STATE OF MICHIGAN

COURT OF APPEALS

SIMONE MAURO,

Plaintiff-Appellant,

v

LUCIDO'S INSURANCE AGENCY, INC., and PAUL G. LUCIDO,

Defendants-Appellees.

UNPUBLISHED
December 21, 2010

No. 294397
Macomb Circuit Court
LC No. 2008-005252-CK

Before: MARKEY, P.J., and WILDER and STEPHENS, JJ.

PER CURIAM.

Plaintiff appeals by right the trial court's order granting summary disposition in favor of defendants. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Plaintiff, a licensed residential builder, planned to construct an 11,000-square-foot home at a cost of approximately $900,000. However, plaintiff procured builder's risk insurance through defendants with a policy limit of only $350,000. Plaintiff testified in his deposition that he spoke with defendant Lucido about the decision not to insure the building for its full value at the start of construction:

> *Q.* And can you tell me when you spoke to Paul Lucido?
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> *A.* Before issuing the policy, and the contents of the conversation was that we knew we were going to put in more than a million dollars into the home, but it was going to take a while for me to get there. I was not getting a mortgage and I was–I didn't want to pay for a million dollars when I'm only putting in a basement. Therefore, we agreed that we were going to start with a $350,000 policy and review it at least at the year-end date after when the policy expired.
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> * * *
>
> *Q.* And did Mr. Lucido say anything back to you when you said that, when you asked that, that you have $350,000 at that time for the insurance?

A. Well, he wanted me to pay on a million-dollar policy, which I felt, you know, why should I pay on a million-dollar policy when I'm only going to put in the basement. I mean, I don't need to cover the dirt. I'm just covering the vertical construction.

Q. So Mr. Lucido had recommended or suggested that you pay for the full million dollar initially, but you didn't want to do that; is that correct?

A. Correct.

Q. And you said to him that you were going to review that at some future date?

A. He was or we were, yes.

* * *

Q. So at the time that the first policy was issued, you knew that it was not issued for the full completed cost of this project?

A. Yes.

Q. And your intent was to let Mr. Lucido know when you had constructed the project to the point that you might need to raise that amount?

A. Both of us. I think it was a mutual understanding between us that–I mean, he knew what the value of the home was. I knew what the value of the home was. Try to come up with a replacement cost of insurance as the home was built during construction.

Q. So as the home was built and you had more construction costs into the home, your intent was to review and reevaluate the amount of insurance that you needed and to increase that amount as appropriate, correct?

A. Yes.

The policy was effective for one year from September 15, 2005. The following year, plaintiff paid the premium to renew the policy for the same $350,000 limit. Evidence indicates that defendants inquired in August of 2006 if work on the project was completed and if the policy needed to be renewed. An agent for plaintiff indicated that the policy should be renewed, and paid the renewal notice. Defendants did not discuss raising the policy limits with plaintiff. Shortly after the policy renewed, a fired destroyed the partially completed home on September 26, 2006. Plaintiff submitted a claim for $547,953.45, but received $312,303.92, a sum that consisted of the policy limit minus a coinsurance penalty.

Plaintiff filed suit alleging that defendants breached their duty to consult with plaintiff regarding the limits on his policy, resulting in a loss to plaintiff when the fire destroyed the insured construction and plaintiff's insurance coverage was insufficient to cover the loss. The trial court granted defendants' motion for summary disposition pursuant to MCR 2.116(C)(10),

finding that defendants owed no duty to plaintiff to advise him on the appropriate coverage limits of his insurance policy.

On appeal, plaintiff argues summary disposition was improper because either plaintiff made an ambiguous request to defendants that required clarification, or there was a material issue of fact as to whether or not the parties made an express agreement that defendants would address increased coverage limits at renewal of the policy. Defendants argue that the general rule that insurance agents have no duty to advise an insured on appropriate coverage applies in this case, and the trial court's grant of summary disposition in their favor was appropriate. We agree with defendants.

A motion for summary disposition granted pursuant to MCR 2.116(C)(10) is reviewed de novo. *Harts v Farmers Ins Exch*, 461 Mich 1, 6; 597 NW2d 47, 52 (1999). The court considers the documentary evidence in the light most favorable to the non-moving party, and summary disposition was properly granted by the trial court if there is no genuine issue of material fact and the moving party was entitled to judgment as a matter of law. *Id* at 6-7.

To establish his negligence claim, plaintiff must show a duty on the part of defendants, defendants' breach of that duty, and damages caused by the breach. *Pressey Enterprises Inc v Barnett-France Ins Agency*, 271 Mich App 685, 687; 724 NW2d 503 (2006). The existence of a duty is a question of law for the court to decide. *Harts*, 461 Mich at 6. The determination of facts underlying the existence or absence of a duty is for the factfinder. *Karrar v Barry Co Rd Comm*, 127 Mich App 821, 830; 339 NW2d 653 (1983).

