

STATE OF MICHIGAN
COURT OF APPEALS

FARM BUREAU INSURANCE COMPANY,

Plaintiff-Appellant,

v

AUTO OWNERS INSURANCE COMPANY,

Defendant-Appellee.

UNPUBLISHED

May 24, 2005

No. 253914

Lapeer Circuit Court

LC No. 00-028917-CZ

Before: Saad, P.J., and Zahra and Schuette, JJ.

PER CURIAM.

Plaintiff appeals as of right an order granting defendant summary disposition. We affirm.

I. FACTS

Plaintiff and defendant insured the same property which was destroyed by a fire in 1999. Plaintiff paid the loss and requested reimbursement or pro rata contribution from defendant. After defendant refused, plaintiff brought this suit against defendant. The ownership interests in the property are set forth below.

Francis Pasternak, Jr. and Lindy Pasternak refinanced their property and mortgaged it to the Adamics. In February of 1999, the Adamics commenced a foreclosure action after the Pasternaks failed to make mortgage payments and pay property taxes. In April of 1999, in lieu of foreclosure, the Adamics and Francis Pasternak entered an "Agreement for Conveyance of Land in Lieu of Foreclosure." Pasternak granted a warranty deed to the Adamics. The Adamics agreed to lease the property to Pasternak and granted him two alternative options to purchase the property back from the Adamics: first, the Adamics agreed to enter a land contract with Pasternak if he tendered \$50,000 by November 11, 1999; alternatively, the Adamics agreed to sell the property outright to Pasternak if he tendered \$255,000 by February 11, 2000. The parties entered into a separate lease agreement which allowed Pasternak to remain on the property rent free until February 11, 2000.

In August of 1999, the Adamics purchased insurance coverage for the property from plaintiff. However, in July of 1999, Francis Pasternak purchased insurance coverage for the same property from defendant. In the application for this insurance, Pasternak represented that the property was titled in his name and that he had not been past due on the mortgage or taxes during the proceeding five years.

On September 18, 1999, the dwelling on the property was completely destroyed by fire. Plaintiff paid the Adamics the actual cash value of the property. Pasternak filed a claim seeking benefits from defendant. During the investigation Pasternak again represented that he was the owner of the property and that the mortgage and taxes were up to date. After an investigation, defendant denied Pasternak's claim for benefits. Defendant also declined plaintiff's request for pro rata payment.

In September of 2000, plaintiff brought an action against defendant asserting that defendant was obligated under its policy to prorate the loss with plaintiff. Defendant filed a motion for summary disposition pursuant to MCR 2.116(C)(10) arguing that plaintiff was not entitled to pro rata contribution from defendant because the Adamics were not contract holders and the policies did not insure the same interest. The court granted defendant's motion.

II. STANDARD OF REVIEW

A trial court's decision on a motion for summary disposition is reviewed de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). The pleadings, affidavits, depositions, admissions, and any other documentary evidence submitted by the parties must be considered in the light most favorable to the nonmoving party. *Id.* A genuine issue of material fact exists when the record leaves open an issue upon which reasonable minds could differ. *West v GMC*, 469 Mich 177, 183; 665 NW2d 468 (2003). When the evidence fails to establish a genuine issue of material fact, the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). The interpretation of contractual language is an issue of law that is reviewed de novo on appeal. *Morley v Auto Club of Michigan*, 458 Mich 549, 465; 581 NW2d 237 (1998).

III. ANALYSIS

Plaintiff contends that the April 1999 deed in lieu of foreclosure acknowledges that Pasternak is the sole title holder of the property. This claim has no merit. Plaintiff completely misconstrues the document. More importantly, the agreement referenced by plaintiff merely indicates that Francis Pasternak had acquired all of the right, title and interest of Lindy, Paul and Jennifer Pasternak and was the sole title holder at the time of the agreement. This was necessary because on April 22, 1997, Francis and Lindy Pasternak executed a quit claim deed conveying a portion of the property to Paul and Jennifer Pasternak. The document further provides that Pasternak conveyed his interest to the Adamics. Moreover, Pasternak signed a warranty deed conveying the property to the Adamics.

