

STATE OF MICHIGAN
COURT OF APPEALS

MARK W. DUPUIS,

Plaintiff-Appellant,

V

UTICA MUTUAL INSURANCE COMPANY,

Defendant-Appellee.

UNPUBLISHED

April 25, 2006

No. 250766

Wayne Circuit Court

LC No. 02-211653-CK

Before: Wilder, P.J., and Sawyer and White, JJ.

PER CURIAM.

In this indemnification action involving an error and omissions “claims-made” liability insurance policy, plaintiff Mark Dupuis in his capacity as an insurance agent appeals by right from the order granting defendant Utica Mutual Insurance Company’s (Utica) motion for summary disposition under MCR 2.116(C)(8) and (C)(10) on plaintiff’s claims seeking indemnification and reimbursement for the costs of his defense and monies paid from his own funds for his clients’ unpaid insurance claims. We affirm.

I

Plaintiff was an employee and officer of Various Markets, Inc. (“VMI”), a company in the business of selling insurance. Defendant Utica provided “claims made” errors and omissions insurance to VMI¹ and its officers and employees. VMI placed coverage for TRJ Properties, Inc. (TRJ) and Mark’s Party Store with American International Sureties (AIS).

On July 17, 1997, Crystal Court Apartments (an assumed name of TRJ) sustained a fire. AIS’s approved adjustor, Rob Brown, adjusted the loss and obtained approval from AIS to pay. However, there were no funds in an AIS account to pay the claim. According to plaintiff, AIS was required to fund a claims reserve account but never did. AIS never forwarded money to VMI for payment of the claims.

¹ Plaintiff has been assigned any and all claims that VMI may have against defendant, thus VMI is not a party in the case.

In partial satisfaction of the claim, VMI paid TRJ \$100,000 on October 21, 1997, \$25,000 on November 20, 1997, \$25,000 and \$49,000 on March 25, 1998, and \$11,145.90 on April 14, 1998. Plaintiff provided his personal funds to cover these payments. In April and July 1998, Mark's Party Store sustained covered losses, but AIS did not pay. On April 17, 1998, TRJ filed a complaint with the Insurance Bureau regarding its claimed losses not yet paid.

The Insurance Bureau filed a "Petition for Summary Suspension," (petition) dated November 30, 1998, against VMI and plaintiff. Mark's Party Store and TRJ were among the claimants mentioned in the petition. The petition's allegations of misconduct primarily concerned policies with AIS, an unadmitted, ineligible insurer (Counts II through V). The petition alleged that the respondents (VMI and plaintiff) had issued insurance certificates to their clients showing that they were insured with AIS, that when respondents became aware of AIS's inability to pay claims, they failed to inform their clients of AIS's status, and that "[a]s a consequence of Respondent's failure to notify the clients that they were without coverage, the clients' losses were not compensated." Finally, the petition also alleged that the respondents placed the policies with insurers not licensed in the United States without first attempting to place the coverage with licensed carriers and complying with a requirement that they place a stamp on the face of the policy notifying the insured that the insurer is not licensed in this state and that if the insurer became insolvent, the claims may not be guaranteed. The petition also, among other things, authorized the commissioner of insurance (commissioner), after a formal hearing, to order the payment of fines, refund any overcharges, and order "restitution to the insured or other claimant to cover incurred losses, damages, or other harm attributable to the acts of the person found to be in violation of this chapter."

The commissioner summarily suspended the insurance licenses of VMI and plaintiff and ordered a hearing within twenty days. Plaintiff testified that VMI forwarded the petition to Utica.

In the interim, TRJ sued VMI, in a separate civil action. After Utica was notified of the action, Utica advised VMI on December 16, 1998, that defendant's policy provided excess coverage and VMI should report the matter to its current carrier. VMI paid Mark's Party Store \$10,000 on December 18, 1998, \$3,825 on February 18, 1999, and \$4,200 on March 8, 1999.

On March 23, 1999, the commissioner issued an order suspending VMI's and plaintiff's licenses for three years. The order did not require plaintiff or VMI to pay the involved clients. The administrative law judge had originally proposed that the suspension of the licenses would last until plaintiff and VMI satisfied all AIS claim holders; however, this proposal was rejected by the commissioner on procedural grounds. Specifically, the commissioner noted that petitioner had stipulated that the hearing would only concern continuation of suspension under MCL 500.1242(4), but restitution was authorized under a different provision, MCL 500.1244(1)(c). In light of the petitioner's stipulation, the commissioner concluded that "having the duration tied to payment of claims inappropriately makes restitution . . . a component of the sanction."