Insurance agents generally have no duty to advise an insured. *Harts*, 461 Mich at 8. However, *Harts* lists four situations when a "special relationship" between the agent and the insured may create a duty to advise the insured on the part of an insurance agent:

> (1) the agent misrepresents the nature or extent of the coverage offered or provided, (2) an ambiguous request is made that requires clarification, (3) an inquiry is made that may require advice and the agent, though he need not, gives advice that is inaccurate, or (4) the agent assumes an additional duty by either express agreement with or promise to the insured. [*Id*. at 10-11.]

Plaintiff argues that the second and fourth exceptions apply in this case. We disagree.

Plaintiff argues the request for $350,000 in coverage was an ambiguous and gave rise to a duty on defendants' part to clarify because it departed from the general structure of these policies, which are typically for the full value of construction. We cannot agree that this represents an ambiguity as contemplated by the *Harts* Court. The *Harts* Court gave a request for "full coverage" as an example of a potentially ambiguous instruction to an insurance agent. *Id.* at 10 n 11. This example dovetails with the definition our Supreme Court has given to the term ambiguous in prior cases. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 467; 663 NW2d 447 (2003) (contractual provisions ambiguous when capable of conflicting interpretations).

Here, plaintiff's request for insurance coverage was not "for an inexact or nonexistent type of coverage." *Pressey*, 271 Mich App at 689. Plaintiff made a specific request for builder's

risk insurance for the specific amount of $350,000. There was nothing ambiguous about plaintiff's request. This may have been a departure from the normal procedure of purchasing builder's risk insurance for the full value of the project. A departure, however, is not inherently ambiguous, and it was not here. The provisions of the insurance agreement are clear, and the unambiguous request is no basis for imposing on defendants a duty to advise about coverage.

Plaintiff points to his deposition testimony as evidence that a material issue of fact exists regarding whether he and defendants had an express agreement that defendants would assume the duty of independently raising the issue of the appropriate policy limits with him. This argument is also unpersuasive. Taken in the light most favorable to plaintiff, plaintiff's own deposition testimony undercuts his argument, and provides no basis for concluding that an express agreement existed.

The *Pressey* case controls our decision here. In *Pressey*, the plaintiffs contended that the insurance agent negligently failed to obtain adequate coverage, and that the plaintiffs suffered a loss when a fire destroyed the plaintiffs' new hotel. *Id.* at 686. The plaintiffs argued that the express agreement exception applied because the insurance agent told the plaintiffs she would switch their policy from builder's risk to business/commercial once the plaintiffs knew their opening date and had moved in furniture. *Id.* at 690. The evidence indicated that the insurance agent did have that knowledge. *Id.* at 687. Nevertheless, this Court found that no express agreement existed because the agent "never expressly stated that she would switch the policy from a builder's risk policy to a full business/commercial policy without further contact with the plaintiffs." *Id.* at 690.

The evidence for an express agreement was even stronger in *Pressey* than it is in this case. Here, there is no evidence that defendants had any knowledge what the status of plaintiff's construction was, nor is there evidence that defendants agreed to discuss a change to the policy limits without contact with plaintiff.

Plaintiff's stated in his deposition that, "we agreed that we were going to start with a $350,000 policy and review it at least at the year-end date after when the policy expired." At best, this generalized, conclusory comment indicates that plaintiff and defendants agreed to discuss the policy limits at some indeterminate point in the future, and at the latest by the time the policy renewed. This statement does not indicate that defendants made an express agreement to either discuss or change the policy limits without prior contact with plaintiff, or to be responsible for knowing how much money plaintiff had put into construction.

Moreover, plaintiff undercut the above statement. When asked if he intended to let defendants know when construction reached a point where an increase in coverage should be considered, plaintiff replied, "Both of us." This statement explicitly indicates that, like *Pressey*, there was no express agreement that defendants would discuss the policy limits without prior contact with plaintiff. Plaintiff continued, "I think it was a mutual understanding . . . he knew what the value of the home was." This is not evidence of an explicit agreement, but rather that plaintiff simply assumed that such an agreement existed. Even taken in the light most favorable to plaintiff, the evidence simply gives no indication defendants entered into the express agreement plaintiff purports. While it might have been logical for defendants to consult with plaintiff about increasing the coverage on plaintiff's policy, defendants had no duty to do so. No

issue of material fact existed, and the trial court correctly found that defendants owed no duty to plaintiff.

As an alternative ground on which to affirm the trial court's ruling, defendants argue that, even if this Court found an express agreement that defendants would reevaluate the policy limits and failed to do so, plaintiff had a duty to read the renewal and advise defendants that the limits needed to be increased. Defendants note that insureds are obligated to read their policies and raise questions about coverage. *Casey v Auto Owners Ins Co*, 273 Mich App 388, 394-395; 729 NW2d 277 (2006). Because we affirm on the same grounds as those relied on by the trial court, we decline to reach this issue.

We affirm. As the prevailing party, defendant may tax costs pursuant to MCR 7.219.

/s/ Jane E. Markey
/s/ Kurtis T. Wilder
/s/ Cynthia Diane Stephens