STATE OF MICHIGAN

COURT OF APPEALS

CHARLES J. KIRBY,

Plaintiff-Appellant,

v

PROGRESSIVE MICHIGAN INSURANCE COMPANY,

Defendant-Appellee.

UNPUBLISHED
April 24, 2007

No. 274260
Wayne Circuit Court
LC No. 05-530454-NF

Before: Cavanagh, P.J., and Jansen and Borrello, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10). We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff was injured in an automobile accident and filed a lawsuit against the party responsible for the accident, Lamont Robinson, who was insured by North Pointe Insurance Company. Robinson's policy provided liability coverage to the extent of $20,000. Plaintiff was insured under a no-fault policy issued by defendant, which included uninsured/underinsured motorist benefits in the amount of $100,000. In a letter dated June 23, 2005, plaintiff's attorney notified defendant that plaintiff had "secured" Robinson's policy limits in the amount of $20,000, and demanded the policy limits of plaintiff's underinsured motorist coverage with defendant. The letter requested that defendant contact plaintiff's counsel within 21 days to discuss the matter. One week later, however, on June 30, 2005, plaintiff executed a Full and Final Release of All Claims with Robinson and North Pointe.

Defendant subsequently denied plaintiff's claim for underinsured motorist benefits, relying on a policy provision that voided this coverage if recovery is made by an insured person from a responsible person without defendant's written consent. Plaintiff thereafter brought this action against defendant for breach of contract. Defendant moved for summary disposition under MCR 2.116(C)(10), arguing that it was not liable for underinsured motorist coverage because plaintiff obtained recovery from Robinson without its consent, thereby prejudicing its ability to seek indemnification from Robinson. The trial court granted defendant's motion.

A trial court's decision on a motion for summary disposition is reviewed de novo. *Veenstra v Washtenaw Country Club*, 466 Mich 155, 159; 645 NW2d 643 (2002). Summary disposition may be granted under MCR 2.116(C)(10) if there is no genuine issue of any material fact and the moving party is entitled to judgment as a matter of law. *Kraft v Detroit Entertainment, LLC*, 261 Mich App 534, 539-540; 683 NW2d 200 (2004).

On appeal, plaintiff argues that defendant waived its rights under its policy by failing to respond to his request for written consent to execute the release with Robinson. We disagree. This Court stated in *Angott v Chubb Group Ins Cos*, 270 Mich App 465, 469-470; 717 NW2d 341 (2006):

> In order for defendant to waive its rights against plaintiff, it must have intentionally and knowingly relinquished those rights. . . . It necessarily follows that conduct that does not express any intent to relinquish a known right is not a waiver, and a waiver cannot be inferred by mere silence. . . . Waiver may be shown by proof of express language of agreement or inferably established by such declaration, act, and conduct of the party against whom it is claimed. [Internal quotation marks and citations omitted.]

Although plaintiff characterizes the June 23, 2005, letter as a request for authorization to enter into a release and settlement with North Pointe and Robinson, there is no language in the letter presenting such a request. Rather, the letter notified defendant that plaintiff had "secured" the limits of Robinson's policy, recited plaintiff's injuries, and set forth a demand for the policy limits of the underinsured motorist benefits coverage. Defendant's failure to respond to the letter cannot reasonably be construed as conduct expressing an intent to waive a right to enforce the provision requiring defendant's consent to the settlement with Robinson. Furthermore, plaintiff closed the letter with the statement, "Please contact me with [sic] 21 days to discuss this matter." Plaintiff executed the settlement on June 30, 2005, only seven days later. Accordingly, plaintiff cannot establish that defendant waived its right to consent to the settlement before the settlement was executed.

Plaintiff also argues that defendant cannot rely on the exclusionary provision unless its indemnification rights were actually prejudiced by plaintiff's unapproved settlement. This Court rejected this argument in *Lee v Auto-Owners Ins Co*, 218 Mich App 672, 676; 554 NW2d 610 (1996), explaining:

> The language of Auto-Owners' policy exclusion is unambiguous and does not contravene Michigan law or public policy. Michigan law recognizes that an insured's release of a potentially liable tortfeasor is prejudicial to the insurer because such a release destroys any possibility that the insurer could recoup some of the amounts paid via its right to subrogation. . . . *There is no need to require Auto-Owners to actually prove prejudice due to the loss of its right to subrogation*. Clear and specific exclusions contained in policy language must be given effect. . . . The exclusion in Auto-Owners' policy must be enforced as written, without incorporating a condition of prejudice. [Emphasis added; citations omitted.]

Accordingly, the trial court did not err in granting defendant's motion for summary disposition.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Kathleen Jansen
/s/ Stephen L. Borrello