STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

TUDOR INSURANCE COMPANY,

Plaintiff,

-vs-

ALTMAN MANAGEMENT COMPANY,

Defendant.

and

WANDA RUIZ, as Guardian of Carmen Otero,

Plaintiff in Intervention,

-vs-

TUDOR INSURANCE COMPANY, ALTMAN MANAGEMENT COMPANY and NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA.,

Defendants in Intervention.
_____/

Case No: 13-010270-CK
Hon. Brian R. Sullivan

ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY DISPOSITION

At a session of said Court, held in the City County Building, City of Detroit, County of Wayne, State of Michigan, on

PRESENT: HONORABLE BRIAN R. SULLIVAN

Plaintiff Tudor Insurance Company (Tudor) seeks summary disposition on a declaratory action against Altman Management Company (Altman) under a policy of

insurance. Tudor claims it has no obligation to indemnify Altman because Altman failed to comply with the insurance contract by giving "practicable" written notice of an "occurrence" or "lawsuit" against Altman. Altman failed to timely provide notice that intervening plaintiff Otero sued Altman, which prejudiced Tudor in its defense of Altman. The prejudice was a default entered against Altman, which Tudor was not allowed to set aside, precluding Tudor from presenting any defenses as to liability or proximate cause. Tudor claims this prejudice precludes coverage. The court agrees and grants Tudor's motion for summary disposition.

I. FACTS

Altman managed a large number of apartment buildings across the country. Altman hired AON Risk Insurance Services West, Inc., (AON) to find insurance for it and process its claims. AON went to Westrope, an agent/broker of Tudor. Westrope procured an insurance policy of Tudor for Altman through AON. (See Exhibit E, Tudor's brief.)

Carmen Otero leased an apartment in a Detroit apartment building managed by Altman. On January 26, 2010 Otero was found in a fetal position in her apartment. She may have been unconscious. Otero, a drug user, exhibited trauma to her face and head, consistent with being beaten. The windows to her apartment were wide open. Otero claimed she suffered carbon monoxide poisoning from, among other potential sources, the heating system in her apartment. The twelve story building had one furnace that services

the entire building. No other tenant suffered any such injury. No carbon monoxide leak was found in the furnace or heating system.

On June 6, 2011 Otero filed suit by her Next Friend claiming personal injury from carbon monoxide poisoning. Altman was served numerous times. The vice-president of Altman was served twice, once by a sheriff and once by a process server. The summons and the complaint was also mailed to both Altman Management Company and Altman's Florida legal counsel on June 20, 2011. Derek Lubson of Altman got the complaint in the mail and sent it to Michael Rosenbach of AON electronically the same day. Rosenbach was not AON's usual contact for Altman and did nothing with the complaint.[1] None of the complaints were forwarded to Tudor.

Otero entered a default on July 25, 2011 after Altman failed to file an answer. The default was served on Altman on August 12, 2011. Nothing happened.

Otero filed a motion for default judgment on February 29, 2012, scheduled to be heard in March, 2012. An e-mail dated March 5, 2012 from Marissa Crescingi of Altman to Wayne Brinkman of AON stated: "This one fell through the cracks; an incident report was never filed and I was not copied on the correspondence so unfortunately it was never submitted to you."

Tudor finally received the complaint on March 6, 2012, six months after it was filed.

Tudor filed an appearance. Tudor also moved to set aside the default alleging it had both good cause and a meritorious defense to Otero's complaint. Tudor alleged the meritorious defense was that the furnace didn't leak; the lack of carbon monoxide exposure in the heating system and building; lack of injury to any other tenant; Otero's drug history and drug abuse; evidence of an assault of Otero; and Otero's windows were wide open, all of which militate against any carbon monoxide poisoning. Tudor also asserted there was no proximate cause between plaintiff's injuries and the alleged defects.

Otero opposed Tudor's motion and argued Altman was properly served numerous times but took no responsive action. Otero contended AON was served by Altman vis a vis Rosenbach. When Altman finally took action, it was negligent because it forwarded the complaint not to Brinkman of AON but to Michael Rosenbach of AON. Otero contended sending the complaint to Rosenbach (the wrong person at AON) instead of Brinkman resulted in no legal action so the default should stand. Otero also said Altman compounded its negligence by not following up on the status of the suit. (See Opinion and Order of Circuit Court, *Otero v Altman,* August 14, 2012,p2,3).

