STATE OF MICHIGAN

COURT OF APPEALS

SAN JUANITA GONZALEZ,

Plaintiff-Appellant,

v

TITAN INDEMNITY COMPANY,

Defendant-Appellee,

and

PATRICK L. COOMES,

Defendant.

UNPUBLISHED
November 27, 2018

No. 341227
Ingham Circuit Court
LC No. 16-000858-NF

Before: RIORDAN, P.J., and RONAYNE KRAUSE and SWARTZLE, JJ.

PER CURIAM.

Plaintiff, San Juanita Gonzalez ("Gonzalez"), appeals as of right the trial court's order granting defendant, Titan Indemnity Company's ("Titan"), motion for summary disposition. This matter arises out of Titan's cancellation of an automobile insurance policy purchased by Gonzalez following her involvement in an automobile accident. The trial court found that Titan was within its rights to rescind Gonzalez's policy and granted Titan's motion for summary disposition. We reverse and remand.

I. STATEMENT OF FACTS

A. INTRODUCTION

On April 1, 2016, Gonzalez purchased an insurance policy from Titan through independent agent Patrick Coomes (Coomes). Gonzalez added a second car to that policy the next day. Gonzalez and Coomes discussed the fact that Gonzalez had a fiancé, although they dispute the details of that conversation. Nevertheless, Gonzalez undisputedly gave Coomes official paperwork showing that her fiancé, Quintana-Fiallo Lazaro Pedro (Pedro), was the co-owner of the car eventually involved in the accident (a Pontiac Torrent) and shared Gonzalez's address. The insurance policy, however, did not list Pedro as either a named insured or an excluded driver. The accident occurred on May 30, 2016, and Pedro was not involved in that accident. Titan's claims adjusters immediately discovered that Pedro was listed as residing with

Gonzalez, who readily admitted as much. Titan formally notified Gonzalez on June 13, 2016, that it was rescinding her policy because she had failed to disclose Pedro as a household resident. Gonzalez commenced the instant action, asserting, in relevant part, that Titan had known about Pedro's existence and that Coomes had failed in his duties as her agent by failing to add Pedro to the policy. Coomes was subsequently discharged from the litigation and is not a party to this appeal.

B. DEPOSITION TESTIMONY AND DOCUMENTARY EVIDENCE

Coomes and Gonzalez both testified that they first met on April 1, 2016, the day Gonzalez purchased the first car. However, they provided different descriptions of the meeting. Gonzalez testified that they met at Coomes's office, and Pedro accompanied her but sat some distance away and did not participate in the discussion. Coomes testified that they first met at the car dealership and Gonzalez only informed him that she had a fiancé after signing the paperwork. Gonzalez testified that she specifically told Coomes that she and Pedro would both be driving both vehicles and that they lived together. Coomes testified that Gonzalez specifically refused to disclose any identifying details about her fiancé despite his requests for her to do so. Coomes and Gonzalez agreed that they met at Coomes's office the next day and added the second car to the existing policy. Coomes testified that on that second day, an unidentified man accompanied Gonzalez, but was not introduced.

In any event, Gonzalez gave Coomes paperwork from the dealership pertaining to both cars. In relevant part, Gonzalez provided Coomes with an "RD-108" form for the Pontiac Torrent. An RD-108 is also known as a Michigan Application for Title. It is undisputed that the RD-108 form for the Pontiac Torrent listed both Gonzalez and Pedro as owners, and it also listed both of them as sharing an address. Coomes sent the RD-108 to Titan along with all of the other policy application materials, although, as will be discussed, when he sent the RD-108 is under some dispute. Gonzalez admitted that Coomes never specifically told her Pedro was *not* on the policy, and she did not read it before signing. She further testified that she noticed that the insurance cards she received did not include Pedro's name, but she thought that was unremarkable because her prior insurance policy, which had also been with Titan, also did not list Pedro despite actually including him as insured.

After the accident, Titan assigned two claims adjusters, Brittany Janes and Nathan Hoerig, to Gonzalez's claim. The claim was investigated for a "material misrepresentation." Hoerig performed a basic computer search, which showed Pedro as possibly living with Gonzalez. Janes performed a different basic computer search, which revealed Gonzalez's prior Titan policy, which had included Pedro. Both Hoerig and Janes observed that Coomes failed to sign the policy application form signifying that he had explained it to Gonzalez. They also both admitted that Titan had received the RD-108 form for the Pontiac Torrent, and it showed Pedro as an owner and living at the same address as Gonzalez. Hoerig believed that Titan had the form from the date the policy was created. Janes is uncertain about when Titan received the form the first time, but it was definitely included in the file Coomes faxed to her. Therefore the RD-108 was at least available to Titan prior to its decision to rescind the policy, and possibly prior to its issuance of the policy.

