STATE OF MICHIGAN

COURT OF APPEALS

KEVIN KRUEGER, Plaintiff-Appellee,	UNPUBLISHED January 8, 2013
v	No. 306472 Sanilac Circuit Court
AUTO CLUB INSURANCE ASSOCIATION, Defendant-Appellant.	LC No. 10-33456-CZ

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

PER CURIAM.

Defendant denied plaintiff's claim for underinsured motorist benefits and refused to participate in arbitration on the grounds that the policy required that a demand for arbitration be submitted within three years of the accident. The trial court granted plaintiff's motion for summary disposition and ordered defendant to participate in arbitration. The court concluded that the three year time limitation relied upon by defendant did not apply because no dispute regarding the amount of damages had arisen during that three year period. The trial court further concluded that if the time limitation did apply, defendant was equitably estopped from raising it as a defense. Because we conclude that the time limitation did apply and because plaintiff has failed to demonstrate detrimental reliance on any representation regarding the coverage, we reverse and remand for entry of judgment in favor of defendant.

Plaintiff purchased an auto insurance policy from defendant. The policy – either initially or as the result of an amendment – provided for up to $100,000 in underinsured motorist coverage. Because Michigan law does not require coverage for underinsured motorist benefits to be provided, "the language of the individual's insurance policy dictates under what conditions uninsured motorist benefits will be provided." *Auto-Owners Ins Co v Harvey*, 219 Mich App 466, 470; 556 NW2d 507 (1996). Included in the relevant portion of the policy was the following requirements:

> 1. If we and an insured person do not agree:
>
> a. whether that person is legally entitled to recover damages from the owner or operator of an uninsured motor vehicle or an underinsured motor vehicle; or
>
> b. as to the amount of damages;

> either party must demand, in writing, that the issues, excluding matters of coverage, be arbitrated.
>
> 2. A demand for arbitration must be filed within 3 years from the date of the accident or we will not pay damages under this Part. Unless otherwise agreed by express written consent of both parties, disagreements concerning insurance coverage, insurance afforded by the coverage, or whether or not a motor vehicle is an uninsured motor vehicle or an underinsured motor vehicle are not subject to arbitration. Any suit or action against us must be filed within 3 years from the date of the accident.

Plaintiff was injured in an auto accident on November 11, 2006 and defendant paid first-party benefits to plaintiff. Plaintiff also brought a third-party claim against the at-fault driver, Randy Stamper. Stamper carried liability coverage of only $20,000 per person. According to the record, the first notification plaintiff sent defendant that a claim for underinsured motorist benefits was being made was a letter from plaintiff's counsel dated November 6, 2009, five days before the three year anniversary of the accident. The letter read in pertinent part:

> This firm represents AAA insured, Kevin Krueger, in regard to an automobile accident he was involved in on November 11, 2009. AAA is currently paying first party benefits to Mr. Krueger for injuries sustained in the accident. As you may know, we commenced a third party lawsuit against the driver responsible for the accident, Randy Stamper. The lawsuit is pending in the Circuit Court for St. Clair County, Michigan, and has been assigned Case No. 08-002682. Discovery has revealed that Mr. Stamper only has $20,000 in coverage. Mr. Stamper's insurance coverage is not sufficient to cover Mr. Krueger's damage. Accordingly, Mr. Stamper is under-insured. Pursuant to Mr. Krueger's under-insured motorist policy, I am writing seeking authority to settle the claim with Mr. Stamper. Specifically, I believe Mr. Stamper will offer to settle the case for $20,000, the full policy limit.

Plaintiff concedes that this letter does not constitute a demand for arbitration and that no such demand was made within three years after the accident. Instead, he argues, and the trial court agreed, that the three year cut-off is inapplicable for either of two reasons. First, because arbitration could not be demanded until there was a disagreement as to the amount of damages and no disagreement had occurred prior to November 11, 2006. Second, because defendant falsely informed plaintiff's counsel that plaintiff did not have underinsured motorist coverage thereby estopping the defendant from relying on the policy's requirements.

Plaintiff is correct that no disagreement as to the amount of plaintiff's damages had arisen as of November 11, 2006. Indeed, given that the letter requesting authority to settle was not mailed until five days before that date, it is not surprising that the parties had not yet discussed their respective positions as to damages. However, the policy in this case unambiguously requires that any demand for arbitration or lawsuit be filed within three years of the date of the accident or "we will pay no damages under this Part." Contrary to plaintiff's suggestion, it does not bar a plaintiff from filing a demand for arbitration or a lawsuit in order to comply with the three year time limitation even if a disagreement has not yet arisen.

Plaintiff alternatively argues that defendant should be equitably estopped from relying on the three-year requirement because defendant's claims representative erroneously advised plaintiff's counsel that plaintiff did not have underinsured coverage. Equitable estoppel may bar a defendant from enforcing a contractual time limit on filing suit if plaintiff can establish (1) a false representation or concealment of a material fact, (2) justifiable reliance on the misrepresentation, and (3) prejudice to plaintiff as a result of the reliance. *City of Grosse Pointe Park v Mich Muni Liability and Prop Pool*, 473 Mich 188, 204; 702 NW2d 106 (2005); *McDonald v Farm Bureau Ins Co*, 480 Mich 191, 203-204; 747 NW2d 811 (2008). Here, plaintiff's equitable estoppel claim fails due to a lack of evidence that defendant made a misrepresentation that induced plaintiff not to demand arbitration in timely fashion.

Plaintiff presents proofs to support two possible time frames in which the claimed misrepresentation occurred. In a letter to defendant dated April 13, 2010, plaintiff's attorney stated that the misrepresentation was made "in a conversation more than thirty days after the [November 6, 2009] letter was sent." Subsequently, plaintiff's counsel was deposed and he testified that the subject misrepresentation was made in a conversation that occurred after he sent the letter on November 6, 2009, and before a subsequent contact on November 19, 2009. He was unable to define the date of the conversation with any greater specificity.[1] Assuming, as we must,[2] that the substance of the conversation occurred as described by plaintiff's counsel, it would have constituted a misrepresentation. However, plaintiff cannot offer any evidence that this conversation took place before the November 11, 2009 deadline to demand arbitration and so a reasonable fact finder could not conclude that it was more probable than not that the alleged misrepresentation occurred prior to November 11, 2009. Thus, there was not a sufficient evidentiary basis to claim that reliance on the alleged misrepresentation induced plaintiff to delay demanding arbitration until after the November 11 deadline had passed.

Reversed and remanded for entry of summary disposition in favor of defendant. We do not retain jurisdiction.

/s/ Amy Ronayne Krause
/s/ Deborah A. Servitto
/s/ Douglas B. Shapiro

[1] Defendant's claims adjustor denied having made any such misrepresentation and could not recall any telephone conversation with plaintiff's counsel during the time period at issue. The claims log showed only a single notation during November, 2009, made by someone other than the adjustor on November 18 reading "provided attorney's [sic] with adjustor's name and phone#."

[2] We must view the facts in the light most favorable to plaintiff, the nonmoving party. *Brown v Brown*, 478 Mich 545, 551-552; 739 NW2d 313 (2007).