

STATE OF MICHIGAN
COURT OF APPEALS

ALFRED M. KREINDLER,

Plaintiff/Counter-Defendant-
Appellant,

and

DANIEL J. GOLDSTONE,

Plaintiff/Counter-Defendant,

v

MARTIN WALDMAN,

Defendant,

and

AMERICAN GUARANTEE & LIABILITY
INSURANCE COMPANY,

Defendant/Counter-Plaintiff-
Appellee.

UNPUBLISHED

April 4, 2006

No. 265045

Oakland Circuit Court

LC No. 2004-055949-CK

Before: Owens, P.J., and Kelly and Fort Hood, JJ.

PER CURIAM.

Plaintiff Alfred M. Kreindler appeals as of right from the trial court's order granting summary disposition to defendant American Guarantee and Liability Insurance Company.¹ We affirm.

¹ Plaintiff Daniel J. Goldstone acted as an insurance agent for plaintiff Kreindler and allegedly failed to properly advise and maintain a disability insurance policy for plaintiff Kreindler's business. These individuals entered into a settlement agreement that assigned Goldstone's
(continued...)

Plaintiff alleges that the trial court erred in concluding that Goldstone was not entitled to coverage based on the errors and omissions policy with defendant. Specifically, plaintiff alleges that there was a genuine issue of material fact with regard to whether Goldstone had uninterrupted professional liability coverage since 1996, a prerequisite for coverage under the policy, the policy was ambiguous, and the trial court erred in concluding that he had the burden of proof with regard to the issue of coverage. We disagree.

A trial court's decision granting summary disposition is reviewed de novo, on the entire record, to determine whether the prevailing party was entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). When reviewing a motion brought under MCR 2.116(C)(10), this Court must examine the documentary evidence presented below and, drawing all reasonable inferences in favor of the nonmoving party, determine whether a genuine issue of material fact exists. *Quinto v Cross & Peters Co*, 451 Mich 358, 361-362; 547 NW2d 314 (1996). Contrary to plaintiff's argument, the test is not whether a record *may* be developed upon which reasonable minds may differ, or whether the court is satisfied that the nonmoving party cannot prevail at trial because of a deficiency that cannot be overcome. *Smith v Globe Life Ins Co*, 460 Mich 446, 454-455, n 2; 597 NW2d 28 (1999). Once the moving party supports its position with documentary evidence, the nonmoving party has the burden of coming forward with evidence of specific facts to establish the existence of a material factual dispute. *Quinto, supra* at 362, 371. If the nonmoving party fails to establish that a material fact is at issue, the motion is properly granted. *Id.* at 363.

In this case, plaintiff concedes that defendant's policy will not provide coverage for Goldstone's alleged negligence in handling plaintiff's disability insurance matter unless it can be established that Goldstone maintained uninterrupted professional liability coverage dating back to 1996. When the issue involves the question of coverage, plaintiff has the burden of showing that the insurance policy covers the matter alleged. *Solomon v Royal Maccabees Life Ins Co*, 243 Mich App 375, 379; 622 NW2d 101 (2000). Further, because defendant supported its motion with documentary evidence demonstrating that there was a breach in coverage, plaintiff was required to come forward with evidence showing that there was a genuine issue of fact for trial in order to avoid summary disposition. *Quinto, supra* at 361-362.

Contrary to plaintiff's argument, the policy at issue is not ambiguous. Even if there was some confusion concerning Goldstone's contract date with another insurance company, this alleged confusion did not involve the meaning of defendant's policy. Furthermore, the alleged confusion is immaterial to the question of coverage because coverage under defendant's policy extends back only to the insured's contract date *or* the first gap in errors and omissions coverage, whichever is earlier. Because the negligent act occurred in 1996, well before Goldstone's gap in coverage—April 1, 2001, to August 1, 2001—and well before his contract date, it is immaterial whether Goldstone's contract date was September 2000, or September 2001.

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claims against defendant insurance company to plaintiff Kreindler. Accordingly, the singular plaintiff refers to Kreindler and the singular defendant refers to the insurance company. The claims against defendant Martin Waldman are not at issue in this appeal.