Janes interviewed Coomes, who admitted at his deposition that he was not entirely truthful with Janes.[1] Janes opined that it would affect her opinion about whether Gonzalez had committed a misrepresentation if Coomes failed to tell her that he had discussed with Gonzalez that she was living with her fiancé. At Titan's internal discussion about whether to rescind Gonzalez's policy, Hoerig specifically stated his belief that no material misrepresentation had occurred, because Gonzalez had been truthful and "we probably should have known about Pedro with him being co-owner on the title." It was also noted that adding Pedro to the policy would have resulted in a $96 increase in either the semiannual or annual premium for the policy. Nevertheless, Titan decided to rescind Gonzalez's policy for failing to list Pedro.

At the hearing regarding Titan's motion for summary disposition, the trial court found an issue of fact whether Titan had in its possession proof that Gonzalez's fiancé was a household member. However, the trial court found this issue to be immaterial based on its reading of *Titan Ins Co v Hyten*, 491 Mich 547; 817 NW2d 562 (2012). The trial court held that under *Titan*, an insurance company has no duty to investigate applications even where the error or misrepresentation is "easily ascertainable." Therefore, even if Titan had the information regarding the fiancé, it had no duty to investigate whether he was truly a household member. The trial court then granted Titan's motion for summary disposition, leading to this appeal.

II. STANDARD OF REVIEW

The arguments made on appeal were presented to the trial court and are therefore preserved for our review. *Peterman v Dep't of Natural Resources*, 446 Mich 177, 183; 521 NW2d 499 (1994). A grant or denial of summary disposition is reviewed de novo on the basis of the entire record to determine if the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). When reviewing a motion under MCR 2.116(C)(10), which tests the factual sufficiency of the complaint, this Court considers all evidence submitted by the parties in the light most favorable to the non-moving party and grants summary disposition only when the evidence fails to establish a genuine issue regarding any material fact. *Id*. at 120. The interpretation and application of statutes, rules, and legal doctrines is reviewed de novo. *Estes v Titus*, 481 Mich 573, 578-579; 751 NW2d 493 (2008).

III. ANALYSIS

A. LEGAL ERROR REGARDING PREVAILING LAW

Plaintiff first argues that the trial court erred in its application of *Titan* regarding the duties of insurers regarding misrepresentations. We agree.

Titan is the current governing law regarding the duties of insurers to investigate any statements made by prospective insureds in their disclosures and applications. The *Titan* Court reaffirmed *Keys v Pace*, 358 Mich 74; 99 NW2d 547 (1959), as the basis for controlling

[1] At the time of his deposition, Coomes was still an active defendant in this matter.

precedent. In relevant part, "an insurer is not precluded from availing itself of traditional legal and equitable remedies . . . even when the fraud was easily ascertainable." *Titan*, 491 Mich at 571. However, "[t]his is not to say, of course, that one may willfully close his eyes to that which others clearly see." *Titan*, 491 Mich at 562, quoting *Keys*, 358 Mich at 84. The Court further stated: "Ignoring information that contradicts a misrepresentation is considerably different than failing to affirmatively and actively investigate a representation." *Id.* n. 4.

In *Keys*, the individual seeking insurance had stated on his application that his vehicle operator's license had not "been revoked, suspended or refused within the past 3 years." *Keys*, 358 Mich at 77-78. In fact, the Detroit Recorder's Court had ordered the individual to surrender his license just under a year and a half previously, and had returned the license on the same day the insured filled out his insurance application. *Keys*, 358 Mich at 78-79. To some extent, the insured argued that he had made no misrepresentation, because the Secretary of State had not revoked his license, and at the time, the Recorder's Court had a policy of not even notifying the Secretary of State about licenses it had ordered surrendered. *Id*. at 78-80. The insured also argued that "the court records 'were available' to the insurer and that it 'knew or should have known of the claimed cause of forfeiture at the time there was a pro rata cancellation of the policy.' " *Id*. at 83-84. The Court rejected the argument that the insurer was obligated to scour court records for "each of its thousands of policy holders," noting also that there was no reason "to stop with the traffic court" when it might also wish to search hospital or medical records. *Id*. at 84.