In June 1999, Utica determined that, contrary to its earlier position, it was the primary carrier for the TRJ action against VMI. Utica retained counsel to represent VMI in that action. The attorney hired by Utica concluded that the chance of a successful defense for VMI in the case was "zero percent," and advised that the independent adjuster evaluated TRJ's damages at \$450,000, of which VMI had already paid \$199,000. Utica eventually paid TRJ \$265,000.

In February 2001, the commissioner entered a consent order. Under its provisions, VMI's and plaintiff's licenses would be restored retroactively upon meeting certain conditions.

In April 2002, plaintiff filed the present action. The complaint alleged breach of contract for failing to provide a defense for "the November 30, 1998 claim" served upon plaintiff (Count I). Plaintiff asserted that Utica had the duty to defend VMI and himself in the proceedings initiated by the filing of the petition with the insurance commissioner. Plaintiff claimed that the \$246,984.50 was paid for attorney fees for the defense of the claims referenced in the complaint. The complaint further alleged breach of contract for defendant's failure to reimburse the amounts that VMI paid to TRJ and Mark's Party Store. (Counts II and III.) Finally, the complaint included counts framed as "equitable subrogation," "misrepresentation," and "unfair trade practices." (Counts IV-VI.)

Utica moved for summary disposition pursuant to MCR 2.116(C)(8) and (10). With respect to the claims asserted in Count I, defendant argued in part that the action was not a "claim . . . seeking damages." Utica argued that restitution, even if it had been awarded, would have been a penalty, and the policy excluded penalties. With regard to the allegations made in Counts II and III, Utica argued that plaintiff violated the provision regarding voluntary payments and the "no-action" clauses of the policy. Defendant offered various reasons why Counts IV-VI failed to state a claim.

Plaintiff filed a response to defendant's motion and requested that the court enter summary disposition in his favor pursuant to MCR 2.116(I)(2). After a hearing, the trial court held that Utica was not responsible for plaintiff's attorney fees in defending the insurance bureau proceedings because "it really wasn't the intent of the parties or at least Utica's intent to be insuring administrative misconduct proceedings . . . [that] involved penalties which included restitution, or restitution was part of the penalties." The trial court further determined that plaintiff was not entitled to be indemnified for the respective payments to TRJ and Mark's Party Store, because those payments were "actually voluntary payments" that plaintiff made "without giving the proper notice to Utica and fulfilling the other conditions precedent that are required by" defendant. Finding plaintiff's remaining claims to be without merit, the trial court granted defendant's motion for summary disposition on all counts. This appeal ensued.

II

This Court reviews de novo a trial court's ruling on a motion for summary disposition. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). A motion under MCR 2.116(C)(8) tests the legal sufficiency of the plaintiff's complaint by the pleadings alone. *Corley v Detroit Bd of Educ*, 470 Mich 274, 277; 681 NW2d 342 (2004). All well-pleaded factual allegations must be taken as true, as well as any reasonable inferences or conclusions that can be drawn from the allegations. *Peters v Dep't of Corrections*, 215 Mich App 485, 486; 546 NW2d 668 (1996). The motion should be granted only if the plaintiff's claims are so clearly unenforceable as a matter of law that no factual development could justify recovery. *Corley, supra* at 278.

In considering a motion pursuant to MCR 2.116(C)(10), a court considers affidavits, pleadings, depositions, admissions and other documentary evidence submitted by the parties in a light most favorable to the nonmoving party. *Corley, supra* at 278. Where the proffered

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). “A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ.” *West v General Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003) (citations omitted). The interpretation of an insurance policy is a question of law that is also reviewed de novo. *City of Grosse Pointe Park v Michigan Municipal Liability and Property Pool*, 473 Mich 188, 214; 702 NW2d 106 (2005) (opinion by Young, J.).

III

A. Utica Did Not Owe a Duty to Defend Plaintiffs in the Insurance Bureau Proceedings

Whether an insurer has a duty to defend its insured is determined by the terms of the applicable contract:

An insurance policy is construed in accordance with well-settled principles of contract construction An insurance policy must be read as a whole in order to discern and effectuate the intent of the parties. Therefore, if a clause in an insurance policy is clear and does not contravene public policy, it must be enforced as written. An insurer is free to define or limit the scope of coverage as long as the policy language fairly leads to only one reasonable interpretation and is not in contravention of public policy. When the language in an insurance contract is subject to more than one reasonable interpretation, it is considered ambiguous. Ambiguities in a contract generally raise questions of fact for the jury; however, if a contract must be construed according to its terms alone, it is the court’s duty to interpret the language. When the parties’ intent in an insurance contract cannot be ascertained from the evidence submitted, any ambiguities should be construed against the insurer. [*Farmers Ins Exch v Kurzmann*, 257 Mich App 412, 417-418; 668 NW2d 199 (2003) (citations and internal quotation marks omitted).]

