S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

CHEYENNE USEWICK,

Plaintiff-Appellant/Cross-Appellee,

v

SAFECO INSURANCE COMPANY OF AMERICA,

Defendant-Appellee,

and

BARNHART GREMEL MARSH AGENCY, INC. and JAMES AAGESEN,

Defendants-Appellees/Cross-Appellants.

UNPUBLISHED
March 19, 2013

No. 300657
Genesee Circuit Court
LC No. 2009-091264-CK

Before: TALBOT, P.J., and DONOFRIO and SERVITTO, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's separate orders granting summary disposition in favor of defendants Safeco Insurance Company of America ("Safeco"), Barnhart Gremel Marsh Agency, Inc. ("Barnhart"), and James Aagesen ("Aagesen"). We affirm.

Plaintiff and her husband have, for the past several years, purchased homes for the purpose of selling them for a profit or renting them out for income. They frequently used Barnhart and specifically insurance agent Aagesen, employed as an insurance agent at Barnhart, to procure insurance on these homes. Around February 4, 2008, plaintiff or her husband contacted Aagesen indicating that they were purchasing another rental home in Davison, Michigan and required insurance for the same. Aagesen filled out an application for insurance with respect to the home on February 4, 2008, and plaintiff signed the application. Safeco issued a landlord policy of insurance on the home effective February 6, 2008, through February 6, 2009.

On November 4, 2008, the Davison home and its contents and surrounding structures were severely damaged in a fire. Safeco, however, denied coverage for the loss, claiming that it

had discovered that material misrepresentations of fact were made on the application for insurance and therefore had rescinded the policy. Plaintiff thus initiated the instant action against Safeco for breach of contract and against Barnhart and Aagesen for negligence.

The trial court granted summary disposition in Safeco's favor pursuant to MCR 2.116(C)(10), finding that plaintiff had made material misrepresentations on her application for insurance on the home, without which the policy would not have been issued, such that Safeco could properly rescind the insurance policy. The trial court further granted summary disposition in favor of Barnhart and Aagesen pursuant to MCR 2.116(C)(10), based upon its determination that regardless of whom was initially at fault for placing the misrepresentations in the application, when plaintiff signed the application she was deemed to have ratified the answers contained therein and was thus responsible for making the material misrepresentations.

This appeal followed. Barnhart and Aagesen have cross-appealed, contending that in the event this Court finds that the trial court erred in granting summary disposition in their favor on the stated basis, alternative bases exist for granting summary disposition in their favor which were raised before but not ruled upon by the trial court.

We review de novo a trial court's decision on a motion for summary disposition. *Patterson v CitiFinancial Mtg Corp*, 288 Mich App 526, 528; 794 NW2d 634 (2010). "Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). In reviewing a motion brought pursuant to MCR 2.116(C)(10), this Court considers the pleadings and the other relevant record evidence in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial. *Dancey v Travelers Prop Cas Co*, 288 Mich App 1, 7; 792 NW2d 372 (2010).

On appeal, plaintiff first contends that material issues of fact exist with respect to whether the answers to the questions on the application for insurance contained misrepresentations such that Safeco should not have been granted summary disposition. We disagree.

"It is the well-settled law of this state that where an insured makes a material misrepresentation in the application for insurance . . . the insurer is entitled to rescind the policy and declare it void ab initio." *Lake States Ins Co v Wilson*, 231 Mich App 327, 331-332; 586 NW2d 113 (1998). If the insurer relies on the misrepresentation rescission is justified, regardless of whether the misrepresentation was innocent or intentional. *Id.* A material misrepresentation occurs when the misrepresentation "substantially increase[s] the risk of loss insured against so as to bring about a rejection of the risk or the charging of an increased premium." *Darnell v Auto-Owners Ins Co*, 142 Mich App 1, 9; 369 NW2d 243 (1985). A misrepresentation "that materially affects the acceptance of the risk entitles the insurer retroactively to void or cancel a policy." *Katinsky v Auto Club Ins Ass'n*, 201 Mich App 167, 170; 505 NW2d 895 (1993).

