STATE OF MICHIGAN

IN THE 20TH CIRCUIT COURT FOR THE COUNTY OF OTTAWA
SPECIALIZED BUSINESS DOCKET
414 Washington Ave.
Grand Haven, Michigan 49417
616-846-8320
* * * * *

ALL WE SELL IS FUN, LLC,

Plaintiff,

v

HOMEOWNERS INSURANCE COMPANY, and **KOOP AND BURR INSURANCE,**

Defendants.
_____/

OPINION AND ORDER GRANTING AND DENYING DEFENDANTS' MOTIONS FOR SUMMARY DISPOSITION

Case No. 2022-006849-CB

Hon. Jon A. Van Allsburg

At a session of said Court, held in the Ottawa County Courthouse in the City of Grand Haven, Michigan on January 18, 2023.
Present: Hon. Jon Van Allsburg, Circuit Judge

Defendants separately move for summary disposition of this action. Plaintiff filed this action for breach of contract against defendant Homeowner's Insurance Company on May 2, 2022, after it suffered a loss nearly three years earlier on May 7, 2019. Defendant Homeowner's alleges that a two-year statute of limitations outlined in the contract bars plaintiff's claims. The Court finds that there is a genuine issue of material fact about when the Statute of Limitations first tolled. Defendant Homeowner's Insurance Company's motion is denied.

Plaintiff filed two claims against Defendant Koop and Burr Insurance: detrimental reliance and fraud. Defendant Koop and Burr Insurance alleges that it is the improper party because it is no longer affiliated with Burr & Co, the company that sold plaintiff the insurance policy. Additionally, defendant Koop and Burr Insurance alleges that service was improper because the Court did not process the summons and complaint that plaintiff served. As alternate theories for summary disposition, defendant Koop and Burr Insurance alleges that Michigan does not recognize a cause of action for detrimental reliance and that plaintiff did not properly or adequately plead its fraud claim. Finally, defendant Koop and Burr Insurance argues that there is no genuine issue of material fact where defendant Koop and Burr Insurance is not the proper party and where plaintiff's claim was denied for its own failure to comply with the insurance policy's requirements. The Court grants defendant Koop and Burr Insurance's Motion for Summary Disposition on grounds that plaintiff failed to state a claim against defendant Koop and Burr Insurance upon which relief can be granted.

I. Brief Facts

Plaintiff, All We Sell is Fun, is an LLC engaged in sales and rental of sporting goods. Plaintiff purchased an insurance policy from Koop and Burr, branch office of Burr and Company. The policy that plaintiff purchased was through Home-Owners Insurance. Plaintiff understood the policy to cover every part of his business, including the building and property.

On May 7, 2019, plaintiff was evicted from its business building. Due to inclement weather and rough handling, plaintiff's business property was damaged when it was removed from the building. Plaintiff alleges that it attempted to file a claim after the loss, but that a representative of defendant Koop and Burr, Jose Mireles, advised plaintiff that it did not have a claim. Eventually, on December 4, 2019, Mr. Mireles completed a claim form for plaintiff with claim number 300-0413022-2019.

Defendant Homeowners sent plaintiff a denial of claim letter on September 15, 2020. Before the denial, defendant Homeowners alleges it sent plaintiff letters on December 4, 2019, December 18, 2019, January 29, 2020, March 24, 2020, April 24, 2020, and June 16, 2020, requesting supporting claim documentation and information about the claim. Defendant Homeowners also engaged in several conversations with plaintiff and granted plaintiff several extensions to provide the information due to the coronavirus pandemic.

On January 10, 2022, with the assistance of counsel, Mark Linton (P66503), plaintiff filed suit against Auto-Owners Insurance Company, Inc., and Integrity Insurance Services, Inc., d/b/a Koop & Burr. The case was assigned to the Business Court in Ottawa County and assigned case number 2022-006734-CB. Attorney Stephen P. Willison (P53735) appeared for Auto-Owners. Attorneys Eugenie Eardley (P48615) and Nicholas F.X. Gumina (P74203) appeared for Integrity Insurance Services, Inc. and filed an answer and affirmative defenses. On March 15, 2022, plaintiff voluntarily dismissed its complaint because it had named the wrong defendants.

The plaintiff filed the present case with the assistance of attorney Daren A. Wiseley (P85220) on May 2, 2022. Attorney Stephen P. Willison (P53735) appeared for Homeowners. Attorneys Eugenie Eardley (P48615) and Nicholas F.X. Gumina (P74203) appeared for Integrity Insurance Services, Inc. Both defendants filed answers and affirmative defenses. On August 18, 2022, defendant Homeowners filed its Motion for Summary Disposition. Defendant Koop and Burr did the same on September 1, 2022. Both motions were scheduled to be heard on October 10, 2022. The Court granted plaintiff's request for adjournment on grounds that plaintiff lost all contact with Attorney Wiseley.

