STATE OF MICHIGAN

COURT OF APPEALS

DAVID BECK,

Plaintiff-Appellant,

v

MICHIGAN BASIC PROPERTY INSURANCE ASSOCIATION,

Defendant-Appellee.

UNPUBLISHED
March 6, 2003

No. 237320
Wayne Circuit Court
LC No. 00-027645

Before: Saad, P.J., and Zahra and Schuette

PER CURIAM.

In this insurance case, the trial court granted summary disposition in favor of defendant pursuant to MCR 2.116(C)(10). The trial court concluded that because there was no appraisal of the property in question, the suit was premature at best and there was no genuine issue of material fact. Plaintiff now appeals as of right and we affirm.

I. Facts and Procedural History

Plaintiff was the owner of a single family dwelling located at 8217 Bryden, Detroit, Michigan. The property was insured through defendant under a policy that covered defendant in the amount of actual cash value in the event of loss with a limit of $30,000.

Since the policy was issued, the property has caught fire three times. The first fire occurred on September 13, 1997. Plaintiff submitted a claim for damage to the interior. The loss was evaluated by an independent adjusting company. Plaintiff informed the adjuster that he suspected a disgruntled tenant of arson. Whether the damages resulting from the first fire were ever repaired is unknown.

On June 23, 1998, the property again caught fire and suffered damage to the kitchen and upstairs. On August 22, 1998, a third fire occurred, destroying the house. Again, plaintiff suspected a disgruntled tenant of committing arson. As of the third fire, damages for the second fire had not been determined. Following that fire, Ron Mumford, an employee of defendant in charge of reviewing plaintiff's claims, spoke with plaintiff about his claim and expressed concern about whether the repairs had ever been made following the first fire, and said to plaintiff, "We've already paid for the house once. You don't think we are going to pay for it again?"

On September 16, 1998, defendant's attorney, sent plaintiff a letter requesting that he submit to examination under oath. Submitting to such an examination under oath is a contractual obligation of an insured as part of the investigation of any claim under any of defendant's policies. Plaintiff ultimately testified at an examination under oath on February 29, 1999 that he did not have receipts for the completed repairs and that he had not inspected the property since December 1987. He was also unable to verify that the repairs from the first fire had been completed, making adjustment of the claim impossible.

In July 1999, defendant demanded appraisal under the policy and appointed Noel Kott as its appraiser. According to plaintiff, on July 22, 1999 he appointed Bill Boyd as his appraiser. Kott wrote to Boyd on August 30, 1999 and on September 23, 1999 requesting that he contact him to discuss the matter. Boyd did not respond. On November 19, 1999 Kott went to the property and discovered that it had been demolished by the city of Detroit. He sent Boyd another letter on November 22, 1999 informing him that the property had been demolished and requesting his cooperation in the appraisal process. Again, he received no response.

Finally, on December 20, 1999, Kott telephoned Boyd. Boyd told him that he had not been officially appointed or retained as an appraiser in this matter and had not inspected the property prior to its demolition. On January 3, 2000, defendant's attorney informed plaintiff's attorney that Boyd was not cooperating. On February 21, 2000, defendant's attorney wrote to plaintiff's attorney requesting information about the claim and the agreement to go to appraisal. Plaintiff's attorney did not respond.

Finally, on May 10, 2000, defendant sent plaintiff's counsel a letter denying plaintiff's claims for the June 23, 1998 and August 22, 1998 fires and advising him that defendant had a right to appeal the decision of the claim. Neither plaintiff nor his attorney ever contacted defendant or its adjuster. On August 23, 2000, plaintiff filed suit alleging breach of contract.

Defendant filed a motion for summary disposition and the trial court granted the motion. The court reasoned that the appraisal provision was a precondition to suit, that defendant had complied with the appraisal provision and that "through no fault of the defendant, it didn't go through, tending to indicate that it was something on plaintiff's side of the equation that prevented it from going through." The court indicated, "since the appraisal did not occur, the suit is premature at best." Thus, there was no genuine issue of material fact. Plaintiff now appeals this decision.

II. Standard of Review

On appeal, a trial court's grant or denial of summary disposition will be reviewed de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). This Court must review the record in the same manner as must the trial court to determine whether the movant was entitled to judgment as a matter of law. *Morales v Auto-Owners Ins,* 458 Mich 288, 294; 582 NW2d 776 (1998).

A motion for summary disposition under MCR 2.116(C)(10) tests whether there is factual support for a claim. *Spiek, supra* 456 Mich at 337. The purpose of summary disposition is to avoid extensive discovery and an evidentiary hearing when a case can be quickly resolved on an

issue of law. *American Community Mutual Ins Co v Comm'r of Ins*, 195 Mich App 351, 362; 491 NW2d 597 (1992).

When deciding a motion for summary disposition, a court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence submitted in the light most favorable to the nonmoving party. *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999).

III. Analysis

A. Breach of Contract

Plaintiff argues that he filed the appropriate proof of loss and, despite the lack of an appraisal, defendant had a statutory duty to pay the claim within 30 days of receiving the proof of loss. We disagree.

