STATE OF MICHIGAN

COURT OF APPEALS

RONALD E. MCNULTY,

Plaintiff-Appellant,

v

HAMILTON MUTUAL INSURANCE COMPANY,

Defendant-Appellee.

UNPUBLISHED
August 6, 2002

No. 228133
Oakland Circuit Court
LC No. 98-010571-CK

RONALD E. MCNULTY,

Plaintiff-Appellant,

v

HAMILTON MUTUAL INSURANCE COMPANY,

Defendant-Appellee.

No. 229619
Oakland Circuit Court
LC No. 98-010571-CK

Before: Gage, P.J., and Cavanagh and Wilder, JJ.

PER CURIAM.

Plaintiff appeals as of right from orders granting defendant's motion for summary disposition and awarding defendant $6,000 in costs and attorney fees. We affirm.

This case concerns insurance coverage attendant to a fire that struck plaintiff's home in November 1997. Plaintiff commenced suit a year later, alleging that defendant, his insurer, wrongfully denied some claims and unreasonably delayed paying others. The parties filed cross motions for summary disposition. The trial court granted defendant's motion, concluding that there was no genuine dispute of material fact, and that plaintiff's own lack of cooperation in the matter justified any delays or denials of payment on defendant's part.

This Court reviews a trial court's decision on a motion for summary disposition de novo. *Ardt v Titan Ins Co*, 233 Mich App 685, 688; 593 NW2d 215 (1999). Summary disposition may be granted under MCR 2.116(C)(10) if there is no genuine issue as to any material fact, and the

moving party is entitled to judgment as a matter of law. Further, the construction and interpretation of an insurance contract is a question of law reviewed de novo. *Henderson v State Farm Fire & Casualty Co*, 460 Mich 348, 353; 596 NW2d 190 (1999). "Where the language of a contract is clear and unambiguous, the intent of the parties will be ascertained according to its plain sense and meaning." *Haywood v Fowler*, 190 Mich App 253, 258; 475 NW2d 458 (1991). An insurance contract is ambiguous if, after reading the entire document, its language can reasonably be understood in differing ways. See *Bianchi v Automobile Club of Michigan*, 437 Mich 65, 70; 467 NW2d 17 (1991).

The parties do not dispute that defendant paid plaintiff the policy limit of $210,100 for his dwelling and that defendant additionally paid the actual cash value of lost contents. At issue is the reasonableness of defendant's delay in paying these amounts, and of defendant's refusal to pay full replacement cost of certain contents.

Plaintiff argues that defendant was obliged to pay the policy's limit on the dwelling within thirty days of ascertaining that the actual loss was in fact greater than the policy limit, and suggests that defendant had this information by January 22, 1998, when defendant's own agent concluded that this was the case. However, the parties' contract in fact states, "[l]oss will be payable 30 days after we receive your proof of loss and . . . reach an agreement with [the insured,] . . . there is an entry of a final judgment[,] or . . . there is a filing of an appraisal award . . . ." Defendant's adjuster's estimate of the dwelling loss by itself did not constitute an agreement, a final judgment, or an appraisal award. Moreover, the record does not include proof of loss from plaintiff before 1998, and defendant had in fact paid the claim on the dwelling the month before. Perhaps it is precisely because there was little doubt that the loss exceeded the policy limits that defendant paid the claim without insisting on perfect adherence to all contractual formalities. In any event, plaintiff cannot impugn to defendant any unreasonable delay in the matter since defendant paid the claim before plaintiff filed a sworn statement of loss, as required by the contract.

In addition, the parties do not dispute that the contract covered plaintiff's actual replacement costs for items damaged in the fire. Defendant did pay plaintiff for the present cash value of the damaged contents, leaving at issue the replacement cost "holdback," or the difference between actual cash value of the loss and the replacement cost ultimately incurred. The contract provided that defendant would pay plaintiff those holdbacks when and if plaintiff obtained replacements of items similar in kind to those lost.

Plaintiff reports that he purchased four appliances—a refrigerator, a stove, a television, and a VCR, submitted receipts to defendant, but then was obliged to return two of the appliances, including the refrigerator, because he did not receive reimbursement from defendant and wished to avoid incurring credit-card interest. At the motion hearing, the trial court observed that plaintiff had suffered the loss of a $900 refrigerator, upon which defendant initially paid plaintiff $600, taking depreciation into account, but that plaintiff had replaced the refrigerator with a unit that cost $2,700 and sought that figure as the total replacement cost. Defendant conceded that if indeed one were obliged to spend $2,700 for a refrigerator of similar kind to the $900 one that plaintiff lost, then plaintiff would be entitled to reimbursement of the whole $2,700. However, plaintiff consistently refused defendant's requests to examine the refrigerator and other replacement items to verify their similarity to the ones lost, which plaintiff defended on the ground that the insurance contract included no express right of inspection. The trial court

elicited from plaintiff that he felt that defendant was obliged to reimburse him for any replacements for which he tendered receipts, with no additional basis other than taking his word for it that the new items were similar to those lost.

