STATE OF MICHIGAN

COURT OF APPEALS

MICHELE DUPREE, Plaintiff-Appellee,	UNPUBLISHED July 18, 2013
V	No. 310405 Wayne Circuit Court
AUTO-OWNERS INSURANCE COMPANY, Defendant-Appellant.	LC No. 11-009132-CK

Before: STEPHENS, P.J., and WILDER and OWENS, JJ.

PER CURIAM.

Defendant appeals by right an order of the trial court denying its motion for summary disposition and granting summary disposition to plaintiff pursuant to MCR 2.116(I)(2). We affirm.

Appellate courts review "the grant or denial of summary disposition de novo to determine if the moving party is entitled to judgment as a matter of law. In making this determination, the Court reviews the entire record to determine whether defendant was entitled to summary disposition." *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

> A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint. All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant. A motion under MCR 2.116(C)(8) may be granted only where the claims alleged are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery. When deciding a motion brought under this section, a court considers only the pleadings.
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> A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, in the light most favorable to the party opposing the motion. 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 119-120 (citations and quotation marks omitted).]

Additionally, MCR 2.116(I)(2) authorizes trial courts to enter summary disposition in favor of the non-movant "[i]f it appears to the court that the opposing party, rather than the moving party, is entitled to judgment . . . ."

Defendant first argues that plaintiff has yet to produce proof of loss regarding replacement costs. It argues that because her insurance policy conditions defendant's obligation to pay on plaintiff's producing such proof, defendant argues it is not yet obligated to pay. We disagree.

MCL 500.2833(1)(m) governs the procedure parties must follow if they do not agree on the amount of loss covered by a fire insurance policy. Specifically, MCL 500.2833(m) states:

> [I]f the insured and insurer fail to agree on the actual cash value or amount of the loss, either party may make a written demand that the amount of the loss or the actual cash value be set by appraisal. If either makes a written demand for appraisal, each party shall select a competent, independent appraiser and notify the other of the appraiser's identity within 20 days after receipt of the written demand. The 2 appraisers shall then select a competent, impartial umpire. If the 2 appraisers are unable to agree upon an umpire within 15 days, the insured or insurer may ask a judge of the circuit court for the county in which the loss occurred or in which the property is located to select an umpire. The appraisers shall then set the amount of the loss and actual cash value as to each item. If the appraisers submit a written report of an agreement to the insurer, the amount agreed upon shall be the amount of the loss. If the appraisers fail to agree within a reasonable time, they shall submit their differences to the umpire. Written agreement signed by any 2 of these 3 shall set the amount of the loss. Each appraiser shall be paid by the party selecting that appraiser. Other expenses of the appraisal and the compensation of the umpire shall be paid equally by the insured and the insurer.

The parties do not dispute that MCL 500.2933(1)(m) applies and was the statute under which the award at issue in this case was ultimately produced. This Court has held in the past that the appraisal/arbitration process articulated in MCL 500.2833(1)(m) is "a substitute for judicial determination of a dispute concerning the amount of a loss, which is a simple and inexpensive method for the prompt adjustment and settlement of claims." *Auto-Owners Ins Co v Kwaiser*, 190 Mich App 482, 486; 476 NW2d 467 (1991) (citation and quotation marks omitted); see also *Thermo-Plastics R&D, Inc. v General Accident Fire & Life Assurance Corp, Ltd*, 42 Mich App 418, 422; 202 NW2d 703 (1972) (same). To that end, "[j]udicial review of the award is limited to instances of bad faith, fraud, misconduct, or manifest mistake." *Auto-Owners*, 190 Mich App at 486. Critically, "[t]he amount of loss attributable to personal property damage, as determined by the appraisers, *is conclusive*." *Id.* at 488 (emphasis added). Accordingly, when determining the loss amount, umpires and appraisers may "freely weigh speculative considerations affecting determinations of loss." *Union Lake Assoc, Inc v Commerce and Industry Ins Co*, 89 Mich App 151, 160; 280 NW2d 469 (1979); see also *Auto Owners*, 190 Mich App at 488.