Plaintiff's insurance policy provides:

> **8. Appraisal.** If you and we fail to agree on the amount of the loss, either may demand an appraisal of the loss. In this event, each party will choose a competent appraiser within 20 days after receiving a written request from the other. The two appraisers will choose an umpire. If they cannot agree upon an umpire within 15 days, you or we may request that the choice be made by a judge of a court of record in the state where the Described Location is located. The appraisers will separately set the amount of loss. If the appraisers submit a written report of an agreement to us, the amount agreed upon will be the amount of loss. If they fail to agree, they will submit their differences to the umpire. A decision agreed to by any two will set the amount of loss.

The above language is required by Michigan statute, MCL 500.2833 which provides for appraisal as set forth below:

> (1) Each fire insurance policy issued or delivered in this state shall contain the following provisions:
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> (m) That if the insured and insurer fail to agree on the actual cash value or amount of the loss, either party may make a written demand that the amount of the loss or the actual cash value be set by appraisal. If either makes a written demand for appraisal, each party shall select a competent, independent appraiser and notify the other of the appraiser's identity within 20 days after receipt of the written demand. The 2 appraisers shall then select a competent, impartial umpire. If the 2 appraisers are unable to agree upon an umpire within 15 days, the insured or insurer may ask a judge of the circuit court for the county in which the loss occurred or in which the property is located to select an umpire. The appraisers shall then set the amount of the loss and actual cash value as to each item. If the appraisers submit a written report of an agreement to the insurer, the amount agreed upon shall be the amount of the loss. If the appraisers fail to agree within a reasonable time, they shall submit their differences to the umpire. Written

> agreement signed by any 2 of these 3 shall set the amount of the loss. Each appraiser shall be paid by the party selecting that appraiser. Other expenses of the appraisal and the compensation of the umpire shall be paid equally by the insured and the insurer.

The statutory appraisal process is a substitute for the judicial determination of disputes over the amount of losses to be paid by insurers. *Emmons v Lake States Ins. Co.*, 193 Mich App 460, 466; 484 NW2d 712 (1992).

> The appraisal procedure as a substitute for judicial determination of a dispute concerning the amount of a loss is legislatively prescribed in the standard fire insurance policy, the terms of which are mandatory under the Michigan Insurance Code. The Michigan Supreme Court has described this appraisal procedure as 'a simple and inexpensive method for the prompt adjustment and settlement of claims. *Thermo-Plastics R. & D, Inc v General Acc Fire & Life Assur. Corp., Ltd*, 42 Mich App 418, 422; 202 NW2d 703, (1972).

An appraisal clause in a fire policy which provides for a determination by umpire constitutes a common-law arbitration agreement. *Commercial Union Insurance Co v Liberty Mutual. Insurance Co,* 78 Mich App 225; 259 NW2d 433 (1984). Michigan law requires that in the event that the parties cannot agree on the amount of the loss, either party may request an appraisal and that appraisal must occur prior to the commencement of a lawsuit. MCL 500.2833(m); MCL 500.2833(q).

Plaintiff failed to set forth any evidence that would preclude a grant of summary disposition. Defendant provided several letters to the lower court which show that it made diligent efforts to obtain an appraisal and that plaintiff ignored those attempts. Plaintiff does not dispute that the letters existed, nor does he dispute that he did not respond to them. Under Michigan law, plaintiff may not proceed with his suit without an appraisal merely because his appraiser did not do his job. MCL 500.2833(q).

Additionally, the insurance policy provides: "No action can be brought unless the policy provisions have been complied with and the action is started within one year after the date of loss." Thus the contract specifically states that appraisal must occur before a lawsuit is proper. In sum, plaintiff has failed to set forth evidentiary materials that a genuine issue of disputed fact exists.

B. Bad Faith

Plaintiff argues that a genuine issue of material fact exists as to whether defendant acted in bad faith in denying his claim. We disagree.

In *Commercial Union Insurance Co v Liberty Mutual Insurance Co*, 137 Mich App 381, 391-392, 357 NW2d 861 (1984), this court discussed the definition of bad faith, stating:

> "Bad faith" by an insurance company for a breach of a duty to settle is something more than negligence. *Wakefield v Globe Indemnity Co,* 246 Mich 645; 225 NW 643 (1929)*; Commercial Union v Medical Protective Co,* 136 Mich App 412; 356

NW2d 648 (1984). However, unlike the implication of the *Medley v Canady*, 126 Mich App 739, 749; 337 NW2d 909 (1983) definition, "bad faith" pursuant to *Wakefield* is something less than fraud:

> "[T]he insurer does not act in bad faith if it refuses settlement in the honest belief that it had a fair chance of victory, or keeping the verdict within the policy limit, or * * * that the compromise amount is excessive, or if it has legal defenses * * *. * * * On the other hand, arbitrary refusal to settle for a reasonable amount, where it is apparent that suit would result in a judgment in excess of the policy limit, indifference to the effect of refusal on the insured, failure to fairly consider a compromise and facts presented and pass honest judgment thereon or refusal to settle upon grounds which depart from the contract and the purpose of the grant of power, would tend to show bad faith."