Moreover:

An insurer has a duty to defend the insured “if the allegations of the underlying suit arguably fall within the coverage of the policy” If one or more theory of recovery falls within the policy, the insurer has a duty to defend, regardless of other theories that are not covered by the policy. The insurer must look behind the allegations to determine if coverage is possible. Where there is doubt concerning whether the complaint “alleges liability of the insurer under the policy, the doubt must be resolved in the insured’s favor.” *Radenbaugh v Farm Bureau Gen Ins Co of Michigan*, 240 Mich App 134, 137-139; 610 NW2d 272 (2000) (internal citations omitted).]

The insurance policy in this case contains the following relevant provisions:

1. "Claim" means a written notice, including service of a suit or demand for arbitration, received by one or more insureds asking for money or services.

* * *

4. "Loss" means injury or damages sustained by one or more person arising out of a single negligent act, error or omission or series of related negligent acts, errors or omissions by one or more insureds.

* * *

12. "Suit" means a civil proceeding in which damages because of a loss from a negligent act, error, or omission to which this insurance applies are alleged. Suit includes:

a. An arbitration proceeding in which such damages are claimed and to which you must submit or do submit with our consent;

b. Any other alternative dispute resolution proceeding in which such damages are claimed and to which you submit with our consent. [Bold in original.]

With regard to the policy's terms of coverage, the policy states in relevant part:

* * *

1. Coverage

On behalf of the insured we will pay for loss up to the Limits of Liability, in excess of the deductible, that the insured becomes legally obligated to pay as a result of having a claim first made against the insured during the policy period, or any Extended Reporting Period provided. The loss must arise out of negligent acts, errors or omissions in the conduct of the insured's business, wherever committed or alleged to have been committed by the insured or any person for whose negligent acts, errors or omissions the insured is legally liable in the rendering or failure to render professional services . . .

* * *

With respect to the insurance afforded by this policy, we shall defend any **claim** first made during the **policy period** seeking damages to which this insurance applies even if the allegations of the **claim** are groundless, false or fraudulent. . . . Our obligation to pay is not separate from our obligation to defend.

* * *

This insurance does not apply to any claim, or arising out of:

1. Any dishonest, fraudulent, malicious, or criminal conduct committed or alleged to have been committed by or at the direction of the insured . . .

This exclusion applies only to insured who participated in, acted with knowledge of, or consented to such conduct.

6. Punitive or exemplary damages, fines, penalties, taxes or any damages which are multiples of any damages assessed against an insured. If a **suit** is brought against an insured covered under this policy seeking both compensatory damages and punitive or exemplary damages, fines, penalties, taxes, or multiple of any compensatory damages, then we will defend the insured until judgment in the trial court, but without liability for such punitive or exemplary damages, fines, penalties, taxes, or multiples of any compensatory damages. [Bold in original.]

Relying in part on the rule of reasonable expectations, plaintiff argues Utica’s duty to defend applies in a quasi-judicial² summary suspension or administrative enforcement proceeding just as it would in a civil “suit.” Plaintiff contends that the Insurance Bureau’s enforcement action involving the potential imposition of restitution against VMI to pay unsatisfied claims constitutes a “claim” or “suit” as those terms are not so specifically defined under the language of the insurance policy to exclude administrative proceedings. Under plaintiff’s theory, the terms “claim” and “suit” are ambiguous. We disagree.

As noted by our Supreme Court, “[t]he principles of construction governing other contracts apply to insurance policies.” *Farm Bureau Mut Ins Co v Nikkel*, 460 Mich 558, 566; 596 NW2d 915 (1999). In construing an insurance contract, this Court must seek to determine the intent of the contracting parties, *id*, beginning first with the actual language used in the contract. *Quality Products & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 375; 666 NW2d 251 (2003). A clear and unambiguous text must be enforced as written. *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 51; 664 NW2d 776 (2003).

In this case, the petition initiating the suspension proceeding requested that the commissioner: (1) summarily suspend plaintiff’s insurance license, (2) issue an order for notice of hearing concerning the allegations, and (3) designate that an administrative law judge from the Office of Legal Services preside over the hearing. The petition further states that the “applicable penalties” for violations found by the commissioner may include:

- (a) Payment of a civil fine . . . [which] shall be turned over to the state treasurer
- (b) A refund of any overcharges.

