STATE OF MICHIGAN

COURT OF APPEALS

TERESA ESSA,

Plaintiff-Appellant,

v

PIONEER STATE MUTUAL INSURANCE COMPANY,

Defendant-Appellee.

UNPUBLISHED
July 5, 2011

No. 297493
Genesee Circuit Court
LC No. 09-092476-CK

Before: BORRELLO, P.J., and JANSEN and SAAD, JJ.

PER CURIAM.

Plaintiff, Teresa Essa, appeals the trial court's order that granted summary disposition to defendant, Pioneer State Mutual Insurance Company. For the reasons set forth below, we affirm.

In September of 2007, defendant issued a property insurance policy to plaintiff. On January 26, 2009, the property suffered severe water damage, and plaintiff notified defendant. Plaintiff failed to timely file the required sworn proof of loss, and defendant ultimately denied plaintiff's claim based in part on this failure. Plaintiff filed a complaint alleging breach of contract, and defendant moved for summary disposition under MCR 2.116(C)(10). The trial court granted defendant's motion because plaintiff failed to timely file the sworn proof of loss as required by the insurance policy.

We review a trial court's decision to grant summary disposition de novo. *Coblentz v City of Novi*, 475 Mich 558, 567; 719 NW2d 73 (2006). Summary disposition pursuant to MCR 2.116 (C)(10) tests the factual support for a claim based on the affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties. *Id.* The evidence is viewed in the light most favorable to the nonmoving party. *Id.* at 567-568. "Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to a judgment as a matter of law." *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

Plaintiff argues that the trial court erred when it granted summary disposition to defendant because she substantially complied with the proof of loss requirement. Plaintiff does not dispute that she filed her sworn proof of loss after the deadline, but argues that because defendant was aware of all of the information that would be contained in the sworn proof of loss, she substantially complied and defendant should not be insulated from liability. The Michigan Supreme Court has specifically held that the failure to provide an insurer with proof of loss

within the deadline bars recovery by the insured. See, e.g., *Fenton v Nat'l Fire Ins Co*, 235 Mich 147, 151; 209 NW 42 (1926) (directing verdict in favor of defendant insurer because "failure to furnish proof of loss within the time provided in the policy [was] fatal to [the] plaintiff's claim). In *Reynolds v Allstate Ins Co*, 123 Mich App 488, 490; 332 NW2d 583 (1983), this Court held that the defendant insurer was entitled to summary disposition because the plaintiff failed to file a written proof of loss within the required 60-day time period notwithstanding that the plaintiff provided oral notification regarding his loss within the deadline.

There is an exception to the general rule that a failure to timely file a proof of loss bars recovery, but it does not apply here. In *Dellar v Frankenmuth Mut Ins Co*, 173 Mich App 138, 146; 433 NW2d 380 (1988), this Court held that the plaintiff's claim should proceed because, after repeated requests, the insurance company denied the plaintiff information regarding her policy and the proof of loss requirement. Here, the exception does not apply because defendant timely provided plaintiff with her insurance policy and information regarding the required sworn proof of loss.

Plaintiff argues that defendant waived strict compliance with the proof of loss requirement. The requirement to furnish an insurer with proof of loss within 60 days is a condition precedent to liability of the insurer, but "this requirement can be waived by the insurer." *Fenton*, 235 Mich at 150. Waiver is defined as "a voluntary relinquishment of a known right." *Dellar*, 173 Mich App at 146. Plaintiff relies on the fact that defendant continued its investigation and accepted plaintiff's late proof of loss without immediate rejection to establish waiver; however, these facts alone do not constitute waiver. In *Dailey v Mid-States Ins Co*, 321 Mich 438, 441; 32 NW2d 698 (1948), the plaintiffs argued that the defendant waived strict compliance with the 60-day requirement set forth in the policy because the defendant took a sworn statement regarding the loss a few days after the fire and investigated the loss completely before informing the plaintiffs that their claim was denied. *Id.* The Court held that the defendant's actions did not constitute waiver, noting that no communication from the defendant to the plaintiffs was inconsistent with the proof of loss requirement. *Id.* at 441. Similarly, here, no communication from defendant to plaintiff was inconsistent with defendant's right to deny liability based on plaintiff's untimely presentation of her sworn proof of loss. Further, defendant specifically reserved its right to defend on that basis in its communications with plaintiff. Implicit in the rule that an insurer may investigate a claim without waiving the right to defend based on the timeliness of a proof of loss is the conclusion that an insurer is not required to immediately accept or reject an insured's proof of loss. Thus, there is no evidence that defendant waived its right to a sworn proof of loss within the deadline.

Finally, plaintiff argues that summary disposition was premature because discovery was not yet completed. Summary disposition is generally considered premature when granted before discovery on a disputed issue is complete. *Prysak v RL Polk Co*, 193 Mich App 1, 11; 483 NW2d 629 (1992). "However, summary disposition may be proper before discovery is complete where further discovery does not stand a fair chance of uncovering factual support for the position of the party opposing the motion." *Id.* Here, the trial court did not prematurely grant the motion because further discovery would not stand a fair chance of uncovering factual support for plaintiff's position. It is undisputed that plaintiff failed to file a sworn proof of loss within the deadline, and plaintiff does not allege that further discovery would uncover any relevant facts that would support her claim. Similarly, if defendant waived this requirement, any facts proving

that waiver would already be known to plaintiff because waiver "must arise from conduct that induces action in reliance upon it." *Struble v Nat'l Liberty Ins Co of America*, 252 Mich 566, 569; 233 NW 417 (1930). Accordingly, further discovery was not necessary.

Affirmed.

/s/ Stephen L. Borrello
/s/ Kathleen Jansen
/s/ Henry William Saad