Defendant does not claim, nor can we discern from the record, that the award was arrived at as the result of "bad faith, fraud, misconduct, or manifest mistake." *Auto-Owners*, 190 Mich App at 486. Defendant instead relies on the insurance contract's replacement cost provisions, which specify that the insured is required to submit proof of actual loss as a precondition of payment by the insurer. However, as the *Auto-Owners* court held, "[t]he amount of loss . . . as determined by the appraisers, *is conclusive*." *Id*. at 488 (emphasis added). The trial court properly noted as much when it held that this case did not involve "a contract matter, [but is] a judgment matter, and [defendant], as a result of the judgment is responsible to pay." Defendant offers no authority that either this Court or the trial court could properly consider the policy language once the appraisal process had concluded and the award was final. Indeed, as the *Auto-Owners* Court held:

> Although the [plaintiff's] policy requires defendant to "exhibit the damaged property to us or our representative as often as may be reasonably required," the appraisers' decision to award for loss without seeing some of the property, as apparently occurred in this case, reflects the method of determining the loss rather than a matter of coverage. The personal property appraisal award is affirmed. [*Id*. at 488.]

Defendant has offered no reason to depart from this holding. The appraisal award's determination regarding the amount of loss was conclusive and superseded the insurance policy's replacement cost provisions. Plaintiff was not required to submit proof of loss, and defendant is required to pay the full amount of the judgment described in the award.

Defendant argues that plaintiff was on notice that she had to provide receipts for proof of loss because after the award issued plaintiff's own insurance adjuster stated that plaintiff was required to replace her belongings before defendant would pay for them. The trial court declined to consider this evidence, citing the parol evidence rule. However, even assuming, arguendo, that the trial court could properly consider this evidence, defendant again fails to explain why plaintiff was still bound by the policy's language regarding replacement costs when the award's determination regarding the loss amount was conclusive. In short, neither that plaintiff was under the belief that she had to produce documentation regarding replacement costs, nor that she actually did produce such documentation, bears at all on whether defendant was in fact required to produce documentation regarding replacement costs. As explained, she was not in fact required to produce that documentation because the award superseded the policy.

Defendant next argues that in any event, plaintiff's complaint was untimely because plaintiff failed to comply with the one-year limitations periods in her policy and in MCL 500.2833(1)(q) . Specifically, defendant argues that it formally denied plaintiff's request for replacement costs in a letter dated July 18, 2007. Therefore, plaintiff had one year in which to

file her claim by statute and by the terms of the policy, and did not file her claim within that time.[1] We disagree.

Initially, we hold that MCL 500.2833(1)(q) does not apply to this case at all. This Court has held in the past that the appraisal process under MCL 500.2833(1)(m) is "effectively an arbitration." *Acorn Investment v Michigan Basic Prop Ins Ass'n*, 298 Mich App 558, 564 (2012). The statutory timeframe to challenge an arbitration award is six years. *Rowry v University of Michigan*, 441 Mich 1, 10; 490 NW2d 305 (1992); see also MCL 600.5807(8). Plaintiff commenced the instant action on July 29, 2011. Accordingly, even if the award had issued in January, 2006, plaintiff's action would have been within the six-year limitations period applicable to arbitration awards.[2]

However, even if MCL 500.2833(1)(q) did apply here, plaintiff's claim would still be timely because defendant never formally denied liability. According to MCL 500.2833(1)(q):

> 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.

In the instant case, the time period specified in the policy was one year.

This Court recently held that "a *formal* denial such as is necessary to end tolling must be explicit and unequivocally impress upon the insured the need to pursue further relief in court." *Smitham v State Farm Fire & Cas Co*, 297 Mich App 537, 545; 824 NW2d 601 (2012) (emphasis in original, citations omitted). The letter of July 18, 2007, upon which defendant relies on appeal, is not a formal denial of liability. Although the letter states that defendant was rejecting plaintiff's receipts because they were somehow "incomplete and insufficient," the letter kept open the possibility that plaintiff could resubmit those receipts and still have her claim processed. The letter closed by stating "I look forward to . . . helping [plaintiff] complete her claim . . . ." There is no way to interpret this letter as an "explicit and unequivocal[]" expression to the insured that she must "pursue further relief in court." *Id*. Defendant is indeed unable to point to a single document in which it formally denied liability. Because plaintiff never formally denied liability, the one year statute of limitations in MCL 500.2833(1)(q) was tolled and the one

[1] Defendant also argues that plaintiff's claim is time-barred because "proof of loss . . . is due 'within 180 days after the loss' under Section 6.b of the Policy." However, having determined that plaintiff was not required to submit proof of loss under the policy because the appraisal award controlled, we need not address this portion of defendant's argument.

[2] Defendant claims that the date of the award was actually January, 2007. In any case, plaintiff's action was filed within six years.

year statute of limitations has not yet begun. Accordingly, plaintiff's complaint, despite coming nearly six years after the award, was timely.

Affirmed.

/s/ Cynthia Diane Stephens
/s/ Kurtis T. Wilder
/s/ Donald S. Owens