

STATE OF MICHIGAN
COURT OF APPEALS

GENERAL AGENCY COMPANY,

Plaintiff/Counter-Defendant-
Appellee,

v

HURON OIL COMPANY, L.L.C., PEARSONS,
INC., HURON TRANSPORTATION, L.L.C., and
ERWIN J. LEWANDOWSKI,

Defendants/Counter-Plaintiffs-
Appellants.

UNPUBLISHED

April 27, 2010

No. 288663

Presque Isle Circuit Court

LC No. 07-002769-CZ

Before: SERVITTO, P.J., and FITZGERALD and BECKERING, JJ.

PER CURIAM.

Defendants appeal as of right the judgment awarding plaintiff damages of \$70,000 in accordance with the jury's verdict, plus costs and interest of \$6,525.71 against all three corporate defendants, jointly and severally,¹ in this breach of contract action to recover the balance owed for insurance coverage procured by plaintiff on behalf of defendants. We affirm.

Plaintiff is an independent insurance agency and was endorsed by the Michigan Petroleum Association ("MPA") to market insurance to MPA members. Defendants Huron Oil Company, L.L.C., Pearsons, Inc., and Huron Transportation, L.L.C. are related corporations connected to the petroleum industry. Defendant Erwin Lewandowski owns both Huron Oil and Huron Transportation, and his son, Richard Lewandowski, owns Pearsons.

Plaintiff's agent, John Olson, began writing insurance policies for defendants in 2002. At that time, defendants had coverage through the MPA's endorsed insurer, Employers Mutual Casualty Company ("Employers Mutual"). Defendants' account with plaintiff was kept current through approximately August 2005. In 2006, Employers Mutual canceled defendants' policies due to excessive claims. According to plaintiff, because of defendants' loss history, the only comparable coverage it could obtain for defendants was through Empire Fire & Marine

¹ The jury found that individual defendant Erwin Lewandowski was not liable.

Insurance Company (“Empire”). Although Empire’s coverage was more costly, Olson testified that defendants authorized him to obtain the coverage because defendants did not have any other alternatives. Plaintiff also obtained other necessary coverages for defendants through other insurance carriers. Because Empire did not offer a billing program, plaintiff paid the premium amount directly to Empire and then billed defendants on an installment basis for the amount of the premiums.

After August 2005, defendants began to accumulate a balance on their account with plaintiff. Although coverage changes were made to lower the cost, plaintiff claimed that defendants owed more than \$90,000 in past-due premiums by January 2007. At that point, plaintiff could not carry the balance any longer and the policies were cancelled. Plaintiff then filed this action to collect the past-due premiums. Defendants filed a counterclaim.

I. SUMMARY DISPOSITION OF DEFENDANTS’ COUNTERCLAIM

Defendants first argue that the trial court erred in granting plaintiff’s motion for summary disposition of their counterclaim in which they alleged that plaintiff breached its fiduciary duties as their insurance agent. Defendants alleged that plaintiff represented that it would work diligently to obtain the best appropriate insurance coverage at the best premium reasonably available in the market, and that they reasonably relied on plaintiff’s representations, but subsequently discovered that plaintiff obtained coverage at “unrealistically high premium charges for the coverage,” “grossly and intentionally overstated values of [the] insured assets,” and made “numerous mistakes in the coverage and premium credits.” The trial court granted plaintiff’s motion for summary disposition of defendants’ counterclaim because the evidence did not establish a special relationship or contract to impose a fiduciary duty on plaintiff.

This Court reviews a trial court’s summary disposition decision de novo. *Spiek v Dep’t of Transp*, 456 Mich 331, 337; 572 NW2d 201 (1998). Although plaintiff requested summary disposition under both MCR 2.116(C)(8) and (10), it appears that the trial court granted the motion under MCR 2.116(C)(10) because it considered evidence beyond the pleadings. A motion under MCR 2.116(C)(10) tests the factual support for a claim. The trial court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted by the parties, and view that evidence in the light most favorable to the nonmoving party. MCR 2.116(G)(5); *Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817 (1999). Summary disposition should be granted if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Maiden*, 461 Mich at 120. “Whether a duty exists is a question of law that is solely for the court to decide.” *Harts v Farmers Ins Exch*, 461 Mich 1, 6; 597 NW2d 47 (1999).