Similarly, in *Titan*, the insured stated that no one in the applicant's household had a suspended or revoked license; however, the applicant's own license was revoked at the time. *Titan*, 491 Mich at 551-552. The Court in *Titan* relied on *Keys* for the proposition that an insurer may rely on statements made by the insured "notwithstanding that the fraud may have been easily ascertainable." *Id*. at 561-562. The *Titan* Court emphasized that a fraud defense generally did not obligate a party "affirmatively to investigate the veracity of all representations made by its contracting partners." *Id*. at 571. The Court explicitly approved of the holdings in two cases wherein "the allegedly defrauded party was given direct information refuting the misrepresentations," which precluded relief to those parties. *Id*. at 556 n 4, citing *Montgomery Ward & Co v Williams*, 330 Mich 275; 47 NW2d 607 (1951), and *Webb v First of Mich Corp*, 195 Mich App 470; 491 NW2d 851 (1992). Thus, although a party may not be obligated "to affirmatively and actively investigate a representation," it is *not* entitled to ignore conflicting information that it actually receives. See *Id*.

The trial court stated, "[n]o one has presented an analogous case that would suggest that even though the general rule is there is no duty . . . to investigate, that if certain factors are known, then a duty springs to – a duty to investigate springs from those factors." The statement of the trial court is a misreading of *Titan*. Our Supreme Court's holding was clear: if an insurer has, or should have, information regarding possible misrepresentations on an application, it cannot willfully ignore that information. The trial court's holding misread *Titan* by essentially holding that Titan was permitted to ignore information it possessed. Again, our Supreme Court held that an insurer need not gratuitously engage in an affirmative investigation, but also that it may not ignore information actually in its possession. The trial court's grant of summary disposition was based on a legal error.

B. GENUINE QUESTION OF MATERIAL FACT

As a consequence of our analysis above, if Titan actually possessed knowledge indicating that Pedro was residing with Gonzalez, it was not permitted to ignore that information. We find that the trial court correctly found a genuine question of fact on this issue, which, under a correct legal analysis, precludes summary disposition.

There is considerable evidence that Titan received an official state form unambiguously showing that Pedro was a co-owner of the car and lived in Gonzalez's home. One of the adjusters even specifically opined that Titan "should have known about Pedro." Consequently, there is, at a minimum, a genuine question of fact whether Titan *actually received* information directly contradicting statements in the policy.

The trial court stated:

> And, third, this issue of whether it makes a difference that there is some testimony that suggests that Titan may have had the motor vehicle application showing both owners at the time that – that they issued the insurance policy.
>
> And the testimony is not – not exactly solid as to whether they did or not, but there is at least some issue that's been raised by some of the testimony.

We find this to be understated, but essentially correct. The trial court's error was in proceeding to conclude that Titan was not obligated to take note of the information it received that conflicted with Gonzalez's policy application.

We find that the record establishes a genuine question of material fact whether Titan became *actually aware* of a problem with Gonzalez's insurance policy application when processing that application, and therefore violated its duty to act on that information and perform a further investigation, and then either modify the policy or refuse to offer it entirely.

C. GONZALEZ'S EQUITABLE CLAIMS

The trial court never reached Gonzalez's equitable claims. Because our resolution of the trial court's interpretation of *Titan* requires us to reverse and remand, we likewise need not address Gonzalez's equitable claims. However, we observe that common-law defenses, such as "duress, waiver, estoppel, fraud, and unconscionability" may "be invoked to avoid enforcement of an insurance policy, unless those defenses are prohibited by statute." *Titan*, 491 Mich at 554-555. Equity demands fundamental fairness; "[a] contract, to be specifically enforceable in equity, should be binding on both parties alike, both as to obligation and remedy." *Kimball v Batley*, 174 Mich 544, 550; 140 NW 915 (1913). Consequently, we remind the trial court that if one party may avail itself of equitable remedies, so may the other. To the extent Titan may assert fraud as a defense to its insurance policy, Gonzalez may likewise assert estoppel or unconscionability as a defense to its rescission. Other than our analysis of *Titan* and the evidentiary record above, we express no opinion as to the merits of those claims or defenses.

IV. CONCLUSION

The trial court's order granting summary disposition in favor of Titan is reversed, and the matter is remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. Gonzalez, being the prevailing party, may tax costs. MCR 7.219(A).

/s/ Michael J. Riordan
/s/ Amy Ronayne Krause
/s/ Brock A. Swartzle