

STATE OF MICHIGAN
COURT OF APPEALS

JEFF BRITTINGHAM and CINDY
BRITTINGHAM,

UNPUBLISHED
October 4, 2012

Plaintiffs-Appellants,

v

No. 305173
St. Joseph Circuit Court
LC No. 10-000740-CK

MICHIGAN INSURANCE COMPANY,

Defendant/Third-Party Plaintiff-
Appellee,

and

SAINT CASS, L.L.C., d/b/a SERVPRO OF CASS
& ST. JOSEPH COUNTIES,

Third-Party Defendant.

Before: M. J. KELLY, P.J., AND HOEKSTRA AND STEPHENS, JJ

PER CURIAM.

In this insurance claim dispute, plaintiffs Jeff and Cindy Brittingham appeal as of right the May 6, 2011 order of St. Joseph Circuit Court Judge Paul E. Stutesman granting defendant Michigan Insurance Company (MIC) summary disposition on the ground that the Brittinghams' suit was time barred under MCL 500.2833(1)(q). We affirm.

The trial court granted MIC's motion under MCR 2.116(C)(7). On appeal, MIC urges us to also review the matter under MCR 2.116(C)(10). Because MIC's motion is based on the argument that the Brittinghams' suit is time barred by statute of limitations, we conclude that MCR 2.116(C)(7) is the appropriate subrule for review. *Mousa v State Auto Ins Cos*, 185 Mich App 293, 294; 460 NW2d 310 (1990).

Appellate review of a motion for summary disposition is de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Additionally, whether a claim is time barred by statute is a question of law reviewed de novo. *DiPonio Constr Co, Inc, v Rosati Masonry Co, Inc*, 246 Mich App 43, 47; 631 NW2d 59 (2001), and questions of statutory interpretation are also reviewed de novo, *Hoffman v Boonsiri*, 290 Mich App 34, 39; 801 NW2d 385 (2010).

Under MCR 2.116(C)(7), a reviewing court considers “all documentary evidence and accepts[s] the complaint as factually accurate unless affidavits or other documents presented specifically contradict it.” *Shay v Aldrich*, 487 Mich 648, 656; 790 NW2d 629 (2010). Any documentary evidence submitted must be considered in a light most favorable to the nonmoving party. *RDM Holdings, Ltd v Continental Plastics Co*, 281 Mich App 678, 687; 762 NW2d 529 (2008). Whether summary disposition is appropriate under MCR 2.116(C)(7) presents a question of law. *Id.* However, if a factual dispute exists, summary disposition is not appropriate. *Id.*

In this case, the statute of limitations is set by MCL 500.2833(1)(q) which requires that:

Each fire insurance policy issued or delivered in this state shall contain the following provisions . . .

That an action under the policy may be commenced only after compliance with the policy requirements. 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.

The insurance policy issued to the Brittinghams included a time limitation without reference to tolling as required by MCL 500.2833(1)(q). Therefore, the time limitation is void and we read MCL 500.2833(1)(q) into the insurance contract. *Randolph v State Farm Fire & Cas Co*, 229 Mich App 102, 105; 580 NW2d 903 (1998). Accordingly, the Brittinghams were required to commence suit within one year of the date of their loss. MCL 500.2833(1)(q). However, “[t]he time for commencing an action is tolled from the time the insured notifies the insurer of the loss until the insurer formally denies liability.” MCL 500.2833(1)(q).

We conclude that the loss occurred on July 24, 2008. The facts are not in dispute in this regard. Both parties agree that the home initially suffered water damage on July 8, 2008. Subsequently, on July 24, 2008, the Brittinghams engaged a company called ServPro to clean the ducts and spray Sporicidin, an anti-microbial. As a result of the Sporicidin, the Brittinghams assert that they fell ill and vacated the home on the advice of their physician. The water damage on July 8, 2008 and the Sporicidin damage on July 24, 2008 are two discrete events in a series of losses, each resulting in different damages. See 13 Couch, Insurance 3d, § 191:6, p 191-16 (distinguishing between a “single loss” which is covered by the initial notice and a “series of losses” each calling for new notice). MIC paid for the losses occasioned by the water damage. The losses currently sought by the Brittinghams are the living expenses and environmental cleaning expenses caused by the use of Sporicidin. As such, the date of loss is July 24, 2008, and under MCL 500.2833(1)(q), absent tolling, the Brittinghams were required to file suit by July 24, 2009.

