STATE OF MICHIGAN

COURT OF APPEALS

HOME-OWNERS INSURANCE COMPANY,

Plaintiff-Appellant,

v

TERESA TOLSMA,

Defendant-Appellee.

UNPUBLISHED
September 30, 2010

No. 292187
Kent Circuit Court
LC No. 08-008017-CZ

Before: O'CONNELL, P.J., and SERVITTO and SHAPIRO, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's April 30, 2009 order granting summary disposition to defendant Teresa Tolsma pursuant to MCR 2.116(C)(6) (another claim pending). We affirm.

On August 27, 2006, Tolsma was injured in an automobile accident in Texas. She was a passenger in a rental car operated by Patricia Aukema. There was a Michigan no-fault insurance policy in effect that plaintiff had issued to Aukema. On July 14, 2008, Tolsma filed an action in a Texas court against the tortfeasor and Auto-Owners Insurance Company. With respect to Auto-Owners, Tolsma asserted that she was covered by the policy issued to Aukema, and that she was entitled to underinsured motorist benefits. On August 4, 2008, plaintiff filed the complaint at issue in this case. It averred that Tolsma had applied for underinsured or uninsured motorists benefits and that her injuries might not satisfy the requirements of the Michigan no-fault act, MCL 500.3101 *et seq.*, including the requirement of a serious impairment of an important body function. Plaintiff sought a determination whether Tolsma was an insured under the policy and a declaration and order stating that Michigan law must be applied.

Tolsma filed a response and affirmative defenses on November 7, 2008. In pertinent part, Tolsma noted the other action regarding the collision and claim that had been brought in Bextar County, Texas, and asserted that the Texas court's jurisdiction was dominant. In a motion for summary disposition filed on February 12, 2009, Tolsma noted that the Texas case was filed first and asserted that it involved the same parties and the same controversy. Further, Tolsma attached corporate information to its supporting brief regarding Auto-Owners Insurance Group. This indicated that Auto-Owners Insurance Group is comprised of five property and casualty companies and one life/health annuity insurer; these five companies include Auto-Owners Insurance Company and plaintiff. Tolsma also attached printouts of "OFIS [Office of Financial and Industry Services] Detailed Information for an Insurance Entity," a Michigan

Department of Energy, Labor & Economic Growth (DELEG) document, for each company; these show that there are separate listings for Auto-Owners Insurance Company and Home-Owners Insurance Company, and that each "is doing business exclusively" under their respective names. These documents also indicate that the two companies share the same licensing address and have a common Michigan resident agent, CEO Roger L. Looyenga.

In opposing the summary disposition motion, plaintiff asserted that it and Auto-Owners Insurance Company were separate legal entities. As noted, the Michigan DELEG printouts describe these companies as "insurance entit[ies]." Plaintiff maintained that the case was not between the same parties, as the only common party to both lawsuits was Tolsma. Plaintiff averred that the lawsuit against Auto-Owners would likely be dismissed, that plaintiff would have to re-file, and that the re-filing would be subsequent to the instant lawsuit and, accordingly, not subject to dismissal as another pending claim.

At the hearing on the summary disposition motion, Tolsma claimed that correspondence regarding this lawsuit had come from Auto-Owners. Further, she asserted that, although the declarations sheet of the policy indicated it was from plaintiff, the policy referenced Auto-Owners. Tolsma's counsel further averred that, in the Texas lawsuit, Auto-Owners had represented that it was properly named and knew of no other potential parties. Counsel claimed that the Texas complaint could be amended to add plaintiff and would relate back. Plaintiff's counsel responded that these were separate companies under one umbrella and that the different companies wrote policies in different states. He noted that a plaintiff was not free to sue any of the five companies for a policy issued by another of the five companies. Further, he explained that the Texas defense attorneys thought there was no other valid party in the Texas lawsuit since plaintiff had filed a Michigan lawsuit, which they concluded would bar it from being named as a party in the Texas lawsuit. Finally, counsel took the position that the filing of this lawsuit by plaintiff would preclude an amendment of the Texas complaint to add plaintiff because it was "first to the courthouse."

The trial court found the documents confusing with regard to which entity had issued the policy of insurance, Auto-Owners or plaintiff. It also determined that the Texas lawsuit was first and that the Texas court could sort out the issue. Further, it indicated that if Auto-Owners were dismissed in the Texas suit, then plaintiff could file for reconsideration or to reopen the file.

On March 16, 2009, plaintiff was added as a defendant in the Texas lawsuit. The trial court issued its order granting summary disposition to Tolsma on April 30, 2009. Plaintiff now appeals.

On appeal, plaintiff argues that summary disposition was inappropriate because it and Auto-Owners are clearly not the "same party" as required under MCR 2.116(C)(6).[1] We decline to address this argument, however, because it is unnecessary to the disposition of this case.

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[1] Plaintiff has not disputed that the same claim is involved and, based on our review of the record, we conclude that the same claim in involved in both cases. Accordingly, the only dispute

Plaintiff was added as a defendant to the Texas case on March 16, 2009. Under Texas law, "misnomer occurs when a party misnames itself or another party, but the correct parties are involved." *In re Greater Houston Orthopaedic Specialists, Inc*, 295 SW2d 323, 325 (Tex, 2009). Parties are permitted to correct misnomers "so long as it is not misleading." *Id.* at 325-326, citing *Sheldon v Emergency Med Consultants, IPA*, 43 SW3d 701, 702 (Tex App, 2001) ("[W]hen an intended defendant is sued under an incorrect name, the court acquires jurisdiction after service with the misnomer if it is clear that no one was misled or placed at a disadvantage by the error."). "Courts are often flexible in these cases because the party intended to be sued has been served and put on notice that it is the intended defendant." *Greater Houston Orthopaedic Specialists*, 295 SW2d at 326. Here, the record indicates that plaintiff was on notice that it was the intended defendant and that the legal counsel assigned to handle the case for Auto-Owners was the same counsel who handled the matter for plaintiff. Accordingly, plaintiff was clearly on notice that it was the intended defendant in the Texas matter. Under these circumstances, the amendment to correct the misnomer "relat[es] back to the date of the original filing." *Id.*

Accordingly, under Texas law, when Tolsma amended the petition in the Texas matter to include plaintiff, that amendment related back to the original filing date of July 14, 2008—before plaintiff's filing of the instant matter on August 4, 2008. Because plaintiff was a party to both actions involving the same claim when summary disposition was granted on April 30, 2009, and the Texas claim was clearly filed first, there was no error. MCR 2.116(C)(6) was applicable.[2]

Affirmed.

/s/ Peter D. O'Connell
/s/ Deborah A. Servitto
/s/ Douglas B. Shapiro

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before us is whether the "same party" existed in both cases.

[2] MCR 2.116(C)(6) applied when the other action is one that is pending in another state. *Valeo Switches & Detection Sys v EMCom, Inc*, 272 Mich App 309, 319; 725 NW2d 364 (2006). Additionally, the trial court in this case properly dismissed the instant case *without prejudice* in case the jurisdiction of the Texas case was disputed or "dismissed on grounds other than the merits." *Id.*