STATE OF MICHIGAN

COURT OF APPEALS

D. J. MANUFACTURING, INC. and GENERAL COMPONENTS, Plaintiffs-Appellants, v CITIZENS INSURANCE COMPANY OF AMERICA, Defendant-Appellee.	UNPUBLISHED April 2, 1999 No. 205338 Oakland Circuit Court LC No. 97-539079 CK
D. J. MANUFACTURING, INC. and GENERAL COMPONENTS, Plaintiffs-Appellants, v CITIZENS INSURANCE COMPANY OF AMERICA, Defendant-Appellee.	 No. 206654 Oakland Circuit Court LC No. 96-523868 CK

Before: Markman, P.J., and Jansen and J.B. Sullivan*, JJ.

PER CURIAM.

In these consolidated cases, plaintiffs appeal as of right the trial court's orders granting defendant's motions for summary disposition in two separate but related lawsuits involving a dispute over insurance proceeds under a commercial property and general liability policy issued by defendant. In Docket No. 205388, the trial court granted summary disposition in favor of defendant on the basis

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

that plaintiffs failed to file a sworn proof of loss statement regarding their claim for interruption of business income coverage. In Docket No. 206654, the trial court granted summary disposition in favor of defendant on the ground that the order in Docket No. 205388 constituted res judicata. We affirm.

Plaintiffs' claims on appeal arise out of a fire that occurred on plaintiffs' insured premises on June 1, 1994, causing heavy damage to the property and plaintiffs' inventory. Defendant's insurance policy covering plaintiffs' business at the time of the fire provided coverage of $308,000 for buildings, $294,000 for inventory, and $90,000 for business income interruption and extra expenses. It is undisputed that, within a matter of weeks after the fire, defendant tendered checks to plaintiffs totaling over $600,000 of its $692,000 policy limits: the only amount unpaid related to the insurance coverage provided for interruption to plaintiffs' business income and extra expenses, of which it paid $66,167 of the $90,000 coverage limit.

Docket No. 206654 stems from plaintiffs' first complaint, filed on May 31, 1996 in order to recover damages of $23,833, plus interest, the unpaid amount of insurance remaining under the policy's business income and extra expense coverage. On February 5, 1997, plaintiffs moved to amend their initial complaint "to more specifically set forth certain losses of business income including extra expenses covered by the policy in issue," and to "relate this amendment back to the May 31, 1996 filing date of [plaintiffs'] initial complaint." The trial court's order denying the amendment was entered on February 13, 1997.

Docket No. 205388 is based on a second, separate suit, which was filed by plaintiffs on February 25, 1997, while their first suit was still pending. The second complaint filed by plaintiffs strongly resembled the first amended complaint that plaintiffs unsuccessfully sought to file in their 1996 action. On March 31, 1997, defendant moved for summary disposition in the second suit pursuant to MCR 2.116(C)(7), alleging that it was entitled to summary disposition "because Plaintiffs' claims are barred by their failure to file a Sworn Statement in Proof of Loss and their failure to bring this action within two years after the date on which the direct physical loss or damage occurred." It is undisputed that plaintiffs never submitted to defendant a sworn statement in proof of loss regarding their business interruption claim even though such a statement was required by their insurance policy and, indirectly, by MCL 500.2833(1)(q); MSA 24.12833(1)(q), which provides that "an action under the policy may be commenced only after compliance with the policy requirements."[1] It is also undisputed that defendant, with respect to plaintiffs' business interruption claim, failed to "specify in writing the materials which constitute a satisfactory proof of loss not later than 30 days after receipt of a claim unless the claim is settled within the 30 days," as required by MCL 500.2006(3); MSA 24.12006(3). Plaintiffs argued that defendant's failure to comply with §2006(3) precluded its "proof of loss" defense, but the trial court disagreed and granted summary disposition in favor of defendants,[2] appealed in Docket No. 205338. The trial court then granted summary disposition in favor of defendant in the first suit on the basis of res judicata, appealed in Docket No. 206654.

