

STATE OF MICHIGAN
COURT OF APPEALS

GAIL SILVERNAIL,

Plaintiff-Appellant,

v

LIBERTY MUTUAL INSURANCE COMPANY,

Defendant-Appellee.

UNPUBLISHED

May 23, 2013

No. 308762

St. Clair Circuit Court

LC No. 10-001090-NF

Before: CAVANAGH, P.J., and SAAD and RIORDAN, JJ.

PER CURIAM.

Plaintiff appeals as of right an order granting defendant's motion for summary disposition in this insurance dispute. We affirm.

On March 1, 2010, plaintiff was in a motor vehicle accident while driving a 2003 Pontiac Aztek that had been insured by defendant. Plaintiff's friend, Shellie Andrews, had procured the insurance policy, but she did not own the Aztek. Plaintiff was not named as an insured on the policy and was not listed as a driver. However, after the accident, plaintiff requested personal injury protection (PIP) benefits pursuant to the policy. Following its investigation, defendant rescinded the Andrews' policy and denied plaintiff's request for benefits. Defendant concluded that Andrews had made material misrepresentations regarding the owner and operator of the Aztek when she insured the vehicle. Andrews did not own the Aztek and she was not the primary operator of the Aztek.

After defendant denied her request for PIP benefits, plaintiff filed this breach of contract action. Defendant eventually filed a motion for summary disposition pursuant to MCR 2.116(C)(10). Defendant argued that Andrews made material misrepresentations regarding the Aztek's owner and operator when she procured the insurance policy on the Aztek. Plaintiff was complicit in those misrepresentations and their actions constituted fraud justifying defendant's rescission of the insurance policy. Thus, defendant did not breach its contract with Andrews by rescinding the policy and denying plaintiff's request for benefits under that policy. Accordingly, defendant argued, it was entitled to summary dismissal of plaintiff's claims.

Plaintiff responded to defendant's motion, arguing that there was no admissible evidence of the purported material misrepresentations. That is, defendant could not establish that Andrews was asked who owned or drove the Aztek. In fact, Andrews testified that she was never asked who owned the Aztek and she advised defendant that plaintiff was the primary driver of the Aztek. And to the extent any material misrepresentations were made, plaintiff was an innocent third party entitled to PIP benefits under the insurance policy. She made no representations to defendant and she did not participate in the procurement of the policy. Further, Andrews drove the Aztek almost on a daily basis; thus, she could be considered a statutory owner under MCL 500.3101 and required to maintain insurance on the vehicle. Accordingly, plaintiff argued, defendant was not entitled to summary disposition of her claim.

Defendant replied to plaintiff's response to its motion for summary disposition, arguing that, as set forth in its policy, defendant does not issue automobile insurance policies to a named insured who is not a titled owner, lessee, or personal user of company cars. Further, at the time that Andrews requested the insurance, plaintiff was not even the titled owner of the vehicle; plaintiff's ex-husband was the titled owner of the Aztek. Defendant also argued that Andrews was not a "statutory owner" because the relevant definition of "ownership interest" for purposes of determining whether Andrews could procure insurance from defendant for the Aztek was contained in defendant's underwriting manual, a publicly available document. And plaintiff was not an innocent third party regarding the fraudulent procurement of the policy. Plaintiff knew that Andrews was adding the Aztek to her policy and agreed with that action because it would save plaintiff money. See *Hammoud v Metro Prop & Cas Ins Co*, 222 Mich App 485; 563 NW2d 716 (1997). Accordingly, defendant argued, its motion for summary dismissal should be granted.

Following oral arguments, the trial court issued its written opinion granting defendant's motion for summary disposition. The trial court concluded that, when the insurance policy was procured by Andrews, neither she nor plaintiff owned the Aztek; nevertheless, Andrews did not disclose that information to defendant. And defendant was not advised that plaintiff was the principal driver of the Aztek. These were material misrepresentations sufficient to permit defendant to rescind the policy. According to its policy, defendant only issued automobile insurance policies to a named insured who is a titled owner, lessee, or personal user of a company car. Andrews was not the titled owner of the Aztek and had no insurable interest in that vehicle. And plaintiff was not an innocent third party because she knew that Andrews was not the titled owner of the Aztek, but was present and permitted Andrews to procure insurance coverage by misrepresenting the owner and operator status of the Aztek to defendant so that she could save money. Thus, the court concluded, defendant was entitled to rescind the policy and deny plaintiff's request for PIP benefits. After plaintiff's motion for reconsideration was denied, this appeal followed.

Plaintiff argues that the trial court erroneously granted defendant's motion for summary disposition because there were genuine issues of material fact whether Andrews made false representations to procure insurance coverage for the Aztek. We disagree.

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion for summary disposition under MCR 2.116(C)(10) is properly granted if no factual dispute exists. *Rice v Auto Club Ins Ass'n*, 252 Mich App 25, 30-31; 651 NW2d 188 (2002). In deciding the motion, a court considers all the evidence, affidavits, pleadings, and admissions in the light most favorable to the nonmoving party. *Id.* at 30-31. The interpretation of clear contractual language is an issue of law that is reviewed de novo on appeal. *DeFrain v State Farm Mut Auto Ins Co*, 491 Mich 359, 366-367; 817 NW2d 504 (2012).

