STATE OF MICHIGAN

COURT OF APPEALS

JAMES DURALL, JR., Plaintiff-Appellant,	UNPUBLISHED March 29, 2011
v	No. 293910 Genesee Circuit Court
HOME-OWNERS INSURANCE COMPANY, Defendant-Appellee.	LC No. 08-088948-CK

Before: SHAPIRO, P.J., and SAAD and K. F. KELLY, JJ.

PER CURIAM.

Plaintiff, James DuRall, Jr., appeals the trial court's order that granted summary disposition to defendant, Home-Owners Insurance Company. For the reasons set forth below, we affirm.

I. FACTS AND PROCEEDINGS

Plaintiff filed this action for breach of contract for defendant's failure to pay benefits under a homeowner's insurance policy covering a home at 233 East Eddington Avenue in Flint. Plaintiff was purchasing the house from the property owner, Ruth Collie, under a land contract. Plaintiff applied for homeowner's insurance through defendant on August 30, 2007 and the policy was issued on September 10, 2007. A fire destroyed the home during the night of October 31, 2007.

Following discovery, defendant filed a motion for summary disposition pursuant to MCR 2.116(C)(10). According to defendant, the day after plaintiff reported the fire, defendant sent plaintiff a letter that explained how he must proceed with his insurance claim, instructed him to review the terms of his policy, and also stated that plaintiff must file a sworn statement in proof of loss within 60 days of the fire. The letter further stated that the deadline for the proof of loss could only be extended in writing by defendant. Despite this notification, plaintiff did not submit a proof of loss by the deadline of December 31, 2007. Rather, plaintiff submitted the proof of loss through his attorney on March 26, 2008. Defendant argued that plaintiff cannot recover for the denial of his claim for benefits because of his failure to file a timely, sworn statement in proof of loss.

In response to defendant's motion, plaintiff argued that he never received correspondence from defendant about his obligations for filing a claim. Plaintiff also denied ever receiving a

copy of his insurance policy and claimed he had no knowledge of his obligation to file a proof of loss statement by the 60-day deadline. Plaintiff further asserted that defendant should be estopped from claiming his proof of loss was untimely because defendant made partial benefit payments to him both before and after the proof of loss deadline and plaintiff provided the "functional equivalent" of a proof of loss and defendant was able to thoroughly investigate the claim.

In reply, defendant argued that its ongoing investigation of plaintiff's claim did not waive defendant's rights under the policy. Defendant also submitted a copy of a document entitled "Property Advance Payment/Non-Waiver Agreement" that plaintiff signed on December 20, 2007. The document stated that defendant would advance partial benefits to plaintiff for personal property. The document further stated as follows:

> It is understood our investigation is not complete and it may be later established that there is no legal obligation for payment under your policy. Issuance of advance payments by the company is not an admission of liability. Acceptance by you does not represent a satisfaction or release of all claims. It is understood this advance shall not benefit any third parties in any manner whatsoever.
>
> This is not a PROOF OF LOSS as required by the policy. A PROOF OF LOSS must still be submitted to the company within 60 days of the date of loss stated above.
>
> This agreement or payment of the advance is not intended to change or modify any of the conditions, terms, provisions or requirements contained in the policy. Any obligations or legal rights which may now or hereafter be available to you or the company are reserved. [Emphasis in original.]

Following oral argument on February 23, 2009, the trial court granted defendant's motion for summary disposition on the ground that plaintiff failed to timely file a sworn proof of loss.

