

STATE OF MICHIGAN
COURT OF APPEALS

HASTINGS MUTUAL INSURANCE
COMPANY,

Plaintiff-Appellant,

v

AUTO OWNERS INSURANCE COMPANY,

Defendant-Appellee.

UNPUBLISHED
September 17, 2002

No. 232947
Kalamazoo Circuit Court
LC No. 00-000360-CK

Before: Murphy, P.J., and Hood and Murray, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting summary disposition in favor of defendant pursuant to MCR 2.116(C)(10). We affirm.

I. Facts and Procedural History

This case arises out of a default judgment entered in favor of plaintiff and against Ronald Bruce Moffit (Moffit), d/b/a Bruce Moffit Construction. In that case, plaintiff obtained a default judgment against Moffit in the amount of \$32,060.80, while settling the case against Moffit's codefendant, May General Contracting (May). May was the general contractor for a renovations project conducted on a building at Mall City Container. May hired Bruce Moffit Construction to enlarge an existing truck dock. Plaintiff filed suit against Moffit, d/b/a Bruce Moffit Construction, and May alleging that the combined negligence of both the defendants resulted in the collapse of two walls. Plaintiff, as insurer for Mall City Container, paid out approximately \$32,000 as a result of Moffit and May's negligence, and became subrogated to the rights of its insured for such amount. It is undisputed that plaintiff obtained the default judgment against Moffit as a result of his failure to appear or cooperate in his own defense. Thereafter, plaintiff brought this suit against defendant, as Moffit's insurer, seeking declaratory relief for payment under the default judgment entered against Moffit.

However, defendant refused to reimburse plaintiff and filed a motion for summary disposition pursuant to MCR 2.116(C)(10) on the basis that, under the contract, which contained a "noncooperation" clause, Moffit lost his coverage under the policy when he failed to cooperate with defendant in his own defense during the initial lawsuit, which resulted in prejudice to defendant. Defendant therefore concluded that no issue of material fact existed and it was entitled to judgment as a matter of law. Plaintiff filed a response to defendant's motion, arguing

that summary disposition was not proper because defendant did not sustain actual prejudice as a result of Moffit's noncooperation. The trial court granted defendant's motion for summary disposition, finding that defendant was indeed prejudiced by its insured's failure to cooperate and defend the initial action against plaintiff.

II. Standard of Review

We review de novo the trial court's decision on a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion for summary disposition brought under MCR 2.116(C)(10) tests the factual support for a claim. *Id.* In recent years the Supreme Court has clarified the standards governing review of motions under this subrule:

"In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), a trial court considers affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10), (G)(4).

"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. *Neubacher v Glove Furniture Rentals*, 205 Mich App 418, 420; 522 NW2d 335 (1994). The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists. *Id.* 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 pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists. *McCart v J Walter Thompson*, 437 Mich 109, 115; 469 NW2d 284 (1991). If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. *McCormic v Auto Club Ins Ass'n*, 202 Mich App 233, 237; 507 NW2d 741 (1993)." [*Smith v Globe Life Ins Co*, 460 Mich 446, 454-455; 597 NW2d 28 (1999), quoting *Quinto v Cross & Peters Co*, 451 Mich 358, 362-363; 547 NW2d 314 (1996).]

III. Analysis

Plaintiff argues on appeal that the trial court erred in granting defendant's motion for summary disposition where the trial court relied on an incorrect standard and defendant did not establish that it sustained actual prejudice as a result of Moffit's failure to cooperate in the defense of the initial lawsuit. We disagree. Defendant's insurance contract with Moffit includes a clause requiring his cooperation with defendant "in the investigation, settlement or defense" of any claim or suit. Defendant claims that due to Moffit's failure to cooperate in the investigation, settlement, or defense of the initial suit brought by plaintiff that resulted in a default, his insurance coverage lapsed and relieved defendant of any liability to plaintiff.

Lack of cooperation by the insured is no defense to a garnishment action seeking to satisfy a default judgment unless the insurer can show it was prejudiced by the insured's noncompliance. *Anderson v Kemper Ins Co*, 128 Mich App 249, 253; 340 NW2d 87 (1983). "Prejudice is an issue of fact upon which the insurer carries the burden of proof." *Id.* In this case, defendant must show that it has been "materially injured in its ability to contest the merits of the case" by Moffit's noncooperation. *Id.* at 254. See also *Allen v Cheatum*, 351 Mich 585, 595-596; 88 NW2d 306 (1958).

First, we find no merit to plaintiff's claim that the trial court did not apply the correct standard of "actual prejudice." We hold this to be a distinction without a difference. In reviewing defendant's motion for summary disposition, the trial court determined that defendant had been prejudiced by Moffit's noncompliance. Thus, the trial court applied the correct standard. See *Anderson, supra*.

Next, we find that defendant established that no genuine issues of material fact existed regarding the prejudice sustained by defendant due to Moffit's failure to cooperate in the principal suit. Plaintiff correctly points out that a mere showing of nonattendance by the insured is not tantamount to a showing of prejudicial non-cooperation as a matter of law. *Allen, supra* at 592-593. Further, prejudice will not be presumed from a mere showing of non-cooperation. *Id.* at 596. Rather, "the insurer must also introduce proofs tending to show actual prejudice." *Id.*

In this case, defendant presented documentary evidence establishing that defendant was materially prejudiced in its ability to defend or settle the case due to Moffit's uncooperative conduct. Defendant retained attorney, Gary Bartosiewicz, to defend Moffit in the initial lawsuit with plaintiff. However, the record indicates that Bartosiewicz was unsuccessful in communicating with Moffit regarding the case or in obtaining requested documents necessary to defend the underlying suit. In fact, Moffit's failure to communicate and cooperate with Bartosiewicz forced Bartosiewicz to withdraw as counsel. Further, defendant was uncooperative in reviewing files and presenting the written contract between May General Contracting and Bruce Moffit Construction, which defendant requested. Finally, it is undisputed that Moffit failed to appear at two depositions, which resulted in the entry of the default judgment. Importantly, it should also be noted that defendant did not sit "idly by, knowing of the litigation, and watch its insured become prejudiced." See *Burgess v American Fidelity Fire Ins Co*, 107 Mich App 625, 630; 310 NW2d 23 (1981). Rather, there is ample evidence in the record showing defendant's efforts to communicate with Moffit and encourage his cooperation in the underlying suit.¹ Thus, this evidence dictates that no reasonable mind could differ in concluding that defendant sustained actual prejudice due to Moffit's failure to cooperate. Regardless of the other discovery sources that plaintiff suggests "clearly point to" Moffit's negligence, it is difficult to imagine how defendant could have completely protected its interest and determined the extent of its liability, if any, under these circumstances without the cooperation of its insured.

¹ For example, the record indicates that a private investigator was hired by Bartosiewicz in an attempt to serve Moffit and assure his appearance at the June 29, 1999 deposition.

Affirmed.

/s/ William B. Murphy

/s/ Harold Hood

/s/ Christopher M. Murray