We agree with the trial court that by refusing to allow defendant to inspect his replacement appliances plaintiff was failing to allow defendant a reasonable exercise of its contractual rights. Even though the policy includes no specific right of inspection, all contracts normally presume good faith and fair dealing in their performance. See *Hammond v United of Oakland, Inc*, 193 Mich App 146, 151-152; 483 NW2d 652 (1992) (excepting employment contracts), and *Stark v Budwarker, Inc*, 25 Mich App 305, 313, n 7; 181 NW2d 298 (1970).[1]

Plaintiff further takes issue with defendant having initially attempted to limit replacement coverage to 400 percent of the actual cash value of the items to be replaced. However, as plaintiff acknowledges, defendant conceded that no such limitation applied to plaintiff after all. On appeal, plaintiff points to no possible prejudice he suffered from that misstep except that he felt obliged to return two appliances while resolving that dispute.[2] However, any argument that defendant should be charged with unreasonably avoiding payment of the replacement cost holdbacks for appliances because of this controversy must fail in light of plaintiff's unreasonable refusal to allow defendant to inspect his replacement appliances.

Plaintiff similarly complains that defendant delayed paying for carpeting lost in the fire by trying to interpret the contract as covering carpeting as part of the building, instead of as contents, if it was attached to subflooring instead of finished flooring, but in fact defendant abandoned that position and issued a separate check for the carpeting. We are satisfied that defendant ultimately interpreted the contract to plaintiff's benefit, and find nothing pernicious about defendant's having initially hesitated over what was a plausible alternative interpretation of its contractual obligations.

Plaintiff also complains that defendant improperly refused to cover his expenses in removing debris from the dwelling. The insurance policy provides as follows:

> **1. Debris Removal.** We will pay your reasonable expenses for the removal of:
>
> a. debris of covered property if a Peril Insured Against that applies to the damaged property causes the loss; or

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[1] Plaintiff asserts that he had invited defendant to send someone to accompany him to the store for inspection of the replacement refrigerator he had chosen, but points to nothing beyond his own assertion of having made any such offer. Mere allegations are not sufficient to create an issue for resolution at trial. See *Jubenville v West End Cartage, Inc*, 163 Mich App 199, 206; 413 NW2d 705 (1987).

[2] Plaintiff's suggestion that defendant bears responsibility for plaintiff's having felt obliged to return certain appliances rather than incur credit card interest is inapt. Defendant had no obligation, contractual or otherwise, to concern itself with plaintiff's mode of transacting his purchases.

> b. ash, dust or particles from a volcanic eruption that has caused direct loss to a building or property contained in a building.
>
> This expense is included in the limit of liability that applies to the damaged property. If the amount to be paid for the actual damage to the property plus the debris removal expense is more than the limit of liability for the damaged property, an additional 5% of that limit of liability is available for debris removal expense.

It is undisputed that, because plaintiff's coverage on the dwelling was less than the actual loss, plaintiff was entitled to receive up to $10,505 for debris removal expenses actually incurred.

When plaintiff asserted a claim of entitlement to payment for debris removal at the motion hearing, defendant retorted that plaintiff would have been entitled to reimbursement had he ever in fact removed the debris, but that plaintiff instead sold the property without ever tending to the matter. Plaintiff submitted an affidavit declaring that he sold the property and discounted the sales price by $15,000 to account for the buyer's expense in removing debris from the fire, and argued that he thereby incurred that much in debris-removal expenses. Plaintiff agreed, however, that he sold the dwelling in 1999, 1-1/2 years after the loss occurred, while litigation was in progress.

In addition to a question of plaintiff's timeliness in even asserting an entitlement to compensation for debris removal, at issue is whether plaintiff incurred an expense for debris removal by way of selling the house for a price that took that expense into account. Defendant pointed out that debris removal was covered only to the extent that the insured actually incurred such an expense, and that such claims were paid only upon presentment of documentation of an actual contract for debris removal. Because plaintiff failed even to assert any specific claim for debris removal until after commencing this action, and because plaintiff's basis for the claim does not afford defendant a reasonable opportunity to ascertain any debris-removal expense actually incurred by plaintiff, plaintiff has failed to show with this issue that he is entitled to judgment in his favor or that a question exists for resolution at trial.

Plaintiff additionally argues that he is entitled to relief pursuant to the Michigan Consumer Protection Act, MCL 445.901 *et seq*. However, that claim was never properly before the trial court, and thus presents no issue for our review. Plaintiff's original complaint included no MCPA claim. Instead, plaintiff sought to introduce such a claim by way of an amended complaint. However, the timing of the amendment was such as to require leave of the trial court or consent of the other party, MCR 2.118(A), plaintiff having brought his motion on the amendment at the same time as his motion for summary disposition. The trial court granted defendant summary disposition without reaching the question of the amendment and there is no indication in the record that defendant agreed to accept the amended complaint. Because the court never granted leave to amend, and because plaintiff does not challenge the court's action in this regard, no issue stemming from the amended complaint is properly before this Court.

Finally, plaintiff argues that the trial court erred in entering an order on the parties' stipulation concerning defendant's entitlement to costs and attorney's fees. Plaintiff's argument is predicated exclusively on the ground that the underlying judgment was erroneous. Because

we conclude that plaintiff has failed to show error in any aspect of the underlying judgment, we have no basis on which to question the court's award of costs and attorney's fees.

Affirmed.

/s/ Hilda R. Gage
/s/ Mark J. Cavanagh
/s/ Kurtis T. Wilder