On October 25, 2022, plaintiff appeared with attorney Klint Kesto (P69711) who plaintiff just hired that morning. The Court heard argument from defense counsel on the motions and granted plaintiff an extension to file written responses. The Court received those responses on November 15, 2022.

II. Defendant Homeowner Insurance MCR 2.116(C)(7) Motion

The Contract for Insurance includes an Endorsement, titled Commercial Property Conditions, which is incorporated into the contract and states at Paragraph D: "No one may bring

a legal action against us under this Coverage Part unless: (1) There has been full compliance with all of the terms of this Coverage Part; and (2) The action is brought within 2 years after the date on which the direct physical loss or damage occurred." There is an additional endorsement that modifies the commercial property coverage part, titled Michigan Changes. Paragraph E of this document states "The time for commencing an action against us is tolled from the time you notify us of the loss or damage until we formally deny liability for the claim."

Defendant Home-Owners Insurance Company (hereinafter, defendant HO) argues that plaintiff's Complaint should be dismissed for failure to file within two years after the loss or damage occurred. It is undisputed that the loss occurred on May 7, 2019. Plaintiff submitted a claim 211 days later, on December 4, 2019, which tolled the two-year deadline to file. On September 15, 2020, defendant HO formally rejected the claim. On February 17, 2022, 731 days (two years plus one day for the leap year) had passed since the loss occurred, including the tolling periods. Plaintiff filed this action on May 2, 2022.

Plaintiff argues that because it filed two Breach of Contract claims against defendant HO, a six-year statute of limitations should apply under Michigan statute rather than the two-year period in the contract. Plaintiff also argues that the timeline should have tolled when it filed its first Complaint on January 10, 2022, until it was dismissed on March 16, 2022. Plaintiff voluntarily dismissed that case because it filed the suit against improper defendants. Finally, plaintiff argues that the statute of limitations should have tolled sooner than December 4, 2019. Plaintiff claims that when it first reported the loss, defendant HO's agent, Jose Mireles, indicated that plaintiff did not have a claim.

MCR 2.116(C)(7) allows the Court to dismiss an action because of statute of limitations. The Court must consider "[t]he affidavits, together with the pleadings, depositions, admissions, and documentary evidenced then filed in the action or submitted by the parties" in accordance with MCR 2.116(G)(5). "The contents of the complaint must be accepted as true unless specifically contradicted by the affidavits or other appropriate documentation submitted by the movant." *Sewell v Southfield Pub Sch*, 456 Mich 670, 674; 576 NW2d 153 (1998). If the movant supports the motion with facts, the burden shifts to the non-moving party to show a genuine issue of material fact. *Kincaid v Cardwell*, 300 Mich App 513, 537; 834 NW2d 122 (2013). MCR 2.116(G)(6) requires that the Court only consider affidavits, depositions, admissions, and documentary evidence to the extent that the content or substance would be admissible as evidence to establish or deny the grounds stated in the motion.

First, the Court considers plaintiff's argument that a six-year statute of limitations applies to the breach of contract claims. In *Rory v Continental Ins. Co.*, 473 Mich 457, 470; 703 NW2d 23 (2005), the Supreme Court held that "an unambiguous contractual provision providing for a shortened period of limitations is to be enforced as written unless the provision would violate law or public policy." The Supreme Court explained that the only context in which the legislature has prohibited shortened limitations periods is for life insurance policies. *Id.* at 472. The Court finds that the two-year limitation to commence an action against defendant HO is unambiguous and enforceable.

Next, the Court considers whether the period of limitations tolled when plaintiff filed its original suit on January 10, 2022 against Auto Owners Insurance Company and Integrity Insurance Services, Inc. Specifically at issue for defendant HO, is the case against Auto Owners Insurance Company. Auto Owners was represented by Stephen Willison as is defendant HO. Plaintiff voluntarily dismissed that case on March 15, 2022 because it had named the wrong defendants.