II. ANALYSIS

The trial court granted summary disposition to defendant pursuant to MCR 2.116(C)(10). As this Court explained in *Auto-Owners Ins Co v Martin*, 284 Mich App 427, 433; 773 NW2d 29 (2009):

> We review a trial court's decision on a motion for summary disposition de novo on the basis of the entire record to determine if the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). When reviewing a motion under MCR 2.116(C)(10), which tests the factual sufficiency of the complaint, we consider all the evidence submitted by the parties in the light most favorable to the nonmoving party. *Id.* at 119-120. Summary disposition should be granted only where the evidence fails to establish a genuine issue regarding any material fact. *Id*. at 120.
>
> Plaintiff's insurance policy states:

1. PROPERTY

If a covered loss occurs, the **insured** must:

***

c. make an inventory of all damaged and destroyed property; show in detail quantities, costs, actual cash value and amount of loss claimed; attach to the inventory all available bills, receipts and related documents that substantiate the figures in the inventory.

d. send to **us**, within 60 days after the loss, a proof of loss signed and sworn to by the **insured**, including:

(1) the time and cause of loss;

(2) the interest of **insureds** and all others in the property;

(3) actual cash value and amount of loss to the property;

(4) all encumbrances on the property;

(5) other policies covering the loss;

(6) changes in the title, use, occupancy or possession of the property;

(7) if required, any plans and specifications of any damaged building or fixtures; and

(8) the inventory of all damaged or stolen property required by 1.c. above.

As discussed, defendant maintains that, on November 2, 2007, the day after plaintiff reported the fire, defendant mailed to plaintiff's address a letter that included instructions on how to proceed with a claim for benefits under his homeowner's policy. The letter stated that plaintiff must prepare a property inventory and a sworn statement in proof of loss. The letter specifically states that plaintiff must submit the proof of loss within 60 days of the fire. Defendant included property inventory and proof of loss forms for plaintiff to submit. Plaintiff claims he did not receive the letter from defendant. However, as set forth above, the property inventory and proof of loss requirements are also set forth in the policy itself. Defendant asserts that plaintiff was given a copy of the homeowner's insurance policy on September 10, 2007, when the policy was issued. Again, however, plaintiff claims he did not have a copy of the policy and was unaware of his obligation to file a sworn proof of loss.

Our courts have held that, "[a]lthough defendant claims not to have read the insurance policy prior to the accident, he nevertheless is held to a knowledge of its terms and conditions." *Auto Owners Ins Co v Zimmerman*, 162 Mich App 459, 461; 412 NW2d 925 (1987). Further,

this Court reiterated in *Zaremba Equipment, Inc v Harco Nat'l Ins Co*, 280 Mich App 16, 29; 761 NW2d 151 (2008):

> [T]he law applied in Michigan leaves no room to doubt that as a general rule, an insured must read his or her insurance policy. As the Supreme Court summarized in *Farm Bureau Mut Ins Co of Michigan v Nikkel*, 460 Mich 558, 567; 596 NW2d 915 (1999): " 'This court has many times held that one who signs a contract will not be heard to say, when enforcement is sought, that he did not read it, or that he supposed it was different in its terms.' " (Citation omitted.)

Moreover, as this Court explained in *Casey v Auto Owners Ins Co*, 273 Mich App 388, 394-395; 729 NW2d 277 (2006):

> It is well established that an insured is obligated to read his or her insurance policy and raise any questions about the coverage within a reasonable time after the policy is issued. Consistent with this obligation, if the insured has not read the policy, he or she is nevertheless charged with knowledge of the terms and conditions of the insurance policy.

Accordingly, plaintiff's claim that he did not know about the policy term requiring him to submit a sworn proof of loss within 60 days is unavailing.

Moreover, when plaintiff received an advance payment from defendant to cover his rent after his house was destroyed by the fire, plaintiff signed the non-waiver agreement that, again, specifically stated: "This is not a PROOF OF LOSS as required by the policy. A PROOF OF LOSS must still be submitted to the company within 60 days of the date of loss stated above." (Emphasis in original.) Plaintiff signed the agreement on December 20, 2007, eleven days before the deadline for filing the proof of loss. In addition to the terms of the policy, this document placed plaintiff on notice of his obligation to submit the sworn proof of loss within the 60-day period.

