

STATE OF MICHIGAN
COURT OF APPEALS

MARCY PRESTON,

Plaintiff/Counter-Defendant-
Appellant,

v

PIONEER STATE MUTUAL INSURANCE
COMPANY,

Defendant/Counter-Plaintiff-
Appellee.

UNPUBLISHED

October 9, 2012

No. 305295

Presque Isle Circuit Court

LC No. 10-002948-CK

Before: SHAPIRO, P.J., and GLEICHER and RONAYNE KRAUSE, JJ.

PER CURIAM.

After a fire destroyed plaintiff Marcy Preston's home, she made a claim under her homeowners' insurance policy issued by defendant Pioneer State Mutual Insurance Company. Pioneer required Preston to submit to an examination under oath (EUO). Preston agreed to do so, and answered questions for approximately three hours. She refused to appear for a continuation of the EUO, and later sued Pioneer for breach of the insurance contract.

Pioneer sought summary disposition based on Preston's failure to complete the EUO. Preston responded that she had not appeared because she was caring for a relative who was in the terminal stages of cancer. The circuit court rejected this excuse, finding the record supported that Preston had willfully refused to continue the exam. We agree with the circuit court's assessment, and affirm.

I. UNDERLYING FACTS AND PROCEEDINGS

Preston's insurance policy with Pioneer provided that "as often as [Pioneer] reasonably require[s]," Preston must "submit to statements and examination under oath, while not in the presence of any other insured, and sign the same[.]" The policy further obligated Preston to "produce representatives, employees, members of the insured's household or others for [EUO] to the extent it is within the insured's power to do so[.]" No legal action could be brought to enforce the policy "unless the policy provisions [had] been complied with and the action [was] started within one year after the date of loss."

Initially, Preston cooperated with Pioneer's demands that she undergo an EUO and that she produce family members for EUOs. On November 10, 2009, counsel for Pioneer questioned Preston and her son under oath for a total of almost seven hours. Counsel's questions of Preston focused primarily on events preceding the fire, which had been determined to have originated from arson. Toward the end of the examination the subject shifted to a review of Preston's proof of loss. Counsel for Pioneer announced after approximately three hours of questioning, "[w]e're not concluding it, but we are discontinuing it to a future date – continuing it to a future date at this point." Neither Preston nor her counsel objected to this plan.

The parties scheduled the continued EUO for December 2, 2009. They then agreed to change the date to December 17. On December 16, Preston's counsel faxed a letter to Pioneer's attorney advising: "As a result of illness in Marcy Preston's family we are requesting an adjournment of the Statements Under Oath that we scheduled for December 17, 2009. Marcy's aunt is apparently dying of cancer and Marcy, as well as her mother, are not able to attend the depositions tomorrow."

On January 12, 2010, Pioneer's attorney sent a letter to Preston and her counsel, stating:

This will serve to confirm the substance of a telephone discussion your attorney, Mr. Michael J. Hackett and our attorney, Mr. Pete Payette had last week in which you had informed your attorney that you are refusing to submit to any further [EUO], and will not appear at his office on January 20, 2010, the date earlier agreed upon for that purpose, and the examinations of several other persons that you agreed to produce.

The letter additionally advised Preston that her "refusal to discharge" her contractual obligations under the policy afforded Pioneer "no alternative but to hereby, formally and absolutely, deny all liability under the policy in connection with this loss and claim."

Approximately nine months later, Preston's new attorney faxed a letter to Pioneer conceding that Preston's "claim was denied because she did not want to continue to be subjected to your examination." The letter continued, "Marcy Preston, however, has reconsidered and is willing to allow you to conclude her EUO. She will also ask others, who you may want to examine, to cooperate and appear for their sworn statements." Preston admits that neither she nor her counsel contacted Pioneer between January and September 14, 2010.

Pioneer declined Preston's invitation to continue the EUO. On October 12, 2010, Preston sued Pioneer seeking coverage for the fire loss. Pioneer filed a motion for summary disposition under MCR 2.116(C)(10), asserting that Preston's failure to cooperate with rescheduling the EUO barred her claim. In response, Preston submitted an affidavit attesting:

5. On November 10, 2009, at Pioneer's request, I appeared for an Examination Under Oath ("EUO") and produced other witnesses within my control for separate statements under oath.

6. Also at Pioneer's request, I submitted a Sworn Statement in Proof of Loss, allowed onsite investigations of my home, authorized Pioneer and its

investigators to take any evidence they wanted from my home, and otherwise cooperated with Pioneer.

7. I also cooperated with separate investigations into the fire by law enforcement.

8. During this time, I was caring for my aunt, Ilene Jennings, while she was in the terminal stages of cancer.

9. My aunt was like a mother to me, since she helped raise me.

10. My aunt's battle with cancer was difficult to watch, since I have previously lost other relatives to cancer.

11. I asked Pioneer to reschedule a second EUO, and, when Pioneer rescheduled the EUO while I was caring for my aunt, I temporarily refused to appear. I did not intend to abandon my claim by doing this.

12. After my aunt succumbed to cancer, I offered to continue my EUO.

The circuit court ruled that *Thomson v State Farm Ins Co*, 232 Mich App 38; 592 NW2d 82 (1998), supported summary disposition in favor of Pioneer. The court explained that *Thompson* held:

[I]f you've got a contract, you got to live up to the terms. And that's not what happened here. From December on, it was very clear that [Preston] was not going to give the EUO. So even at that juncture, while I would be personally of a mind to say, Well, okay, then, she's willing to give the EUO now, yet I'm instructed by the appellate court that if the noncompliance is willful, then the dismissal has to be with prejudice. So it's not without some reluctance, but I do believe it's following the law, and judgment is for the defendant.