Cobb v Mid-Continent Telephone Service Corp., 90 Mich App 349, 354; 282 NW2d 317 (1979) provides a framework to help the Court determine whether "service of process upon one defendant is sufficient to toll the statute of limitations as to another prospective corporate defendant." They are:

> (1) Whether service was had upon one who was a proper representative of both corporations; (2) whether the corporations share the same legal address; (3) whether the corporations are in the same general business; (4) whether the corporations have most of the same officers; (5) whether the corporations are represented by the same law firm; and (6) whether the officers of the corporations which plaintiff is seeking to add were clearly informed of facts which would indicate which entity plaintiff intended to sue. Furthermore, courts generally have considered the extent of plaintiff's fault in bringing an action against the wrong entity.

In *Matti Awdish, Inc. v Williams*, 117 Mich App 270, 277-278; 323 NW2d 666 (1982), the Court of Appeals stated that "[i]t is the general rule that when an action is instituted against one party, the applicable limitations period is not tolled against other potential parties not originally named in the suit... However, this proposition is not sacrosanct. Whether this rule should be applied turns on the particular circumstances of each case." *Id.,* citing *Cobb v Mid-Continent Telephone Service Corp.,* 90 Mich App 349, 355; 282 NW2d 317 (1979).

In *Matti*, the plaintiff sued the defendant insured in a no-fault claim. Plaintiff did not sue insurer, Farmers Insurance Group. However, Farmers knew about the suit. Farmers defended the suit on the insured's behalf. Plaintiff requested leave to amend its Complaint and add Farmers Insurance as a defendant. The Trial Court denied the request on the grounds that the one-year statute of limitations to file suit had lapsed. The Court of Appeals reversed on grounds that it was "obvious that Farmers… had actual knowledge of the pendency of the suit... The insurer literally conducted the defense for the insured." The Court also criticized Farmers' litigation tactics. Farmers knew that it was the proper party to the suit, but to avoid litigation defended the suit for the insured until the statute of limitations to file suit against Farmers had passed. Then, when it was too late to add Farmers as a party, Farmers moved for summary disposition on the grounds that defendant insured was the improper party. The Court characterized Farmers' tactics as clever and "taken with malice aforethought." *Awdish,* at 278-279.

The Court recognizes that these cases are distinct from the present case because they involve amendments to existing cases to add a new party. However, the Court finds the framework instructive as the tolling implications and factual scenarios are similar. In this case, plaintiff asks the Court to toll the limitations period throughout the first case that it filed, but voluntarily dismissed because it had named the wrong defendants. Plaintiff now alleges that defendant HO had actual knowledge of the first suit. On the one hand, plaintiff has not provided the Court with

any evidence about whether defendant HO and Auto-Owners share the same resident agent, legal address, have the same officers, or whether the officers of defendant HO were clearly informed of facts which would indicate which entity Plaintiff intended to sue. On the other hand, defendant HO and Auto Owners are represented by the same law firm and are in the same general business. From the record, the Court is also aware that from inception of the policy until the final denial notice, the correspondence that Plaintiff received about his insurance was drafted on Auto-Owners Insurance letterhead.

While the Court suspects that defendant HO is an affiliate or subsidiary of Auto-Owners and does not condone any tactics Defendant HO may have employed to avoid this litigation, plaintiff failed to present evidence to satisfy the *Cobb* factors. The Court's review is limited to the pleadings and evidence in this case and cannot consider documents from the prior case that were not submitted as evidence in this matter. Without more evidence to confirm that Defendant HO had actual notice at the time of the first complaint, the Court cannot toll the statute of limitations from the date of the first complaint.

Finally, the Court considers whether the period of limitations should have tolled when plaintiff made its first contact with insurance agent Mireles. Defendant HO indicates that this occurred on December 4, 2019, which is the date that Defendant HO created claim number 300-04130222-2019. Plaintiff insists that it contacted agent Mireles much sooner, but that agent Mireles told plaintiff it did not have a claim. Plaintiff argues that tolling should begin from this earlier date. Plaintiff included an affidavit from Israel Quintanilla, plaintiff's manager and operating partner, in which he swears "(3) [t]hat he attempted to file a claim through his insurance agent, who was working for Koop and Burr Insurance Agency, Defendant at the time of the loss. (4) That his insurance agent, Jose Mireles indicated that he did not have a claim. (5) That later, Jose Mireles indicated to Plaintiff that he could file a claim with the insurance company." Plaintiff does not provide a specific date when the alleged first contact occurred.

The policy is clear that the statute of limitations tolls when defendant HO is notified of the loss or damage. The crux of the argument hinges on what "notify" means in this insurance contract.

> Ambiguous provisions in an insurance contract are construed against the insurer and in favor of coverage. Where the policy is clear, however, 'courts are bound by the specific language set forth in the agreement.' Terms in an insurance policy must be given their plain meaning and the court cannot 'create an ambiguity where none exists.' An insurer is free to define or limit the scope of coverage so long as the policy language fairly leads to only one reasonable interpretation and is not in contravention of public policy. If these prerequisites are fulfilled, the policy will be enforced as written.

