STATE OF MICHIGAN

COURT OF APPEALS

THOMAS MICOU, JR.,

Plaintiff-Appellant,

v

PROGRESSIVE MICHIGAN INSURANCE COMPANY,

Defendant-Appellee.

UNPUBLISHED
March 13, 2014

No. 311937
Wayne Circuit Court
LC No. 11-011561-NF

Before: SERVITTO, P.J., and SAWYER and BOONSTRA, JJ.

PER CURIAM.

In this first-party automobile insurance coverage dispute, plaintiff appeals from the order of the trial court granting summary disposition to defendant on the grounds that the policy had been cancelled at the time of plaintiff's accident. Because we hold as a matter of law that plaintiff's policy of insurance with defendant had been cancelled for non-payment on the day before his accident, we affirm.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

Plaintiff had a No-Fault policy of auto insurance with defendant in 2010. When plaintiff's unemployment benefits were discontinued in August 2010, he was unable to make his premium payment to defendant. On September 13, 2010, defendant sent plaintiff a cancellation notice which indicated that his policy would be cancelled at 12:01 a.m. on September 26, 2010 if the premium of $221.73 was not received or postmarked by that time. On September 23, 2010, plaintiff called defendant in response to an automated call concerning the upcoming cancellation of his policy.

The phone call was recorded. During the phone call, plaintiff told defendant's employee that he had lost his unemployment benefits, but that his church was willing to assist him with the payment. The employee informed plaintiff that his policy was "currently pending canceled." Plaintiff stated that he would pay the premium at defendant's local branch office on Monday, September 27, if defendant would "give [him] that extra day." The following colloquy then took place:

Q. All right. So I put a note on the policy, on the policy. We're gonna go ahead and extend the date, um, to the 27th, which is on the Monday. Um, you can take the payment into your agency, um, and make a payment.

A. OK.

Q. It's totaling, uh, $221.73. Now, it's on a note in the policy, so keep in mind this is something we have no way of stopping the cancel, but we're just honoring coverage . . .

A. Mm-hmm.

Q. . . . as long as you make payment. So when you go in your agency, when they look in their system, they're probably gonna see it's canceled. Just have them call us.

A. Mm-hmm.

* * *

Q. That's fine. We definitely understand. OK. We do appreciate you calling us to let us know what's going on, OK? Um, and, you know, definitely just Monday you would need to make the payment in order for us to honor that.

A. OK.

Q. Otherwise it will revert back to the original cancel . . .

A. OK.

Q. . . . on the 26th

A. OK. Thank as [sic] million.

On September 27, plaintiff found that the church was again closed. Plaintiff was not able to obtain the check from the church, and did not pay the policy premium on September 27. He did not contact defendant to advise that he would not be making the payment on September 27.

Unfortunately, plaintiff was involved in a motor vehicle accident while driving his car on the evening of Monday, September 27. The next morning, plaintiff's sister, and later plaintiff himself, attempted to pay his premium, but were informed by plaintiff's insurance agency that the policy was cancelled.

Defendant denied plaintiff's claim for first-party benefits under the policy. Plaintiff filed suit, seeking both damages under the policy and a declaration that the policy was in effect and covered plaintiff at the time of the accident. Defendant moved the trial court for summary disposition, arguing that the policy was cancelled on September 26 when plaintiff failed to pay the premium on September 27. Plaintiff responded, arguing that the policy was still in force, or

alternatively that the doctrines of impossibility, mutual mistake, and/or equitable estoppel barred defendant's claim for summary disposition. Plaintiff also argued that defendant's motion was premature, as discovery had not yet closed and the deposition of defendant's employee who spoke on the phone to plaintiff had not been taken.

After a hearing, the trial court granted defendant's motion, finding that "there was coverage on the 27th if there was a payment on the 27th. And there's no question of fact that that payment was not made." The trial court further found that there was no mutual mistake of fact. With regard to the discovery issue, counsel for defendant noted that discovery had been open since September of 2011, and was set to close two business days after the hearing. The trial court invited plaintiff to show that they had noticed the witness in question for deposition and to file another motion "to show why you're entitled to your discovery." An order issued from the trial court granting summary disposition to defendant. No motion was ever filed by plaintiff related to discovery. This appeal followed.

II. STANDARD OF REVIEW

Defendant moved for summary disposition pursuant to MCR 2.116(C)(10). We review a trial court's decision on summary disposition de novo. *Allen v Bloomfield Hills Sch Dist*, 281 Mich App 49, 52; 760 NW2d 811 (2008). A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 206; 815 NW2d 412 (2012). In reviewing the grant of summary disposition under MCR 2.116(C)(10), this Court considers the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party. *Sallie v Fifth Third Bank*, 297 Mich App 115, 117-118; 824 NW2d 238 (2012). This Court is "limited to considering the evidence submitted to the trial court before its decision on the motions." *Calhoun Co v Blue Cross Blue Shield of Mich*, 297 Mich App 1, 12; 824 NW2d 202 (2012). Summary disposition is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10); *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008).