II. ANALYSIS

Preston challenges the circuit court's summary disposition ruling, which we review de novo. *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). "In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Id.* We review underlying issues of contract interpretation de novo as well. *Citizens Ins Co v Pro-Seal Service Group, Inc.*, 477 Mich 75, 80; 730 NW2d 682 (2007).

Preston's policy unambiguously provides that she must submit to an EUO "as often as [Pioneer] reasonably require[s]," and that Pioneer is not subject to suit in the event of noncompliance with this policy term. Preston has raised no claim that Pioneer conducted the unfinished EUO in an unreasonable fashion, or that it was unreasonable to require continuation of the questioning. Instead, Preston contends that because her noncompliance with the EUO provision was not "willful," the circuit court should have dismissed her claim without prejudice.

Alternatively Preston maintains that she “substantially complied” with the policy provisions, and thus the case should proceed to trial on the merits.

Submission to an EUO is an enforceable condition precedent to recovery under the Pioneer policy. This Court explained in *Yeo v State Farm Ins Co*, 219 Mich App 254, 258; 555 NW2d 893 (1996), that “as a general rule” an EUO term “is a condition precedent to filing the action, and the failure to comply with such a condition is not an absolute bar to recovery, but acts to suspend the right to recovery until the examination is held.” Thus, we find meritless Preston’s alternative argument that absent a completed EUO, she is nevertheless entitled to pursue her lawsuit. Because the EUO was not completed, Preston has not fulfilled a condition precedent to her suit.

Even if Preston’s failure to submit to an EUO did not frustrate a condition precedent, we would reject her claim that her “substantial compliance” with the policy requirements entitled her to pursue suit. As provided in *Gibson v Group Ins Co of Mich*, 142 Mich App 271, 276; 369 NW2d 484 (1985), where the plaintiff “substantially performs his [or her] obligation to cooperate with the [insurance] investigation, . . . he [or she does] not forfeit his [or her] contractual rights.” However, an insured’s substantial compliance cannot resuscitate his or her right to pursue suit where it would prejudice the insurer’s rights. *Bernadich v Bernadich*, 287 Mich 137, 144; 283 NW 5 (1938); *Gibson*, 142 Mich App at 276. Pioneer presented a persuasive argument of prejudice in its dismissal motion brief—that the trail “of the criminal arsonist had gone cold” during the nine-month delay, preventing Pioneer from adequately determining its liability under the policy.

Whether the circuit court erred by finding Preston’s conduct “willful” and dismissing Preston’s claim with prejudice presents a more difficult question. In *Yeo*, this Court left unresolved whether an insured that has willfully refused to comply with policy provisions is entitled to dismissal without prejudice. *Thomson*, 232 Mich App at 45. The plaintiff in *Yeo* had failed to sit for a scheduled EUO, but this Court found “nothing in the record to indicate” that the plaintiff’s noncompliance “was the result of a flat refusal to submit to such an examination.” *Yeo*, 219 Mich App at 259. The *Thomson* Court held that “if the noncompliance is willful, the dismissal is to be with prejudice. On the other hand, if the noncompliance is not willful, the implication is that the dismissal is to be without prejudice.” *Thomson*, 232 Mich App at 45-46.

“Willful noncompliance” as defined in *Thomson* “refers to a failure or refusal to submit to an EUO or otherwise cooperate with an insurer in regard to contractual provisions allowing an insurer to investigate a claim that is part of a *deliberate* effort to withhold material information or a *pattern of noncooperation* with the insurer.” *Id.* at 50-51 (emphasis in original). The plaintiffs in *Thomson* had provided recorded statements to their insurer, which this Court characterized as “at least a minimal showing that the Thomsons were not deliberately intending to withhold material information from State Farm.” *Id.* at 51. This Court emphasized that in future cases, providing “unsworn statements to the insurer” would not be enough to demonstrate cooperation. *Id.* Rather, “the burden henceforth is on the insured to demonstrate that the insured has not deliberately withheld material information. This burden will be an extraordinarily difficult one to meet.” *Id.* at 51 (emphasis omitted).

The *Thomson* Court expressed that “ignor[ing] or rebuff[ing]” repeated requests to arrange an EUO “would be sufficient to find a pattern of noncooperation with the insurer.” *Id.* at 52. *Thomson* further instructs that an insured may not demonstrate cooperation by claiming that she “do[es] not believe it to be reasonable” to participate in an EUO. *Id.* (quotation marks omitted). That said, “willful noncompliance . . . involves something more than merely knowingly failing to appear for an EUO.” *Id.* at 46. Thus, the crux of this case is whether Preston has sustained her burden of demonstrating that she did not willfully withhold information from Pioneer.

Standing alone, Preston’s request for rescheduling of the EUO on account of her aunt’s illness would support that she did not willfully fail to cooperate with Pioneer. Although the date of her aunt’s death does not appear in the record, it would certainly have been reasonable for Pioneer to adjourn the EUO for several weeks to permit Preston to spend the time she needed with her aunt. But the record does not stop with Preston’s concern for caring for her dying aunt. At some point between December 16, 2009, when Preston’s counsel informed Pioneer of the aunt’s illness, and January 12, 2010, Preston elected not to participate in a continued EUO. Preston has conceded this point. Specifically, Preston admitted that her previous attorney notified Pioneer that she “and other witnesses within her control would not appear for further [EUO].” Although Preston’s affidavit avers that she “temporarily refused to appear,” she did not characterize her refusal to cooperate with Pioneer in that manner. Because the record amply supports that Preston deliberately withheld material information from Pioneer during the time that Pioneer investigated her fire loss claim, her refusal to continue the EUO qualifies as willful under *Thomson*, and the circuit court properly dismissed Preston’s claims with prejudice.

Affirmed.

/s/ Elizabeth L. Gleicher
/s/ Amy Ronayne Krause