

STATE OF MICHIGAN
COURT OF APPEALS

RE/MAX PREFERRED, INC.,

Plaintiff-Appellant,

v

KEMPER INSURANCE COMPANIES and
KEMPER NATIONAL GROUP,

Defendants-Appellees.

UNPUBLISHED

March 21, 2006

No. 258481

Wayne Circuit Court

LC No. 04-405890-CK

Before: Schuette, P.J., and Murray and Donofrio, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(10) in this declaratory judgment action. Because we agree with the trial court's determination that defendants were not required to defend plaintiff in an underlying action since the claims alleged in that action were excluded from coverage under defendants' insurance policy, we affirm.

In an underlying action, Mounir M. Abdel-Hak filed suit against plaintiff and plaintiff's agents Jason Saad and Ally Saad. Abdel-Hak alleged that Ally Saad prepared and presented an allegedly confidential offer to purchase real estate on Abdel-Hak's behalf. While the offer was pending, Ally Saad allegedly told Jason Saad about Abdel-Hak's offer and Jason Saad made a higher cash offer for the property, that the seller later accepted. Jason Saad made a down payment and signed the offer of purchase as the "purchaser." Jason Saad's mother, Marion Saad, subsequently completed the purchase transaction. . Abdel-Hak filed a lawsuit against plaintiff, Ally Saad, and Jason Saad, alleging fraud and misrepresentation, breach of contract, breach of fiduciary duty, violation of the Michigan Consumer Protection Act, MCL 445.901 *et seq.*, civil conspiracy, tortious interference with a business relationship or expectancy, and professional malpractice. Defendants declined to defend plaintiff against Abdel-Hak's claims under an errors and omissions insurance policy with plaintiff, relying on the following exclusions:

We will not defend or pay any claim:

* * *

K. Based on or arising out of the purchase of property by, or the sale, leasing, appraisal, or property management of property developed, constructed or owned by:

1. Any Insured;

2. An entity in which any Insured had a financial interest or a contemplated financial interest;

* * *

L. Based on, arising out of, or related to actual or alleged misappropriation of ideas, information or materials; improper gaining or misuse of confidential or proprietary information; materials or trade secrets; interference with actual or prospective business relationships, contracts or contractual relationships; or unfair competition.”

Plaintiff subsequently filed this action, seeking a declaration that defendant was required to defend and indemnify plaintiff in the underlying action brought by Abdel-Hak. The trial court granted defendants’ motion for summary disposition, concluding that the exclusion prescribed in paragraphs K and L of defendants’ insurance policy barred coverage for the claims alleged in Abdel-Hak’s underlying action.

Plaintiff first argues on appeal that the trial court erred in finding that the exclusion found in paragraph K of the insurance policy was applicable, because it erroneously concluded that Jason Saad was the “purchaser” of the property in question when the evidence established that his mother actually purchased the property. This Court reviews a trial court’s decision granting summary disposition de novo. *Spiek v Dep’t of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). “A motion for summary disposition pursuant to MCR 2.116(C)(10) tests the factual support of a claim. The motion should be granted if the evidence demonstrates that no genuine issue of material fact exists, and that the moving party is entitled to judgment as a matter of law.” *MacDonald v PKT, Inc*, 464 Mich 322, 332; 628 NW2d 33 (2001) (citations omitted). The interpretation of contract language is an issue of law that is also reviewed de novo. *Morinelli v Provident Life & Accident Ins Co*, 242 Mich App 255, 261; 617 NW2d 777 (2000).

As the Court explained in *Allstate Ins Co v Freeman*, 432 Mich 656, 662-663; 443 NW2d 734 (1989), modified 433 Mich 1202 (1989),

[t]he duty of an insurance company to provide a defense in an underlying tort action depends upon the allegations in the complaint and extends to allegations which ‘even arguably come within the policy coverage.’ The duty to defend is broader than, and not necessarily conclusive of, an insurer’s duty to indemnify. The court must resolve any doubt pertaining to the duty to defend in favor of the insured. However, it is equally clear that an insurer’s duty to defend and indemnify does not depend solely upon the terminology used in a plaintiff’s pleadings. Rather, ‘it is necessary to focus on the basis for the injury and not the nomenclature of the underlying claim in order to determine whether coverage

exists. . . . (S)o must the allegations be examined to determine the substance, as opposed to the mere form, of the complaint.’ [Citations omitted.]

It is well settled that a valid contract requires an offer and acceptance. *Eerdmans v Maki*, 226 Mich App 360, 364; 573 NW2d 329 (1997). Additionally, a purchaser is generally defined as “(1) one who obtains property for money or other valuable considerations; a buyer; (2) one who acquires real property by means other than descent or inheritance.”¹ Black’s Law Dictionary (7th ed). Here, the evidence established that Jason Saad signed the offer to purchase as purchaser, and the seller accepted it, thereby establishing a valid contract for the purchase of the property with Jason Saad as the purchaser. Jason Saad also made the down payment for the purchase of the property. The purchase of the property arose out of this transaction. The trial court did not err in concluding that there was no genuine issue of material fact that the claims alleged by Abdel-Hak were based on, or arose out of, Jason Saad’s purchase of the property.

Plaintiff also argues that the exclusion in paragraph L of defendants’ insurance policy is inapplicable to Abdel-Hak’s claims of civil conspiracy, fraud and misrepresentation, and violation of the Consumer Protection Act, because these claims are not referenced in the exclusion. However, “an insurer’s duty to defend and indemnify does not depend solely upon the terminology used in a plaintiff’s pleadings. Rather, ‘it is necessary to focus on the basis for the injury and not the nomenclature of the underlying claim in order to determine whether coverage exists.’” *Freeman, supra* (citations omitted). Each of Abdel-Hak’s claims in the underlying case were premised on the allegation that Ally Saad improperly revealed Abdel-Hak’s confidential offer to Jason Saad, allowing Jason Saad to make a successful offer to purchase the property. The misuse of this confidential information was the basis for each count in Abdel-Hak’s underlying action. Coverage for claims involving such actual or alleged misuse of confidential information is specifically excluded under paragraph L. Therefore, we agree that paragraph L likewise excludes coverage for the claims in the underlying action.

Finally, we reject plaintiff’s argument that paragraph L of defendants’ insurance policy is contrary to public policy because it excludes coverage on the basis of alleged activities. Plaintiff cites no authority in support of this argument. Further, plaintiff has not demonstrated that the exclusion in paragraph L “transgresses our state and federal constitutions, our statutes, the common law, our administrative rules and regulations, or our public rules of professional conduct.” *Royal Prop Group, LLC v Prime Ins Syndicate, Inc*, 267 Mich App 708, 723-724; 706 NW2d 426 (2005). We may not rely on plaintiff’s subjective views of fairness to establish this state’s public policy. *Id.*

Affirmed.

/s/ Bill Schuette
/s/ Christopher M. Murray
/s/ Pat M. Donofrio

¹ A court may consider dictionary definitions to ascertain the meaning of an undefined term when construing an insurance contract. *Morinelli, supra* at 262.