In *Harts*, our Supreme Court recognized that an insurance agent has no duty to advise an insured regarding the adequacy of insurance coverage. *Id.* at 7-8. The agent’s principal is the insurance company, and therefore, the agent’s job is merely to present the product of his principal and take orders from those who want to purchase coverage. *Id.* at 8. Furthermore, this state has recognized a distinction between insurance agents and insurance counselors. Insurance agents are essentially “order takers,” whereas insurance counselors primarily function as advisors on insurance coverage. *Id.* at 8-9.

Nonetheless, the Court in *Harts* recognized that there can be exceptions to the limited role of insurance agents if the relationship between the insured and the agent is altered into “a ‘special relationship’ that gives rise to a duty to advise on the part of the agent.” *Id.* at 9-10. In *Harts* the Court explained that a special relationship sufficient to impose a duty on an agent arises when

(1) the agent misrepresents the nature or extent of the coverage offered or provided, (2) an ambiguous request is made that requires a clarification, (3) an inquiry is made that may require advice and the agent, though he need not, gives advice that is inaccurate, or (4) the agent assumes an additional duty by either express agreement with or promise to the insured. [*Id.* at 10-11 (footnotes omitted).]

Defendants’ counterclaim alleges that plaintiff “represented that it would work diligently to obtain the best appropriate insurance coverage for the best premium reasonably available in the market.” Defendants alleged that they reasonably relied on plaintiff’s representations until they discovered in 2006 that the premiums were “unrealistically high” for the coverage provided. Furthermore, defendants claimed that plaintiff “intentionally overstated [the] values of [the] insured assets” and made mistakes regarding coverage and credits for changes in coverage.

After reviewing the record, we agree with the trial court that the evidence failed to establish a genuine issue of material fact regarding the existence of a special relationship to support the allegations in defendants’ counterclaim for breach of a fiduciary duty. Plaintiff’s promotional materials and Olson’s statements when he solicited defendants’ business did not establish that plaintiff was assuming some special or additional duty to defendants. The crux of defendants’ allegations is their dissatisfaction with the increase in their premiums when they switched insurers. Although defendants argue that plaintiff made errors that caused the increase in premiums, defendants have not shown that this involved special expertise or advice to defendants. Defendants’ overall complaint was not that they were offered improper advice about coverage issues, but that they were charged too much or that plaintiff did not seek enough competitive bids. Under *Hart*, this is insufficient to support defendants’ cause of action. Accordingly, the trial court did not err in granting plaintiff’s motion for summary disposition of the counterclaim.

II. DEFENDANTS’ RIGHT TO CREDITS AND OFFSETS

Defendants next argue that the trial court erred in granting plaintiff’s motion in limine to preclude defendants from offering evidence of the parties’ relationship, including claims for offsets and credits, before August 1, 2005. This Court reviews a trial court’s ruling on a motion in limine for an abuse of discretion. *Bartlett v Sinai Hosp of Detroit*, 149 Mich App 412, 418; 385 NW2d 801 (1986). We find no error.

This case was presented to the jury on plaintiff’s claim for breach of contract. More specifically, it involved a claim based on a revolving account. According to defendants, they had an open or fluctuating account with plaintiff; they have always denied owing plaintiff the full amount claimed; their briefs in opposition to plaintiff’s motion for summary disposition and motion in limine, as well as the affidavit of defendant Erwin Lewandowski, establish that they were entitled to specific “set-offs” pre-August 2005; the trial court’s denial of their counterclaim

should not have precluded them from presenting that “set-off” evidence at trial, especially considering that the court permitted them to present evidence of post-August 2005 “set-offs”; and whether there was a zero balance as of August 2005 was in dispute, so the August 2005 cut-off date was completely arbitrary.

