STATE OF MICHIGAN

COURT OF APPEALS

JAMES C. DAHLKE and KATHLEEN H. DAHLKE,

Plaintiffs-Appellees,

v

HOME OWNERS INSURANCE COMPANY,

Defendant-Appellant.

UNPUBLISHED
December 23, 2003

No. 239128
Ingham Circuit Court
LC No. 01-093003-CK

Before: Whitbeck, C.J., and Hoekstra and Donofrio, JJ.

PER CURIAM.

In this suit in which plaintiffs, James and Kathleen Dahlke, claimed breach of contract and violations of the Uniform Trade Practices Act (UTPA), and the Michigan Consumer Protection Act (MCPA), defendant, Home Owners, appeals by leave granted the trial court's denial of its motion for summary disposition pursuant to MCR 2.116(C)(10). More specifically, Home Owners argues that summary disposition should have been granted for the following reasons: the exclusionary provision in the parties' insurance policy that excludes coverage for losses caused by mold operates to preclude coverage of the Dahlkes' claim; failure to provide adequate proof of loss within the sixty-day time limit provided by the policy operates to preclude coverage of the Dahlkes' claim; the claim was "reasonably in dispute" so as to relieve Home Owners of liability for its refusal to pay the Dahlkes' claim and consequent interest on the claim under the UTPA; and principles of waiver and estoppel were inappropriate to expand coverage in the instant case. Because we agree with Home Owners on the controlling issues, we reverse and remand.

The instant case arises out of Home Owners' denial of coverage to the Dahlkes based on an exclusionary provision in the parties' insurance policy. The facts relevant to the resolution of this appeal are that in January 1999, melting ice and snow on the Dahlkes' roof leaked into their house causing the ceiling to collapse, and causing damage to the walls. Various contractors and adjusters examined the house and determined that in addition to the ceiling and wall damage, the leaking water fostered mold growth which caused the house to be a total loss.[1] Before

[1] There is some indication that the mold damage developed from water leaking into the Dahlkes' house before the water buildup that resulted in the ceiling and wall damage. However, because
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discovering the extent of the damages to the house caused by mold, Home Owners agreed to pay for repairs, provide temporary housing, and even pay for some remediation of the mold problem by applying a standard milicide. But after further investigation revealed the full extent of the mold damage, Home Owners denied the Dahlkes' claim for mold damages, relying on an exclusionary provision of the parties' insurance policy that provides in pertinent part:

> We do not cover loss to covered property caused directly or indirectly by any of the following, whether or not any other cause or event contributes concurrently or in any sequence to the loss:
>
> (12)(c) Rust, corrosion or electrolysis, mold or mildew, or wet or dry rot.

The denial letter also maintained that the Dahlkes failed to protect the property from further loss.

The Dahlkes filed the instant suit against Home Owners, alleging breach of contract, violation of the UTPA, MCL 500.2006, and violations of the MCPA, MCL 445.903. Home Owners moved for summary disposition pursuant to MCR 2.116(C)(10), arguing that no genuine issue of material fact existed that losses caused by mold damage were excluded under the terms of the policy regardless of how or when they were caused; that the Dahlkes failed to timely file a proof of loss; that the Dahlkes failed to pursue a declaration of rights or to request statutory appraisal; that the Dahlkes failed to state a claim under the MCPA; and that since the claim was in reasonable dispute, no claim existed under the UTPA.

The trial court denied Home Owners' motion for summary disposition, stating:

> My opinion is that this insurance policy covers losses and damages that flow from those losses. And I believe that, also, in this particular case, the situation is, is that the evidence here at least gives a question as to whether this mold was caused by this water flowing into the house. And that it was – and if it was a consequential event from that it should be covered.
>
> And I also think that it's ridiculous to send out letters wanting to pay for things and then claiming that they are not covered and then claiming you need proof of loss on things that you're already paying for.

This Court granted Home Owners delayed application for leave for appeal.

