. On appeal to the Supreme Court, the defendant insurer argued that the plaintiff was estopped by the contention of her counsel in the criminal proceedings from claiming that the policy was legally issued. The *Smith* Court noted that the defendant had not claimed in any of the earlier proceedings that the policy had not been legally issued, and that the only dispute had been as to the liability of the defendant thereon. *Id.* at 122. The Court continued:

> Had the defendant taken the position at the close of the criminal trial that no enforceable policy had been issued by it, a different question would be presented.
>
> This court has many times held, and it must be accepted as the settled law of this State, that, when a loss under an insurance policy has occurred and payment refused for reasons stated good faith requires that the company shall fully apprise the insured of all of the defenses it intends to rely upon, and its failure to do so is, in legal effect, a waiver, and estops it from maintaining any defenses to an action on the policy other than those of which it has thus given notice. [*Smith, supra* at 122-123.]

In contrast to *Smith, supra*, in the instant case, defendant did not fail to apprise plaintiff of its reason for denying plaintiff's replacement claim. Here, although defendant cited a provision applicable to personal property, the reason given, that plaintiff could not collect for both repair and replacement of the loss, was also applicable to the real property loss, albeit under a different policy provision. As defendant argues, *Smith* requires that the insurer apprise the insured of defenses it intends to rely on, and does not require that the insurer cite particular policy provisions. Defendant's error in citing the wrong provision did not render the notice inadequate under *Smith, supra.*[3]

Plaintiff asserts that he is entitled to recover under provision 2(f) of the policy. Although plaintiff may very well be entitled to recover under provision 2(f), the court did not address that provision. The court shall address this argument on remand.

Defendant also argues that the trial court erred in awarding plaintiff interest pursuant to MCL 500.2006(4). Given our reversal of the grant of summary disposition, the award of interest must be vacated.

We reverse the grant of summary disposition to plaintiff, vacate the order awarding interest, and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Michael R. Smolenski
/s/ Janet T. Neff
/s/ Helene N. White

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[3] Plaintiff's brief on appeal presented several counter-questions to defendant's appellate brief, but we do not address them given that the circuit court granted summary disposition based on *Smith* alone.