STATE OF MICHIGAN

COURT OF APPEALS

MICHAEL REMAR,

Plaintiff-Appellant,

v

CATHERINE SUSAN TRUMBLEY and WAYNE TRUMBLEY, d/b/a SHAROLYN MOTEL,

Defendants,

and

CITIZENS INSURANCE COMPANY OF AMERICA,

Garnishee/Defendant-Appellee.

UNPUBLISHED
June 3, 2003

No. 242779
Chippewa Circuit Court
LC No. 99-004616-NO

Before: Smolenski, P.J., and Griffin and O'Connell, JJ.

PER CURIAM.

Plaintiff appeals as of right from the order granting summary disposition to garnishee/defendant Citizens Insurance Company (Citizens). Plaintiff secured a $350,000 default judgment against defendants and then sought payment of the judgment by defendants' insurance provider, Citizens.[1] Citizens declined to pay the judgment, claiming it never received notice of the lawsuit and was never provided copies of the lawsuit papers as required by the terms of its policy with defendants. Citizens sought, and was granted, summary disposition regarding plaintiff's garnishment claim and this appeal followed. We affirm.

The trial court granted summary disposition under MCR 2.116(C)(10), a decision which we review de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion for summary disposition under MCR 2.116(C)(10) tests whether there is factual support for a claim, *Id.*, and a court must consider the pleadings, affidavits, depositions,

[1] Plaintiff was allegedly bitten by a brown recluse spider at defendants' motel and suffered injuries as a result.

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).

This case concerns the interpretation of language in the insurance policy issued by Citizens to defendants. This Court examines the language of an insurance policy and enforces the policy in accordance with its terms. *Frankenmuth Mut Ins Co v Masters*, 460 Mich 105, 111; 595 NW2d 832 (1999). Where there is no ambiguity, the policy will be enforced as written, and the terms of the policy will be interpreted according to their "commonly used meaning." *Id.* at 111-112.

Plaintiff claims that the trial court erred by granting summary disposition to Citizens because a telephone call made by Catherine Trumbley to her insurance agency, the Madigan-Pingatore Agency (Madigan-Pingatore), after she was served with plaintiff's summons and complaint, was sufficient to provide Citizens with notice of plaintiff's lawsuit as required by the insurance contract. Plaintiff further asserts that, at least for the purpose of receiving notice of an insurance claim, the agency was Citizens' "authorized agent."

Plaintiff asserts that Madigan-Pingatore is an "authorized agent" of Citizens, and because defendants' policy contained an endorsement which provided that "[n]otice given by or on behalf of the insured to our authorized agent, with particulars sufficient to identify the insured, shall be considered notice to [Citizens],"[2] Trumbley's March 2000 telephone call to Madigan-Pingatore constituted notice of the lawsuit to Citizens. The first issue is whether Madigan-Pingatore was the "authorized agent" of Citizens for purposes of receiving notice of a claim and notice of a lawsuit.

Generally an independent insurance agent is an agent of the insured, not the insurer. *Mate v Wolverine Mut Ins Co*, 233 Mich App 14, 20; 592 NW2d 379 (1998). Madigan-Pingatore considers itself an independent agency. Both Stephen Madigan and Randy Pingatore testified that their agency was an independent agency that dealt with numerous insurance companies. Such testimony is generally sufficient to prove that the independent agent is an agent of the insured and not of the insurer. *Id.; Harwood v Auto-Owners Ins Co*, 211 Mich App 249, 254; 535 NW2d 207 (1995) (holding that independent insurance agent that "had the power to place insurance with various insurance companies" was not an agent of the insurer).

Plaintiff asserts that because the agency agreement between Madigan-Pingatore and Citizens stated that Madigan-Pingatore was an agent and the agreement required Madigan-Pingatore to perform certain duties, Madigan-Pingatore was clearly an authorized agent of Citizens. The agency agreement between Madigan-Pingatore and Citizens stated that "[b]y

---

[2] This endorsement was included to comply with MCL 500.3008, which provides:

> In such liability insurance polices there shall be a provision that notice given by or on behalf of the insured to any authorized agent of the insurer within this state, with particulars sufficient to identify the insured shall be deemed to be notice to the insurer; and also a provision that failure to give any notice required to be given by such policy within the time specified therein shall not invalidate any claim made by the insured if it shall be shown not to have been reasonably possible to give such notice within the prescribed time and that notice was given as soon as was reasonably possible.

signing this agreement you [Madigan-Pingatore] become an Agent for the Companies indicated above," which included Citizens, and the agreement further stated that Madigan-Pingatore had the authority to "accept and bind contracts of insurance that [Citizens] is licensed to write." However, the agreement further stated, under a heading titled "Your Duties and Responsibilities," that Madigan-Pingatore was "an independent contractor, not an employee of the Companies."