We review a trial court's grant or denial of summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion brought under MCR 2.116(C)(10) tests the factual sufficiency of a claim. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). "Summary disposition is appropriate under MCR 2.116(C)(10) if there

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review of the denial of a motion for summary disposition under MCR 2.116(C)(10) requires us to resolve all reasonable inferences in favor of the non-moving party, *Hall v McRea Corp*, 238 Mich App 361, 369-370; 605 NW2d 354 (1999), we assume that the mold damage at issue resulted from the water leaks that occurred just before the event that caused the Dahlkes to make this claim.

is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v General Motors Corp*, 469 Mich 177, 182; 665 NW2d 468 (2003).

On appeal, Home Owners argues that the trial court erred in denying its motion for summary disposition. Specifically, Home Owners claims that the policy language that provides that losses caused "directly or indirectly" by mold, "whether or not any other cause or event contributes concurrently or in any sequence to the loss" excludes coverage for the mold damage to the Dahlkes house. We agree.

Generally, "an insurance policy is a contract that should be read as a whole to determine what the parties intended to agree on." *McKusick v Travelers Indemnity Co*, 246 Mich App 329, 332; 632 NW2d 525 (2001). "In interpreting insurance policies, we are guided by well-established principles of construction." *Id*. "The policy must be enforced in accordance with its terms; therefore, if the terms of the contract are clear, we cannot read ambiguities into the policy." *Id*. "It is axiomatic that if a word or phrase is unambiguous and no reasonable person could differ with respect to application of the term or phrase to undisputed material facts, then the court should grant summary disposition to the proper party pursuant to MCR 2.116(C)(10). *Henderson v State Farm Fire & Casualty Co*, 460 Mich 348, 353; 596 NW2d 190 (1999).

With respect to exclusions, it is well settled that "exclusionary clauses in insurance policies are strictly construed in favor of the insured." *Auto-Owners Ins Co v Churchman*, 440 Mich 560, 567; 489 NW2d 431 (1992). "However, coverage under a policy applies to an insured's particular claims." *Id*. "Clear and specific exclusions must be given effect. It is impossible to hold an insurance company liable for a risk it did not assume." *Id*.

In *Sunshine Motors, Inc v New Hampshire Ins Co*, 209 Mich App 58, 59-60; 530 NW2d 120 (1995), this Court examined an insurance policy with an exclusionary clause virtually identical to the exclusionary clause in the instant case, and determined that even where the excluded loss was a direct result of a covered event, the insured could not recover if the policy excluded the loss "regardless of any other cause or event that contributes concurrently or in any sequence to the loss." In that case, heavy rains flooded the plaintiff's car dealership when the local drainage system became partially blocked with a piece of wood. *Id*. The defendant insurance company denied coverage for certain losses, relying on its policy provision that excluded losses caused by flood, surface water, water backing up from a sewer or drain, or certain other events or causes, "regardless of any other cause or event that contributes concurrently or in any sequence to the loss." *Id*. The plaintiff filed suit, and the trial court granted the defendant's motion for summary disposition pursuant to MCR 2.116(C)(10), holding as a matter of law that the plaintiff's losses were caused by surface water and therefore excluded from coverage. *Id*. This Court reasoned:

> It appears to us that plaintiff's losses were the result of an unfortunate sequence or concurrence of direct and indirect causes: heavy rainfall creating surface water that failed to drain away because of debris blocking the drainage system. Plaintiff's claim that the blocked drainage system was "the proximate cause" of its losses misses the point: Whether the blocked drainage system was a direct or indirect cause of plaintiff's water damage, or whether it was *the* principal factor or

> merely a contributing factor, the policy expressly excluded coverage. Accordingly, plaintiff has failed to assert the existence of a genuine issue of material fact, and the trial court did not err in finding that, as a matter of law, plaintiff's losses plainly were excluded from coverage. Summary disposition was proper. [*Sunshine, supra* at 60 (emphasis in original).]

