STATE OF MICHIGAN

COURT OF APPEALS

SASSON SANDER BABAYOV, Plaintiff-Appellant,	UNPUBLISHED December 2, 2010
v	No. 294165 Wayne Circuit Court
FIRE INSURANCE EXCHANGE, Defendant-Appellee.	LC No. 08-016306-CK

Before: OWENS, P.J., and K. F. KELLY and FORT HOOD, JJ.

PER CURIAM.

This action arises from plaintiff's claim that defendant breached an insurance policy to cover losses from an alleged fire and subsequent theft. Plaintiff appeals as of right from the trial court's orders granting partial summary disposition in favor of the defendant as to plaintiff's theft loss, denying plaintiff's motions for summary disposition of certain affirmative defenses and to amend the complaint to add an additional defendant, and finally dismissing plaintiff's remaining claims for lack of subject-matter jurisdiction. We affirm in part, and reverse and remand.

I. Summary Disposition of Plaintiff's Claim for Theft Loss

We review de novo a trial court's grant of summary disposition. *Adair v State*, 470 Mich 105, 119; 680 NW2d 386 (2004). In this case, it is not clear whether the trial court based its grant of summary disposition in favor of defendant on MCR 2.116(C)(8) or (C)(10). Under either approach, we hold that summary disposition was inappropriate.

A motion based on MCR 2.116(C)(8) for failure to state a claim tests the legal sufficiency of the pleadings. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). "All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant." *Id.* The motion should only be granted if no factual development could justify recovery. *Id.*

For a motion based on MCR 2.116(C)(10), we view all documentary evidence in the record in the light most favorable to the nonmoving party. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). The motion should be granted only if there is no genuine issue of material fact. *Id.* There is a genuine issue of material fact when the evidence might lead

reasonable minds to disagree. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

The trial court found that defendant mailed a cancellation of plaintiff's insurance policy on April 25, 2007. Under MCL 500.2833, defendant was required to provide ten days' notice before cancellation of the policy could become effective, so the effective date of the cancellation would be May 5, 2007. Because the trial court found that the theft did not occur until May 20, 2007, it held that the policy was no longer in force and did not cover the theft.

Regardless of which summary disposition theory the trial court proceeded under, these are not the facts that it should have applied. It appears that the trial court accepted the facts as pleaded in defendant's counterclaim.[1] However, if the trial court was applying MCR 2.116(C)(8), it should have assumed the facts as alleged in plaintiff's complaint. The complaint, without specifying dates, alleges that the theft occurred while the policy was still effective. Plaintiff never conceded that the theft occurred after May 5, 2007, but merely *assumed* as much for purposes of its own motion for summary disposition against defendant. Contrary to the assertion by defendant, plaintiff's assumptions for purposes of its own motion for summary disposition did not constitute admissions. Therefore, summary disposition under MCR 2.116(C)(8) was inappropriate.

If the trial court instead applied MCR 2.116(C)(10), plaintiff did not move on this basis and did not attach documentary evidence in support. Therefore, plaintiff did not have the opportunity to create a genuine issue of material fact as to the date of the theft. Under MCR 2.116(G)(3), some form of documentary evidence is required to support summary disposition under MCR 2.116(C)(10). Here, there was no documentary evidence before the trial court regarding the date of the theft, only the parties' contradictory statements in their respective pleadings. Additional evidence was added to the record after the trial court decided the motion, but there is still nothing more than competing conclusory statements regarding the date of the theft. On this evidence, reasonable minds could certainly disagree as to the date of the theft. Therefore, the trial court erred in sua sponte granting summary disposition in defendant's favor regarding the theft loss.

II. Subject-Matter Jurisdiction

Plaintiff next claims the trial court erred by dismissing his remaining fire loss claims for lack of subject-matter jurisdiction. Whether a trial court has subject-matter jurisdiction is generally determined by the facts alleged in the complaint. *Grubb Creek Action Comm v*

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[1] Plaintiff originally moved for summary disposition against defendant's counterclaim under MCR 2.116(C)(8), and some of defendant's affirmative defenses under MCR 2.116(C)(9). The trial court granted the motion in part, striking defendant's counterclaim, but sua sponte granted summary disposition in favor of defendant on plaintiff's claim for theft losses. The fact that plaintiff was the original movant may explain why the trial court based its dismissal of the theft claim upon improper facts.

Shiawassee Co Drain Comm'r, 218 Mich App 665, 668; 554 NW2d 612 (1996). However, when a portion of a plaintiff's claim is dismissed and the amount in controversy in the remaining claims is less than the jurisdictional minimum, dismissal for lack of jurisdiction is appropriate. See *Etafia v Credit Technologies, Inc*, 245 Mich App 466, 475; 628 NW2d 577 (2001); *Underwood v Rechsteiner*, 68 Mich App 628, 630; 243 NW2d 700 (1976). Circuit courts have jurisdiction of civil claims where the amount in controversy is greater than $25,000. MCL 600.605 and 600.8301. In this case, plaintiff alleged an amount in controversy greater than $25,000, but conceded that the remaining unpaid portion of his fire claim was less than that amount. Because the trial court should not have dismissed the theft claim, the amount in controversy remained greater than $25,000. Therefore, the trial court had jurisdiction to hear the case.

