STATE OF MICHIGAN

COURT OF APPEALS

CORNELIUS WATTS and WATTS CLUB MOZAMBIQUE,

Plaintiffs-Appellants,

v

MICHIGAN BASIC PROPERTY INSURANCE ASSOCIATION,

Defendant-Appellee,

and

JOHN MORGAN,

Defendant.

UNPUBLISHED
November 25, 2003

No. 241774
Wayne Circuit Court
LC No. 00-038335-CK

Before: Fort Hood, P.J., and Murphy and Neff, JJ.

PER CURIAM.

Plaintiffs appeal as of right from an order granting defendant Michigan Basic Property Insurance Association's motion for summary disposition under MCR 2.116(C)(10). We affirm.

I

Plaintiff Cornelius Watts is the owner of commercial property in Detroit at which he operated plaintiff Watts Club Mosambique, a restaurant and nightclub. On June 23, 1999, Watts Club Mosambique was destroyed by a fire. Plaintiffs filed a property loss claim with defendant Michigan Basic Property Insurance Association (MBPIA) under a casualty insurance policy issued to plaintiffs by MBPIA and sold by defendant John Morgan, an insurance agent. MBPIA denied the claim on the basis that the insurance policy was cancelled effective March 11, 1999, because it had lapsed for nonpayment of the renewal premium. Although plaintiffs had issued a check, dated May 19, 1999, in payment of the past due premium, Morgan failed to forward the payment to MBPIA and apparently instead negotiated the check for his own use. Plaintiffs filed the instant action seeking recovery for the fire loss.

II

Plaintiffs first argue that the trial court erred in granting defendant's[1] motion for summary disposition under MCR 2.116(C)(10) because a genuine issue of material fact exists regarding whether defendant had properly cancelled, under MCL 500.3020, the insurance policy issued to plaintiffs. We disagree.

We review de novo motions for summary disposition granted under MCR 2.116(C)(10), considering the facts in the light most favorable to the nonmoving party. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). "A motion under MCR 2.116(C)(10) must be supported by affidavits, depositions, admissions, or other documentary evidence. The adverse party may not rest on mere allegations or denials of a pleading, but must, by affidavits or other appropriate means, set forth specific facts to show that there is a genuine issue for trial. All this supporting and opposing material must be considered by the court." *Cole v Ladbroke Racing Michigan, Inc*, 241 Mich App 1, 7; 614 NW2d 169 (2000) (citations omitted). Summary disposition under MCR 2.116(C)(10) is properly granted if "there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Mino v Clio School Dist*, 255 Mich App 60, 68; 661 NW2d 586 (2003).

MCL 500.3020 provides, in relevant part, that a policy of casualty insurance shall not be issued unless it contains a provision:

> That the policy may be canceled at any time by the insurer by mailing to the insured at the insured's address last known to the insurer or an authorized agent of the insurer, with postage fully prepaid, a not less than 10 days' written notice of cancellation with or without tender of the excess of paid premium or assessment above the pro rata premium for the expired time. [MCL 500.3020(1)(b).]

Plaintiffs argue that the following language in their insurance policy gave rise to a statutory duty to issue a written cancellation notice under MCL 500.3020(1)(b):

> A. Paragraphs 1, 2, & 5 of the CANCELLATION Common Policy Condition are replaced by the following:
>
> * * *
>
> 2. We may cancel this policy by mailing or delivering to the first Named Insured, with postage fully prepaid, written notice of cancellation at least:
>
> a) 10 days before the effective date of cancellation if we cancel for nonpayment of premium . . . .

[1] Plaintiffs settled their claim against Morgan, and he is not a party to this appeal. This opinion therefore refers to defendant MBPIA as "defendant."

Plaintiffs argue that this language in the policy forecloses the possibility that the policy expires if not renewed, and therefore the policy remains in force unless defendant expressly sends a cancellation notice in keeping with the policy and MCL 500.3020. As a result, defendant was liable for payment of plaintiffs' claim arising from the fire that destroyed Watts Club Mosambique on June 23, 1999. Defendant counters that the policy has a clear expiration date, and that absent payment of a renewal premium, the policy clearly expired on March 11, 1999.