Similarly, in the instant case, the Dahlkes' losses were the result of a winter thaw which led to water damage and mold growth. The parties' insurance policy expressly excluded coverage for loss caused directly or indirectly by mold. Additionally, the policy expressly excluded coverage for such losses "whether or not any other cause or event that contributes concurrently or in any sequence to the loss." Here, loss caused by mold was expressly excluded regardless of the water damage that contributed concurrently or in any sequence to the loss. There was no genuine issue of material fact as to whether the Dahlkes' claimed losses caused by mold were excluded under the terms of the insurance policy, and the trial court erred in denying defendant's motion for summary disposition on this basis.

We decline to adopt the interpretation of the exclusionary provision at issue that is argued by the Dahlkes and amicus curie Michigan Association of Commercial Property Owners. In essence, their argument is that even if damage is of a kind that is named in the exclusion, such as the mold in this case, if the damage results from an otherwise covered event the exclusion does not apply. In our opinion, this interpretation is contrary to the clear and unambiguous terms of the insurance policy which excludes losses caused "directly or indirectly" by any of the named conditions or events, "whether or not any other cause or event contributes concurrently or in any sequence to the loss." The language of the exclusion is typically referred to as "anticoncurrent causation" because it expressly excludes coverage for losses directly or indirectly caused in whole or in part by one of the listed causes of loss. As applied in this case, the "anticoncurrent causation" language of the policy excludes coverage for damage resulting from mold even though the mold itself may have formed as the result of a covered event.

We are not unmindful of the concerns expressed to us regarding the number and breadth of listed causes of loss that are excluded by Home Owners' policy. Our interpretation of the exclusion would result in denial of coverage for damage to covered property that many insureds would ordinarily expect to be covered. For example, section (12)(a) of the policy excludes "wear and tear, marring, scratching or deterioration." Presumably under this section, if the Dahlkes' kitchen cabinets and countertops were scratched or marred by the falling ceiling, they would not be covered. Nevertheless, these concerns do not provide grounds upon which we may rewrite the terms of the policy, and we must apply the unambiguous terms of the policy in this case. *McKusick, supra* at 332; *Henderson, supra* at 353. Further, the Michigan Supreme Court has recently held that an insured's reasonable expectations, "clearly has no application when interpreting an unambiguous contact because a policyholder cannot be said to have reasonably expected something different from the clear language of the contract." *Wilkie v Auto Owners Ins Co*, 469 Mich 41, 62; 664 NW2d 776 (2003).

The Dahlkes also argue that Home Owners breached an implied covenant of good faith and fair dealing by engaging in dilatory conduct prohibited by the insurance policy. While it is true that there is an "implied covenant of good faith and fair dealing which arises from the contract between the insurer and the insured," we are not persuaded by the Dahlkes' argument that Home Owners breached any such duty. *Commercial Union Ins Co v Medical Protective Co,*

426 Mich 109, 116; 393 NW2d 479 (1986). The Dahlkes argue that the insurance policy required Home Owners to pay for covered losses, and that Home Owners' refusal to authorize proper remediation techniques amounted to a failure to perform its obligations under the contract. However, losses caused by mold are specifically excluded from coverage, and Home Owners was under no obligation to pay for corrective measures to remedy losses caused by mold. Moreover, the policy places the onus of protecting the covered property from further damage on the Dahlkes, and an implied covenant does not supersede an express obligation. *Eastway & Blevins Agency v Citizens Ins Co of America*, 206 Mich App 299, 303; 520 NW2d 640 (1994).

Home Owners next argues that the trial court erred in denying its motion for summary disposition and allowing the UTPA claim to proceed. We agree. MCL 500.2006 provides in pertinent part:

> "(1) * * * Failure to pay [insurance] 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.
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> ***
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> "(4) When 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."