As this Court explained in *Dellar v Frankenmuth Mut Ins Co*, 173 Mich App 138, 145-146; 433 NW2d 380 (1988):

> The purpose of provisions in an insurance contract requiring the insured to give prompt notice is to allow the insurer to make a timely investigation in order to evaluate claims and to defend against fraudulent, invalid, or excessive claims. [*Wendel v Swanberg*, 384 Mich 468; 185 NW2d 348 (1971).] The filing of a proof of loss within sixty days allows the insurer to determine with certitude that the insured demands payment under the policy, the amount of the claim, and the question of its liability.

It is well-settled that, generally, "the failure to file a signed and sworn proof of loss within sixty days of the loss bars recovery on a claim without regard to whether the insurer is prejudiced by such failure." *Dellar*, 173 Mich App at 145.

In *Dellar*, this Court ruled that the plaintiff could submit to the jury a question of fact about whether the insurance company waived or was estopped from relying on the plaintiff's

failure to submit her sworn proof of loss by the contractual deadline. *Id*. at 147-148. However, the Court based its ruling on the fact that, before the time limit, plaintiff had twice requested a copy of her insurance policy, but the insurer failed to send her a copy until after the deadline passed. The *Dellar* Court also relied on *Struble v National Liberty Ins Co of America*, 252 Mich 566; 233 NW 417 (1930), in which the plaintiff asked for a copy of his policy, but did not receive one from his insurance agent and was unaware that he needed to file a proof of loss until after the deadline passed. This case differs from both *Dellar* and *Struble*. Here, plaintiff never asked for a copy of his insurance policy and he signed the non-waiver agreement, which explicitly placed him on notice of his need to timely submit a sworn proof of loss.

The Court in *Dellar* further observed that, under the facts of that case, a proof of loss would have added "nothing to the context of this case" because, in light of the documents the plaintiff submitted and the insurer's own investigation, there already existed a "functional equivalent" of a proof of loss. *Dellar*, 173 Mich App at 148. This is not the case here because, as defendant points out, by the December 31, 2007 deadline, plaintiff had only submitted a partial property inventory and he had not obtained replacement estimates, he did not submit receipts for his personal property, he did not submit a total loss tally, and he had not made a demand for payment of a sum certain. Importantly, the Court in *Dellar* did not merely hold that it was sufficient that there was a "functional equivalent" of a proof of loss based on the information submitted by the insured and the investigation conducted by the insurer. Again, the Court ruled that the plaintiff's breach of contract claim could go to the jury because, not only was there a "functional equivalent" of a proof of loss, but the plaintiff also was denied a copy of her policy twice upon request and had no notice of the proof of loss filing deadline before it passed. *Id*. at 147-148.

Nonetheless, plaintiff asserts that defendant waived or is estopped from relying on the proof of loss deadline because defendant paid him advances toward his rent and personal expenses both before and after the proof of loss deadline.

> A waiver is a voluntary relinquishment of a known right. Estoppel is based on some misleading conduct or language of one person which, being relied on, operates to the prejudice of another, and is applied to the wrongdoer by the court in denial of some right, which otherwise might exist, to prevent a fraud. [*Dellar*, 173 Mich App at 138, quoting *Dahrooge v Rochester-German Ins Co*, 177 Mich 442, 451-452; 143 NW 608 (1913).]

Again, when defendant paid plaintiff advance partial benefits on December 20, 2007, plaintiff signed the non-waiver agreement that stated he must submit a timely proof of loss. Further, in the non-waiver agreement, defendant was explicitly *reserving* its rights under the policy and notifying plaintiff of the need to file a timely proof of loss, notwithstanding the partial benefit payment. This negates any claim of waiver or misrepresentation. Moreover, that defendant provided benefit payments to plaintiff after the proof of loss deadline but before its formal denial of his insurance claim does not amount to a waiver or support the application of estoppel.

Logically, any actions taken by defendant *after* plaintiff missed the proof of loss deadline have no bearing on plaintiff's failure to comply with the deadline before it expired. For these reasons, the trial court correctly granted summary disposition to defendant. [1]

Affirmed.