III. Summary Disposition of Defendant's Affirmative Defenses

Plaintiff argues on appeal that the trial court erred by denying his motion under MCR 2.116(C)(9) for summary disposition of four of defendant's affirmative defenses: numbers one, three, four, and eight. The first defense in question is that plaintiff did not file suit within one year of the denial of coverage, as required by the terms of the policy. In light of defendant's concession that dismissal of this defense was appropriate, the trial court erred by refusing to strike defense number one.

Defenses three and four stated that any theft or vandalism losses were not covered because plaintiff's property was unoccupied for at least thirty days prior to the date of loss. Plaintiff argues that defendant conceded that the house was occupied until April 22, 2007, which was within thirty days of May 20, 2007. However, defendant never conceded that the theft occurred on or before May 20, 2007. Defendant's counter-claim erroneously stated May 20 as the date plaintiff claimed the theft occurred, and defendant's claim logs showed May 20 as the date that plaintiff discovered the loss, but neither of these documents constitute an admission. We find that the trial court properly denied summary disposition to plaintiff as to affirmative defenses three and four.

Affirmative defense number eight stated that the policy was not in effect at the time the theft occurred. Plaintiff again claims that defendant conceded that the theft occurred within the time the policy was effective. As discussed, defendant made no such concession.

Plaintiff also argues that defendant is barred from asserting this defense as a reason for denying his claim because it was not included in defendant's original letter denying coverage. Plaintiff points to the general rule in Michigan that "once an insurance company has denied coverage to an insured and stated its defenses, the company has waived or is estopped from raising new defenses." *Ronnie E Lee v Evergreen Regency Coop & Mgt Sys, Inc*, 151 Mich App 281, 285; 390 NW2d 183 (1986). However, the *Lee* Court further stated that except in limited circumstances, waiver and estoppel may not be applied to extend the scope of a policy to protect the insured against risks that were not contemplated by the policy. *Id.* at 286. The company should not be forced "to pay a loss for which it charged no premium." *Id.* at 285.

Any extension of the time periods contained in the insurance policy would force defendant to cover risks for which it charged no premium. Therefore, defendant cannot be

barred by estoppel or waiver from asserting that the loss occurred outside of the time covered by the policy. Additionally, in its letter denying coverage, defendant expressly reserved the right to assert additional grounds for denying plaintiff's claim as it discovered them. *Accord First Mercury Syndicate, Inc v Tel Alarm Sys, Inc*, 849 F Supp 559, 568 (WD MI, 1994). We hold that the trial court properly denied summary disposition of affirmative defense number eight.

IV. Leave to Amend Complaint

Plaintiff finally contends it was reversible error for the trial court to deny his motion for leave to amend the complaint to add a second defendant. We review decisions on motions for leave to amend a pleading for abuse of discretion by the trial court. *Weymers v Khera*, 454 Mich 639, 654; 563 NW2d 647 (1997). A trial court should ordinarily grant motions for leave to amend, but may deny them for reasons including delay, bad faith, and undue prejudice to the opposing party. *Id.* at 658. The court should place on the record its specific reasons for denying the motion. *Franchino v Franchino*, 263 Mich App 172, 190; 687 NW2d 620 (2004).

Delay alone will not support denial of a motion to amend. *Weymers*, 454 Mich at 659. If a party caused the delay in bad faith, or if the delay results in actual prejudice to the opposing party, then a court may deny the motion to amend. *Id.* Prejudice in this context means that the opposing party would not receive a fair trial. *Id.* Proposed amendments must be submitted in writing. MCR 2.118(A)(4). In the present case, plaintiff failed to submit a proposed amended complaint delineating the claims against the insurance agent. Moreover, where the trial court's order does not prevent plaintiff from bringing a separate suit against the agent, we need not reverse the trial court's order. See MCR 2.613(A). Therefore, we affirm the trial court's ruling on plaintiff's motion for leave to amend.

V. Conclusion

We affirm the trial court's denial of plaintiff's motion for summary disposition against defendant's affirmative defenses three, four, and eight. We likewise affirm the trial court's order denying leave to amend.

However, we reverse the order granting summary disposition in favor of the defendant on plaintiff's claim for loss caused by theft. We also reverse the order dismissing plaintiff's remaining claim for fire loss because the trial court had proper subject-matter jurisdiction. Finally, we reverse the trial court's decision denying summary disposition to plaintiff on defendant's first affirmative defense.

Affirmed in part, and reversed and remanded in part for further proceedings consistent with this opinion. We do not retain jurisdiction. No taxable costs pursuant to MCR 7.219, neither party having prevailed in full.

/s/ Donald S. Owens
/s/ Kirsten Frank Kelly
/s/ Karen M. Fort Hood