STATE OF MICHIGAN

COURT OF APPEALS

DART BANK,

Plaintiff-Appellee,

v

TITAN INSURANCE COMPANY,

Defendant-Appellant.

UNPUBLISHED
April 22, 2003

No. 235483
Ingham Circuit Court
LC No. 01-093020-AV

Before: Talbot, P.J., and Sawyer and O'Connell, JJ.

PER CURIAM.

Defendant appeals by leave granted from a circuit court order affirming a district court's decision granting plaintiff summary disposition pursuant to MCR 2.116(C)(10). We reverse.

Marco Esquivel purchased a 1997 Chevrolet Blazer, which he financed at the dealership. The finance agreement was assigned to plaintiff in 1998. Under the terms of the contract, Esquivel was required to maintain insurance on his vehicle at all times. When Esquivel obtained insurance coverage for the vehicle, plaintiff was listed as a lienholder. However, Esquivel also named himself as an excluded driver. The Blazer was destroyed in an accident in January 2000, while Esquivel was operating it. Because Esquivel was an excluded driver, defendant denied plaintiff's claim for coverage under the loss payable clause.

After plaintiff commenced this action in the district court, the parties filed cross-motions for summary disposition on stipulated facts. The court found that plaintiff was entitled to coverage and granted plaintiff's motion. The court also awarded plaintiff twelve percent interest pursuant to MCL 500.2006. Defendant appealed to the circuit court, which affirmed both rulings. This Court subsequently granted defendant's application for leave to appeal.

This Court reviews a trial court's decision on a motion for summary disposition de novo. *Baker v Arbor Drugs, Inc*, 215 Mich App 198, 202; 544 NW2d 727 (1996). Plaintiff 's motion was granted under MCR 2.116(C)(10). A motion under MCR 2.116(C)(10) tests the factual support for a claim. The court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence. MCR 2.116(G)(5). Summary disposition should be granted if, except as to the amount of damages, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Babula v Robertson*, 212 Mich App 45, 48; 536 NW2d 834 (1995).

At issue is whether plaintiff was entitled to recover under the loss payable clause of defendant's insurance policy, which provides:

> LOSS PAYABLE
>
> **Loss** or damage covered by the policy shall be paid to you and the lienholder shown in the declarations. Payment for the **loss** may be made separately to each interested party. This insurance with respect to the lienholder, shall not become invalid except:
>
> 1. When **your covered auto** is intentionally damaged, destroyed or concealed by or at the direction of any Named Insured or any owner; or
>
> 2. When **your covered auto** is damaged, destroyed, or concealed as a result of any other act which constitutes a breach of contract between any Named Insured or owner and the lienholder.
>
> We reserve the right to cancel the policy terms and the cancellation shall terminate this agreement as to the lienholder's interest. We will mail notice of cancellation to the lienholder(s) shown on the declaration page. When we pay the lienholder we shall, to the extent of payment, be subrogated to the lienholder's rights of recovery. The lienholder agrees to notify us of any change of ownership or increase in hazard and to furnish us Proof of Loss within 60 days if the Named Insured or owner fails to do so within the time required in the policy.

In *Foremost Ins Co v Allstate Ins Co,* 439 Mich 378, 383-385; 486 NW2d 600 (1992), our Supreme Court explained that there are two types of loss payable clauses; whether coverage is available depends upon which type of clause has been adopted by the insurer:

> In general, there are two types of loss payable clauses, otherwise known as mortgage clauses, contained in insurance policies which protect lienholders. The first type, commonly known as an ordinary loss payable clause, directs the insurer to pay the proceeds of the policy to the lienholder, as its interest may appear, before the insured receives payment on the policy. Under this type of policy, the lienholder is simply an appointee to receive the insurance fund to the extent of its interest, and its right of recovery is no greater than the right of the insured. There is no privity of contract between the two parties because there is no consideration given by the lienholder to the insured. Accordingly, a breach of the conditions of the policy by the insured would prevent recovery by the lienholder.
>
> The second type of loss payable clause is known as a standard loss payable clause. Under this type of clause, a lienholder is not subject to the exclusions available to the insurer against the insured because an independent or separate contract of insurance exists between the lienholder and the insurer. In other words, there are two contracts of insurance within the policy--one with the lienholder and the insurer and the other with the insured and the insurer. Under

> the standard loss payable clause, the consideration for the insurer's contract with the lienholder is that which the insured paid for the policy itself.
>
> Traditionally, insurers have undertaken the risk that the insured will commit fraud against them by inserting a standard loss payable clause in the insurance contract for the lienholder's protection. The lienholder, usually the financial or lending institution, is assured, through the incorporation of the clause, that they will not be required to evaluate the borrower's insurance claim history when approving a loan. Thus, the lender protects its interest by requiring the borrower to obtain insurance with a loss payable clause made payable to the lender prior to purchasing the vehicle that will protect the lender against the defenses that could be asserted against the borrower by the insurer. [Footnotes omitted.]

We agree with the trial court that the policy in this case contained a standard loss payable clause, meaning that there was a separate contract for insurance coverage with plaintiff as a lienholder. However, as also discussed in *Foremost, supra* at 392 n 34, insurers may avoid liability to lienholders by expressly excluding coverage for certain acts committed by an insured. In this case, the loss payable clause provides that coverage is excluded if the insured breached his agreement with the lienholder. Plaintiff's agreement with Esquivel required that he maintain insurance on the vehicle at all times. However, by listing himself as an excluded driver, Esquivel negated coverage for the vehicle at all times while he operated it. Accordingly, by operating the vehicle while he was listed as an excluded driver, Esquivel breached his agreement. Thus, defendant was not liable to plaintiff pursuant to the express language in the loss payable clause excluding coverage in this circumstance.

We also reject plaintiff's suggestion that defendant should still be liable for coverage because it violated a duty of notification. See MCL 500.3020. In the context of this case, any duty of defendant was limited to providing plaintiff notice that Esquivel opted to list himself as an excluded driver. The documentary evidence submitted by defendant shows that defendant sent plaintiff a copy of the declarations page of Esquivel's policy, which clearly shows that Esquivel is listed as an excluded driver. It was thereafter incumbent upon plaintiff to exercise its right under the loan agreement to protect itself against risk of loss. Plaintiff did not submit any evidence countering the evidence submitted by defendant. *Smith v Globe Life Ins Co*, 460 Mich 446, 455-456 n 2; 597 NW2d 28 (1999). Thus, defendant is entitled to summary disposition on the issue of coverage.

Because we are reversing the trial court's decision to grant plaintiff summary disposition, we also vacate the trial court's award of penalty interest under MCR 500.2006.

Reversed.

/s/ Michael J. Talbot
/s/ David H. Sawyer
/s/ Peter D. O'Connell