Safeco rescinded the policy based upon four alleged misrepresentations in plaintiff's February 4, 2008, application for insurance. First, under "Maintenance Condition" the box marked "excellent" is checked. Safeco contends that the condition of the house was not

"excellent" at the time of the application, as admitted by plaintiff and others and that the same was a material misrepresentation. We agree.

Aagesen testified that he had insured many of plaintiff and her husband, Edward Usewick's, rental properties, as well as their residential home. With respect to the home at issue, Aagesen testified that he did not go inside the house, but simply drove by the outside. Aagesen further testified that he called plaintiff's husband, Edward Usewick, for information regarding the home and he directed Aagesen to the mortgage company to get a copy of the appraisal. Aagesen obtained a copy of the appraisal and utilized that information. He testified that he marked the box for "excellent" concerning the condition of the home on the application based upon his opinion of the appearance of the home from the outside and the information in the appraisal. The appraisal indicated "the interior of the subject is typical of the homes in this market area." Aagesen testified that if he had been aware of the interior condition of the home, he would have checked the box marked "poor."

In her deposition, plaintiff testified that she and her husband looked at the home in question prior to purchasing it and prior to requesting insurance for the same. Plaintiff testified that the home needed drywall on the entire first floor and flooring, as well as other improvements. She testified that the home was probably not in excellent condition.

Mr. Usewick was, according to both him and Aagesen, the contact person regarding the insurance on the home. He testified that the entire first floor of the home required drywall and flooring, it had no kitchen, and that no one could live in the home in its current condition. He testified that he did not give insurance agent Aagesen the answers to fill in on the application and some of the information on the application is incorrect. Mr. Usewick specifically testified that as to the maintenance question, "I would not have told him it was excellent. I mean I knew the condition of the house inside." Mr. Usewick agreed that at the time of the application, the condition of the home was not excellent.

Based upon the testimony, there is no question of fact that the condition of the home being marked "excellent" on the application was a misrepresentation of fact. There is also no question of fact that the misrepresentation was material. Attached to Safeco's motion for summary disposition was an affidavit indicating that had it known that the home was uninhabitable, in need of significant renovations, was vacant, or that it had been placed for sale at the time of the application, it would not have issued the insurance policy. In *Montgomery v Fidelity & Guar Life Ins Co*, 269 Mich App 126, 129; 713 NW2d 801 (2005), a panel of this Court found that an underwriter's affidavit stating that the insurance company would not have issued an insurance policy had it been aware of a misrepresentation was sufficient to make the misrepresentation material.

There is no requirement that there be more than one material misrepresentation of fact in order for an insurer to rescind a contract. As a result, Safeco was entitled to rescind the insurance contract based upon the above material misrepresentation alone and the trial court properly granted summary disposition in Safeco's favor. However, the remaining three allegations of material misrepresentations of fact additionally provided Safeco with a sufficient basis to rescind the insurance policy.

The second alleged misrepresentation in the application concerns the question, "Is the dwelling for sale?" The "No" box was checked in response. Plaintiff asserts that she has no way of knowing what Safeco meant by that question. Plaintiff points out that the property was obviously for sale at the time of the application because she was in the process of buying the property—which Safeco knew. Thus, the question must be interpreted as asking whether plaintiff would be putting the property up for sale and, plaintiff asserts, the property was not for sale, as plaintiff put a renter, Gemale Tyler, in the property as soon as plaintiff took title to it and he could be evicted like any tenant.

Contrary to plaintiff's position, Gemale Tyler was not a renter, but a purchaser of the property by virtue of a March 7, 2008, land contract between him and plaintiff. Plaintiff actually purchased the home on March 5, 2008, then entered into a land contract to sell the property to Mr. Tyler a mere two days later. Plaintiff is referred to as "seller" throughout the contract and Mr. Tyler is referred to as "purchaser." The contract provides that the seller agrees "to sell and convey" the property for a specified price and lists various terms and conditions. Though plaintiff and Mr. Usewick both testified that they believed a land contract holder and lease tenant to be the same, their subjective belief as to Mr. Tyler's status does not change his legal status.

