

STATE OF MICHIGAN
COURT OF APPEALS

TIMOTHY THIERRY, KAREN THIERRY, and
TKT, INC., d/b/a I M THURSTIES TAVERN,

UNPUBLISHED
December 14, 2004

Plaintiffs-Appellants,

v

NORTH POINTE INSURANCE CO.,

No. 248081
Wayne Circuit Court
LC No. 01-135844-CK

Defendant-Appellee.

Before: Borrello, P.J., and Murphy and Neff, JJ.

PER CURIAM.

Plaintiffs appeal as of right from an order granting defendant's motion for summary disposition in this insurance coverage dispute. We affirm.

I

Plaintiffs sought coverage under a policy of insurance with defendant for alleged damages to a building in 1998 and continuing through 2000, caused by ground and earth movement during a county sewer construction project. Plaintiffs' initial claim for coverage was made on November 27, 1998, and denied by defendant by a letter dated December 10, 1998, on the ground that the claim fell within a policy exclusion applicable to earth movement. Plaintiffs subsequently made a second claim of loss through their attorney by a letter dated May 23, 2001. When defendant failed to provide coverage after the second claim, plaintiffs filed suit on October 18, 2001, alleging breach of contract and unfair trade practices. The trial court granted defendant's motion for summary disposition pursuant to MCR 2.116(C)(7) on the ground that plaintiffs' suit was barred by a two-year limitations period set forth in the insurance policy.

II

Plaintiffs argue that the trial court erred in granting summary disposition. Plaintiffs contend that the Insurance Code, MCL 500.2254, precludes defendant from establishing a contractual two-year limitation period as a precondition to filing a lawsuit. Alternatively, plaintiffs contend that most of their cause of action falls within the two-year limitations period because their May 23, 2001 letter tolled the limitations period. We find no basis for reversal with regard to either argument.

A

This Court reviews de novo a decision on a summary disposition motion under MCR 2.116(C)(7). *Fane v Detroit Library Comm*, 465 Mich 68, 74; 631 NW2d 678 (2001). We consider all documentary evidence submitted by the parties and accept as true the contents of the complaint unless affidavits or other appropriate documents specifically contradict them. *Id.* The proper construction of MCL 500.2254, is a question of law, also subject to de novo review. *Livonia Hotel, LLC v Livonia*, 259 Mich App 116, 130; 673 NW2d 763 (2003).

B

Plaintiffs' insurance policy contains the following provision concerning legal action:

LEGAL ACTION AGAINST US

No one may bring a legal action against us under this policy unless:

* * *

b. The action is brought within 2 years after the date on which the direct physical loss or damage occurred.

Plaintiffs argue that this policy provision is contrary to MCL 500.2254, which prohibits contractual bars to lawsuits against insurance companies, and the policy provision is therefore unenforceable. Accordingly, plaintiffs assert that because the statute of limitations generally applicable to contracts is six years, the two-year limitations period set forth in the insurance policy violates MCL 500.2254. We disagree.

MCL 500.2254, contained in the Insurance Code, provides:

Suits at law may be prosecuted and maintained by any member against a domestic insurance corporation for claims which may have accrued if payments are withheld more than 60 days after such claims shall have become due. *No article, bylaw, resolution or policy provision adopted by any life, disability, surety, or casualty insurance company doing business in this state prohibiting a member or beneficiary from commencing and maintaining suits at law or in equity against such company shall be valid and no such article, bylaw, provision or resolution shall hereafter be a bar to any suit in any court in this state:* Provided, however, That any reasonable remedy for adjudicating claims established by such company or companies shall first be exhausted by the claimant before commencing suit: Provided further, however, That the company shall finally pass upon any claim submitted to it within a period of 6 months from and after final proofs of loss or death shall have been furnished any such company by the claimant. [Emphasis added.]

Plaintiffs rely on a decision of the Kent Circuit Court, which considered the enforceability of an insurance policy provision requiring that a lawsuit be commenced within one-year from the date of loss. Although the circuit court held that the one-year limitation at

issue fell within the prohibition of § 2254 as a precondition to a lawsuit, the circuit court's decision has since been reversed on appeal. *Robinson v Allied Ins Co*, unpublished opinion per curiam of the Court of Appeals, issued August 3, 2004 (Docket Nos. 247375, 251003). This Court held that § 2254 "does not prohibit insurers from including provisions in their policies that limit the time insureds may file suit to collect benefits that have been denied to less than the time provided in the applicable statute of limitations." *Id.* at slip op p 12. Plaintiffs' reliance on the decision of the Kent Circuit Court is no longer appropriate.

Although the decision in *Robinson* is not binding with respect to our decision in this case, MCR 7.215(C)(1), we find its reasoning persuasive and concur with the result reached. We agree that the statutory language cannot be read to broadly prohibit any contractual modification of the generally applicable statute of limitations.

In this case, we need not decide whether any contractual time limitation for commencing legal action, no matter how short, would be violative of the prohibition in § 2254. We merely conclude that under the plain language of the statute, the two-year period in the policy at issue cannot be construed as prohibiting plaintiffs from "commencing or maintaining" a lawsuit nor can it be construed as a "bar" against a lawsuit. Plaintiffs had ample opportunity to commence a lawsuit following defendant's denial of their claim despite the contractual limitation.

C

Plaintiffs argue alternatively that this action was filed within the contractual two-year limitations period because plaintiffs suffered additional damages from the dewatering phase of the construction project after their 1998 claim to defendant, as reflected by their claim of May 23, 2001. Plaintiffs reason that the damages that occurred after May 23, 1999, are compensable because the limitations period was tolled after their May 23, 2001 claim, which defendant did not formally deny. We reject this argument.

Plaintiffs correctly note that the running of a limitations period provided in an insurance policy is tolled from the time that an insured gives notice of the loss until the claim is denied. *The Tom Thomas Organization, Inc v Reliance Ins Co*, 396 Mich 588, 596-597; 242 NW2d 396 (1976); *Saad v Citizens Ins Co of America*, 227 Mich App 649, 650; 576 NW2d 438 (1998). However, plaintiffs' counsel's letter of May 23, 2001, does not state a new claim unrelated to their 1998 claim. The letter stated in substantive part:

Re: I.M. Thirsties [sic]
Policy number NPD25479

Please be advised that our office represents the interests of [plaintiffs] relative to the above matter.

Under the above referenced policy number, [defendant] is responsible to pay for repairs to our client's property, which was damaged as a result of a county construction project, specifically known as Downriver Regional Storage and Transport System, Contract #4.

Moreover, [defendant] is also responsible for any loss in income I.M. Thirsties [sic] sustained during the project period, pursuant to its business income coverage under the relevant policy.

As such, please consider this notice of our client's claim. You may contact our office for any information or documents you may need to process this claim.

The letter indicates only that plaintiffs suffered damages to their property as a result of the construction project and may have suffered lost business income. There is no indication that any such damages occurred after December 1998 or were to be distinguished from the previous claim for construction project damages. As the trial court noted, plaintiffs' complaint states that damages sought in this action stem from construction "*beginning on or about November, 1998* [sic] and continuing on [sic] through 1999 and 2000." It is undisputed that defendant denied plaintiff's construction project claim by its letter dated December 10, 1998. Even allowing for tolling between the date of notice of loss and defendant's denial of the claim, the two-year limitations period would have ended in December 2000. We find no error in the trial court's conclusion that plaintiffs' lawsuit, filed October 18, 2001, was not filed within the two-year limitations period.

Affirmed.

/s/ Stephen L. Borrello
/s/ William B. Murphy
/s/ Janet T. Neff