The trial court specifically accepted Otero's argument that Altman "failed to act reasonably to report the lawsuit to its insurer [Tudor] . . ." (Opinion,p3). "Relying on one e-mail – sent to the wrong individual – is not reasonable." Opinion,p3. The court denied Tudor's motion to set aside the default.

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[1]The usual contact was Wayne Brinkman.

The default precluded Tudor from contesting liability and proximate cause so Tudor could not present any of the above meritorious defenses to Otero's claims in court.

II. SERVICE

Altman and intervening plaintiff claim the service in this case on AON should be imputed service to Tudor. Altman claims the relationship of the parties established an agency, at least in part, based on the course of conduct of past notice to Tudor. Altman's past practice of providing notice to Tudor was accomplished by delivery through a chain of entities, always resulting in Tudor's acceptance of the suit. That course of conduct was the only procedure used each time Altman was served with a claim (50-60 times) during the policy year of 2010-2011. The course of conduct utilized by all the parties to provide notice to Tudor was: 1) Altman received notice of an occurrence or a Summons and Complaint; 2) Altman sent it to AON and never sent the notice directly to Tudor; 3) AON submitted the claim to Westrope; 4) Westrope accepted the claims from AON and submitted them to Tudor; and 5) Tudor accepted the claims from Westrope and processed all of them (even this one in *Otero*).[2]

Each of these services was substantiated by e-mail. All the parties agreed this chain of service was utilized.

[2]On occasion Altman initially circumvented AON and gave notice directly to Westrope. Westrope rejected it and instructed Altman to serve AON.

Altman claims Westrope once directed Altman serve AON not it, and this direction established a manner of service which binds Tudor, as Westrope is Tudor's agent.

III. SUMMARY DISPOSITION

A. Arguments and Conclusions

Tudor raised several grounds in support of its motion for summary disposition:

1. Tudor claims the contract provides Altman must serve Tudor directly.[3]

The court concludes the contract does not require Altman to directly serve Tudor nor does it prescribe a specific method to accomplish service. The contract only provides the burden is on Altman to get notice to Tudor ("You (Altman) must see to it …").

2. Tudor contends AON is not Tudor's agent. Tudor has no contract or connection with AON, so service by Altman to AON has no legal significance and cannot be imputed to Tudor.[4]

The court concludes (and parties agree) AON is not Tudor's actual agent.

3. Tudor contends Westrope is its wholesale broker, not its agent, so it cannot bind Tudor.

The court concludes Westrope is Tudor's actual agent.

4. Altman contends the repeated use (50-60 times) of the chain of service establishes AON is Tudor's agent by dint of Tudor's acceptance of service via this chain.

The court concludes the chain of service (course of conduct) used by the parties, regardless of how often it was used, does not create an agency relationship between AON and Tudor. Each prior presentment was timely and an individual service. Acceptance of service by Tudor does not establish an agency between AON and Tudor.

5. Altman contends Westrope, an agent of Tudor, directed it to serve AON,

[3]Tudor focuses on "practicable" service, which did not occur, unless service to Aon is service to Westrope and Tudor. The focus of the opinion is on Altman's duty "to see it" Tudor got written notice.
[4]There is no issue of actual agency presented in this case.

which establishes an agency relation between AON and Tudor.

Westrope's undisputed verbal direction to Altman to serve only AON is not attributable to Tudor. There is no evidence Tudor held Westrope as having the authority to direct service of process in any manner, i.e. that Altman could not serve Tudor or Altman had to serve a particular entity.

Secondly, Tudor never held out that Westrope had any authority to amend the contract by a course of conduct to effectuate service in a particular manner contrary to the language of the contract.

Thirdly, the chain of service, *coupled with* Westrope's directive to serve AON does not create an agency relation between AON and Tudor. There is no evidence Tudor authorized Westrope to direct Altman as to the manner of service of process to bind Tudor.

Finally, Tudor's knowledge of the chain of service utilizing AON is insufficient to create an agency relationship between Tudor and AON. The evidence shows Tudor knew Altman used AON and Westrope to effectuate timely contractual notice to Tudor. Knowledge alone does not constitute mutual agreement that can amend the contract to provide for untimely service or restrictive service in a manner contrary to the contract.