/s/ Henry William Saad
/s/ Kirsten Frank Kelly

[1] Because this issue is dispositive, we need not address defendant's alternative claim that the trial court should have granted its motion for summary disposition on other grounds.

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Before: SHAPIRO, P.J., and SAAD and K. F. KELLY, JJ.

SHAPIRO, J. (*dissenting*).

Because I conclude that there is a question of fact whether defendant complied with its statutory duty under MCL 500.2006(3) to provide plaintiff with written notice of what would constitute a satisfactory proof of loss, I respectfully dissent.

Plaintiff's home burned to the ground on November 1, 2007. Plaintiff immediately notified defendant Home-Owners Insurance Company of the loss. The very next day, November 2, 2007, plaintiff met with defendant's adjustor. On that date, the adjustor provided plaintiff with an inventory form and directed him to identify the personal property lost in the fire. It is undisputed that, at that meeting, the adjustor did not provide plaintiff with a proof of loss form or any writing that set forth what constituted a sufficient proof of loss. Plaintiff promptly completed the inventory and provided it to the adjustor.

Shortly after the fire, defendant received a copy of the fire department report which stated that the entire value of the house had been lost. Similarly, the Property Loss Notice prepared by plaintiff's insurance agent stated that the property was a "total loss – down to the ground." Defendant's investigator inspected the insured property on November 5 and submitted a report to defendant on the same date. The report stated that "[t]he house was totally destroyed and was down in the basement. The only structural material remaining was a portion of the chimney." Photographs showing the total destruction of the structure were included in the report.

Also on November 5, plaintiff gave a 28-page tape-recorded interview with an investigator representing defendant. During that interview, plaintiff answered all the investigator's questions and signed a consent form allowing the investigator to enter the insured premises. He also told the investigator that "the only thing standing [after the fire] is the chimney." The investigator made no mention of a proof of loss form during the interview and

did not provide plaintiff with a proof of loss form or any writing that set forth what constituted a sufficient proof of loss.

On November 10, plaintiff signed a release permitting defendant to obtain his employment, financial, utility and insurance records. By November 12, defendant had obtained a full appraisal on the insured property by an appraiser of its choosing.

On November 30, the adjustor mailed the inventory form back to plaintiff with a letter directing him to provide additional information regarding the age and replacement cost of the items and to sign a certification that the inventory was "representative of the loss we experienced on the above stated date of claim." The letter did not contain a proof of loss form or any writing that set forth what constituted a sufficient proof of loss. Plaintiff signed the inventory form and returned it on December 3, 2007.

The November 30 letter was sent by defendant to plaintiff in care of his sister at her address because plaintiff's home had completely burned down and no mail could be delivered there, as the mail receptacle had been on the front of the house and not in a separate location. Notably, the letter had originally been sent to plaintiff's destroyed home and, according to defendant's records, was returned to defendant by the post office no later than November 26. Defendant called plaintiff on November 29 and obtained his new mailing address. Defendant's internal e-mail demonstrates that defendant's adjustor was aware, no later than November 26, that no mail could be received at the insured address.

On December 3, the outside adjustor sent a second report to defendant. It included the appraisal report, plaintiff's handwritten inventory list, and a 17-page detailed estimate of all losses both personal and building that had been prepared by the adjustor.

MCL 500.2006(3) states in mandatory terms: "An insurer shall specify in writing the materials that constitute a satisfactory proof of loss not later than 30 days after receipt of a claim unless the claim is settled within 30 days."

Defendant asserts that on November 2, 2007, it sent a letter to plaintiff at the insured address providing a proof of loss form that set forth what constituted a satisfactory proof of loss. Plaintiff asserts that he never received this letter and argues that it was not sent. Other than an unsigned file copy of the letter, defendant does not offer any proofs that it was sent, such as a certified mail receipt, an affidavit from the person who mailed it, or internal documentation confirming that it was mailed. Moreover, since plaintiff's home was burned to the ground and had no outside mail receptacle, it was impossible for the post office to deliver mail there. As noted above, defendant's records contain evidence that the late-November letter containing the inventory that defendant sent to the insured address was returned to defendant's office by the post office. It is reasonable to infer that, if the November 2, 2007 letter had in fact been sent, the file would similarly contain some reference to it having been returned by the post office. The absence of any such notation given the impossibility of mail delivery to the address, therefore, allows for a reasonable inference that the letter was not sent. This would certainly be consistent with plaintiff's testimony and the lack of any evidence of the mailing, let alone receipt.

