STATE OF MICHIGAN

COURT OF APPEALS

STATE FARM FIRE & CASUALTY,

Plaintiff-Appellant,

v

THOMAS WYLIE,

Defendant,

and

STATE AUTO INSURANCE,

Defendant-Appellee.

UNPUBLISHED
June 6, 1997

No. 189703
Wayne Circuit Court
LC No. 92-221631-NZ

Before: Sawyer, P.J., and Saad and Gage, JJ.

PER CURIAM.

Plaintiff appeals as of right the circuit court order granting summary disposition for garnishee-defendant State Auto. We affirm.

On November 11, 1990, Donald Demmy's garage, located on his property in Belleville, Michigan, burned down. At the time of the fire, Demmy was out of town and had entrusted the care of the property to defendant, Thomas Wylie. Plaintiff, Demmy's fire insurer, paid Demmy $27,004.49 for the replacement value of the loss and Demmy assigned its rights against Wylie to plaintiff. On August 4, 1992, plaintiff filed suit in Wayne Circuit Court against Wylie to recover for the payment of Demmy's loss. Plaintiff's complaint alleged that its investigation of the fire revealed that Wylie's careless smoking and negligent handling of flammable liquids caused the fire. Wylie failed to respond to the suit and default judgment was entered against him on September 23, 1992.

Pursuant to information obtained during several creditor's examinations, plaintiff filed a writ for non-periodic garnishment against State Auto on January 13, 1995. The garnishment claim was based

on a homeowner's insurance policy issued to Wylie's father by State Auto purporting to provide personal liability coverage to family members residing in the father's home. State Auto filed a garnishee disclosure denying any liability to Wylie. Subsequently, State Auto filed a motion for summary disposition arguing that any coverage that might have been available to Wylie was forfeited due to the failure of Wylie to give timely notice of the underlying suit. The trial court granted the motion, finding that the failure to notify resulted in prejudice to State Auto. From that order, plaintiff now appeals by right.

First, plaintiff argues that the trial court erred in finding that State Auto was prejudiced by the delay in receiving notice. We disagree. The trial court granted summary disposition pursuant to MCR 2.116(C)(10) upon finding no genuine issue of material fact with respect to the issue of prejudice. A motion for summary disposition pursuant to MCR 2.116(C)(10) tests whether there is factual support for the claim, and the motion must be supported by affidavits, depositions, admissions, or other documentary evidence. *Patterson v Kleiman*, 447 Mich 429, 432; 526 NW2d 879 (1994); *Radtke v Everett*, 442 Mich 368, 374; 501 NW2d 155 (1993). The party opposing the motion may not rest on the allegations of the pleadings, but must set forth, by affidavit or other means, specific facts which show that there is a genuine issue for trial. *Patterson*, *supra*, 447 Mich 432.

All of the supporting and opposing material must be considered by the court in making its decision on the motion. *Id*. Giving the nonmoving party the benefit of reasonable doubt, the trial court must determine whether a record may be developed which would create an issue upon which reasonable minds could differ. *Farm Bureau Mutual Ins Co of Michigan v Stark*, 437 Mich 175, 184-185; 468 NW2d 498 (1991). A trial court's grant of summary disposition is reviewed de novo on appeal. This Court must examine the entire record when reviewing a grant of summary disposition, to determine whether the defendant was entitled to judgment as a matter of law. *Borman v State Farm Fire & Casualty Co*, 198 Mich App 675, 678; 499 NW2d 419 (1993).

Under the terms of the policy issued to Wylie's father, if Wylie was a resident of his father's household at the time of the fire, he was an "insured" under the policy. The policy required that the insured give written notice of an accident or occurrence, and forward every notice, demand, summons or other process relating to the accident or occurrence to State Auto as soon as practicable. The purpose of notice provisions in insurance contracts is to allow an insurer to timely investigate the claim, and defend against fraudulent, invalid or excessive claims. *Wendel v Swanberg*, 384 Mich 468, 477; 185 NW2d 348 (1971). Because notice provisions are interpreted to require notice within a reasonable time, mere delay of notice by an insured to his insurer is no defense to recovery of insurance policy proceeds unless the insurer can show prejudice from the lack of notice. *Wood v Duckworth*, 156 Mich App 160, 162-163; 401 NW2d 258 (1986) (citing *Burgess v American Fidelity Fire Ins Co*, 107 Mich App 625, 628; 310 NW2d 23 [1981]); *Kermans v Pendleton*, 62 Mich App 576, 581; 233 NW2d 658 (1975). Absent prejudice, a delay in giving notice to an insurer will not result in forfeiture of coverage. *Wood*, *supra*, 156 Mich App 163. The burden is on the insurer to establish prejudice resulting from late notice. *Wendel*, *supra*, 384 Mich 478; *Burgess*, *supra*, 107 Mich App 628. The question of whether the notice was reasonably given is a question for the factfinder. *Wendel*, *supra*, 384 Mich 478, n 8; *Burgess*, *supra*, 107 Mich App 629. However, where the facts are

undisputed and only one conclusion is reasonably possible, the issue of prejudice is one of law. *Koski v Allstate Ins Co*, 213 Mich App 166, 175; 539 NW2d 561 (1995).

In the present case, it is undisputed that State Auto did not receive notice of the fire or suit until plaintiff notified it of the default judgment by letter dated February 2, 1994. This notice was more than three years after the fire, clearly precluding any effective investigation of the fire scene. Additionally, Demmy died prior to State Auto being notified of the fire on his property. This significantly impaired any attempt by State Auto to investigate the duties entrusted to Wylie by Demmy, and whether Wylie was living at Demmy's residence at the time of the fire. In light of these facts, a defense against the underlying claim by State Auto would be seriously impaired even if the default judgment was set aside. See *Wood*, *supra*, 156 Mich App 163-164; *Kermans*, *supra*, 62 Mich App 582. From this, we conclude that the trial court did not err in finding that State Auto was prejudiced by the lack of notice from its insured. Therefore, any coverage which State Auto's policy may have provided to Wylie was forfeited. Consequently, State Auto was not liable for garnishment.

Next, plaintiff argues that State Auto's garnishee disclosure was defective in pleading a defense under the insurance policy and, therefore, the trial court's grant of summary disposition pursuant to the disclosure was error requiring reversal. We disagree. The procedural aspects of the garnishment process are set forth exclusively in MCR 3.101 and 3.102. *Royal York of Plymouth Ass'n v Coldwell Banker Schweitzer Real Estate Services*, 201 Mich App 301, 304; 506 NW2d 279 (1993). State Auto complied with the applicable rules in filing its garnishee disclosure which denied any liability to Wylie. MCR 3.101(H)(1)(b). Nothing more than a general denial is required by the rules relating to the garnishment process.

Affirmed.

/s/ David H. Sawyer
/s/ Henry William Saad
/s/ Hilda R. Gage