

STATE OF MICHIGAN
COURT OF APPEALS

DONNA M. FOUNTAIN,

Plaintiff-Appellant,

v

AMEX ASSURANCE COMPANY,

Defendant-Appellee.

UNPUBLISHED
November 2, 2004

No. 248294
Wayne Circuit Court
LC No. 01-136044-NF

Before: Griffin, P.J., and Saad and O’Connell, JJ.

PER CURIAM.

Plaintiff appeals as of right the order granting defendant’s motion for summary disposition. We reverse. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff filed this action, asserting that defendant wrongfully refused to pay first-party no-fault benefits arising out of a traffic accident. Defendant moved for summary disposition under MCR 2.116(C)(10), asserting that the insurance policy it issued to plaintiff was void ab initio because plaintiff misrepresented that she did not use the vehicle in her business and that she had private health insurance.

A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating the motion, the trial court considers affidavits, pleadings, depositions, admissions and other evidence submitted by the parties in a light most favorable to the party opposing the motion. Where the proffered evidence fails to establish a genuine issue of material fact, the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

Plaintiff first asserts that there was no misrepresentation regarding her personal use of the car because she did not use the car for business at the time she completed the application. While we do not pass on the ultimate question, we agree that the trial court improperly resolved this factual question in defendant’s favor. In her deposition, plaintiff testified that she had been working on and off at Aon Consulting for approximately seven years. The insurance company argued that she was using her vehicle for business purposes while working for the consulting company, so this was a material misrepresentation in the application. However, plaintiff also asserts that she was not using her vehicle for business purposes when she filled out her insurance application. Plaintiff’s acknowledgement that she worked for Aon Consulting “on and off” does

not directly contradict her straightforward assertion that she was working from home when she filled out the application. This is not the kind of blatant contradiction upon which a trial court may base a finding that no material question of fact exists. Trial courts must carefully approach potential factual questions and should not lightly dismiss them as immaterial. Because the trial court improperly resolved this factual question in favor of the moving party, it erred. MCL 2.116(C)(10).

Plaintiff also argues that the trial court erred when it found that her misstatement regarding her health insurance coverage was a material misrepresentation that justified rescission. We agree. The question on the application asked, “Do you have primary medical coverage with a health insurance company?” Plaintiff answered affirmatively, and now asserts that she honestly believed that she had such coverage. Defendant presented evidence that plaintiff’s health program, provided through Wayne County, was not, in the strictest sense, a health insurance company and did not provide primary coverage for motor vehicle accidents. Defendant presented evidence that if it had known that plaintiff did not have primary medical coverage, the rate charged for the policy would have been substantially higher. The trial court found that the misrepresentation was material, so defendant was entitled to rescind the policy. However, under the unique circumstances of this case, plaintiff raised a factual issue regarding whether defendant reasonably relied on its vague “yes or no” question to obtain the information it claims was vital to this contract’s formation. *Novak v Nationwide Mut Ins Co*, 235 Mich App 675, 689; 599 NW2d 546 (1999). Because plaintiff raised issues of fact, the trial court erred when it summarily disposed of plaintiff’s claims.

Reversed.

/s/ Richard Allen Griffin

/s/ Henry William Saad

/s/ Peter D. O’Connell