Heniser v Frankenmuth Mut Ins Co, 449 Mich 155, 160-161; 534 NW2d 502 (1995) (citing *Powers v DAIIE*, 427 Mich 602, 624; 398 NW2d 411 (1986), *Raska v Farm Bureau Mut Ins Co*, 412 Mich 355, 314 NW 2d 440 (1982), and *Upjohn Co v New Hampshire Ins Co*, 438 Mich 197, 206; 476 NW2d 392 (1991). "The policy of interpreting ambiguities in a contract against insureds is rooted in the fact that insurers have superior understanding of the terms they employ, which should not

bind relatively unsophisticated insureds. This goal is not furthered by allowing insureds to employ a sophisticated version of a term to create a claim of ambiguity." *Heniser* at 163.

Defendant HO provided the Court with a March 17, 2019 Policy Renewal Declaration and its accompanying endorsements as an exhibit to its Affirmative Defenses. "Notify" is not defined in any of these documents, so the Court must rely on its ordinary and plain meaning. According to Merriam-Webster, "notify" means "to give formal notice to" or "to give notice of or report the occurrence of."[1]

The Court finds that there is a genuine issue of material fact regarding the requirements of the policy for formal notice and when defendant HO was notified of the loss. Defendant HO provided a claim form which shows that Plaintiff made claim number 300-0413022-2019 on December 4, 2019. Plaintiff countered this with an affidavit in which Plaintiff's manager and operating partner swears under oath that he reported the loss to defendant HO's agent sooner than December 4, 2019. The ordinary and plain meaning of "notify" does not require a written notice or report. The Court cannot bind the unsophisticated insured Plaintiff to Defendant HO's understanding of the term "notify" where notify was not defined in the insurance contract language.

If plaintiff notified defendant HO sooner than December 4, 2019, then the statute of limitations should have tolled sooner than December 4, 2019. If the statute of limitations tolled much sooner than December 4, 2019, plaintiff's filing may be timely. While plaintiff does not provide an exact date, the Court must view the evidence in the light most favorable to the non-moving party. Taken as true, plaintiff's affidavit creates a genuine issue of material fact about when plaintiff notified defendant HO about the loss. It follows that there is a genuine issue of material fact about when the statute of limitations for plaintiff's breach of contract claims first tolled and whether the statute of limitations was lapsed at the time plaintiff filed this case. Defendant HO's Motion for Summary Disposition under MCR 2.116(C)(7) is denied.

III. Defendant Koop MCR 2.116(C)(2) and (C)(3) Motion

Defendant Koop and Burr Insurance (hereinafter, defendant Koop) is an insurance agency. Defendant Koop alleges that its current location at 348 South Waverly Road, Holland, Michigan 49423, was a branch office of Burr & Company until October 21, 2021. On October 21, 2021, Koop and Burr, Inc. (defendant Koop) became its own independent agency, unassociated with Koop and Burr (an assumed name for Koop and Burr Insurance), which sold plaintiff the insurance policy at issue. Defendant Koop argues that plaintiff did not serve the proper legal entity, so its case should be dismissed under MCR 2.116(C)(3) on grounds that service of process was insufficient.

Additionally, the summons and complaint that plaintiff served on defendant Koop was apparently not processed by Ottawa County Circuit Court. The documents defendant Koop received did not comply with MCR 2.102(B). They do not include several important pieces of information such as the name and address of the court, the case number, the name of the court

[1] MERRIAM WEBSTER https://www.merriam-webster.com/dictionary/notified (last visited January 12, 2022).

clerk, the date on which the summons was issued, and the last date on which the summons is valid. Defendant Koop argues that because the pleadings were so technically deficient, the case should be dismissed under MCR 2.116(C)(2) on the grounds that the process issued in the action was insufficient.

Plaintiff correctly argues that Motions under MCR 2.116(C)(2) and (3) "must be raised in a party's first motion under this rule or in the party's responsive pleading, whichever is filed first, or they are waived." Defendant Koop did not raise these issues in its answer or affirmative defenses. Therefore, the issues are permanently waived and defendant Koop's requests for summary disposition under MCR 2.116(C)(2) and (C)(3) are denied.

