STATE OF MICHIGAN

COURT OF APPEALS

TIEL OIL COMPANY,

Plaintiff-Appellant,

v

EMPLOYERS MUTUAL CASUALTY COMPANY,

Defendant-Appellee.

UNPUBLISHED
January 15, 2009

No. 280180
Mecosta Circuit Court
LC No. 06-017661-CK

Before: Murray, P.J., and O'Connell and Davis, JJ.

PER CURIAM.

Plaintiff Tiel Oil Company appeals as of right the Mecosta Circuit Court's order granting defendant Employers Mutual Casualty Company's motion for summary disposition. This case involves defendant's denial of insurance claims made by plaintiff for damage occurring at two of its gasoline stations. Because we conclude there is a genuine issue of material fact regarding when the claims were denied by defendant, we reverse and remand for further proceedings consistent with this opinion.

I. Facts

Plaintiff suffered losses at two gas stations it owns and operates, one in Big Rapids on February 6, 2004, and one in Reed City on March 17, 2004, when certain underground pipes containing gasoline experienced cracks in their protective outer pipe. Plaintiff carried insurance policies on both locations with defendant. Plaintiff notified defendant of both claims, which were assigned to the same claims adjuster, Kay Inman. On August 31, 2004, defendant sent two letters to plaintiff, one for each claim, notifying plaintiff that it had "determined that the damage was caused by the soil freezing and causing earth movement which cracked the pipe" and that "this type of claim is not covered by your insurance policy" (First Letter). The letter invited plaintiff to "submit additional information" and reserved the right to "reassess its position . . . in light of additional information it may receive in the future." Plaintiff asserts that it sent in additional information, while defendant claims plaintiff merely requested reconsideration of the denial. Whatever the catalyst, defendant sent another letter for each claim on October 8, 2004, indicating that the "possible causes of loss were earth movement, [or] water entering through a sump and freezing." (Second Letter). The letter listed several new exclusion provisions and stated that "our position of denial remains the same." The Second Letter contained identical language to the First Letter inviting submission of additional information.

On December 21, 2005, plaintiff's counsel sent a letter to defendant providing an affidavit and photographs, arguing that "the crack was not caused by earth movement, but rather by water collecting in the submersible pump basins and backing up into the space between the inner and outer walls of the pipes, freezing and cracking" and requesting defendant "reconsider the denial." Defendant responded on December 23, 2005, citing for the first time the frozen plumbing exclusion (Third Letter). The letter provided that "[i]n order to reconsider this claim, I will need to know exactly how this area is heated. After I receive this information, I may request other information or documentation." It also contained the identical language inviting further submissions.

Plaintiff responded in March 2006, arguing that there was no need to heat petroleum piping because petroleum does not freeze. Defendant sent the Fourth Letter four days later, reiterating the frozen plumbing exception and noting that the affidavit provided by plaintiff "states the loss was caused by freezing and cracking of the pipes." Defendant stated that "[t]he fact remains that this loss was **caused by frozen plumbing**" and that "our denial of this claim still stands." There was no language inviting further submission of information.

In October 2006, plaintiff filed its complaint requesting declaratory relief and alleging a breach of contract. Plaintiff had mailed the documents on Friday, October 5, 2006, but the documents were not filed with the Mecosta Circuit Court until Tuesday, October 10, 2006, evidently due to the delay caused by the Columbus Day federal postal holiday. Defendant filed its answer and alleged the affirmative defense that plaintiff's claims were untimely, having not been brought within two years of the date of loss.

Defendant ultimately moved for summary disposition on this affirmative defense, alleging that it had formally denied liability for the losses on August 31, 2004. Plaintiff responded that there was a genuine issue of material fact because the term "formal denial" was ambiguous such that it was unclear which of the letters was the "formal denial" that stopped the tolling for filing a claim. At the hearing, the trial court concluded:

> It doesn't look good that—you may not be paying the claim and may not have wanted to pay the claim. But, I mean, when the policy speaks to denial and common language speaks to denial and court cases speak to denial, I think the word "denial" should be in there. It's one thing to say this is not covered, hence your claim is denied.
>
> Now settle your heart pumping down a little bit, let's look at the October 8th letter. Ms. DeFevre, at the bottom of the letter: As the resulting damage was cracking piping under the ground, the above captioned exclusion may have caused or contributed to the sustained damage. Therefore, our position of denial remains at this time. That word "denial" is in that letter.
>
> * * *
>
> And as far as the verbiage about inviting more information, that doesn't take away from the denial that I've concluded was made on October 8th.
>
> So I'm determining that the denial was actually made on October 8th because the word "denial" is in there. Arguably it could be August 31st, but there's no question the word "denial" is in there on October 8th.