Given the above facts, there appears to be a genuine issue of material fact as to whether Madigan-Pingatore was an agent of defendants, Citizens, or possibly a dual agent. *Vargo v Sauer*, 457 Mich 49, 68-69; 576 NW2d 656 (1998). However, reversal is unnecessary because, even if we were to conclude that Madigan-Pingatore was an agent of Citizens, there is no genuine issue of material fact regarding the insufficiency of Trumbley's notice to Madigan-Pingatore which prejudiced Citizens. Trumbley stated that soon after she was served with plaintiff's summons and complaint in March 2000, she called Madigan-Pingatore and stated that, "I've been sued." Trumbley was allegedly told that someone would return her call. Madigan-Pingatore denies ever receiving such a telephone call, and, therefore, never contacted Citizens.

"Notice to an authorized agent is notice to the insurer." *Wendel v Swanberg*, 384 Mich 468, 478; 185 NW2d 348 (1971); see MCL 500.3008. The purpose of liability policy provisions requiring the insured to give the insurer immediate or prompt notice of accident or suit is to allow the insurer to make a timely investigation in order to evaluate claims and defend against fraudulent, invalid or excessive claims. *Weller v Cummins*, 330 Mich 286, 293; 47 NW2d 612 (1951).

However, mere failure by an insured to notify its insurer of a lawsuit will not cut off the insurer's liability under the policy absent a showing of prejudice by the insurer. *Koski v Allstate Ins Co*, 456 Mich 439, 444-445; 572 NW2d 636 (1998).

> Ordinarily, one who sues for performance of a contractual obligation must prove that all contractual conditions prerequisite to performance have been satisfied. However, it is a well-established principle that an insurer who seeks to cut off responsibility on the ground that its insured did not comply with a contract provision requiring notice immediately or within a reasonable time must establish actual prejudice to its position. [*Id*. at 444.]

The *Koski* Court determined that the evidence in the case "established that Allstate received no notification of the suit brought against plaintiff until three months after the entry of the default judgment. . . . Consequently, Allstate was deprived of any opportunity to engage in discovery, cross-examine witnesses at trial, or present its own evidence relative to liability and damages. *Id.* at 444-445.

In this case, the policy imposed certain duties on the insured: (1) the insured had to give prompt notice of a claim or of an occurrence that might result in a claim; (2) the insured had to give prompt notice of any lawsuit; (3) the insured had to immediately send any legal papers received in connection with the lawsuit to Citizens, authorize Citizens to obtain records and other information, cooperate in the investigation or settlement of the claim, and assist Citizens in the enforcement of any right against anyone liable to the insured; and (4) the insured could not make any payment or assume any obligation without Citizens' consent. Unless the insured performed

these duties, "[n]o person or organization has a right under this Coverage Part . . . [t]o sue us on this Coverage Part."

There is no dispute that in this alleged telephone call Trumbley did not identify plaintiff, the basis for the lawsuit and its alleged occurrence date, or when Trumbley herself received notice of the lawsuit. Also, there is no dispute that defendants forwarded none of the legal papers, including the complaint and summons, the default, the motion to enter a default judgment, and the default judgment, to Madigan-Pingatore or to Citizens. Defendants' complied with none of the policy requirements concerning notice of a lawsuit.[3]

There is evidence to suggest that Madigan-Pingatore learned of the default judgment in early November 2000. However, even if Madigan-Pingatore had informed Citizens immediately, Citizens would have had but a few days to obtain the applicable legal papers regarding the suit, investigate the claim, and file a motion to set aside the default judgment with in the 21-day window. MCR 2.603(D). We hold that, based on these facts, there is no genuine issue of material fact that Citizens has established prejudice as a result of defendants' failure to comply with its notice duties as required by their policy, and, therefore, Citizens is relieved of liability to provide coverage. Accordingly, the trial court properly granted summary disposition in favor of Citizens.

Affirmed.

/s/ Michael R. Smolenski
/s/ Richard Allen Griffin
/s/ Peter D. O'Connell

[3] Plaintiff asserts that the policy language regarding notice only requires the insured to identify herself, which Trumbley did when she called Madigan-Pingatore in March 2000. Plaintiff is referring to the policy endorsement, which incorporates MCL 500.3008. We believe that plaintiff misinterprets this provision's meaning. It states that notice "*with* particulars sufficient to identify the insured shall be deemed to be notice to the insurer." The provision provides that the notice must include identification of the insured. The content of the notice itself must still provide insurer with sufficient information regarding the lawsuit to enable it to act accordingly.