In an examination under oath on March 14, 2008, plaintiff testified that he had not received a letter from defendant asking him for proof of loss. When asked why he did not submit a proof of loss he testified, "I think I would have filled one of these out, because I was asked to fill [the inventory] out [and did so]. And if I had been asked when [that] was asked for, you would have got them both. Obviously, somebody didn't do their job and it wasn't me, cause I did what I was asked . . . I didn't receive this type at all, no [indicating a proof of loss form provided at his examination by defendant's attorney]."

In support of its motion for summary disposition, defendant has proffered an affidavit from the first adjustor assigned to plaintiff's claim. This affidavit states that, on November 2, 2007, when he provided plaintiff with a check in partial payment to plaintiff, he had plaintiff sign a property advance/non-waiver agreement and that this document included the language: "This is not a PROOF OF LOSS as required by the policy. A PROOF OF LOSS must still be submitted to the company within 60 days of the date of loss stated above." Notably, however, the adjustor does not aver that on that date he gave plaintiff a form proof of loss to complete or any writing stating what constituted a satisfactory proof of loss.[1] Thus, his affidavit is not proof that defendant complied with MCL 500.2006(3).

Defendant proffers a similar affidavit from a second claims representative as to the December 20, 2007 property advance/non-waiver agreement she had plaintiff sign when providing him with a second partial payment for his losses. This claims representative also fails to aver that she provided plaintiff with a form proof of loss or any other writing stating what constituted a satisfactory proof of loss. Thus, like the first affidavit, the second fails to provide proof that defendant complied with MCL 500.2006(3).[2]

Plaintiff challenges defendant's claim that it complied with its duty to send a proof of loss form and/or instructions and argues that this failure, as well as other actions by defendant, estops defendant from seeking to enforce the contractual provision mandating the submission of a satisfactory proof of loss within 60 days. The application of MCL 500.2006(3) in this setting arose in *Dellar v Frankenmuth Mut Ins Co*, 173 Mich App 138; 433 NW2d 380 (1988). In that case, the plaintiff asserted that the insurer had not provided the proof of loss form within 30 days and so was estopped from relying on the 60-day requirement as against the insured. The court in *Dellar* did not reach this issue, noting that to do so, it would have to reconcile two possibly conflicting statutes: MCL 500.2006(3) and 500.2832.[3] MCL 500.2006(3), as previously noted, requires the insurer to provide the relevant form or information in writing within 30 days after the loss. The other statute at issue, MCL 500.2832, set forth mandatory contract language, including a requirement that the insured file the proof of loss within 30 days of the loss and a provision stating that doing so was a condition precedent to a suit upon the contract.

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[1] While orally-provided information would not satisfy the statute, it is worth noting that the affiant also does not aver that any discussion about the proof of loss requirement took place.

[2] Like the first affiant, this second affiant also does not aver that any discussion about the proof of loss requirement took place.

[3] The *Dellar* court did find that the insurer was estopped on other grounds, citing *inter alia*, *Struble v National Liberty Ins Co of America*, 252 Mich 566; 233 NW 417 (1930).

There is a significant difference between the instant case and *Dellar*. When *Dellar* was decided, the requirement that the proof of loss be filed within 60 days was statutorily required by MCL 500.2832. Since *Dellar*, however, MCL 500.2832 has been repealed and replaced by MCL 500.2833, which does not contain such a requirement, thus eliminating the insured's statutory duty to file the proof of loss within 60 days. Indeed, there is no longer any statutory penalty for failing to file a proof of loss, other than that the insurer's time period in which to pay benefits is not triggered until the filing occurs. By contrast, the Legislature has not repealed MCL 500.2006(3) and the insurer retains a statutory duty to "specify in writing the materials that constitute a satisfactory proof of loss not later than 30 days after receipt of a claim."

