

STATE OF MICHIGAN
COURT OF APPEALS

DOMINIQUE NELSON,

Plaintiff-Appellant,

v

AMERICAN FELLOWSHIP MUTUAL
INSURANCE COMPANY,

Defendant-Appellee.

UNPUBLISHED
November 22, 2011

No. 299528
Oakland Circuit Court
LC No. 2008-095086-CZ

Before: SERVITTO, P.J., and CAVANAGH and STEPHENS, JJ.

PER CURIAM.

Plaintiff appeals as of right orders granting summary disposition in defendant's favor in this case alleging breach of contract, as well as race and gender discrimination, that was filed after defendant denied plaintiff's claim for benefits under her homeowners' insurance policy. We affirm.

On February 24, 2007, plaintiff's home was destroyed in a fire and she became aware of the loss the next day. On March 2, 2007, she filed her claim with defendant, reporting a total loss of her property. During the course of defendant's investigation of the claim, plaintiff was required to provide testimony under oath on September 14, 2007. Thereafter, in a letter dated October 4, 2007, defendant denied plaintiff's insurance claim on the grounds that (1) documentation did not support plaintiff's claimed losses and (2) defendant's investigation revealed that plaintiff "misrepresented material facts and/or circumstances regarding her loss. (Particularly her alleged contents losses)." On October 6, 2008, plaintiff filed her complaint against defendant alleging breach of contract and discrimination claims. Her race and gender discrimination claims asserted that similarly situated male policy holders who were not of her race were not treated the way that she was treated. That is, she was subjected to a higher degree of scrutiny during the investigation of her claim because of her race and gender.

Eventually defendant filed a motion for summary disposition, arguing in relevant part that plaintiff's breach of contract claim was barred by the contractual limitation period which provided that an action must be filed within one year of the loss. The trial court agreed, holding that the earliest plaintiff could have reported her loss to defendant was February 25, 2007, when she discovered the loss. Defendant denied her claim on October 4, 2007; thus, "the claim became untimely at the latest on October 3, 2008, but was not filed until October 6, 2008." Accordingly, the breach of contract claim was dismissed.

Subsequently defendant filed a motion for summary disposition as to the remaining race and gender discrimination claims, arguing that plaintiff had no evidentiary support for these claims. The trial court agreed, holding that plaintiff produced no evidence suggesting that defendant's scrutiny of her claim was motivated by race or gender; rather, her claims were premised solely on speculation and conjecture. Accordingly, the claims were dismissed and the case was closed. This appeal followed.

Plaintiff first argues that her breach of contract claim was not barred by the one-year limitation period; therefore, the trial court erred in dismissing her claim. We disagree. A decision on a motion for summary disposition under MCR 2.116(C)(7) is reviewed de novo. *Wickings v Arctic Enterprises, Inc*, 244 Mich App 125, 146; 624 NW2d 197 (2000).

Fire insurance policies are governed by the Insurance Code, MCL 500.100 *et seq*. MCL 500.2833(1)(q) mandates that each fire insurance policy contain the following provision:

That an action under the policy may be commenced only after compliance with the policy requirements. An action must be commenced within 1 year after the loss or within the time period specified in the policy, whichever is longer. The time for commencing an action is tolled from the time the insured notifies the insurer of the loss until the insurer formally denies liability.

Plaintiff's homeowners' insurance policy contained the following mandatory provision:

No action can be brought against us unless there has been full compliance with the policy provisions. Any action must be started within one year after the date of loss or damage. The time between when you notify us of the loss or damage and we formerly [sic] deny the claim does not apply to the one year period allowed for starting action. You may not begin any action against us until we have formerly [sic] denied the claim.

Accordingly, the one-year limitation period governed plaintiff's breach of contract claim.

According to the homeowners' policy, an action must have been "started within one year after the date of loss or damage." The "date of loss or damage" was the day the fire occurred, February 24, 2007. Plaintiff notified defendant of the loss or damage on March 2, 2007. The time period for filing any action was not tolled during that five day delay. While the claim was pending, the time period for filing an action was tolled. Plaintiff's claim was formally denied on October 4, 2007. See *Saad v Citizens Ins Co of America*, 227 Mich App 649, 652; 576 NW2d 438 (1998) (formal denial of an insurance claim occurs when the insurer mails the notice of denial). However, plaintiff did not file her breach of contract claim until over a year later, on October 6, 2008. The action would have been timely filed if the start date of the one-year period of limitations was the date on which plaintiff's claim was denied, but it was not. The one-year limitation period began on February 25, 2007, the day after the fire. See, generally, MCR 1.108(1) (when computing a period of time, the day of the event after which the period of time begins to run is not included). Thus, the trial court properly granted defendant's motion for summary disposition of plaintiff's breach of contract claim on the ground that it was time-barred.

Next, plaintiff argues that genuine issues of material fact existed with regard to her claims of gender and race discrimination; therefore, the trial court erred in dismissing these claims under MCR 2.116(C)(10). After de novo review of the decision to grant the motion for summary disposition, we disagree. See *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

A motion for summary disposition under MCR 2.116(C)(10) is properly granted if no factual dispute exists, thus entitling the moving party to judgment as a matter of law. *Rice v Auto Club Ins Ass'n*, 252 Mich App 25, 30-31; 651 NW2d 188 (2002). In deciding a motion brought under subrule (C)(10), a court considers all the evidence, affidavits, pleadings, and admissions in the light most favorable to the nonmoving party. *Id.*

Here, because defendant moved for summary disposition under MCR 2.116(C)(10) it had the burdens of (1) identifying the matters that had no disputed factual issues and (2) supporting its position with affidavits, depositions, admissions, or other documentary evidence. *Coblentz v Novi*, 475 Mich 558, 569; 719 NW2d 73 (2006), citing MCR 2.116(G)(4); *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). Accordingly, defendant presented affidavits of its record custodian, claims adjuster, and property claim supervisor. The affiants averred that plaintiff's claim was not treated any differently because of her race or gender—any delay in handling the claim was caused by plaintiff and the claim was denied solely in accordance with the policy provisions.

In light of defendant's claims and supporting evidence, the burden then shifted to plaintiff to demonstrate that a genuine issue of disputed fact existed for trial. See *Quinto*, 451 Mich at 362. Plaintiff could not rely on mere allegations, but was required to present admissible, documentary evidence establishing the existence of a material fact. *Maiden v Rozwood*, 461 Mich 109, 120-121; 597 NW2d 817 (1999); *Quinto*, 451 Mich at 362-363. But, instead, plaintiff merely responded that the facts and circumstances surrounding the denial of her claim supported her position. She argued: "Their behavior in the context of this case indicates that they knew

they were dealing with an African-American female, who they either jumped to the conclusion and assumed would be trying the [sic] ‘cheat’ the insurance company given the chance because she was African-American, and/or could be pushed around simply because she is a woman.” Plaintiff attached part of her own affidavit in support of her response to defendant’s motion for dismissal. Plaintiff’s efforts were not enough. She did not sustain her burden of demonstrating the existence of a disputed material fact. As the trial court held, plaintiff’s discrimination claims were based on mere speculation and conjecture which are insufficient to prevent their summary dismissal. See *Ghaffari v Turner Constr Co (On Remand)*, 268 Mich App 460, 464; 708 NW2d 448 (2005). Accordingly, the trial court also properly granted defendant’s motion for summary disposition of plaintiff’s discrimination claims.

Affirmed.

/s/ Deborah A. Servitto

/s/ Mark J. Cavanagh

/s/ Cynthia Diane Stephens