STATE OF MICHIGAN

COURT OF APPEALS

ELIZABETH A. NULL,

Plaintiff-Appellant,

v

AUTO-OWNERS INSURANCE COMPANY,

Defendant-Appellee,

and

BERKEY INSURANCE AGENCY, INC., and WELLS FARGO BANK NA,

Defendants.

UNPUBLISHED
October 22, 2013

No. 308473
Cass Circuit Court
LC No. 10-000228-NI

Before: FITZGERALD, P.J., and O'CONNELL and SHAPIRO, JJ.

PER CURIAM.

Plaintiff appeals by right the trial court's grant of summary disposition in favor of defendant Auto-Owners Insurance Company. Because we find the insurance policy at issue did not cover plaintiff's losses, we affirm.

This insurance dispute arose from a 2009 fire that destroyed a home in Cassopolis, Michigan. Plaintiff and her late husband were buying the home from plaintiff's brother-in-law, Lonnie Null. Lonnie had obtained property insurance from defendant on the home, but had not made any payments on the mortgage or on the insurance premium escrow since at least 1998. Instead, plaintiff and her husband were making the mortgage payments and paying the insurance premium escrow. Lonnie stayed in the home with plaintiff and her husband sporadically for a few days or weeks at a time, through approximately 2004. When the fire occurred in 2009, Lonnie had not lived in the home for several years.

After the fire, plaintiff sought insurance coverage from defendant for property loss, personal property loss, and substitute living expenses. Defendant denied the claim on the ground that Lonnie, who was the named insured, did not reside in the home. Plaintiff then sued defendant for breach of contract. The trial court initially granted partial summary disposition in favor of plaintiff. However, after hearing plaintiff's case on damages in a bench trial, the trial

court reversed its initial grant of summary disposition and granted summary disposition in favor of defendant under MCR 2.116(I)(2).

We review de novo the trial court's grant of summary disposition. *Dancey v Travelers Prop Cas Co*, 288 Mich App 1, 7; 792 NW2d 372 (2010). In addition, we review de novo the trial court's interpretation of the insurance policy at issue. *DeFrain v State Farm Mut Automobile Ins Co*, 491 Mich 359, 366-367; 817 NW2d 504 (2012). We must enforce the insurance policy according to its terms. *Liparato Constr, Inc v Gen Shale Brick, Inc*, 284 Mich App 25, 35; 772 NW2d 801 (2009).

The analysis begins with a determination of whether the policy provides coverage for the claimed loss. *Heniser v Frankenmuth Mut Ins Co*, 449 Mich 155, 161; 534 NW2d 502 (1995). The policy defined the insured premises as "the residence premises," and in turn defined "residence premises" as:

> **a.** the one or two family dwelling where **you** [the named insured] reside, including the building, the grounds and other structures on the grounds; or
>
> **b.** that part of any other building where **you** reside, including grounds and structures; which is described in the Declarations.

The policy stated that it covered "**your** dwelling located at the **residence premises** including structures attached to that dwelling. Thisdwelling [sic] must be used principally as **your** private residence."

The controlling Michigan case law establishes that defendant properly denied coverage on the basis of the policy's residence requirements. In *Heniser*, our Supreme Court explained that when a property insurance policy includes a "residence premises" definition, there is no coverage if the insured does not reside at the property. The property at issue in *Heniser* was a vacation home that the insured had sold on a land contract, and the insured did not live in the home. *Id*. at 157. The Court held, "[w]e agree with those courts that have found the exact language of this policy to unambiguously require the insured to reside at the insured premises at the time of the loss." *Id*. at 168.

This Court applied *Heniser* to confirm a denial of insurance coverage in *McGrath v Allstate Ins Co*, 290 Mich App 434; 802 NW2d 619 (2010). The *McGrath* Court determined that the residence premises requirement precluded coverage unless the insured lived in the premises at the time of the loss. *Id.* at 441. The Court rejected the argument that the insured could be deemed to reside in the premises if the insured intended to return at some time in the future. *Id*. at 442. The Court determined that the term "reside" had no technical meaning in the policy, and that the policy plainly required the insured to live in the premises in order to obtain coverage. *Id*. at 442-443.

The *McGrath* Court also addressed an argument similar to one presented by plaintiff in this case, i.e., that a change in the insured's mailing address placed the insurance company on notice of a potential change in the occupancy status of the covered property. The Court first noted, "it is common in the context of insurance contracts that the insured's billing address is different from the address of the property insured." *Id*. at 446. The Court then explained:

> a person may change a billing address for myriad reasons that would not raise a suspicion that residency has changed. As one example, the children of an elderly person may decide to assume the responsibility for paying a parent's bills, and thus make arrangements for those bills to be sent somewhere other than the parent's residential address. [*Id*. at 447.]

The Court concluded that the change in the billing address did not put the insurance company on notice that the insured no longer lived in the property. *Id*. at 626.

Heniser and *McGrath* control the coverage question in this case. There is no ambiguity in the policy language at issue; the policy limits coverage to the dwelling in which the insured resides and which is used as the insured's primary residence. The record confirms that Lonnie did not reside in the home at the time of the fire. Plaintiff testified in deposition that Lonnie lived at the Cassopolis house with plaintiff and her husband for approximately one month after being released from jail in 1997. After that, Lonnie "bounced around a lot," meaning he stayed sporadically at the Cassopolis house for a few days at a time, and stayed there for two weeks in approximately 2005. Nothing in the record indicates that Lonnie resided in the home after 2005. Accordingly, the home did not fall within the policy definition of covered property, and defendant properly denied coverage.

Plaintiff argues that this case is factually distinguishable from *Heniser* and *McGrath*. Specifically, plaintiff points out that in this case, defendant paid at least two property damage claims prior to the fire. According to plaintiff, defendant knew or should have known that Lonnie did not live in the home at the time the prior losses occurred. Plaintiff argues that defendant's prior payment on the claims waived any subsequent denial of coverage. Plaintiff also argues that this Court should equitably estop defendant from denying coverage.

Plaintiff's arguments are misplaced. To establish a waiver of the policy provisions, plaintiff must show that defendant intentionally abandoned a known right. See *Quality Prod & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 374; 666 NW2d 251 (2003) (defining waiver). In this case, there is no evidence that defendant intentionally abandoned the policy's coverage requirements. Moreover, the policy precluded any implied waiver: "CHANGES[.] This policy and the Declaration include all the agreements between **you** and **us** or our agency relating to this insurance. No change or waiver may be effected in this policy except by endorsement issued by **us**."

Similarly, plaintiff has not established that the elements of equitable estoppel apply in this case. Equitable estoppel arises when "(1) a party, by representations, admissions, or silence intentionally or negligently induces another party to believe facts, (2) the other party justifiably relies and acts on that belief, and (3) the other party is prejudiced if the first party is allowed to deny the existence of those facts." *Conagra, Inc v Farmers State Bank*, 237 Mich App 109, 141; 602 NW2d 390 (1999). To establish the first element of equitable estoppel, plaintiff would have to demonstrate that defendant induced plaintiff to believe that Lonnie's residential status was irrelevant to the policy coverage. The record contains no evidence to support the first element. Instead, the record evidence is ambiguous concerning whether Lonnie may have been living in the home in 2001 or 2004 when defendant paid the prior two claims. The record is also ambiguous as to whether anyone ever expressly informed defendant about Lonnie's residential

status. Given the lack of evidence regarding whether defendant knew of Lonnie's residential status, plaintiff cannot establish that defendant induced plaintiff to believe that Lonnie's status was irrelevant to the policy coverage. Accordingly, plaintiff's equitable estoppel claim fails.

Plaintiff also maintains that she is entitled to coverage for personal property loss and for her substitute living expenses. The policy covers personal property losses only for insureds, as defined in the policy:

> **c. Coverage C – Personal Property**
>
> **(1) Covered Property**
>
> **We** cover:
>
> (a) personal property owned or used by any **insured** anywhere in the world including property not permanently attached to or otherwise forming a part of realty.
>
> (b) at **your** option, personal property owned by others while it is in that part of the **residence premises** occupied by any **insured.** [Policy]

Plaintiff is not an insured within the meaning of the policy. Plaintiff therefore cannot recover for personal property damage arising from the fire at the home.

Similarly, plaintiff cannot recover substitute living expenses she may have incurred after the fire. The policy's living expenses coverage reads:

> **d. Coverage D – Additional Living Expense and Loss of Rents**
>
> If a covered loss makes **your residence premises** unfit to live in, **we** will pay, at **your** option [reasonable living expenses or fair rental value.]

We have concluded that the home does not fall within the policy definition of "residence premises." Accordingly, plaintiff cannot recover additional living expense.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Peter D. O'Connell