IV. Defendant Koop MCR 2.116 (C) (8) Motion

Next defendant Koop argues that this plaintiff's claims against defendant Koop should be dismissed because plaintiff did not properly plead its fraud claim and because detrimental reliance is not a separate cause of action under Michigan law. Plaintiff argues that the detrimental reliance claim should be subsumed into the fraud claim. While plaintiff's original fraud claim alleges that defendant Koop committed fraud when its agent recommended the policy at issue because it "would insure every part of [plaintiff's] business, including but not limited to building and property." In its response to defendant Koop's Motion for Summary Disposition, Plaintiff alleges that the fraud claim is for defendant Koop's representation to plaintiff that it did not have a claim when its property was damaged by bad weather during or after an eviction.

The Court's decision on a motion for summary disposition under MCR 2.116(C)(8) for failure to state a claim on which relief can be granted is limited to review of the pleadings per MCR 2.116(G)(2). "The term 'pleading' includes only: (1) a complaint, (2) a cross-claim, (3) a counterclaim, (4) a third-party complaint, (5) an answer to a complaint, cross-claim, counterclaim, or third-party complaint, and (6) a reply to an answer." MCR 2.110.

The Court in *Erickson's Flooring & Supply Co, Inc v Tembec, Inc*, 212 Fed Appx 558, 562 (2007) found that "Michigan does not recognize an independent cause of action for detrimental reliance." In *Aero Taxi-Rockford v General Motors Corp*, No 259565, 2006 WL 1479915 at 9 (Mich Ct App May 30, 2006), the court also found "that there is no cause of action for 'detrimental reliance....' Rather, detrimental reliance is an element of other causes of action, for example promissory estoppel and innocent misrepresentation." Because detrimental reliance is not a recognized cause of action, the Court grants defendant Koop's motion to dismiss the third count of Plaintiff's complaint, detrimental reliance.

The plaintiff requests that the Court subsume the allegations contained in the detrimental reliance claim into the fraud claim, which defendant Koop asserts should also be dismissed for failure to state a claim upon which relief can be granted. A common law fraud claim requires plaintiff to plead that:

1. The defendant made a material representation;
2. The representation was false;

3. The defendant knew it was false when it was made or made it recklessly, without knowledge of its truth and as a positive assertion;
4. The representation was made with the intention to induce reliance by the plaintiff;
5. The plaintiff acted in reliance on it; and
6. The plaintiff suffered injury.

Roberts v Saffell, 280 Mich App 397, 403; 760 NW2d 715 (2008).

According to *Cooper v Auto Club Ins Ass'n*, 481 Mich 399, 414-415; 751 NW2d 443 (2008),

> [C]ourts should carefully consider … whether insureds can satisfy the reliance factor. Insureds must "show that any reliance on the insurer's representation was reasonable." Because fraud cannot be "perpetrated upon one who has full knowledge to the contrary of a representation," insureds' claims that they have reasonably relied on misrepresentations that clearly contradict the terms of their insurance policy must fail. One is presumed to have read the terms of his or her insurance policy, therefore, when the insurer has made a statement that clearly conflicts with the terms of the insurance policy, an insured cannot argue that he or she reasonably relied on that statement without questioning it in light of the provisions of the policy.

Citing *Foreman v Foreman,* 266 Mich App 132, 141-142; 701 NW2d 167 (2005), and *Montgomery Ward & Co v Williams*, 330 Mich 275; 47 NW2d 607 (1951).

The Court finds that plaintiff cannot satisfy the reliance element of its fraud claim even if the court includes and considers plaintiff's allegations under its claim for detrimental reliance together with its allegations for fraud. It was not reasonable for plaintiff to rely on its interpretation of "every part of plaintiff's business, including but not limited to building and property." Defendant Koop provided plaintiff with a written insurance policy that detailed the coverage and defined the extent of everything that was covered. The policy does not include coverage for evictions. Plaintiff does not contend that defendant Koop represented that it would provide Plaintiff coverage for evictions. Defendant Koop's motion for summary disposition under MCR 2.116(C)(8) of plaintiff's fraud claim is granted.

V. Defendant Koop MCR 2.116(C) (10) Motion

Because the Court finds that Plaintiff's claims against Defendant are dismissed pursuant to MCR 2.116(C)(8), the Court declines to consider defendant Koop's Motion under MCR 2.116(C)(10).

VI. Conclusion

Defendant Koop's Motion for Summary Disposition pursuant to MCR 2.116(C)(8) is granted. Pursuant to MCR 2.116(I)(5) Plaintiff may amend its pleadings within fourteen (14) days of this Order in accordance with MCR 2.118.

IT IS SO ORDERED.

Dated: January 18, 2023

Hon. Jon Van Allsburg, Circuit Judge