An insurance policy is a contract between the parties and is generally construed in accordance with the principles of contract construction. *Auto-Owners Ins Co v Churchman*, 440 Mich 560, 566; 489 NW2d 431 (1992). The policy application, the declaration page of the policy, and the policy itself construed together constitute the contract. *Dancey v Travelers Prop Cas Co*, 288 Mich App 1, 8; 792 NW2d 372 (2010) (citation omitted). Because insurance policies are contracts, common-law defenses including fraud may be invoked to avoid enforcement of the policy. *Titan Ins Co v Hyten*, 491 Mich 547, 554-555; 817 NW2d 562 (2012). There are three types of fraud: fraudulent misrepresentation, innocent misrepresentation, and silent fraud. *Id.* at 555. Generally, to establish actionable fraud, or fraudulent misrepresentation, a false material representation must have been made, knowingly or recklessly, with the intention that it be acted upon, and another acted in reliance on it, causing injury. *Id.* (citation omitted). Innocent misrepresentation is similar, except that the misrepresentation may be made innocently in connection with making a contract and the resulting injury to another inures to the benefit of the misrepresenter. *Id.* at 556 n 5. Silent fraud is accomplished when one has a legal or equitable duty of disclosure, yet the truth is suppressed to the detriment of another. *Id.* at 557. Fraud in the procurement of a contract is grounds to retroactively avoid contractual obligations through traditional remedies, including rescission "notwithstanding that the fraud may have been easily ascertainable, and notwithstanding that the claimant is a third party." *Id.* at 557-558, 562. "[A]n insurer [has] no duty to investigate or verify the representations of a potential insured." *Id.* at 570.

Here, plaintiff argues that Andrews testified in her deposition that she told defendant's representative that plaintiff owned the Aztek and was its primary driver when she procured the insurance; thus, a jury must decide whether any false material misrepresentations were made to procure the policy. However, the record evidence refutes plaintiff's claim. Andrews testified in her deposition as follows:

Q. Okay. So tell me again what you told [defendant] about [plaintiff] driving any of the vehicles[.]

A. I said I lived with Gail, my sister, is it okay if I put her on my policy, and they said yes, so I put Gail on my policy with the Aztec [sic].

* * *

Q. Did you ever indicate to [defendant] that Gail would be a principal driver on any of the vehicles?

A. They didn't ask.

Q. . . . Were you ever asked who owned the Aztec [sic]?

A. I'm not sure. I don't remember.

First, contrary to plaintiff's assertion on appeal, Andrews initially testified that she was not sure if she was asked who owned the Aztek. However, even if Andrews did advise defendant's representative that plaintiff owned the Aztek, as she later claimed in her deposition, such statement was also a misrepresentation.¹ On the day Andrews procured the insurance policy on the Aztek, September 23, 2009, plaintiff did not own the vehicle. Thus, whether intentional or innocent, if Andrews advised defendant's agent that plaintiff owned the Aztek, it constituted a misrepresentation.

Further, according to the contemporaneous notes of defendant's agent taken during the telephone call in which Andrews added the Aztek to her existing policy, Andrews inquired whether her daughter's vehicle could be added to her policy and was advised "only if titled in [Andrews'] name or in her daughter's name and [Andrews'] name." Although specifically advised that only vehicles titled in her name could be added to her insurance policy, Andrews proceeded to add the Aztek to her existing contract, concealing the fact that she was not a titled owner in an effort to mislead defendant as to her eligibility to procure insurance on the vehicle. Accordingly, we agree with the trial court's alternative conclusion that there was no genuine issue of material fact that Andrews procured the policy by silent fraud. See *Roberts v Saffell*, 280 Mich App 397, 403-404; 760 NW2d 715 (2008); see also *Sullivan v Ulrich*, 326 Mich 218, 227-229; 40 NW2d 126 (1949) (citations omitted).

Second, contrary to plaintiff's assertion on appeal, Andrews testified that she did not disclose that plaintiff would be the Aztek's principal driver because "they didn't ask." However, according to the contemporaneous notes of defendant's agent taken during the telephone call in which Andrews added the Aztek to her existing policy, Andrews specifically indicated that the principal driver of the Aztek would be herself. And the declaration page of the policy, dated shortly after the addition of the Aztek to the policy, is consistent with the agent's note. Plaintiff was not a named insured on the policy and was not listed as a driver of any vehicle covered by the policy. An insured is obligated to read her insurance policy and raise any questions about coverage; thus, even if the insured does not read the policy, she is charged with knowledge of its contents. *Casey v Auto Owners Ins Co*, 273 Mich App 388, 394-395; 729 NW2d 277 (2006); see also *Dancey*, 288 Mich App at 8. Plaintiff's mere denial of the substance of this documentary evidence is insufficient to demonstrate that a genuine issue of material fact exists. See *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). And plaintiff's claim that Andrews had an insurable interest in the Aztek which required her to maintain insurance on it even if true would not prohibit defendant from rescinding the policy on the ground that it was procured by fraud.

¹ Although Andrews represented to defendant's agent that plaintiff is her sister, plaintiff is not Andrews' sister. They are friends.

In summary, the trial court properly concluded that defendant was entitled to both rescind the insurance policy that was procured by fraud and deny plaintiff's request for PIP benefits pursuant to that policy. Accordingly, the summary dismissal of plaintiff's claim is affirmed.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Henry William Saad
/s/ Michael J. Riordan