The trial court did not set the August 2005 cut-off date arbitrarily. It selected that date based on the parties’ representation that there was a zero balance at that point, i.e., plaintiff was not claiming that defendant owed them any money prior to that date, only from that point forward. As plaintiff’s attorney pointed out at oral arguments on appeal, defendants attached an account activity sheet to its brief in opposition to plaintiff’s motion in limine, which indicated that there was a zero balance in August 2005 (granted, in n 1 of the brief, defendants stated that the sheet was one of many different accountings prepared by plaintiff). It was after that time, when Employers Mutual cancelled its coverage and new coverage was obtained through Empire, that an unpaid balance began to accrue and defendants began to question the amounts that were billed. At the hearing on the motion in limine, defense counsel first stated that defendants contested that there was a zero balance in August 2005, but later stated that he was unsure of when there was a zero balance and that it was approximately August 2005. Defendants have not presented any evidence to indicate that there was not a zero balance at that time.

The heart of defendants’ argument is that even if there was a technical zero balance in August 2005, they were overcharged, and thus, overpaid, before that date and do not owe plaintiff as much because of those overpayments. Defendants call it a “set-off”, but they are essentially arguing that they are entitled to credits because they were overcharged and they overpaid in the past. At oral arguments on appeal, defense counsel stated that defendants were entitled to approximately \$60,000 in “set-offs”, including pre-August 2005 “set-offs”, and that those “set-offs” were listed in their brief in opposition to plaintiff’s motion for summary disposition, Lewandowski’s affidavit, and their brief in opposition to plaintiff’s motion in limine (which states that defendants are entitled to “credits” for credits not properly applied, premiums for non-existent locations and vehicle charges, excess premiums resulting in inflated vehicle values, and unearned penalties, totaling approximately \$60,000). But what defendants fail to acknowledge on appeal is that all of the “set-offs” or “credits” they claim are entitled to overlap with what they claimed in their counterclaim, which the trial court dismissed in granting plaintiff summary disposition.

Defendants argue that because they were permitted to present evidence of post-August 2005 “set-offs” at trial, they should have been permitted to present pre-August 2005 evidence. The key distinction, however, is that plaintiff only claimed that defendants had an outstanding balance after August 2005. The amount of that balance was to be determined by the jury. Therefore, the court was within its discretion in concluding that the admission of pre-August 2005 evidence would have been irrelevant and would only have confused the jury. MRE 401, 403. Accordingly, the trial court did not abuse its discretion in granting plaintiff’s motion in limine. See *Bartlett*, 149 Mich App at 416-417.

III. JOINT AND SEVERAL LIABILITY

Defendants next argue that the trial court erred in giving the jury a supplemental instruction that allowed it to find defendants jointly and severally liable. The trial court’s instructions allowed the jury to apportion damages among the defendants individually, or to find

that defendants were jointly and severally liable. The jury awarded plaintiff \$70,000 against the three corporate defendants, jointly and severally.

Claims of instructional error are ordinarily reviewed de novo. *Ward v Consolidated Rail Corp*, 472 Mich 77, 83; 693 NW2d 366 (2005). But as explained in *Guerrero v Smith*, 280 Mich App 647, 660; 761 NW2d 723 (2008), this Court applies an abuse-of-discretion standard when reviewing a trial court's decision regarding supplemental jury instructions. A trial court is entitled to some deference in deciding whether the evidence supports an instruction. *Keywell & Rosenfeld v Bithell*, 254 Mich App 300, 339; 657 NW2d 759 (2002).

The abolition of joint and several liability in tort cases, or cases involving "another legal theory seeking damages for personal injury, property damage, or wrongful death," MCL 600.2956, does not apply to contract actions. *Zahn v Kroger Co of Michigan*, 483 Mich 34, 38-40; 764 NW2d 207 (2009); *Laurel Woods Apartments v Roumayah*, 274 Mich App 631, 641-642; 734 NW2d 217 (2007). In a contract action, if the parties agreed that the defendants would be jointly and severally liable for any damages caused by any one or all of them, joint and several liability can apply. *Laurel Woods*, 274 Mich App at 642.

In this case, the evidence showed that a single application for insurance was submitted jointly in the names of all three corporate defendants, and defendants were jointly listed on the policies. These facts support the trial court's decision to instruct the jury that defendants could be jointly and severally liable for the policy premiums.

Affirmed.

/s/ Deborah A. Servitto
/s/ E. Thomas Fitzgerald
/s/ Jane M. Beckering