This Court reviews decisions on motions for summary disposition de novo to determine if the moving party was entitled to judgment as a matter of law. *Stehlik v Johnson (On Rehearing)*, 206 Mich App 83, 85; 520 NW2d 633 (1994). In Docket No. 205338, plaintiffs first argue that defendant is barred from asserting plaintiffs' failure to submit a sworn proof of loss as a defense because defendant

failed to specify in writing within thirty days of the fire what would have constituted a satisfactory proof of loss in accordance with MCL 500.2006(3); MSA 24.12006(3). Generally, "[t]he failure to furnish proof of loss within the time provided in the policy is fatal to plaintiff's claim." *Helmer v Dearborn Nat Ins Co*, 319 Mich 696, 700; 30 NW2d 399 (1948) (citations omitted). MCL 500.2833(1)(q); MSA 24.12833(1)(q) provides "[t]hat an action under the policy may be commenced only after compliance with the policy requirements." In the policy at issue, the section entitled "Business Income Coverage Form (and Extra Expense)," the subsection "Loss Conditions" states that the "following conditions apply in addition to the Common Policy Conditions and the Commercial Property Conditions": in the event of a loss the insured is obligated to "[s]end us a signed, sworn proof of loss containing the information we request to investigate the claim. You must do this within 60 days after our request. We will supply you with the necessary forms." Paragraph D1, under the section entitled "Commercial Property Conditions," provides that no one may bring a legal action against defendant "under this Coverage Part" unless "[t]here has been full compliance with all of the terms of this Coverage Part . . . ."[3] Thus, plaintiffs' policy clearly required that plaintiffs submit a signed, sworn proof of loss form with regard to their business income claim, which plaintiffs did not do.

However, plaintiffs argue that defendant's failure to "specify in writing the materials which constitute a satisfactory proof of loss not later than 30 days after receipt of a claim," pursuant to MCL 500.2006(3); MSA 24.12006(3), precludes defendant's defense that plaintiffs did not submit a proof of loss as required by the insurance policy and indirectly by MCL 500.2833(1)(q); MSA 24.12833(1)(q). Plaintiffs rely upon *Medley v Canady*, 126 Mich App 739, 745; 337 NW2d 909 (1983), in which this Court stated that the obligation to supply a satisfactory proof of loss in § 2006(4) must be read in light of § 2006(3), and thus, "failure to specify in writing the materials which constitute satisfactory proof of loss excuses the requirement of said proof of loss in [§ 2006(4)]." However, in our judgment, *Medley* is factually distinguishable from the case at bar, and thus does not bolster plaintiffs' position. *Medley* dealt with the payment of interest to a third party tort claimant on an insurance claim left unpaid in bad faith by the insurer beyond the time limit set for payment in § 2006(4). While it may be logical to read § 2006(3) together with the paragraph that directly follows it, § 2006(4), we do not believe that we must read § 2006(3) in light of a totally separate insurance policy requirement to file a sworn proof of loss statement.[4] Plaintiffs also rely on *Lawrence v Will Darrah & Associates, Inc*, 445 Mich 1, 4 n 2; 516 NW2d 43 (1994), in which the Supreme Court opined that even if the insurer in that case had preserved a proof of loss claim (which it had not), "the failure of the insurer to meet the thirty-day requirement found in [MCL 500.2006(3); MSA 24.12006(3)] would most likely have precluded a ruling in its favor." However, since this comment constitutes merely speculative dictum, we do not believe that it is dispositive in resolving the present question. The Supreme Court did not have the opportunity to fully consider and address this issue, taking all of the applicable factors into account. It neither had the opportunity to consider the specific language of the statute nor the insurance policy itself.

In *Dellar v Frankenmuth Mutual Ins Co*, 173 Mich App 138; 433 NW2d 380 (1988), this Court faced the question of whether an insurer's failure to comply with § 2006(3) excused the insured's failure to submit a sworn proof of loss pursuant to MCL 500.2832; MSA 24.12832, which, before its repeal in 1992, provided that a fire insurance policy must contain language requiring the insured to submit to the insurer a sworn proof of loss within sixty days after the fire, and that no suit on the policy

could be maintained unless all the requirements of the policy were met. See *Reynolds v Allstate Ins Co*, 123 Mich App 488, 489-90; 332 NW2d 583 (1983). This Court stated:

> We are invited by plaintiff to rule as a matter of law that performance by an insurer under § 2006(3) is a condition precedent to an insured's duty under § 2832(1) to provide a sworn proof of loss. We decline to go so far, but clearly a breach of such duty is a *factor relevant* to whether an insurer is estopped from asserting as a defense to payment of an otherwise valid claim the failure on the part of the insured to file a proof of loss. [*Dellar, supra* at 144 (emphasis added).]

Although § 2832 is not at issue in the case at hand, the language in the policy regarding the proof of loss requirement is similar to that found in the repealed § 2832.[5] Thus, we believe that *Dellar* is relevant to the case at hand, and that defendant's failure to comply with § 2006(3) constitutes a factor "relevant" to (but not controlling of) the issue of defendant's right to maintain its "proof of loss" defense. This conclusion is supported by the penalty provision of the uniform trade practices act, MCL 500.2001; MSA 24.12001, of which § 2006 is a part. MCL 500.2038; MSA 24.12038 provides specific sanctions for practices prohibited in §§ 2001-2050, and there is no indication that a penalty would include a prohibition against enforcing the terms and conditions of an insurance policy. Similarly, § 2006 itself only mentions an interest penalty for untimely payment of benefits, and does not allow for any private cause of action. *Dellar, supra* at 143.