Therefore, "under the statute, an insurer may refuse to pay a claim and be relieved of paying interest on the claim only when 'the claim is reasonably in dispute.'" *Siller v Employers Ins of Wausau*, 123 Mich App 140, 143-144; 333 NW2d 197 (1983). "Otherwise, an insured is entitled to 12% interest where an insurer does not timely pay the benefits owed to the insured." *Id*. at 144. Here, Home Owners declined to pay the Dahlkes' claimed damages for losses caused by mold based on the policy's exclusionary provision. We believe that the Dahlkes' claim was reasonably in dispute when Home Owners refused to pay for losses caused by mold, based on the clear and unambiguous exclusionary policy provision.

This Court has stated that "the purpose of the penalty interest statute is to penalize insurers for dilatory practices in settling meritorious claims, not to compensate a plaintiff for delay in recovering benefits to which the plaintiff is ultimately determined to be entitled." *Arco Industries Corp v American Motorists Ins Co (On Second Remand, On Rehearing)*, 233 Mich App 143, 148; 594 NW2d 74 (1998). We believe that the trial court erred in denying Home Owners' motion for summary disposition as to the UTPA claim, because it is evident that Home Owners disputed its obligation to cover losses caused by mold in good faith, based on the policy's exclusionary provision. Home Owners covered the Dahlkes' claimed losses caused by water damage. Additionally, Home Owners paid for a place for the Dahlkes to live while their house was being repaired. Home Owners clearly fulfilled its obligation under the terms of the policy. Home Owners' obligation to cover losses caused by mold was reasonably in dispute, and the trial court erred in allowing plaintiffs' UTPA claim to proceed.

Finally, Home Owners argues that the trial court erred by employing principles of waiver and estoppel to expand coverage. Apparently relying on Home Owners' payment to the Dahlkes to cover losses arising from the water damage, including its offer to pay for a standard milicide to remedy losses caused by mold, the trial court in effect determined that defendant's actions superseded the exclusionary provision. The trial court stated that "it's ridiculous to send out letters wanting to pay for things and then claiming that they are not covered." However, this Court has held that "the fact that an insurer has paid some benefits to an insured party does not preclude it from later asserting that it owes nothing when the insured party files suit." *Calhoun v Auto Club Ins Ass'n*, 177 Mich App 85, 89; 441 NW2d 54 (1989), abrogated on other grounds *Tousignant v Allstate Ins Co*, 444 Mich 301; 506 NW2d 844 (1993). Further, Home Owners expressly advised the Dahlkes that the policy may not cover all claimed damages, and expressly relied on the exclusionary provision to deny coverage for losses caused by mold. Additionally, Home Owners' offer to pay for cleaning the mold with a standard milicide was rejected, thereby precluding any claim of detrimental reliance. Consequently, we agree that the trial court erred by employing principles of waiver and estoppel to expand their coverage under the terms of the policy.

In light of our resolution of these issues, we need not address the remaining issues raised on appeal by the parties.[2] More specifically, because summary disposition is appropriate on the basis that the exclusionary clause precludes coverage, it is unnecessary for us to address Home Owners' claim that plaintiffs failed to provide adequate proof of loss within the sixty-day time limit provided by the policy.

In sum, we find that the trial court erred in denying Home Owners' motion for summary disposition. In light of our decision that the exclusionary provision for damages caused by mold precludes coverage for the Dahlkes' claim, that the claim was reasonably in dispute so as to relieve Home Owners of liability under the UTPA, and that principles of waiver and estoppel were inappropriate to expand coverage in the instant case, we believe that Home Owners is entitled to summary disposition in its favor. Accordingly, we remand the case to the trial court for entry of an order granting defendant's motion for summary disposition.

Reversed and remanded with instructions to enter summary disposition in favor of defendant consistent with this opinion. We do not retain jurisdiction.

/s/ William C. Whitbeck
/s/ Joel P. Hoekstra
/s/ Pat M. Donofrio

[2] We note that defendant did not raise plaintiffs' MCPA claim as an issue in the statement of questions presented; therefore, defendant failed to properly present this issue for review and we decline to address it. MCR 7.212(C)(5); *Grand Rapids Employees Independent Union v Grand Rapids*, 235 Mich App 398, 409-410; 597 NW2d 284 (1999).