The court further holds:

6. There is no course of conduct which amended Altman's contractual burden to provide "practicable notice to Tudor" of an occurrence or written notice of the Summons and Complaint. That notice was not accomplished and Tudor was prejudiced because of the failure to provide the contractual notice.

7. Otero argued successfully to the trial court that Altman's service of AON was not effective (i.e. someone at AON was the "wrong" person for service), and the default should not be set aside. Otero is judicially estopped and cannot now argue service on AON was valid, that is, that AON is now Altman's agent for satisfaction of the arbitration award.

B. Contract

1. The insurance contract does not specify a particular method by which Altman must provide notice to Tudor, nor can service only be made on Tudor by Altman as Tudor contends.

Tudor contends the contract requires Altman (and no one else) serve Tudor. These rules of construction of a contract are well established:

> (i) An insurance contract must be enforced in accordance with its terms. *Citizens Insurance Co. v Pre-Seal Service Group, Inc.,* 477 Mich 75 (2007).
>
> (ii) A court, in reading the contract, should not create an ambiguity where the terms are clear and precise. *Id,* at 82. This rule applies to present an over reading to benefit either party, as an ambiguity is construed in favor of the insured. See *Henderson v State Farm Fire & Casualty Co.,* 460 Mich 348 (1999).

The notice provision of the contract between Altman and Tudor provides: "*You must see to it* that we are notified as soon as practicable of an "occurrence" or an offense which may result in a claim." (Emphasis supplied). Sec. IV, paragraph 2, p 8 of 12). And: "*you must see to it* that we receive written notice of the claim or "suit" as soon as practicable in response to a claim or suit. (Emphasis supplied. See IV, p262, p 8 of 12). "You" in the definition section of the policy refers to Altman.

The contract does not specify the method by which such notice is to be effectuated by Altman. That is, the manner of service is not specified. The contract places the burden on Altman to get the notice to Tudor and it must be done "practicably", but it does not specify how service is to be accomplished. Since the manner of service is contractually unspecified, any means to accomplish the contractual requirement is acceptable.

Sandra McFarlane, a representative of Tudor, stated in her deposition that the

insurance policy does not specify how such notice is to be provided to Tudor. Tudor's proposed reading changes the language of the contract and the obligations of the parties. It is also directly contrary to Tudor's acceptance of service from Westrope of Altman's other claims. The contract simply does not specify any particular identity, method or vehicle of delivery. It specifies only that: a) the burden is on Altman to do it and b) it must be done practicably.

2. Tudor further claims that only Altman can serve Tudor under the contract.

Contrary to Tudor's assertion, the contract does not state that Altman is the only entity who can provide notice to Tudor. The contract does not state that notice must be "only" or "directly" be provided to Tudor by Altman.

McFarlane also admitted Altman never provided direct notice to Tudor for any occurrence and Tudor accepted all notice provided to it. The notice always came from a source other than Altman. McFarlane admitted the notice came to Tudor by a "forwarding chain of things." . . . "All but one, received them from Westrope." (Deposition of Sandra McFarlane, page 28,29). Tudor's argument that Altman was the only entity allowed to serve Tudor is rejected.

C. Agency

Altman claims the course of conduct used in this case to provide Tudor with contractual notice under occurrence or suit used over fifty times in the same policy year

creates a question of fact of agency. That question of fact is whether Tudor's acceptance of service (about fifty times) coupled with Westrope's direction to Altman to serve AON, fulfills Altman's contractual obligation of providing practicable written notice to Tudor.

Otero and Altman have established Westrope directed Altman to serve AON, but there is no evidence Tudor authorized Westrope to give make such a direction on Tudor's behalf.

1. AON is not Tudor's actual agent.

The parties agree AON is not Tudor's actual agent. Tudor and Altman have no contract, nor has any evidence been provided to the court, which establishes an actual agency between Tudor and Altman.

2. Apparent Agency. There is no question of fact that AON is not Tudor's apparent agent.

Tudor asserts there is no apparent agency between Tudor and AON. Tudor asserts Westrope had no authority from it to establish the time or manner of service for Tudor. Moreover, Westrope had no authority to amend the written contract.

