STATE OF MICHIGAN

COURT OF APPEALS

KUNG CHIU CHU and SO KWAN CHU, Plaintiffs-Appellants,	UNPUBLISHED October 18, 2012
V	No. 304603 Oakland Circuit Court
GRANGE INSURANCE COMPANY, Defendant-Appellee.	LC No. 2010-111792-CK

Before: O'CONNELL, P.J., and DONOFRIO and BECKERING, JJ.

PER CURIAM.

Plaintiffs appeal as of right the trial court's order granting summary disposition for defendant in this insurance coverage dispute. Because the insurance policy was cancelled before the date of loss as a result of plaintiffs' failure to pay the premium and defendant was not estopped from relying on the cancellation of the policy in denying plaintiffs' claim, we affirm.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

This case arises out of a fire that occurred at plaintiffs' residence on January 1, 2010. Before the fire, plaintiffs had a homeowner's insurance policy with defendant. The policy was an annual policy, with a policy term from May 4, 2009, to May 4, 2010. Plaintiffs generally paid their insurance premiums in monthly installments. On November 14, 2009, defendant sent plaintiffs a Homeowner's Invoice notifying them of a minimum $62 premium payment due on December 7, 2009. When defendant did not receive the payment, it sent plaintiffs a Notice of Cancellation, informing them that a minimum payment in the amount of $87 was due immediately or the policy would be cancelled effective 12:01 a.m. on December 29, 2009. Plaintiffs failed to make a payment before the cancellation date.

On December 30, 2009, defendant sent plaintiffs a Confirmation of Cancellation, notifying them that the homeowner's policy had been cancelled on December 29, 2009, because of nonpayment of the premium. Also on December 30, 2009, defendant sent plaintiffs an Earned Premium Notice, informing them of a balance due in the amount of $78.88 for insurance coverage provided up to the cancellation date. The Earned Premium Notice also stated that plaintiffs could request reinstatement of the policy by immediately remitting a payment in the amount of $174. The Earned Premium Notice further provided:

> If your request for reinstatement is accepted, coverage under your policy will not begin until the reinstatement effective date which will be indicated on your updated policy Declarations page.

On January 7, 2010, defendant received a payment from plaintiffs and reinstated the homeowner's policy. On January 12, 2010, defendant issued a new Declarations Page, indicating that coverage began on January 7, 2010, and would end on May 4, 2010.

As previously stated, a fire occurred at plaintiffs' residence on January 1, 2010. On that date, plaintiffs made a claim with defendant's claim center, but the date of loss was erroneously recorded as January 1, 2009. Defendant paid some of plaintiffs' expenses pursuant to their claim, including some of their hotel bills. On January 11, 2010, defendant sent plaintiffs instructions to assist defendant in processing their claim. The letter identified the date of loss as January 1, 2009. On January 23, 2010, defendant discovered that plaintiffs' claim reflected the wrong date. After a new claim was generated, using the correct date of loss, defendant discovered that the policy was not in effect on that date because of the cancellation. In a letter dated January 29, 2010, defendant informed plaintiffs that it had denied their claim because the policy had been cancelled on December 29, 2009, was not reinstated until January 7, 2010, and was not in effect on the date of loss.

On July 14, 2010, plaintiffs filed this action against defendant alleging breach of contract, intentional infliction of emotional distress,[1] and seeking a declaratory judgment that the insurance policy was in full force and effect on the date of loss because defendant was estopped from relying on its alleged cancellation of the policy. Defendant moved for summary disposition pursuant to MCR 2.116(C)(8) and (10), arguing, in relevant part, that no policy of insurance was in effect on January 1, 2010, because the policy had been cancelled on December 29, 2009, as a result of plaintiffs' failure to pay the premium. Defendant also argued that reinstatement of the policy was not retroactive and that coverage did not recommence until January 7, 2010, the date that defendant received plaintiffs' payment. Further, defendant contended that plaintiffs' claim based on equitable estoppel lacked merit because defendant did nothing to induce plaintiffs to believe that coverage would continue despite their failure to pay the premium. In response, plaintiffs argued that, by accepting premium payments for each day of the policy term, defendant was equitably estopped from asserting that the policy was not in effect on certain days of the policy term. Plaintiffs also argued that defendant was equitably estopped from denying coverage because defendant reinstated the policy and continued to charge the full premium despite that the dwelling had been substantially damaged in the fire and plaintiffs' personal property inside the dwelling had been destroyed.

The trial court granted defendant's motion pursuant to MCR 2.116(C)(10). The court determined that plaintiffs' breach of contract claim failed because the insurance policy was not in effect on the date of loss since it had been cancelled for nonpayment of the premium. The court also determined that plaintiffs were provided proper notice of the cancellation. The court further

[1] Because plaintiffs do not challenge the dismissal of their intentional infliction of emotional distress claim, we do not discuss that claim further.

determined that the principle of estoppel was not implicated because plaintiffs failed to establish that they relied on any representation that defendant made when plaintiffs failed to pay their premium.

II. STANDARDS OF REVIEW

We review de novo a trial court's decision on a motion for summary disposition. *Coblentz v City of Novi*, 475 Mich 558, 567; 719 NW2d 73 (2006). In reviewing a ruling pursuant to MCR 2.116(C)(10), we must review the documentary evidence and all legitimate inferences arising from the evidence 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 judgment as a matter of law.'" *Id*. at 568, quoting *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). We also review de novo questions involving the interpretation of insurance contracts. *Citizens Ins Co v Secura Ins*, 279 Mich App 69, 72; 755 NW2d 563 (2008).

III. LEGAL ANALYSIS

Plaintiffs first argue that defendants' denial of their claim constituted a breach of the insurance contract. As with contracts in general, courts must enforce an insurance contract in accordance with its terms. *Frankenmuth Mut Ins Co v Masters*, 460 Mich 105, 111; 595 NW2d 832 (1999). Thus, we examine the language of the contract as a whole, according words their plain and ordinary meanings. *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 47; 664 NW2d 776 (2003); *Royal Prop Group, LLC v Prime Ins Syndicate, Inc*, 267 Mich App 708, 715; 706 NW2d 426 (2005). "The policy application, declarations page of policy, and the policy itself construed together constitute the contract." *Id*.

The trial court properly determined that plaintiffs failed to create a justiciable question of fact with respect to their breach of contract claim because the insurance policy had been properly cancelled for nonpayment of the premium and was not in effect on the date of loss. The insurance policy provided:

> **We** agree with **you**, *in return for **your** premium payment*, to provide insurance subject to all the terms of this policy. The coverages provided, the limits of **our** liability and the premiums are shown in the Declarations of this policy. [Bold in original; italics added.]
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> * * *
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> 2. **Cancellation**
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> * * *
>
> (b) **Our** Right to Cancel or Refuse to Renew
>
> **We** may cancel this policy only for the reasons stated below by mailing notice of cancellation to **you**, and to any lienholder named in the policy at the address shown in the Declarations, or by delivering the notice to **you**.

> (1) **We** may cancel this policy at any time with only 10 days notice before the effective date of cancellation if **you** have not paid the premium payable to **us**, to **our** agent or under any finance plan. [Bold in original.]

The policy term was from May 4, 2009, to May 4, 2010. Defendant sent plaintiffs monthly invoices indicating the amounts due and the due dates. On November 14, 2009, defendant sent plaintiffs an invoice for a minimum $62 payment due on December 7, 2009. On December 12, 2009, having received no payment, defendant sent plaintiffs a Notice of Cancellation, effective December 29, 2009, unless defendant received a payment in the amount of $87.[2] It is undisputed that plaintiffs did not pay the premium before the December 29, 2009, cancellation date. Accordingly, pursuant to the terms of the insurance contract, the policy was cancelled before the January 1, 2010, date of loss. Because plaintiffs failed to pay the premium, resulting in the policy's cancellation, there was no policy in effect on January 1, 2010, and defendant's denial of plaintiffs' claim did not constitute a breach of the contract.

Plaintiffs argue that by accepting their request for reinstatement, defendant agreed to provide coverage for the fire loss. Plaintiffs' argument lacks merit. The Earned Premium Notice stated that plaintiffs could request reinstatement of the policy by immediately remitting a payment in the amount of $174. The notice further provided that if plaintiffs' request for reinstatement was accepted, coverage "will not begin until the reinstatement effective date which will be indicated on your updated policy Declarations page." After receiving plaintiffs' payment on January 7, 2010, defendant issued a new Declarations Page, indicating that coverage began on January 7, 2010, and would end on May 4, 2010. Plaintiffs argue that defendant's January 11, 2010, letter asking them to provide information to assist defendant in processing their claim shows that defendant reinstated the policy with the intent to cover the fire loss. Plaintiffs neglect to mention, however, that the January 11, 2010, letter reflected an incorrect date of loss and that the error regarding the date of loss was not discovered until January 23, 2010. Because the letter erroneously reflected January 1, 2009, as the date of loss, it did not indicate that defendant reinstated the policy with the intent to cover the January 1, 2010, loss. Thus, the record fails to show that defendant agreed to provide coverage for the January 1, 2010, loss when it reinstated the policy.

Plaintiffs also contend that the Declarations Page issued on April 12, 2010, indicating a policy term of May 4, 2009, to May 4, 2010, demonstrates that defendant contracted to cover the fire loss and that there was no "lapse" in coverage. Again, plaintiffs' argument lacks merit. The January 12, 2010, Declarations Page states that it was issued because of the reinstatement of the

[2] Although plaintiffs have claimed at various times in this litigation that they did not receive the Notice of Cancellation, the Confirmation of Cancellation, or the Earned Premium Notice, it is well established that a letter mailed in the due course of business is presumed to have been received. *Good v Detroit Auto Inter-Ins Exch*, 67 Mich App 270, 274; 241 NW2d 71 (1976). Defendant submitted the affidavit of Shawn VanDervort, defendant's Central Division Underwriting Manager, averring that the notices were generated and mailed in the due course of business.

policy and indicates that coverage was from January 7, 2010, to May 4, 2010. The April 12, 2010, Declarations Page states that it was issued because of a policy change with respect to the identity of the mortgagee. That Declarations Page reflected a new mortgagee and stated that April 12, 2010, was the effective date of the change. The fact that the new Declarations Page did not identify the dates that the policy was not in effect does not demonstrate that defendant reinstated the policy retroactively, with no time out of force.

Plaintiffs next argue that defendant's acceptance of premiums based on the pre-fire cash value of the dwelling and personal property indicate that it reinstated the policy retroactively to cover the fire loss. Otherwise, plaintiffs assert, defendant would have been charging and collecting premiums for property with no insurable value because it had been destroyed in the fire. Plaintiffs, however, fail to show that defendant had any duty to unilaterally change the coverage under the policy or alter the policy limits, and the record does not indicate that plaintiffs requested that the policy limits be reduced. The failure to alter the premium does not demonstrate that the policy was reinstated retroactively, with no time during which the policy was not in effect.

In addition, plaintiffs failed to submit evidence rebutting defendant's evidence showing that plaintiffs did not pay premiums for the dates that the policy was not in effect. Defendant submitted the affidavit of Shawn VanDervort, defendant's Central Division Underwriting Manager, averring that plaintiffs were not charged a premium for the period from December 29, 2009, through January 7, 2010, during which the policy was not in effect. Accompanying VanDervort's affidavit was a copy of plaintiffs' payment log showing their premiums and fees along with their payments made. Plaintiffs failed to produce any evidence contesting defendant's claim that it credited plaintiffs $16.90 for the nine days during which the policy was not in effect. While the party moving for summary disposition under MCR 2.116(C)(10) has the initial burden of supporting its motion with affidavits, depositions, and other documentary evidence, the burden then shifts to the opposing party to establish a genuine issue of material fact for trial. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). The nonmoving party may not rest on mere allegations, but rather, must go beyond the pleadings and present documentary evidence establishing a material factual dispute. MCR 2.116(G)(4); *Quinto*, 451 Mich at 362-363. If the nonmoving party fails to present such evidence, the motion is properly granted. *Id.* Here, plaintiffs failed to present any evidence rebutting defendant's evidence showing that it did not charge plaintiffs a premium for the days that the policy was not in effect.

Plaintiffs next argue that the doctrine of quasi-estoppel precludes defendant from relying on the cancellation of the policy because defendant began adjusting plaintiffs' claim stemming from the fire after receiving and accepting their reinstatement payment. Because plaintiffs did not preserve this argument for our review by asserting it in response to defendant's motion for summary disposition below, our review of this issue is limited to plain error affecting their substantial rights. *Kloian v Schwartz*, 272 Mich App 232, 242; 725 NW2d 671 (2006).

Although Michigan courts have not formally recognized the doctrine of "quasi-estoppel," in other jurisdictions the doctrine precludes a party from taking a position contrary to a position previously taken if allowing the party to do so would be unconscionable or if the party accepted a benefit from the previous position. See *Bott v JF Shea Co, Inc*, 299 F3d 508, 512 (CA 5,

2002); *Sowinski v Walker*, 198 P3d 1134, 1147 (Alas, 2008). According to plaintiffs, the element of reliance required for equitable estoppel[3] is not required under the doctrine of quasi-estoppel. Plaintiffs assert that the doctrine is applicable because, before defendant reinstated the policy, it never represented that reinstatement would be conditioned on a "lapse" in coverage. Contrary to plaintiffs' argument, the Earned Premium Notice explicitly provided that plaintiffs could request reinstatement of the policy, but that if defendant accepted the request for reinstatement, coverage would not begin until the reinstatement effective date. Thus, plaintiffs were notified that, if the policy was reinstated, there would be a time period during which the policy would not be in effect. Moreover, the fact that defendant took action with respect to plaintiffs' claim after reinstating the policy did not indicate that it reinstated the policy with full retroactive effect. As previously discussed, defendant's efforts in this regard were made before it realized that the date of loss had been erroneously recorded. Defendant's efforts ceased and it denied plaintiffs' claim as soon as it realized that the fire had occurred during the nine-day period when the policy was not in effect. Accordingly, plaintiffs' argument based on quasi-estoppel lacks merit.

Finally, plaintiffs argue that defendant breached the insurance contract by failing to provide the mortgagee, Bank of America, ten days' notice before cancellation as required under the policy. The insurance policy provided:

> CONDITIONS – SECTION I
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> * * *
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> 2. **Mortgagee**
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> * * *
>
> **Our** Duties
>
> **We** will:
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> *** * ***
>
> (b) give the mortgagee 10 days notice before cancelling this policy. [Bold in original.]

Defendant concedes that it did not provide Bank of America ten days' notice before it cancelled the policy, but correctly argues that that fact does not support a breach of contract claim on

[3] The doctrine of equitable estoppel requires that the plaintiff establish "(1) that the defendant's acts or representations induced plaintiff to believe that the policy was in effect at the time of the accident, (2) that the plaintiff justifiably relied on this belief, and (3) that plaintiff was prejudiced as a result of his belief that the policy was still in effect." *Morales v Auto-Owners Ins Co*, 458 Mich 288, 296-297; 582 NW2d 776 (1998).

behalf of plaintiffs. The rights of an insured person and those of a mortgagee under a policy of insurance are severable. A policy may be properly cancelled with respect to an insured person because of his failure to pay the premium but nevertheless remain in effect with respect to a mortgagee as a result of an insurer's failure to provide the mortgagee timely notice of the cancellation. See *O'Neill v Auto Club Ins Ass'n*, 175 Mich App 384, 386-390; 438 NW2d 288 (1989). This was the scenario that occurred in this case, and the policy was properly cancelled as to plaintiffs, but remained in effect as to Bank of America. Defendant admits that it paid Bank of America's claims stemming from the fire. The fact that the policy remained in effect with respect to the mortgagee does not support plaintiffs' breach of contract claim because the policy was properly canceled with respect to plaintiffs. Thus, the trial court properly granted summary disposition for defendant.

Affirmed. Defendant, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Peter D. O'Connell
/s/ Pat M. Donofrio
/s/ Jane M. Beckering