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). A trial court's decision concerning equitable issues is reviewed de novo. *Eller v Metro Indus Contracting, Inc*, 261 Mich 569, 571; 683 NW2d 242 (2004).

III. POLICY CANCELLATION/EQUITABLE ESTOPPEL

Plaintiff first argues that the agreement between defendant's employee and plaintiff that he could pay his premium on September 27 extended coverage under the policy through September 27, 2010. We disagree.

Plaintiff is correct in general that a duly authorized agent has the power to bind the principal to the same extent as if the principal had acted. *See In re Estate of Capuzzi*, 470 Mich 399, 402; 684 NW2d 677 (2004). Thus, if defendant's employee were in fact a "duly authorized agent," a representation from that employee that the policy was extended through September 27 would have sufficed to bind defendant. However, we need not decide if defendant's employee

was such an agent, because the record is clear that the employee made no such representation.

The cancellation letter sent to plaintiff clearly indicated that his policy would be cancelled if payment was not received or postmarked by 12:01 a.m., September 26, 2010. The employee stated that she could not stop the cancellation, but represented that defendant would provide continuous coverage if payment was received by September 27. The employee also clearly stated to plaintiff that if the premium was not paid on September 27, the policy "would revert back to the original cancel . . . on the 26th." The words of the employee are not ambiguous and cannot reasonably be interpreted as stating that coverage would be extended through September 27 *even if payment was not received on that date*. Thus, even if defendant's employee had the authority to modify the agreement between plaintiff and defendant to provide for coverage on September 27, it is clear that such modification was conditioned on payment being received on that date. Failure to meet that condition would result in the policy's cancellation occurring, as originally scheduled, at 12:01 a.m. on September 26. Plaintiff does not dispute that payment was not received (or even postmarked) on September 27; thus the trial court did not err in finding no genuine question of material fact that defendant was entitled to judgment as a matter of law on this issue. MCR 2.116(C)(10); *Latham*, 480 Mich at 111.

In a related argument, plaintiff also alleges that the doctrine of equitable estoppel applies in this case, and defendant should be estopped from denying coverage.

> Equitable estoppel arises when one by his acts, representations, or admissions, or by his silence when he ought to speak out, intentionally or through culpable negligence induces another to believe certain facts to exist and such other rightfully relies and acts on such belief, so that he will be prejudiced if the former is permitted to deny the existence of such facts. [*Lichon v Am Universal Ins Co*, 435 Mich 408, 415; 459 NW2d 288 (1990) (quotation marks and citation omitted).]

Here, plaintiff argues that the statements of defendant's employee caused him to believe he had coverage through September 27, and that such reliance caused him to operate his vehicle on that date, whereupon he ultimately become involved in an accident.

Plaintiff's argument ignores the clear language of defendant's employee. As stated above, the employee clearly told plaintiff that unless the premium was received on the 27th, the policy would cancel on the 26th. Plaintiff indicated during the phone conversation that he understood this, and said "OK" multiple times. Thus, it is clear that there was no act, representation, admission or silence on the part of the employee that arguably may have induced plaintiff to believe that the policy would remain in effect past September 26 even if payment was not made on September 27. Plaintiff stated in his deposition that when he discovered the church was closed on Monday (the 27th), he realized that he would not have the money to pay defendant on that date and would not have the money until Tuesday. Plaintiff had no other plans to get the money on Monday.

For the doctrine of equitable estoppel to apply, a party's reliance on the representations of another must be reasonable. See *Adams v City of Detroit*, 232 Mich App 701, 709; 591 NW2d 67 (1998). In the instant case, plaintiff's claimed reliance was not reasonable for two related reasons: first, the employee's statements clearly indicated that plaintiff would only avoid policy

cancellation (as of September 26) if he paid the premium on September 27; second, plaintiff admits that prior to his accident, he realized he would not be able to make the payment in time. Thus, when plaintiff operated his motor vehicle on the evening of September 27 and was involved in the accident, he could not have *reasonably* believed that he was covered by the insurance policy at the time, because he knew that the premium would not be paid on September 27. Therefore, plaintiff's equitable estoppel claim is without merit. Although the trial court did not directly state that it was ruling on that claim, it correctly found that no issue of material fact existed as to the lack of coverage under the policy.

IV. MUTUAL MISTAKE/IMPOSSIBILITY

Plaintiff also asserts that the common-law defenses of mutual mistake of fact and impossibility render the trial court's grant of summary disposition erroneous. We disagree.

Both of defendant's arguments in this section are based upon a single faulty premise: that the agreement between plaintiff and defendant was that plaintiff would obtain a check from his church and give that check to defendant on September 27. Thus, plaintiff argues, the fact that the church was closed on Monday rendered his performance impossible or, in the alternative, that the agreement was marred by a mutual mistake of fact and should be reformed in favor of plaintiff.