The general rule is that an independent insurance agent (AON) is ordinarily the agent of the insured (Altman). See *Mate v Wolverine Mutual Insurance Company,* 233 Mich App 14 (1998). Dual agency has been recognized in the insurance industry. See

Schneider v American Spirit Insurance Company, (cite).

An agent can bind a principal where the agent acts with apparent authority of the principal. The principal must hold the agent out, cloak it with apparent authority or at least acquiesce in the agent's conduct. *Shinaburger v Phillips,* 370 Mich 135, 139 (1963).

An imputed or implied agency cannot exist contrary to the will of the principal. However, such an agency can emerge from "acts and circumstances within his [the principal's] control and permitted over a course of time by acquiesce or in recognition thereof." See *Weller v Speet,* 275 Mich 655 (1936). Whether or not such an agency exists depends on the facts and the circumstances which give rise to the alleged, or implied agency. Such facts must be: "1. known to the alleged principal; 2. within the control of the alleged principal; and 3. either explicitly acknowledged or at least acquiesced in by the alleged principal." See *AFP Specialties, Inc. v Vereyken,* 303 Mich App 497 (2014).

MCL 500.3008 provides that notice given by or on behalf of the insured to any *authorized* agent of the insurer shall be deemed notice to the insurer. (Emphasis supplied).

The general rule of law for apparent agency is that acts, appearances or circumstances which are presented, from which an inference of an apparent agency may be drawn, presents a question of fact as to the existence of such an agency relationship for

the jury. See *Douglas v Insurance Company of North America,* 215 Mich 529 (1921).

Apparent authority arises from the acts, circumstances and appearances which lead a third person to reasonably believe that an agency relationship exists. Such apparent authority must be traceable to the principal and cannot be established only by the acts of the agent. *Meretta,* at 698, 699; *Alar v Mercy Memorial Hospital,* 208 Mich App 518 (1995). Such authority must be transferable to the principal and do not reside on the acts, conduct or declaration of the agent alone. *Mitchell v Western Fire Insurance Company,* 272 Mich 204; *Auto Owners Insurance Company v Michigan Mutual Insurance Company,* 223 Mich App 205 (1997).

a. Tudor and AON

Tudor's ultimate acceptance of service in this case is not an affirmative act which supports an agency relationship between it and AON. The acceptance by Tudor was within the plain language of the contract. Tudor always accepted service, even this time, when the complaint and summons were delivered. Here there is no delivery and Altman seeks to impute delivery to Tudor by service on AON – where the summons stopped.

Neither Otero nor Altman have produced any evidence Tudor held AON out as its agent to Altman.

Westrope was Tudor's actual agent/broker. However, there is no evidence Tudor

held Westrope out to anyone (Altman or AON) that Westrope was authorized to dictate the method, manner, time or object of service.

Altman claims (and Otero concurs) the facts, the circumstances and appearances are such that a routine for the delivery of notice from Altman to Tudor was established through the chain of service via the four entities. The delivery went from Altman to AON to Westrope and finally to Tudor. Tudor knew it and accepted delivery from Westrope every time (including the *Otero* case) in the calendar year. This method was confirmed by Leslie Armstrong, a Tudor representative, who testified Altman reported fifty or sixty claims in the same policy year at issue here to Tudor. (See deposition of Leslie Armstrong, page 27).

There is no evidence linking Tudor to AON, other than AON being in the chain where Tudor accepted service vis a vis this method of delivery.

b. Tudor and Westrope

Westrope was Tudor's wholesale broker/agent.[5] Westrope one time instructed Altman to serve AON and not it, as the above deposition transcript testimony clearly shows. There is no evidence Tudor authorized this statement, agreed to it or even knew about it. The general fact Westrope is Tudor's agent/broker does not factually nor legally establish that Westrope's instruction to Altman binds Tudor. Westrope's instruction to Altman is not an authorized act which speaks for or binds, Tudor. In the absence of any

evidence Tudor held Westrope out as having that binding authority, Westrope bound only Westrope. The law requires that Tudor hold out to either or both Altman or AON that Westrope could bind Tudor. There is no evidence of it.[6]

c. Tudor's knowledge of claim

Tudor's knowledge of the method of presentment of notice and service in the chain of delivery is just that, knowledge. See *Quality Products and Concepts Co. v Nagel Precision, Inc.,* 469 Mich 362 (2003). Silence (or even knowledge) of a party [Tudor] is insufficient to establish mutual amendment of a written contract by clear and convincing evidence.[7] *Id,* at 376, 377, 380. The contract contained no specific provision as to how service was to be accomplished. The established pattern of service does not create an agency by dint of Tudor's mere knowledge or participation.