Our Supreme Court has set forth the general rules for construing insurance policies:

> An insurance policy must be enforced in accordance with its terms. We will not hold an insurance company liable for a risk it did not assume.
>
> In interpreting ambiguous terms of an insurance policy, this Court will construe the policy in favor of the insured. However, we will not create ambiguity where the terms of the contract are clear. Where there is no ambiguity, we will enforce the terms of the contract as written. [*Frankenmuth Mut Ins Co v Masters*, 460 Mich 105, 111; 595 NW2d 832 (1999) (citations omitted).]

This Court has held that where an insurer's automobile insurance policy contained a similar cancellation-for-nonpayment clause and the plaintiff failed to remit the renewal premium, the insurer was not required to send a cancellation notice. *McCormic v Auto Club Ins Ass'n*, 202 Mich App 233, 234-238; 507 NW2d 741 (1993). Once the policy was in force, it "continued in effect until it was canceled or it expired." *Id*. at 238. While the policy was in effect, it could not be canceled without a notice of cancellation pursuant to the policy cancellation provision, which incorporated the language of MCL 500.3020(1)(b). *Id*. "However, after the period of coverage had expired, the policy was no longer in effect and a notice of cancellation was not required." *Id*. at 238. The Court concluded that the contract language was unambiguous and the cancellation provisions related only to cancellation of the policy during the time it was in effect. *Id.* at 239.[2]

In the instant case, the declaration page of the policy in question had a clearly defined expiration date of March 11, 1999. Furthermore, defendant's policy renewal certificate required that payment be received by defendant before that date or the policy would be cancelled, effective March 11, 1999. It is undisputed that defendant did not receive payment by that date. We conclude, therefore, even viewing the evidence in a light most favorable to plaintiffs, that the policy expired on a date certain, and that defendant was not required to send the cancellation notice mandated under MCL 500.3020.

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[2] In *McCormic*, the policy also contained a nonrenewal provision, which the Court concluded clearly stated that the policy would expire on its own terms for nonpayment of the renewal premium. *Id*. at 238, 240. However, the absence of a nonrenewal provision in this case does not alter the analysis with regard to the cancellation provision. See *Grable v Farmers Ins Exch*, 129 Mich App 370; 341 NW2d 147 (1983) (if policy expires on its own terms, e.g., pursuant to the policy provisions, no notice of cancellation is required).

III

Plaintiffs next argue that the trial court erred in granting defendant's motion for summary disposition because defendant is bound by the acts of its agent, Morgan. That is, Morgan's collection of premium payments from plaintiffs to send to defendant, bound defendant to a renewal contract with plaintiffs under a theory of actual or apparent agency. We disagree.

"Ordinarily, an independent insurance agent or broker is an agent of the insured, not the insurer." *Mate v Wolverine Mut Ins Co*, 233 Mich App 14, 20; 592 NW2d 379 (1998) (internal quotation omitted). Morgan met with Cornelius Watts to complete defendant's application form, which explicitly states that agents are not representatives of defendant and that agents are not authorized to bind defendant. Furthermore, Morgan was the owner of his own insurance agency. Morgan testified that he made no representation to Cornelius Watts regarding whom he represented. Morgan stated that he chose defendant as a potential insurer for plaintiffs "because it would have been the only market available for Watts Club Mosambique," which indicates that Morgan ordinarily had a choice of various insurance companies to which he might apply for coverage on behalf of a client, further supporting that Morgan was not an agent of defendant.

Viewing the evidence in a light most favorable to plaintiffs, we conclude that Morgan was an independent insurance agent. As such, he was plaintiffs' agent and not defendant's, and could not have bound defendant under any theory of agency, actual or otherwise.

Affirmed.

/s/ Karen M. Fort Hood
/s/ William B. Murphy
/s/ Janet T. Neff