Impossibility excuses a party to a contract from liability for a breach "in the event his or her contractual promise becomes objectively impossible to perform." *Roberts v Farmers Ins Exch*, 275 Mich App 58, 73; 737 NW2d 332 (2007). Impossibility may be present at contract formation or develop after the contract is formed. *Id*. at 74. Absolute impossibility is not required; however there must be a showing of "'impracticability because of extreme and unreasonable difficulty, expense, injury or loss involved.'" *Id*., quoting *Bissell v L.W. Edison Co*, 9 Mich App 276, 284; 156 NW2d 623 (1967).

In the instant case, plaintiff asserts that his performance under the alleged agreement with defendant's employee was impossible, because he frames his duty under the agreement as the duty to obtain a check from his church and tender it to defendant. However, the record of the phone call indicates that defendant's employee merely stated that he could pay the premium on September 27. No reasonable reading of the transcript could compel the belief that an agreement had been formed that involved plaintiff obtaining the funds to pay the premium from a specific source. Plaintiff's duty was merely to pay his premium; further, this was not a new duty he had assumed, but rather a duty defendant's employee had granted him an additional day to fulfill. Plaintiff has provided this Court with no authority that a mere lack of funds is the sort of "impossibility" that warrants the application of this common-law doctrine. Impossibility is generally not applicable in situations involving a downturn in the financial situation of one of the parties. See Restatement Contracts, 2d, § 261. To hold otherwise would be to excuse the duty to pay under a contract for all parties who simply lack the funds with which to pay. We decline to do so.

With regard to plaintiff's mutual mistake of fact argument, a mutual mistake of fact occurs when the parties share an erroneous belief about a material fact that affects the substance of the transaction. See *Ford Motor Co v City of Woodhaven*, 475 Mich 425, 442; 716 NW2d 247 (2006). A mutual mistake of fact generally allows rescission of a contract. *Id*. at 441. However,

a mutual mistake of fact also allows a court, under equitable principles, to reform a contract to conform to the agreement actually made. *Casey v Auto Owners Ins Co*, 273 Mich App 388, 398; 729 NW2d 277 (2006).

Plaintiff argues that the agreement between plaintiff and defendant involved a mutual mistake of fact that the church was open on Monday; therefore, he urges this Court to reform the agreement to indicate that plaintiff could pay the premium on Tuesday, September 28, the earliest day that the church was open. However, as stated above, the agreement between plaintiff and defendant was simply that plaintiff would pay his premium on September 27. The fact that the church was closed on September 27 is not a material fact that affects the substance of the transaction, nor is there any evidence that the mistaken belief that the church was open was shared by both parties. *Ford Motor Co v City of Woodhaven*, 475 Mich at 442. We find no error in the trial court's holding that "that mutual mistake as to [plaintiff's] understanding is not mutual. I think the mutual understanding is that [plaintiff] was going to come into LA Insurance and make that payment."

V. PREMATURITY

Finally, plaintiff argues that the trial court's grant of summary disposition was premature, because it occurred before discovery was closed. We disagree.

> A grant of summary disposition is premature if granted before discovery on a disputed issue is complete. *Dep't of Social Services v Aetna Casualty & Surety Co.*, 177 Mich App 440, 446, 443 NW2d 420 (1989). However, summary disposition is appropriate if there is no fair chance that further discovery will result in factual support for the party opposing the motion. *Neumann v State Farm Automobile Ins Co.*, 180 Mich App 479, 485, 447 NW2d 786 (1989). The purpose of summary disposition is to avoid extensive discovery and an evidentiary hearing when a case can be quickly resolved with a ruling on an issue of law. *American Community Mutual Ins Co. v Comm'r of Ins.*, 195 Mich App 351, 362, 491 NW2d 597 (1992). [*Mackey v Dept of Corr*, 205 Mich App 330, 333-34; 517 NW2d 303, 305 (1994).]

Here, plaintiff alleged that the trial court's grant of summary disposition was premature because discovery was open for two more business days following the summary disposition hearing, and plaintiff had not yet deposed the employee of defendant to whom plaintiff spoke on September 23. Opposing counsel noted that discovery had been open for over nine months at that point. Although plaintiff's counsel claimed that they had "noticed it up before in the beginning of the file[,]" the record does not reflect any noticing of that deposition. Further, as the trial court noted, it is difficult to see what valuable information the deposition of defendant's employee would yield, in light of the fact that the transcript of the conversation between the employee and plaintiff was available to both parties. Finally, the trial court invited plaintiff to explain further in a separate motion why additional discovery should be granted; plaintiff did not do so. We decline to reverse the trial court on grounds of prematurity, especially since the instant case can appropriately be resolved based on an issue of law. *Id.*

Affirmed. As the prevailing party, defendant may tax costs. MCR 7.219(A).

/s/ Deborah A. Servitto
/s/ David H. Sawyer
/s/ Mark T. Boonstra