In addition, Mr. Usewick testified that prior to his closing on the home at issue, a customer of his car business had indicated that one of his cousins was interested in purchasing a property in the subdivision where the home was located. The customer had heard that Mr. Usewick was purchasing the home at issue and asked Mr. Usewick if he would be interested in selling the home. Mr. Usewick testified that this conversation took place two or three weeks prior to plaintiff's March 5, 2008, closing on the home and the home was then sold to this cousin, Mr. Tyler, on March 7, 2008. Thus, prior to plaintiff's purchase of the home, at least her husband planned on selling the home immediately and already had a potential buyer for the home.

Plaintiff also testified that *all* of the properties she and her husband purchase are intended to be sold. Plaintiff testified that sale is the end goal and they are rented out in the meantime.

Based upon the above, it can be inferred that the home was for sale at or around the time the insurance application was filled out and it was a material misrepresentation on the application that the home was not for sale.

The third alleged misrepresentation concerns the following question on the application: "Is the dwelling or any unit in the dwelling vacant?" The "No" box was checked in response. Mr. Usewick, however, testified that this information was incorrect on the application. He testified that there were things that needed to be done to the home and that a tenant would thereafter be moving in. Plaintiff thus knew that the home was and would be unoccupied for a period of time after she applied for the insurance. Additionally, the "tenant" (purchaser in actuality), Mr. Tyler, provided a recorded claims statement wherein he stated that he moved into the home approximately one month after he signed the land contract. The land contract is dated March 7, 2008. Plaintiff's application for insurance is dated February 4, 2008.

Plaintiff now states "obviously it was vacant at the time the application was made" but that there is a question of fact as to what time frame the question on the application referred.

Plaintiff refers this Court to cases holding that an insurance company must acknowledge that a home will be vacant from the time a seller moves out until the time a buyer moves in. See e.g., *Smith v Lumbermen's Mut Ins Co*, 101 Mich App 78, 86; 300 NW2d 457 (1980)("it is impliedly contemplated by the parties to the (insurance) contract that any temporary vacancy caused by or incident to a change to allow the old residents to leave the premises and the new residents to arrive is not within the vacancy clause . . ."). Those cases, however, generally address homeowner's insurance policies (owner occupied homes). The policy applied for and issued in this instance, on the other hand, was a landlord protection policy. Plaintiff has provided no authority to suggest that the same acknowledgement applies to rental homes or outside the realm of vacancy clauses in homeowners' insurance policies. A vacant home poses more risk to an insurance company than an occupied home, prompting insurance companies to frequently include special contractual provisions concerning unoccupied homes. See, e.g., *Vushaj v Farm Bureau General Ins Co of Michigan*, 284 Mich App 513, 516; 773 NW2d 758 (2009)(". . . the purpose of the provision in question is to protect the insurance company from the increased risk that accompanies insuring a house that does not have an occupant.").

The home was, as plaintiff concedes, vacant at the time of her application and as the application reflected that the home was not vacant, the application contained a material misrepresentation of fact on this issue.

The final alleged misrepresentation appears in response to the question on the application: "Is the dwelling under construction or significant renovation?" The "No" box was checked in response. While plaintiff contends that she did not provide the agent with that information and that neither she nor anyone else could know what Safeco meant by "significant renovation," Mr. Usewick affirmatively testified that he saw the interior of the home and would have told the insurance agent to check "yes." Also, given the testimony concerning the lack of flooring, drywall on the entire first floor and lack of a kitchen, there really can be no dispute that the home was under significant renovation.

In addition, Mr. Tyler, stated in a recorded claims statement that as part of his land contract, his down payment was to be the approximately $30,000.00 in repairs that were needed on the home. Mr. Tyler stated that drywall needed to be put in, floors needed to be put in, and kitchen cabinets and countertops needed to be installed. The land contract itself provides that "Thirty Thousand Dollars of repairs as stated in (2)(g)" had been paid to plaintiff as part of the purchase price. Section (2)(g) of the land contract provides that the first three months of payments are "to go toward repairs that consist of floors, walls ceilings, rebuild of kitchen and bathrooms and labor estimated at $30,000." Given the above, there is no question of fact that this was also a material misrepresentation on the application.

In sum, there were several material misrepresentations on plaintiff's application for insurance with Safeco that entitled it to rescind the insurance policy. No material questions of fact existed on these issues. The trial court thus did not err in granting summary disposition in Safeco's favor.

With respect to whether summary disposition was appropriate in Barnhart and Aagesen's favor, plaintiff states that she relied upon Aagesen's expertise in filling out the form correctly. Plaintiff has not, however, provided any evidence that she provided accurate information to

Aagesen to fill in the application (that the home was not in excellent condition, that it was vacant, that it was undergoing renovations, that it was placed for sale) and that he nevertheless put the wrong information on the application.

Most importantly, a contracting party has a duty to examine the contract and to know what he has signed. *Clark v John Hancock Mut Life Ins Co*, 180 Mich App 695, 698; 447 NW2d 783 (1989). And, one's signature on a document indicates that he or she warrants the answers to be true and complete in every respect. See, e.g., *Lake States Ins Co v Wilson*, 231 Mich App 327, 333; 586 NW2d 113 (1998).

In *Montgomery v Fidelity & Guar Life Ins Co*, 269 Mich App 126, an insured's widower filed an action against a life insurer that had rescinded the deceased's life insurance policy following his death based upon an alleged misrepresentation concerning whether the insured was a smoker. Although the decedent had a significant smoking habit, his application for life insurance reflected that he had not used tobacco within the previous five years. The life insurance company accepted the decedent's application and issued a policy. The decedent died in a car accident a short time later. After receiving clinical notes from the decedent's doctor visits which revealed him to have been a smoker, the insurance company found that the decedent had made material misrepresentation on his application for life insurance and rescinded the policy. The widower claimed that there was material question of fact as to whether she or the decedent had made a material misrepresentation on the application, in part because the agent was the one who completed the application and neither she nor her husband read the application before signing it. This Court stated:

> Plaintiff's argument is misplaced. Whether it was plaintiff, the decedent, or the agent who misrepresented the decedent's tobacco use on the application is not material because plaintiff and the decedent signed the authorization, stating that they had read the questions and answers in the application and that the information provided was complete, true, and correctly recorded. It is well established that failure to read an agreement is not a valid defense to enforcement of a contract. A contracting party has a duty to examine a contract and know what the party has signed, and the other contracting party cannot be made to suffer for neglect of that duty. Regardless of who actually completed the application, plaintiff and decedent both signed the authorization, attesting to the completeness and truth of the answers, after the application was completed. Thus, plaintiff and the decedent had the opportunity to review the application and correct any errors before submitting it. We therefore conclude that there was no genuine issue of material fact that the decedent made a material misrepresentation on the application, entitling defendant to rescind or avoid the policy. *Id.* at 129-130 (internal citations omitted).

The same holds true here. Plaintiff cannot recall providing any answers on the application to Aagesen, but admits that she signed the application. She testified that she did not read the application, but that is of no consequence under *Montgomery*. She had the opportunity to read the application and correct any errors. The fact that she did not does not relieve her of any obligation to do so, and her signature serves as her attestation that the information contained

in the application is true and complete. "[T]he law applied in Michigan leaves no room to doubt that as a general rule, an insured must read his or her insurance policy . . . [and] one who signs a contract will not be heard to say, when enforcement is sought, that he did not read it, or that he supposed it was different in its terms." *Zaremba Equipment, Inc v Harco Nat'l Ins Co*, 280 Mich App 16, 29; 761 NW2d 151 (2008). The *Montgomery* case holds that the same principle applies to insurance applications, such that any representations, and thus any misrepresentations contained in the application, are attributable to plaintiff. Summary disposition was thus appropriately entered in favor of Barnhart and Aagesen.

The remaining arguments raised by plaintiff on appeal were not raised before or decided by the trial court and are thus not preserved for appeal. In civil cases, we are not required to consider unpreserved issues, *Coates v Bastian Bros, Inc*, 276 Mich App 498, 509–510; 741 NW2d 539 (2007), and we decline to do so here. Additionally, given our resolution of the appeal we need not address Barnhart and Aagesen's cross-appeal.

Affirmed.

/s/ Michael J. Talbot
/s/ Pat M. Donofrio
/s/ Deborah A. Servitto