² “[A]n agency is acting in a quasi-legislative capacity when it makes rules, whereas an agency’s adjudicative decisions . . . are quasi-judicial in nature.” *Northwestern National Cas Co v Comm’r of Ins*, 231 Mich App 483, 489; 586 NW2d 563 (1998).

(c) That restitution be made to the insured or other claimant to cover incurred losses, damages, or other harm attributable to the acts of the person found to be in violation of this chapter.

(d) The suspension or revocation of the person's license.

We first conclude, based on the nature of the proceedings against the plaintiff as well as the fact that the proceedings were conducted before the insurance commissioner rather than a court of law, that the proceeding involves neither a claim nor a suit as those terms are expressly defined in the contract.

Plaintiff's reliance on case law which held that enforcement actions by the Environmental Protection Agency (EPA) and Department of Natural Resources (DNR) constituted "suits" within the meaning of an insurance policy is misplaced. In *Michigan Millers Mut Ins Co v Bronson Plating Co*, 445 Mich 558, 563; 519 NW2d 864, overruled in part on other grounds by *Wilkie, supra*, at 63, the relevant policy provision required the insurer to "defend any *suit* against the insured seeking damages on account of . . . bodily injury or property damage" (emphasis added). The Court held that the term "suit," which was not defined in the policy, was "ambiguous and capable of application to nontraditional legal actions that are the functional equivalent of a suit brought in a court of law." *Id.* at 575. Based on the contents of the potentially responsible party (PRP) letter from the EPA to the insured, the Court concluded that EPA enforcement action was "the functional equivalent of a suit brought in a court of law," thereby triggering the insurer's duty to defend. *Id.* In *American Bumper & Mfg Co v Hartford Fire Ins Co*, 452 Mich 440, 450; 550 NW2d 475 (1996), the Court considered a similar PRP letter and "reaffirm[ed]" the holding in *Bronson*. In *South Macomb Disposal Auth v American Ins Co (On Remand)*, 225 Mich App 635, 660-668; 572 NW2d 686 (1997) ("SMDA"), this Court, applying the principles in *Bronson, supra* at 558, held that a demand letter from the Department of Natural Resources (DNR) constituted a "suit" that triggered coverage.

We find these cases are distinguishable. First, the insurance policies in *Bronson*, *American Bumper*, and *SMDA* were not claims-made policies, but rather occurrence policies. More importantly, the policies did not define "suit." *Bronson, supra* at 567; *American Bumper, supra* at 450; *SMDA, supra* at 660-668. Finally, the PRP letters in *Bronson* and *American Bumper* and the DNR letter in *SMDA* contained express language advising the insureds of potential liability for costs and future civil enforcement actions. *Bronson, supra* at 564; *American Bumper, supra* at 450; *SMDA, supra* at 661.

We also disagree that *Polkow v Citizens Ins Co of America*, 180 Mich App 651, 658; 447 NW2d 853 (1989), rev'd on other grounds 438 Mich 174; 476 NW2d 382 (1991), supports the conclusion that the term "restitution" as used in the petition filed against plaintiff is equivalent to the term "damages" as that term is used in the insurance policy at issue. The policy quite clearly does not apply to any claim or suit seeking a "penalty." Irrespective of whether the petition initiated by the insurance commissioner constitutes a suit or claim, the restitution sought with the filing of the petition was defined by the petition itself as a penalty. Accordingly, even if the petition constitutes a suit or claim against plaintiff, Utica had no duty to defend plaintiff against the petition because the petition sought a recovery, a penalty, that was excluded from coverage by the plain terms of the policy.

B. Utica Not Required to Show Prejudice to Invoke Voluntary Payment Clause

Next, relying on *Aetna Casualty & Surety Co v Dow Chemical Co*, 10 F Supp 2d 800, 833-834 (ED Mich, 1998) and *Koski v Allstate Ins Co*, 456 Mich 439, 444; 572 NW2d 636 (1998), plaintiff argues that because Utica made no showing of prejudice, the trial court erred by finding that Utica could properly refuse to indemnify plaintiff on the basis that plaintiff both failed to provide Utica proper notice and violated the “action” and “voluntary payment” clauses of the policy when he made the payments to TRJ and Mark’s Party Store. We disagree.

