STATE OF MICHIGAN

COURT OF APPEALS

CARLTON M. DEAN, II, Plaintiff-Appellant,	UNPUBLISHED March 1, 2011
v	No. 295762 Leelanau Circuit Court
FIDELITY NATIONAL TITLE INSURANCE COMPANY, Defendant-Appellee.	LC No. 09-008041-CK

Before: SERVITTO, P.J., and GLEICHER and SHAPIRO, JJ.

PER CURIAM.

Plaintiff, owner of a parcel of real property in Leelanau County, appeals by right an order of the circuit court denying his motion for summary disposition and granting summary disposition in defendant's favor. Because defendant had no duty to defend or provide coverage to plaintiff under the applicable insurance policy, we affirm.

Plaintiff owns property immediately to the west of property owned by Paul and Edith Glynn. An abandoned road traversed the southern portion of both properties. Plaintiff had been accessing a road to the east of the Glynns by traversing the abandoned road through their property. The Glynns filed suit against plaintiff for trespass and seeking to quiet title and permanently enjoin plaintiff from traversing their land. Plaintiff thereafter initiated an action against defendant, the issuer of a policy of title insurance to plaintiff, for its failure to defend plaintiff in the underlying lawsuit and to provide insurance coverage for the same. The cases were consolidated in the circuit court.

Eventually, both plaintiff and the Glynns accepted a case evaluation regarding the Glynns' litigation. With respect to the instant matter, plaintiff moved for summary disposition and defendant responded by contending that summary disposition was appropriate in its favor, rather than plaintiff's favor because the underlying litigation triggered no duty on its part under the insurance policy. The trial court agreed, granting summary disposition to defendant.

A circuit court's decision on a summary disposition motion under MCR 2.116(C)(10) is reviewed de novo on appeal, *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008), as is the interpretation of an insurance contract, *Citizens Ins Co v Pro-Seal Serv Group*, 477 Mich 75, 80; 730 NW2d 682 (2007). In reviewing a motion under MCR 2.116(C)(10), this Court considers "[t]he affidavits, together with the pleadings, depositions, admissions, and

documentary evidence then filed," in a light most favorable to the non-moving party. MCR 2.116(G)(5); *Jackson v Saginaw Co*, 458 Mich 141, 146; 580 NW2d 870 (1998). Summary disposition is appropriate when "there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." MCR 2.116(C)(10).

"In the context of a summary disposition motion, a trial court may determine the meaning of the contract only when the terms are not ambiguous." *D'Avanso v Wise & Marsac PC*, 223 Mich App 314, 319; 565 NW2d 915 (1997). "An insurance contract is ambiguous when its provisions are capable of conflicting interpretations." *Klapp v United Ins Group Agency*, 468 Mich 459, 467; 663 NW2d 447 (2003) (internal quotation marks and citation omitted).

The insured bears the burden of proving coverage. *Michigan Twp Participating Plan v Federal Ins* Co, 233 Mich App 422, 431; 592 NW2d 760 (1999). However, the duty of an insurer to defend the insured or to provide coverage depends, in part, upon the allegations of the third party's complaint against the insured, and is triggered if there are any theories of recovery that fall within the policy. *Detroit Edison v Michigan Mut Ins*, 102 Mich App 136, 141-142; 301 NW2d 832 (1981). In addition, the duty to defend is not strictly limited to the language used in the third party's complaint; the insurer must look beyond the allegations to see if coverage is possible. *Id*. at 142. If there is doubt as to whether the insurer would be liable for coverage, doubt will be resolved in favor of the insured. *Id*.

The insurance policy in this matter clearly states that the insurer will "insure . . . against loss or damage . . . sustained or incurred by the insured by reason of . . . [l]ack of a right of access to and from the land." However, the policy contains several exceptions from coverage, including damages that arise out of the "66 foot wide easement for ingress and egress . . . more fully described in the Quit Claim Deed." The referenced easement provides access to defendant's property through the western portion of the abandoned road (the portion that does not traverse the Glynn property). The recorded easement stops many feet short of the boundary between plaintiff and the Glynn's property. The parties and the circuit court all operated under the assumption that the referenced portion of the insurance contract precludes, or would potentially preclude, coverage for any loss of a right to access the land along the western access. What plaintiff sought, however, was access to his property from the *eastern* portion of the abandoned road. Plaintiff has not established that he previously accessed his property through the eastern portion of the road, or that he had any right (recorded or otherwise) to use that portion. To the extent that plaintiff is asserting the right to an easement over the eastern portion of the abandoned road, the policy also excepts from coverage "easements, liens, or encumbrances or claims thereof, which are not shown by the public record." Because plaintiff has presented no evidence that any claimed easement was shown in public record, summary disposition was appropriate in defendant's favor.

Moreover, plaintiff has not met his burden of proving that coverage applies in this case by showing how the eastern access to his land constitutes the "damages or loss" necessary to trigger coverage. *Michigan Twp*, 233 Mich App at 431. The circuit court correctly found that

any purported access to plaintiff's property from the east had long been abandoned. Plaintiff continues to have access to his land through the western access and there is no indication that the western access is currently threatened in any way.[1] Thus, plaintiff did not lack a right of access to and from his land. As such, there are no theories of recovery that fall within the coverage of the policy issued by defendant. *Detroit Edison*, 102 Mich App at 141-142.

Affirmed.

/s/ Deborah A. Servitto
/s/ Elizabeth L. Gleicher
/s/ Douglas B. Shapiro

[1] At oral argument, counsel for defendant stated that the insurance policy at issue insures against plaintiff's property becoming landlocked and that any challenge to accessing plaintiff's land via the western portion of the road would trigger coverage.