Next, plaintiff suggests that the Adamics were in a position similar to a land contract holder. This claim is also without merit. The Adamics were the fee simple owners of the property, not land contract vendors or mortgagees, at the time that the insurance policy was purchased from defendant and at the time of the fire. Prior to purchasing the policy from defendant, Pasternak deeded the property to the Adamics, as reflected in the agreement for conveyance of land in lieu of foreclosure and the warranty deed. Pasternak's option to purchase did not constitute an interest in land or a contract for purchase. *Oshtemo Twp v Kalamazoo*, 77 Mich App 33, 37-38; 257 NW2d 260 (1977). Moreover, the existence of the option contract did

not make the Adamics a “contract holder” under the defendant’s insurance policy. The term “contract holder” is not defined in the policy; therefore, it should be given its commonly used meaning. *Twichel v MIC General Ins Corp*, 469 Mich 524, 534; 676 NW2d 616 (2004). Pasternak’s representations and the policy language are most reasonably constructed as referencing a land contract vendor, not the party to an option contract. Accordingly, the Adamics were not contract holders within the meaning of defendant’s policy.

Although Pasternak had an insurable interest in the property, the failure to exercise the option to purchase and Pasternak’s misrepresentations to Auto Owners precluded him from collecting benefits under the policy. Public policy prohibits recovery on an insurance contract unless the beneficiary has an insurable interest in the subject of the policy. *Secura Ins v Pioneer St Mut Ins*, 188 Mich App 413, 415; 470 NW2d 414 (1991). The existence of an insurable interest depends on whether the insured will suffer a loss by the destruction of the property or gain an advantage due to the interest’s existence and is not determined by title, possession or any other label attached to the insured’s property right. *VanReken v Allstate Ins Co*, 150 Mich App 212, 219; 388 NW2d 287 (1986). “Insurance policies founded upon mere hope and expectation, and without some interest in the property, are objectionable as a species of gambling.” *Secura, supra* at 413. Defendant relies on *Oshtemo, supra* at 33, for the proposition that an option to purchase land is not an insurable interest. However, *Oshtemo* merely holds that an option is not a property right. *Id.*, 38. The existence of a property right is not coextensive with the existence of an insurable interest. *VanReken, supra* at 219. Our Supreme Court has held that an option to purchase land is an insurable interest. *Crossman v American Ins Co of Newark*, 198 Mich 304, 311; 164 NW 428 (1917). However, in *Crossman*, the option holder disclosed the nature of his interest to the insurance company when he took out the policy and exercised the option subsequent to the fire loss. *Id.*, 304. Similarly, our Supreme Court has held that the equity of redemption is an insurable interest where the prospective insured discloses the nature of the interest prior to obtaining insurance. *Perkins v Century Ins*, 303 Mich 697, 682; 7 NW2d 106 (1942). Pasternak’s option to purchase the property technically gave him an insurable interest at the time he purchased the policy from defendant and at the time of the loss. However, his failure to exercise the option when it became due precludes him from recovering under the policy. Accordingly, the Adamics are precluded from recovering under the policy, and plaintiff is not entitled to pro rate the loss.

Finally, Pasternak’s fraud allows defendant to avoid the contract. This Court has held:

[W]here an insured makes a material misrepresentation in the application for insurance . . . the insurer is entitled to rescind the policy and declare it void ab initio. Rescission is justified without regard to the intentional nature of the misrepresentation, as long as it is relied upon by the insurer. Reliance may exist when the misrepresentation relates to the insurer’s guidelines for determining eligibility for coverage. *Lake States Ins v Wilson*, 231 Mich App 327, 331; 586 NW2d 113 (1998) (citations omitted).]

The insurance policy in question provides:

CONCEALMENT OR FRAUD This entire policy is void if an insured person had intentionally concealed or misrepresented any material fact or circumstance

relating to this insurance. [Auto Owners Insurance Farm Policy attached to Defendant's brief on appeal, exhibit I, 22.]

In the application for this insurance, Pasternak represented that the property was titled in his name and that he had not been past due on the mortgage or taxes. However, Pasternak did not own the property and failed to pay his mortgage and taxes following the 1997 mortgage agreement with the Adamics. Defendant affirmatively states that it would have denied Pasternak's application if he had filled it out correctly. Plaintiff suggests that Pasternak's misrepresentations were not material, and relies on the underwriters' deposition testimony to argue that a policy would have been issued if all the information was available to the underwriters. Yet, plaintiff misconstrues this testimony and the record contradicts plaintiff's assertion. Indeed in their depositions the underwriters merely testify that some form of an insurance policy could have been issued if the true *ownership interests* were known. Plaintiff offers no proof that a policy would have been issued if Pasternak's failure to pay the mortgage and taxes had been known by defendant. Pasternak's misrepresentations allowed Auto Owners to rescind the policy. Auto Owners has no obligation to Pasternak and thus has no obligation to plaintiff. Therefore, the Adamics were not able to recover under defendant's policy, and plaintiff is not entitled to a pro rata contribution from defendant.

Affirmed.

/s/ Henry William Saad

/s/ Brian K. Zahra

/s/ Bill Schuette