Accordingly, we look to the specific circumstances of this case to determine whether defendant's failure to comply with § 2006(3), estopped defendant to assert the "proof of loss" defense. First, the insurance policy at issue here explicitly spells out the requirements for a plaintiff to receive a business income insurance payment, including filing a sworn proof of loss form as provided by defendant. Unlike the plaintiff in *Dellar, supra* at 147, who did not receive a copy of her insurance policy in order to timely file the proof of loss required by the policy, plaintiffs here were given a copy of at least the "business income (and extra expenses)" portion of the policy at issue on August 26, 1994. This policy clearly states, in such portion, that in the event of a loss the insured is obligated to "send us a signed, sworn proof of loss containing the information we request to investigate the claim. You must do this within 60 days after our request. We will supply you with the necessary forms." Thus, plaintiffs had notice of the proof of loss requirement regarding their business income claim from the policy even before defendant requested the proof of loss.

Second, plaintiffs were fully informed about the business income proof of loss, including their duty to file a sworn proof of loss and the information that constituted a satisfactory proof of loss to defendants. Plaintiffs requested by facsimile on October 3, 1994 that defendant provide a suitable proof of loss form in connection with the business income coverage, evidencing that plaintiffs were actually aware of the additional proof of loss requirement for the business income claim. In response, defendant sent a letter to plaintiffs on October 5, 1994 that clearly stated, in conformity with the policy, that although up to that time defendant had not requested a proof of loss for the business income portion of the claim, a blank sworn statement in proof of loss was enclosed with the letter, but was not required to be filed for sixty days from the date of this letter with regard to the business interruption claim. In addition, plaintiffs admit that two proof of loss forms, submitted on June 2, 1994 and September 8,

1994 with regard to the building and contents coverage, were identical to the blank proof of loss form sent by defendant with regard to the business income coverage. Plaintiffs' attorney also admitted to the trial court that he told his clients that they must submit a separate proof of loss form for the business income claim. Thus, plaintiffs were fully aware that they had to file a separate and specific business income proof of loss with the information contained within the blank form sent by defendant on October 5, 1994.

Third, plaintiffs were derelict in their duties under the insurance policy. Even though they had an insurance policy that clearly stated their duties and were fully informed further by defendant and their own attorney, plaintiffs failed to do what was required to collect their insurance under the policy. Plaintiffs do not dispute that they did not submit the specific proof of loss form required by the policy, but they try to argue now that they did not have to submit exactly what was required by the policy that they signed. It appears that plaintiffs simply ignored the requirements and would like this Court to find a way around the policy language.

On the basis of these particular facts, we believe that plaintiffs' failure to file a proof of loss with regard to the business income claim precluded their recovery of insurance benefits. Although defendant failed to fulfill a separate statutory requirement in this case, we believe that the greater dereliction under the circumstances of this case was plaintiffs'. Not every violation of a statute is a cause of harm, and here defendant's dereliction did not harm plaintiffs. In addition, defendant's noncompliance with § 2006(3) was subject to the penalties specifically prescribed by the statute itself, which did not include the preclusion of the "proof of loss" defense. Even if defendant had complied with § 2006(3), plaintiffs would not have had any more information than they already were given in plenty of time to timely file the business income proof of loss. This is not a case where an insurer has taken advantage of an innocent or unrepresented insured-- instead, the insured here ignored the policy and the information regarding the requirements. Thus, we do not believe that, under the facts of this case, defendant's failure to comply with MCL 500.2006(3); MSA 24.12006(3) precludes it from asserting plaintiffs' failure to file a proof of loss as a defense.

Plaintiffs next contend that summary disposition was improper because reasonable minds could differ regarding whether defendant waived its "proof of loss" defense by allegedly specifying and accepting plaintiffs' financial statements and by making partial payments on plaintiffs' claim, and then denying further liability on the claim. Plaintiffs' contention that waiver occurred when defendant paid a portion of the business interruption claim on the basis of plaintiffs' financial statements is unpersuasive. Unlike the insurers in plaintiffs' cited cases, defendant here did not deny all liability, which would make the proof of loss unnecessary. See e.g., *Johnson v National Fire Ins Co,* 254 Mich 126; 235 NW 864 (1931); *Young v Ohio Farmers' Ins Co,* 92 Mich 68; 52 NW 454 (1892). Rather, the issue is whether plaintiffs are entitled to the policy limits for business income or to some lesser sum, and a sworn statement in proof of loss is required for that determination. It is not logical to assume that, by making partial payment based on plaintiffs' financial documents, defendant waived its proof of loss requirement regarding the ultimate extent of the business income claim.[6] See *Helmer, supra.* Unlike the cases cited by plaintiffs in their brief on appeal, plaintiffs here were fully aware that a sworn proof of loss was required specifically for the business income claim and that the information required was contained in the

