STATE OF MICHIGAN

COURT OF APPEALS

KEVIN DITMORE and MELANIE DITMORE,

Plaintiffs-Appellees,

v

LESLEY W. LOCHNER, a/k/a LESLY W. RACINE,

Defendant/Third-Party Plaintiff-Appellant,

and

LARRY MICHALIK, BECKY MICHALIK, RON HIVELEY, GLENA HIVELEY, RAY A. BUSIK, PHYLLIS J. BUSIK, DALE HERRING, LUCINDA HERRING, FLOYD CAMPBELL, and COMMONWEALTH LAND TITLE INSURANCE COMPANY,

Third-Party Defendants-Appellees.

UNPUBLISHED
March 24, 2005

No. 251572
Washtenaw Circuit Court
LC No. 00-000343-CK

Before: Hoekstra, P.J., and Neff and Schuette, JJ.

PER CURIAM.

Defendant-third-party plaintiff Lesley Lochner, also known as Lesly Racine (Racine), appeals as of right from the grant of summary disposition to third-party defendant Commonwealth Land Title Insurance Company (Commonwealth). We affirm.

This case has a complex history. In 1974, Racine and her then-husband purchased two parcels of property, Lot 43 and Parcel II, and purchased a title insurance policy from Commonwealth for those parcels. Racine's husband quitclaimed the property to Racine pursuant to their divorce in 1980.

In 1995, Racine sold the property on land contract to plaintiffs. When plaintiffs discovered that neighbors were in the habit of recreating on one of the parcels they sued to enjoin them from using the property. The neighbors countersued and, in 1999, the circuit court entered

judgment in their favor on the ground that a 1964 judgment pertaining to the use of an adjoining parcel was res judicata. We reversed that judgment in *Ditmore v Michalik*, 244 Mich App 569; 625 NW2d 462 (2001).

While the case between plaintiffs and the neighbors was pending before this Court, plaintiffs filed a second suit against Racine, alleging in part that they were injured by Racine's failure to disclose the 1964 judgment. Racine then filed a third-party complaint against Commonwealth on the ground that Commonwealth was obligated by the title insurance policy to provide her with a defense but that Commonwealth had failed to do so. Eventually, all parties to both cases agreed to a consent judgment that dismissed all claims except for Racine's claim against Commonwealth. Thus, the only issue remaining is whether the trial court properly granted summary disposition to Commonwealth as to Racine's claim of a duty to defend her.

A grant or denial of summary disposition is reviewed de novo on the basis of the entire record to determine if the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). When reviewing a motion under MCR 2.116(C)(10), which tests the factual sufficiency of the complaint, this Court considers all evidence submitted by the parties in the light most favorable to the non-moving party and grants summary disposition only where the evidence fails to establish a genuine issue regarding any material fact. *Id*. at 120. Proper interpretation of an unambiguous contract is also reviewed de novo as a question of law. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 463; 663 NW2d 447 (2003).

The parties correctly agree that an insurer's duty to defend or indemnify is not dependent on the precise language used by the complaint, but rather on whether any of the allegations can arguably be construed as possibly falling within the policy coverage. *Shefman v Auto-Owners Ins Co*, 262 Mich App 631, 636-637; 687 NW2d 300 (2004). "This duty is not limited to meritorious suits and may even extend to actions which are groundless, false, or fraudulent, so long as the allegations against the insured even arguably come within the policy coverage." *Detroit Edison Co v Michigan Mut Ins Co*, 102 Mich App 136, 142; 301 NW2d 832 (1981). Therefore, an insurer must look behind the allegations and resolve all doubts in favor of the insured. *Shefman*, *supra* at 636-637. However, because the "duty to defend is essentially tied to the availability of coverage," an insurer is not required to offer a defense if coverage is impossible. *Marlo Beauty Supply, Inc v Farmers Ins Group of Companies*, 227 Mich App 309, 315; 575 NW2d 324 (1998). "An insurer is not required to defend its insured against claims specifically excluded from policy coverage." *American Bumper and Mfg Co v National Union Fire Ins Co*, 261 Mich App 367, 375; 683 NW2d 161 (2004).

The parties further agree that the title insurance policy specifically excludes claims based on instruments not of record. The policy defines "public records" as "those records which by law impart constructive notice of matters relating to said land." Racine admits in her brief on appeal that plaintiffs' complaint against her in this case does not allege that the 1964 judgment was recorded and her third-party complaint against Commonwealth does not allege that the judgment was recorded. However, she contends that plaintiffs' counsel "repeatedly asserted" to

her counsel that the judgment was recorded,[1] thereby giving rise to her claim the she was entitled to a defense from Commonwealth. Commonwealth accurately points out that the complaint does not allege that the 1964 judgment was recorded and that it is therefore entitled to the benefit of the exclusion. The parties agree that, in fact, the judgment was not recorded.

Racine points to a somewhat confusing comment by plaintiffs' counsel on the record at a motion hearing related to answers to interrogatories on August 8, 2001, as evidence that plaintiffs' complaint alleged or implied that the 1964 judgment was recorded. However, by the time the statement was made, we had issued our decision in *Ditmore*, and the 1964 judgment was no longer relevant because it was clear that the judgment had no effect on the property at issue here. If the pleadings did not even arguably fall within the policies when the comment was made, the duty to defend could not have arisen at that time.

Therefore, the only relevant question is whether the complaint, taken by itself, could "even arguably" be construed as substantially alleging a situation not exempted from policy coverage.

The relevant portions of the complaint are:

> 15. In the 1996 lawsuit, the circuit court ruled that the doctrine of *res judicata* and collateral estoppel prevented the plaintiffs from pursuing the relief requested based on a judgment that was entered in the Washtenaw County Circuit Court on or about August 5, 1964, in a case captioned Portage Lake Land Company vs. Thurmon Andrew, Don Dickerson, and Clarence Rozmarynowski.
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> 16. Plaintiffs had no knowledge of the existence of the judgment that had been entered in 1964 in the Washtenaw County Circuit Court at the time they entered into the Land Contract.
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> 17. The judgment that had been entered in 1964 in the Washtenaw Circuit Court was not disclosed in the subject land contract or the related title work.
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> 18. Defendant did have knowledge of the existence of the judgment that had been entered in 1964 in the Washtenaw Circuit Court prior to entering into a purchase agreement with the plaintiffs and the subsequent land contract, but she failed to disclose the existence of the judgment or its significance to the plaintiffs.
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> 19. Defendant did have knowledge that the other residents believed they had the right to use plaintiffs' property to gain access to Portage Lake prior to entering into a purchase agreement with the plaintiffs and the subsequent land contract, but she failed to disclose this information to the plaintiffs.

[1] It is not clear why Racine's counsel did not simply determine from the Register of Deeds whether the 1964 judgment was ever recorded which would have been the prudent course in light of the demand for a defense from Commonwealth and the exclusion in Commonwealth's policy.

> 20. Defendant is a real estate agent and has been involved in the sale and transfer of real estate for many years. Defendant knew, or should have known, that her failure to disclose the prior judgment and the activities of the other residents of the Township of Dexter constituted fraud.
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> * * *
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> 24. If plaintiffs had been aware of the prior circuit court judgment or the activities of the other residents, plaintiffs would not have purchased the property.

Thus, the plain language of the complaint is that Racine allegedly failed to disclose the existence of a document of which she had actual knowledge and it does not allege that the document was recorded.

The complaint necessarily falls into an exception to coverage under the title insurance policy for two reasons. First, the complaint simultaneously alleges that the 1964 judgment was entered by a circuit court but not found in the property's title work, and it fails to allege that it was recorded, indicating or implying that it was not recorded. Commonwealth therefore had a right to rely on its "public records" policy exclusion. In addition, the 1964 judgment specifies that it concerns only Lot 42 and the property between Lot 42 and the lake. It makes no mention of Lot 43 or Parcel II, the property at issue here. "The constructive notice imported by the record of an instrument is strictly confined to that which is set forth on its face." *Savidge v Seager*, 175 Mich 47, 56; 140 NW 951 (1913). Therefore, even if the complaint explicitly alleged that the 1964 judgment had been recorded with the Washtenaw County Register of Deeds, it would nevertheless not be a record that "by law impart[s] constructive notice of matters relating to said land" as the relevant title insurance policy defines public records.

Based on the complaint and on the 1964 judgment, the allegations in the case against Racine are not "even arguably" covered by the title insurance policy, because they necessarily fall within the exception for claims based on instruments not of record.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Janet T. Neff
/s/ Bill Schuette