The cooperation clause of the insurance policy reads in relevant part:

SECTION V-CONDITIONS

1. Insured’s Duties In The Event Of a Claim or Suit – Cooperation Clause

It is a condition precedent to the application of the insurance afforded herein that you shall:

* * *

e. Not voluntarily assume or admit liability nor, without our prior written consent, settle any claim or incur any expense except at the insured’s own cost.

* * *

9. Action Against Company.

No action shall lie against us unless, as a condition precedent thereto, there shall have been full compliance with all the terms of this policy, nor until the amount of the insured’s obligation to pay shall have been finally determined either by judgment after actual trial or by written agreement of the insured, the claimant and us. [Bold in original.]

In *Coil Anodizers, Inc v Wolverine Ins Co*, 120 Mich App 118, 121-123; 327 NW2d 416 (1982), this Court held that no-action and voluntary payment clauses were enforceable without a showing of prejudice by the insurer because they were express conditions precedent to recovery by the plaintiff. This Court specifically noted that:

“plaintiff’s settlement with Prime and Avion effectively excused defendant from liability. That plaintiff may have felt a certain “compulsion” to settle in order to retain the goodwill of its customers does not render the settlement any less voluntary for purposes of paragraphs B(c) and C of the contract; defendant has bargained for the contractual right to contest the liability of its insured instead of having its money given away by an agreement to which it was not a party.” *Id.* at 123.

See also *Lee v Auto-Owners Ins Co (On Second Remand)*, 218 Mich App 672, 674; 554 NW2d 610 (1996) (determining that a condition of prejudice should not be incorporated into an exclusionary clause requiring the insurers consent before the insured party may release a tortfeasor from liability).³

C. Equitable Claims Properly Dismissed

Next, plaintiff, citing *McNamara v Horner*, 249 Mich App 177, 188-189; 642 NW2d 385 (2002), argues that the trial court's dismissal of his equitable claims without any explanation requires reversal. Again, we disagree.

Assuming plaintiff has not waived this issue by failing to file objections to the proposed order entered by the trial court, MCR 2.602(3), plaintiff's reliance on *McNamara* is nonetheless misplaced. In that case, this Court was effectively unable to review the disposition of marital property when the trial court failed to articulate on the record which property division factors were relevant. *Id.* at 186-187.

In this case, however, we review de novo the grant of summary disposition. *Corley, supra* at 277-278. Thus, our review considers whether the record *as presented* to the trial court warranted summary dismissal. Accordingly, plaintiff's procedural challenge to the trial court's ruling is not well founded.

We also reject the substance of plaintiff's challenge to the trial court's ruling. Plaintiff makes no more than cursory arguments challenging the trial court's dismissal of Count IV ("equitable subrogation") and Count VI (violations of the Michigan Uniform Trade Practices Act, MCL 500.2001 *et seq.*), and we deemed them abandoned. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority." *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 14; 672 NW2d 351 (2003) (Internal citations omitted).

We also conclude the trial court properly dismissed plaintiff's remaining claim alleging misrepresentation (Count V). A misrepresentation claim requires reasonable reliance on a false representation. *Nieves v Bell Industries*, 204 Mich App 459, 464; 517 NW2d 235 (1994). There can be no fraud where a person has the means to determine that a representation is not true. *Id.* An insured is held to have knowledge of the terms of its insurance policy, even if the insured did not read them. *Auto-Owners Ins v Zimmerman*, 162 Mich App 459, 461; 412 NW2d 925 (1987).

³ Because we conclude that plaintiff's voluntarily incurred expenses contrary to the express terms of the insurance policy precludes recovery, we need not address plaintiff's assertion that the trial court erred in alternatively granting defendant's motion for summary disposition on the basis that plaintiff failed to provide notice, without first requiring a showing of prejudice to Utica derived from insufficient notice.

In *Novak v Nationwide Mut Ins Co*, 235 Mich App 675, 690-691; 599 NW2d 546 (1999), this Court explained that “a person who *unreasonably* relies on false statements should not be entitled to damages for misrepresentation.” (Emphasis in original). This Court also concluded that, as a matter of law, the plaintiff’s reliance on certain statements was not reasonable because the statements contradicted the parties’ written contract. *Id.* at 689-691.

In accordance with *Novak*, plaintiff’s misrepresentation claim must fail. Plaintiff’s reliance on a brochure’s description of the insurance coverage cannot support a misrepresentation claim where plaintiff had the policy itself and the policy does not provide the asserted coverage.

Affirmed.

/s/ Kurtis T. Wilder

/s/ David H. Sawyer