form sent by defendant on October 5, 1994. See *Masters Massachusetts Bonding and Ins Co,* 349 Mich 98; 84 NW2d 462 (1957); *Young, supra*. This is especially true in light of the October 5, 1994 letter from defendant requesting a sworn statement in proof of loss regarding plaintiffs' business income claim, which specifically stated that defendant did not waive any of the policy's terms or conditions, and expressly reserved all rights and defenses.[7] Overall, we conclude that defendant did not overtly waive the proof of loss requirement, nor mislead plaintiffs to expect that such requirement was no longer in effect.

Plaintiffs further argue that summary disposition was improper because their June 2, 1994 "Sworn Statement in Proof of Loss" and their July 29, 1994 letter to defendant created material issues regarding the sufficiency of these documents as constituting the requisite "proof of loss." We disagree. First, the amount claimed in the June 2, 1994 document is clearly described as "partial," contrary to plaintiffs' assertion that the June 2, 1994 proof of loss was for the full insurance policy amount of $692,000-- such amount was only listed as the total amount of insurance, not the amount claimed in the proof of loss. Of the $413,000 actually claimed, $313,000 is attributed to the *building* and $100,000 to the *contents.* This document, therefore, does not in any way constitute a sworn statement regarding plaintiffs' *business income interruption* claim. Second, although the July 29, 1994 letter notes in passing the policy's maximum coverage for business income as $90,000, it does not in any way state that this full amount was claimed or due. It was also unsworn. The letter was merely a formal notice of the fire and claim. Thus, neither of the documents could be viewed as giving defendant the same information as the specific business income proof of loss such that defendant would waive the actual proof of loss requirement.

Finally, in Docket No. 206654, plaintiffs appeal the trial court's order granting summary disposition in the first suit on the basis of res judicata. The complaint in this first suit was virtually the same as the complaint filed in the second suit, except for the addition of an interest claim in the second complaint, which was also the essence of the amendments sought and denied in the first suit. Thus, in view of our resolution of the issues raised in Docket No. 205338, and their application to Docket No. 206654, we need not reach the issues presented in Docket No. 206654. *Makowski v Towles,* 195 Mich App 106; 489 NW2d 133 (1992).

Affirmed.

/s/ Stephen J. Markman
/s/ Kathleen Jansen
/s/ Joseph B. Sullivan

[1] Plaintiffs argue that other information, including financial statements, letters and proof of loss forms submitted to defendant served as satisfactory proof of loss with regard to the business income claim, discussed infra. However, plaintiffs admit that they did not submit the specific signed, sworn proof of loss form with regard to the business income claim, as required by the policy.

[2] We do not understand the trial court to have granted summary disposition on any issue other than the "proof of loss" defense.

[3] It appears that the current policy achieves essentially the same result as the language formerly mandated by the repealed statutory provision, MCL 500.2832; MSA 24.12832, which provided that a fire insurance policy must contain language requiring the insured to submit to the insurer a sworn proof of loss within sixty days after the fire, and that no suit on the policy could be maintained unless all the requirements of the policy were met. See *Reynolds v Allstate Ins Co*, 123 Mich App 488, 489-90; 332 NW2d 583 (1983).

[4] We note that *Medley, supra,* was issued in 1983. Thus, we are not constrained to follow the holding of this case. MCR 7.215(H)(1).

[5] The similarity between the current policy and MCL 500.2832; MSA 24.12832 is likely explained, at least in part, by MCL 500.2833(2); MSA 24.12833(2), which provides: "Except as otherwise provided in this act, each fire insurance policy issued or delivered in this state pursuant to subsection (1) shall contain, at a minimum, the coverage provided in the standard fire policy under former section 2832."

[6] Plaintiffs admit that the business income claim could not be determined at the outset because it was an ongoing claim: "No one then knew how long the business restoration period would run nor therefore the total amount of DJ's business losses, if less than $90,000." Thus, proceeding with the adjustment of the coverage by defendant without a sworn proof of loss could be viewed as a necessary step in this type of claim.

[7] Plaintiffs' reliance on the October 5, 1994 letter as indicating that defendant waived its proof of loss defense by denying liability beyond February 28, 1995, is belied by the letter's explicit statement that defendant was not waiving any of the policy's requirements.