Plaintiff contends that there is evidence of bad faith in that defendant waited five months between its first correspondence with plaintiff's appraiser, and informing plaintiff that his appraiser was not cooperating. However, the evidence indicates that defendant sent a total of nine letters attempting to resolve this issue.

Plaintiff also asserts that defendant had a predisposition to deny his claim, also evidence of bad faith. Beyond merely asserting this, plaintiff provides no evidence that defendant had a predisposition to deny his claim. Plaintiff may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998). We believe that the trial court properly determined that there was no genuine issue of material fact as to the claim of bad faith.

C. Michigan Unfair and Prohibited Trade Practices Act

Plaintiff argues that there is a genuine issue of fact as to whether defendant violated the Michigan Unfair and Prohibited Trade Practices Act. We disagree.

MCL 500.2006 states in relevant parts:

> (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, or a third party tort claimant the benefits provided under the terms of its policy, or, in the alternative, the person must pay to its insured, an individual or entity directly entitled to benefits under its insured's contract of insurance, or a third party tort claimant 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** (emphasis added).
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> (4) If 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. If the claimant is a third party tort claimant, then the benefits paid

> shall bear 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 liability of the insurer for the claim is not reasonably in dispute, the insurer has refused payment in bad faith and the bad faith was determined by a court of law. The interest shall be paid in addition to and at the time of payment of the loss. If the loss exceeds the limits of insurance coverage available, interest shall be payable based upon the limits of insurance coverage rather than the amount of the loss. If payment is offered by the insurer but is rejected by the claimant, and the claimant does not subsequently recover an amount in excess of the amount offered, interest is not due. Interest paid pursuant to this section shall be offset by any award of interest that is payable by the insurer pursuant to the award.

Here, the claim was "reasonably in dispute," thereby absolving defendant of liability for the 12 percent interest penalty. This Court has previously reviewed the application of the 12 percent interest penalty in relation to the Michigan Unfair and Prohibited Trade Practices Act in *O J Enterprises, Inc v Insurance Co of North America*, 96 Mich App 271; 292 NW2d 207 (1980), stating:

> We believe that the 12 percent interest statute was never triggered in this case because the proof of loss originally submitted was not "satisfactory", but was the subject of an appraisal dispute which was settled under the terms of the Michigan Standard Fire Policy Statute, MCL § 500.2832.
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> The 12 percent interest rate is a penalty to be assessed only against insurers who procrastinate in paying meritorious claims. *Fletcher v Aetna Casualty & Surety Co.*, 80 Mich App 439, 445, 264 NW2d 19 (1978). It is inconceivable that the Michigan Legislature in enacting the two statutes would have intended to penalize insurers for seeking settlement of a disputed claim through the appraisal process. We must conclude that when the amount of the loss is reasonably disputed by the insurer and the insured and the matter is submitted to a court-appointed appraiser, MCL s 500.2006(4) should be read in conjunction with MCL § 500.2832. This statute states:
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> > "When loss payable. The amount of loss for which this Company may be liable shall be payable sixty days after proof of loss, as herein provided, is received by this Company and ascertainment of the loss is made either by agreement between the insured and this Company expressed in writing or by the filing with this Company of an award as herein provided."
>
> Therefore, insurers will be allowed up to 60 days from the date of the appraiser's award to pay awarded benefits to policy holders. Id. at 274.

Here, defendant was unable to separate the damage caused by the first fire from the damage caused by the second and third fires. Thus, the amount of the claim was in dispute which necessitated an appraisal under the terms of the insurance contract and no provisions of the Michigan Unfair and Prohibited Trade Practices Act were triggered.

D. Waiver of Appraisal Provision

Plaintiff argues that defendant's conduct in failing to notify him that his appraiser was unresponsive constituted a waiver of the appraisal provision. We disagree.

"Waiver is the voluntary relinquishment of a known right" *The Tom Thomas Organization, Inc v Reliance Insurance Co*, 396 Mich 588, 600; 242 NW2d 396 (1976). "Waiver is a matter of fact to be shown by evidence. It may be shown by express declarations, or by acts and declarations manifesting an intent and purpose not to claim the supposed advantage; or it may be shown by a course of acts and conduct, and in some cases will be implied therein. It may also be shown by neglecting and failing to act as to induce a belief that there is an intention or purpose to waive. Proof of express words is not necessary, but the waiver may be shown by circumstances or a course of acts and conduct which amounts to estoppel." *Klas v Hardware & Furniture Co*, 202 Mich 334, 339-340; 168 NW 425 (1918).

In order to show that defendant waived the appraisal provision in the insurance contract, it must show that defendant delayed substantially in requesting appraisal so as to have waived it. *Bielski v Wolverine Insurance Co*, 379 Mich 280; 150 NW2d 788 (1967). In the present case, the evidence indicates that defendant made several attempts to move forward with the appraisal of plaintiff's property. Plaintiff presents no evidence that the delay was caused by anything other than himself or the appraiser hired by him. There is nothing in the record to indicate that defendant waived the appraisal provision through its conduct.

Affirmed.

/s/ Henry William Saad
/s/ Brian K. Zahra
/s/ Bill Schuette