All such service in the policy year accepted by Tudor, even coupled with the direction of Westrope, does not create a question of fact as to the existence of an apparent agency between Tudor and AON. There can be no apparent agency without a holding out by Tudor. There is no evidence presented by Altman or Otero that Tudor held out AON as its agent. There is no evidence Tudor authorized Westrope to direct service of process, or itself prescribe notice be sent to AON. Prior timely acceptance of service by Tudor does not create an agency by the parties' course of conduct, any more than if Altman used

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[5]Tudor denied Westrope is its agent but the term is used in its contract in Western World/Tudor.

[6]Wayne Brinkman, a casualty consultant for AON, testified that Tudor's wholesale broker, Westrope, required that AON submit all notices to Westrope only . ". . . They'd accept them from AON. They were just a pass through. [Westrope don't take them directly.]" (Deposition of Wayne Brinkman, page 74-77).

Federal Express fifty times and it lost the documents. The prior conduct is simply fulfillment of the contract.

The plain language of the contract places the burden on Altman to get written notice to Tudor without specifying the method of delivery or the identity of the deliverer. Altman did not comply timely. Tudor was deprived of the ability to present a defense, which amounts to legal prejudice.

D. Estoppel of Otero.

Intervening plaintiff successfully argued AON was not Tudor's agent for service of process when Tudor sought to set aside the default of Altman. In particular, Otero argued Altman served Rosenbach, not Brinkman, both of whom are employed by AON.[8] Otero argued this service was deficient to set aside the default although AON actually received the notice, because service was sent to the wrong person. Otero now claims that service on AON is valid because AON is Tudor's agent for service. Otero is estopped from now asserting AON is the agent of Tudor.

The trial court in *Otero* relied on intervening plaintiff's assertion when it denied Tudor's motion to set aside the default. The trial court held Altman's presentation of the complaint to AON did not fulfill Altman's duty and did not warrant setting aside the default. If Altman's service on AON was sufficient, the court would not have found Altman acted

[7]But see *Mitchell v Western Fire,* 272 Mich 204 (1935), an exception not applicable here.
[8]Both Brinkman and Rosenbach were employed by AON. The failure to serve Brinkman and service on

unreasonably.

The judicial estoppel doctrine was discussed by our Supreme Court in *Paschke v Retool Industries,* 445 Mich 502, 509-510; 519 NW2d 441 (1994). Under this doctrine, a party who has successfully and unequivocally asserted a position in a prior proceeding is estopped from asserting an inconsistent position in a subsequent proceeding. The doctrine of judicial estoppel applies where the claims are wholly inconsistent. Moreover, the mere assertion of inconsistent positions is not sufficient to invoke estoppel; rather, there must be some indication that the court in the earlier proceeding accepted that party's earlier position as true.

Otero successfully argued Altman's service on AON was insufficient, that is service on Rosenbach of AON, being the wrong person, did not fulfill Altman's contractual duty of service on Tudor. The trial court relied on and accepted this assertion.[9] Now, Otero claims that same service on AON is valid such that it should be imputed to Tudor (i.e. AON is Tudor's agent) for enforcement of the arbitration award. These positions are directly and wholly inconsistent. Otero is estopped from asserting it. *Paschke, Id.*

CONCLUSION

Rosenbach has not been legally distinguished from service on AON through either one.

[9]Otero initially argued service on Rosenbach of AON was insufficient. Rosenbach worked for AON. Service on an authorized agent is notice. Otero prevailed on this ground before Judge Sapada who refused to set the default aside. Otero now asserts such service on AON was valid to trigger the policy.

For all the reasons stated, plaintiff's motion for summary disposition is granted; and

IT IS SO ORDERED.

/s/ Brian R. Sullivan
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BRIAN R. SULLIVAN
Circuit Court Judge

ISSUED: