

STATE OF MICHIGAN
COURT OF APPEALS

SPARKLE BUILDERS I, LTD.,

Plaintiff-Appellant,

v

GEORGE BOINES and BRENDA A. BOINES,

Defendants/Counter-Plaintiffs,

and

FARMERS INSURANCE EXCHANGE,

Defendant-Appellee.

UNPUBLISHED

March 15, 2012

No. 301893

Wayne Circuit Court

LC No. 10-003604-CK

Before: O'CONNELL, P.J., and SAWYER and TALBOT, JJ.

PER CURIAM.

Sparkle Builders I, LTD. (“Sparkle Builders”) appeals as of right the trial court’s order granting summary disposition in favor of Farmers Insurance Exchange (“Farmers Insurance”).¹ We affirm.

This action arises from a fire that damaged the home of George and Brenda Boines, who were insured under a fire policy issued by Farmers Insurance. The Boineses entered into a contract with Sparkle Builders to repair the house. The contract states, in pertinent part:

[T]he undersigned Owner, hereby irrevocably contracts with Sparkle Builders I, LTD, the undersigned Contractor, its successor or assigns, to make all necessary repairs caused by a fire or other act occurring on or about [date], at approximately [time] at [address]. Owner hereby authorizes Contractor to negotiate his loss with his insurance carrier.

¹ MCR 2.116(C)(10).

Contractor, its successor or assigns, agrees the damaged property identified by the specifications executed by the Owner or, if no specifications are executed by the Owner, the damaged property identified by the Owner's insurance carrier as the adjusted claim will be repaired to as good or better condition as before the fire or other act causing the damage. The Owner shall pay to the Contractor for such repairs the amount of the adjusted claim and irrevocably assigns to the Contractor, its successor or assigns, all insurance proceeds due the Owner as a result of the fire or other act causing the damage to secure payment of such sums due the Contractor from the Owner. The Owner shall not be liable to the Contractor for any sum in excess of the adjusted claim paid by the Owner's insurance carrier for the Contractor's performance pursuant to this agreement and endorsement of the insurance proceeds check or checks by the Owner to the Contractor shall be payment in full for such performance (except for any insurance deductibles, extras and improvements to prior code violations).

Sparkle Builders boarded up the home and was paid for those services. Thereafter, the Boineses refused to allow Sparkle Builders to perform the construction services pursuant to the contract. After the Boineses informed Farmers Insurance that they had cancelled their contract with Sparkle Builders, Farmers Insurance issued the Boineses checks for the insurance proceeds that did not also name Sparkle Builders as a payee. Sparkle Builders subsequently brought this action against the Boineses² and Farmers Insurance. The complaint alleged that Farmers Insurance owed Sparkle Builders in excess of \$25,000 "as a result of the assignment of the insurance proceeds" and also alleged that it was "custom and trade practice in the fire repair industry to place the name of the contractor on all insurance proceeds disbursements," that Farmers Insurance failed to honor that practice, and that "the actions of [Farmers Insurance] in failing to acknowledge the assignment of the insurance proceeds and/or the custom and trade practice constitutes a conversion of [Sparkle Builders'] assets, the assigned insurance proceeds."

The trial court granted Farmers Insurance's motion for summary disposition³ on the basis that Sparkle Builders' contract was with the Boineses, not with Farmers Insurance. Summary disposition may be granted under MCR 2.116(C)(10) when "there is no genuine issue as to any material fact, and the moving party is entitled to judgment . . . as a matter of law." This Court reviews a trial court's decision on a motion for summary disposition de novo.⁴

In support of its claims against Farmers Insurance, Sparkle Builders relies on its contract with the Boineses in which the Boineses "irrevocably assign[ed]" to Sparkle Builders "all insurance proceeds due" the Boineses. Sparkle Builders does not claim that any direct contractual relationship existed between it and Farmers Insurance, or that it was a third-party beneficiary of the contract (the insurance policy) between Farmers Insurance and the Boineses.

² The action against the Boineses was administratively closed due to the filing of a bankruptcy petition.

³ MCR 2.116(C)(10).

⁴ *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

Sparkle Builders argues that because Farmers Insurance had notice of its contract with the Boineses, Farmers Insurance was obligated to protect Sparkle Builders' interest in the insurance proceeds. We disagree. Sparkle Builders relies on statutory and case law⁵ that addresses the assignment of accounts receivable under Article 9 of the Uniform Commercial Code to contend that once an obligor is given notice of an assignment, the obligor must pay the assignee. Sparkle Builders' reliance on these authorities is misplaced because this case does not involve a perfected security interest or an account receivable.

Additionally, application of principles involving the assignment of accounts receivable do not support Sparkle Builders' request for relief. Sparkle Builders cites *Commercial Savings Bank v G & J Wood Prod Co, Inc*,⁶ for the principle that Farmers Insurance, the obligor, was required to pay it (Sparkle Builders), the assignee. In that case, the defendant/obligor was aware that "Bennington" (the assignor) had obtained financing from the plaintiff bank on the basis of assigned accounts receivable, including the defendant's. On July 3, 1969, the plaintiff directed the defendant to pay the plaintiff. This Court held that the amount the defendant was responsible to pay the bank on the accounts receivable was properly reduced by the amount that the defendant effectively paid (by reducing the amount of indebtedness on an advance) the assignor before July 3, 1969.⁷ This Court stated that "[a]n account debtor may pay the assignor of accounts until notified by the assignee that payment is to be made to the assignee."⁸ In the present case, the contract between Sparkle Builders and the Boineses does not direct that payments be made to Sparkle Builders. Rather, it contemplates that the Boineses will receive the insurance proceeds and pay Sparkle Builders by endorsing the check or checks. Sparkle Builders argues that, through this agreement, Farmers Insurance had notice of Sparkle Builders' rights to the insurance proceeds, yet this agreement informs Farmers Insurance that payment to Sparkle Builders is to be made by the Boineses, not Farmers Insurance.

In addition, the contract between Sparkle Builders and the Boineses provides that the assignment of insurance proceeds is to secure the Boineses' payments of amounts due Sparkle Builders for repairs. Sparkle Builders was fully paid for the temporary repairs it performed. The Boineses cancelled the contract before Sparkle Builders made additional repairs. When the contract was cancelled, the assignment was terminated. Sparkle Builders did not make further repairs so there were no amounts due to Sparkle Builders for repairs for the assignment of insurance proceeds to secure.

Sparkle Builders also asserts that Farmers Insurance breached the custom and trade practices in the fire repair industry, which Sparkle Builders contends is evidence of a breach of a

⁵ See, e.g., MCL 440.9406, formerly MCL 440.9318, *Commercial Savings Bank v G & J Wood Prod Co, Inc*, 46 Mich App 133; 207 NW2d 401 (1973), and *Dimmitt & Owens Fin, Inc v Realtek Indus, Inc*, 90 Mich App 429; 280 NW2d 827 (1979).

⁶ *Commercial Savings Bank*, 46 Mich App at 133.

⁷ *Id.* at 136-137.

⁸ *Id.* at 136, citing former MCL 440.9318(2).

standard of conduct. We disagree. Sparkle Builders does not provide any authority indicating that custom and trade practices create a legal obligation that may substitute for a contractual duty or create a legal duty actionable in tort. Violation of custom and industry practices, while “relevant to the issue of due care,” do not establish a legal duty that would support a tort action.⁹

Finally, we reject Sparkle Builders’ argument that it may seek recovery under a tort theory of conversion because Farmers Insurance failed to protect the assignment of the proceeds when it issued checks without Sparkle Builders’ name, thereby giving the proceeds to the Boineses. This theory of recovery assumes that the insurance proceeds properly may be considered Sparkle Builders’ asset. Because we have concluded that there is no genuine issue of material fact that Farmers Insurance was not obligated to pay the insurance proceeds to Sparkle Builders, the proceeds cannot be considered Sparkle Builders’ property. Moreover, Sparkle Builders cites *Head v Phillips Camper Sales & Rental, Inc.*,¹⁰ but in that case this Court stated, “To support an action for conversion of money, the defendant must have an obligation to return the specific money entrusted to his care.” Sparkle Builders does not assert that Farmers Insurance had an obligation to return to Sparkle Builders a specific cache of money.¹¹

Affirmed.

/s/ Peter D. O’Connell
/s/ David H. Sawyer
/s/ Michael J. Talbot

⁹ *Schultz v Consumers Power Co*, 443 Mich 445, 456; 506 NW2d 175 (1993).

¹⁰ *Head v Phillips Camper Sales & Rental, Inc.*, 234 Mich App 94, 111; 593 NW2d 595 (1999).

¹¹ *AFSCME v Bank One, NA*, 267 Mich App 281, 295 n 6; 705 NW2d 355 (2005).