Regarding the Brittinghams’ provision of notice, the Brittinghams mention three dates of contact with MIC: July 14, 2008, June 1, 2009 and September 29, 2009. The Brittinghams assert that on July 14, 2008 MIC received notice of the loss. MIC does not dispute that notice of the initial water damage was provided on this date. However, July 14, 2008 was before the date of the Sporicidin loss. As such, the notice provided on July 14, 2008 could only have related to the

water damage, and could not have included notice of the Sporicidin damage that occurred on July 24, 2008.

Next, the Brittinghams contend that they contacted MIC on June 1, 2009 via a letter from their attorney which stated simply: “It was a pleasure speaking with you today regarding the above captioned matter. As discussed, please provide me with a copy of the policy that was in effect as of the above-stated date of loss together with the entire claim file relative to this incident.” The caption to the letter listed only the Brittinghams’ names, their address, and a date of loss of “July 2008.” The Brittinghams assert that this letter also serves as written documentation of discussions that took place on the same date, June 1, 2009. While the Brittinghams contend that this letter is proof of notice, the letter is devoid of any reference to Sporicidin, health hazards, illness, living expenses, or the events of July 24, 2008. The letter’s caption lists the date of loss as “July 2008,” which is the month in which the original water damage also occurred. Other than counsel’s oral assertions to the court that there were “on-going discussions,” there is no documentary or otherwise admissible evidence upon which the trial court could find even a question of fact regarding the Brittinghams providing any detail about the nature of their July 24, 2008 loss.. Without reference to July 24, 2008 as the specific date of loss or reference to the use of Sporicidin, there is no suggestion the letter concerns anything but the original water damage. Nowhere in this vague letter is there information to put MIC on notice that the Brittinghams suffered a new loss resulting from the use of Sporicidin, or to indicate a second claim was being made. As such, we conclude that the letter and related undocumented conversations did not offer the notice necessary to toll the statute of limitations under MCL 500.2833(1)(q).

Notice was finally provided by a demand letter from the Brittinghams to MIC dated September 29, 2009. In this letter the Brittinghams detailed the events of July 24, 2008 and the damage suffered as a result of the Sporicidin. It also makes clear the Brittinghams’ intention to file a claim relating to the Sporicidin expenses. While we conclude that the September 29, 2009 letter provided unequivocal notice to MIC of the Sporicidin damage, the time for the Brittinghams to file suit expired before that notice on July 24, 2009. Under MCL 500.2833(1)(q), we find that the Brittinghams suit filed in August of 2010 was not timely. Accordingly, the trial court properly granted MIC’s motion for summary disposition under MCR 2.116(C)(7).

Because the Brittinghams waited until after the statute of limitations had expired to provide notice, tolling is not applicable and we need not consider when a formal denial occurred. We reject the Brittinghams’ arguments that the statute of limitations did not begin to run until a formal denial was made, or that our adherence to the plain meaning of MCL 500.2833(1)(q) requires an insured to file a preemptive suit before a cause of action arises. The plain language of MCL 500.2833(1)(q) gives the insured one year from the date of loss to file suit, and, if applicable, the time for commencing the suit is tolled from when the insured provides notice until the insurer issues a formal denial. *Randolph*, 229 Mich App at 107; see also *Universal Underwriters Ins Group v Auto Club Ins Ass’n*, 256 Mich App 541, 544; 666 NW2d 294 (2003) (noting judicial construction is not permitted where a statute is clear and unambiguous). The statute of limitations began running after the July 24, 2008 loss. To take advantage of the tolling provisions, the Brittinghams were required to provide MIC with notice of the Sporicidin loss. Notice was not provided, and, after a year, the time for commencing suit expired.

MCL 500.2933(1)(q). Nothing in the plain language of MCL 500.2833(1)(q) suggests that a subsequent formal denial gives the Brittinghams another year in which to file suit.

Affirmed.

/s/ Michael J. Kelly

/s/ Joel P. Hoekstra

/s/ Cynthia Diane Stephens