Plaintiff failed to come forward with documentary evidence showing the existence of a genuine issue of material fact with regard to whether Goldstone had uninterrupted professional liability coverage dating back to 1996. Goldstone's mere assertion that he believed he had uninterrupted coverage, without any factual support for this position, was insufficient to show that a question of material fact exists. *Willis v Deerfield Twp*, 257 Mich App 541, 550; 669 NW2d 279 (2003); see also *Quinto, supra* at 371-372. Indeed, Goldstone conceded that he could not produce any evidence showing that uninterrupted coverage was in place. Accordingly, the trial court properly granted defendant's motion for summary disposition under MCR 2.116(C)(10).

Plaintiff also alleged that the policy at issue was ambiguous because it failed to define the term "proof," and therefore, must be construed against defendant as the drafter. The failure to define a contractual term does not render a contract ambiguous. *Henderson v State Farm Fire & Casualty Co*, 460 Mich 348, 354; 596 NW2d 190 (1999). In that case, a term must be examined in light of its plain and ordinary meaning. The plain and ordinary meaning of a term can be ascertained by utilizing the dictionary definition. *Echelon Homes, LLC v Carter Lumber Co*, 472 Mich 192, 196; 694 NW2d 544 (2005). In the present case, defendant's representative indicated that any type of proof, including paycheck stubs, would be satisfactory. Plaintiff did not present any proof, but made a blanket assertion that he had obtained the required policy. Moreover, the rule of contra proferentem, the rule that construes a contract against the drafter, is a rule of last resort that does not apply unless there is a true ambiguity and the parties' intent cannot be discerned. *Twichel v MIC General Ins Corp*, 469 Mich 524, 535 n 6; 676 NW2d 616 (2004).

We reject plaintiff's argument that defendant was estopped from denying liability in this case. Although defendant initially agreed to defend Goldstone, it did so under an explicit reservation of rights. Because defendant timely notified Goldstone that it was proceeding under a reservation of rights, it is not estopped from denying coverage. *Kirschner v Process Design Assoc, Inc*, 459 Mich 587, 593; 592 NW2d 707 (1999).

Furthermore, although the trial court did not address the question of plaintiff's standing, we agree that plaintiff lacked standing to pursue this action against defendant. Whether a party has standing is a question of law to be reviewed de novo. *Crawford v Dep't of Civil Service*, 466 Mich 250, 255; 645 NW2d 6 (2002).

"[I]n order to have standing a party must have a 'legally protected interest that is in jeopardy of being adversely affected.'" *Bowie v Arder*, 441 Mich 23, 42; 490 NW2d 568 (1992). In this case, plaintiff has no legally protected interest in defendant's policy, apart from whatever interest was assigned to him by Goldstone. Thus, plaintiff's standing, if any, arises by virtue of his agreement with Goldstone. While prohibitions against assignments are disfavored, where a clause prohibiting assignments is clear and unambiguous, it must be enforced as written. *Detroit Greyhound Employees Fed Credit Union v Aetna Life Ins Co*, 381 Mich 683, 689-690; 167 NW2d 274 (1969); see also *Quality Products & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 375; 666 NW2d 251 (2003). Here, defendant's policy expressly prohibited Goldstone's

assignment of his “claims and causes of action” under the policy.² Thus, plaintiff has no interest under the policy and, therefore, has no standing to sue defendant. This provides an alternative basis for affirming the trial court’s summary disposition order against plaintiff.

In light of our decision, it is unnecessary to address whether plaintiff’s claims against defendant were extinguished by his agreement with Goldstone.

Affirmed.

/s/ Donald S. Owens
/s/ Kirsten Frank Kelly
/s/ Karen M. Fort Hood

² Goldstone’s “claims and causes of action,” if any, stem from his rights under the policy. Accordingly, there is no meaningful distinction between an assignment of Goldstone’s “claims and causes of action,” and an assignment of Goldstone’s “interest” under the policy. A contrary result would render nugatory the policy’s prohibition against assignments. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 468; 663 NW2d 447 (2003).