Plaintiff then argued that the claim was still timely filed on October 10, 2006 because October 8 was a Sunday and October 9 was a legal holiday—Columbus Day. In its order, the trial court ruled "that October 9, 2006 was not a holiday within the meaning of the court rules and, further, that the complaint in the instant case was filed after the two year deadline established by the insurance policy" and granted defendant's motion for summary disposition.

II. Analysis

As noted, plaintiff argued to the trial court that it was not until the March 2005 letter that defendant issued a "formal denial", but the trial court concluded that the October 8, 2004 letter was the "formal denial." We hold that there is a genuine issue of material fact as to which date constituted the formal denial.

Motions for summary disposition made under MCR 2.116(C)(10) are reviewed de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). The facts are considered in the light most favorable to the nonmoving party. *Id.* This Court reviews the record and the documentary evidence but does not make findings of fact or weigh credibility. *Taylor v Lenawee Rd Comm'rs*, 216 Mich App 435, 437; 549 NW2d 80 (1996).

The policy defendant issued to plaintiff provides:

> **E. Property Loss Conditions**
>
> * * *
>
> **4. Legal Action Against Us**
>
> No one may bring a legal action against us under this insurance unless:
>
> a. There has been full compliance with all of the terms of this insurance; and
>
> b. The action is brought within 2 years after the date on which the direct physical loss of damage occurred.

The endorsement, labeled "MICHIGAN CHANGES" provides:

> **D.** The following is added to the **Legal Action Against Us** Property Loss Conditions:
>
> The time for commencing action against us is tolled from the time you notify us of the loss or damage until we formally deny liability for the claims.

The parties do not dispute that plaintiff properly notified defendant or that defendant at some point denied the claim. The dispute is *when* the denial took place. The trial court took it upon itself to determine which of the letters constituted the "formal denial," declaring it to be the Second Letter. However, trial courts may not make findings of fact on a motion for summary disposition, *In re Handelsman*, 266 Mich App 433, 437; 702 NW2d 641 (2005), and that is precisely what the trial court did when it considered the different letters and declared which was the "formal denial." However, at least the first three letters contain language indicating both that a denial (though not always with that precise language) had occurred "at that time" *and* that additional information would be accepted and considered in deciding or "reassessing" the coverage dispute. Hence, which letter constituted a formal denial was for a fact-finder, not a judge deciding a motion for summary disposition. The very fact that such a choice had to be made, and the trial court's own admission that "[a]rguably it could be" the First

Letter, evidences the existence of a disputed material fact that should have precluded summary disposition in favor of defendant.[1]

Taking all the evidence in the light most favorable to plaintiff as the nonmoving party, *Dressel*, *supra* at 561, there was a question regarding whether the filing of the complaint was timely because there was a material fact issue concerning which of the four letters from defendant constituted a "formal denial."

Adding to our conclusion is the uncertainty regarding whether the Third or Fourth Letters related to both claims, or only the Big Rapids claim, which they reference. According to plaintiff, the issue was "a bit of a tempest in a teapot" because both claims were identical, were investigated by the same investigator, and the engineer's report makes no factual distinction between the two claims. The record evidence, however, is not conclusive. According to defendant's case notes for the Reed City claim, defendant was notified via email in June 2005 that plaintiff was represented by counsel, though it was not until December 21, 2005, that plaintiff's counsel sent a letter to defendant indicating that plaintiff was represented by counsel on the Big Rapids claim. However, the case notes suggest that defendant was aware that plaintiff was represented by counsel for both claims, and even defendant's own engineer treated the claims identically.

Taking this evidence in the light most favorable to plaintiff, it is possible that the Third and Fourth Letters relate to both claims, not simply to the Big Rapids claim. Accordingly, whether the Third and Fourth Letters relate to both claims was an outstanding issue of material fact, and the trial court was thus precluded from determining as a matter of law whether plaintiff's complaint was timely. Therefore, summary disposition in favor of defendant was improper. *Dressel*, *supra* at 561.[2]

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

Plaintiff may tax costs, being the prevailing party. MCR 7.219(A).

/s/ Christopher M. Murray
/s/ Peter D. O'Connell
/s/ Alton T. Davis

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[1] Of course the trial court likely chose between these letters because the parties largely argued which one should be considered the formal denial, rather than explicitly arguing that a finder of fact needed to decide this issue.

[2] Because when the denial took place must be decided by the trier of fact on remand, it is not necessary for us to determine whether Columbus Day is a legal holiday for the Mecosta Circuit Court. Judge O'Connell is of the opinion that Columbus Day is a legal holiday.