While the *Dellar* Court hesitated to address whether an insurer's lack of compliance with MCL 500.2006(3) estopped an insured from relying on an insured's statutory duty under MCL 500.2832, we, unlike the *Dellar* court, are not faced with the issue of harmonizing two statutes. We need merely determine the relationship of defendant's statutory duty under MCL 500.20906(3) to plaintiff's contractual duty. It appears that the majority would allow an insurer to enforce a *contractual* deadline the insured violated even where the insurer violated a *statutory* deadline imposed by the Legislature to assure that the insured could meet his contractual deadline. In my view, this renders the statute nugatory and violates the long-standing principle that where a contract and statute cannot be harmonized, it is the contract that must give way.[4] Moreover, allowing such conduct could have unintended results, as it would provide an incentive to an insurer to violate statutory duties where doing so could induce a contractual violation by its insured upon which it can then deny coverage and obtain a windfall.

The majority holds for defendant given that plaintiff had a duty to read his policy and may not claim that he was unaware of the contract requirement that he timely file a proof of loss.[5] However, that general principle does not settle the question whether defendant may rely on that requirement to deny coverage if it itself violated the statutory requirement to "specify in writing the materials that constitute a satisfactory proof of loss not later than 30 days after receipt of a claim."

Defendant also suggests, and the majority agrees, that by providing plaintiff with a copy of the insurance policy at the time he purchased coverage, it met its duty because the policy itself set forth what constituted a proof of claim. While I question whether providing a copy of the policy at the time of sale rather than within 30 days after the loss would meet the requirements of MCL 500.2602(3), the majority errs in concluding that plaintiff was *ever* provided with the policy, either before the loss or within 30 days thereafter. Indeed, by accepting defendant's assertion that it provided plaintiff with a copy of the policy at the time of sale, the majority is

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[4] Insurance contracts that are in conflict with a statute are void as against public policy, although the courts, where reasonably possible will harmonize the contract with the statute. *Cruz v State Farm*, 466 Mich 588, 600-601; 648 NW2d 591 (2002).

[5] The majority relies on *Auto-Owners Ins Co v Zimmerman*, 162 Mich App 459; 412 NW2d 925 (1987) and *Zaremba Equip, Inc v Harco Nat'l Ins Co*, 280 Mich App 16; 761 NW2d 151 (2008). I would agree that those cases stand for the general principle that an insured is held to the standard of having read the policy though I note that neither case occurred in the factual setting of a late-filed proof of loss.

assuming the facts most favorable to the moving, rather than non-moving, party. Plaintiff testified that he was never provided with a copy of the policy until well after the proof of loss deadline. Defendant does not proffer any testimony from plaintiff that he was given the policy at the time he purchased the insurance or at any time prior to the due date for the proof of loss. In addition, defendant does not provide any other proofs that it provided plaintiff with a copy of the policy prior to the fire or within 30 days thereafter. Defendant's statement of facts asserts that "[w]hen the policy was issued on September 10, 2007, a copy of the policy was mailed to Mr. Durall." However, no citation to the record is provided in support of this claimed fact, despite MCR 7.212(D)(3)(b)'s requirement that the statement of facts include "specific page references to the transcript, the pleadings or other document or paper filed with the trial court, to support the appellee's assertions." Nevertheless, the majority seems to have accepted this unproven assertion by the moving party as conclusively true.

Plaintiff testified that he did not receive information required by MCL 500.2006(3). As set forth above, there is other factual support for plaintiff's assertion that defendant failed to comply. Defendant asserts that it did comply and proffers an unsigned office copy of a letter as its proof. There is clearly a question of fact as to this issue that can only be resolved by the factfinder.

I would, therefore, reverse the grant of summary disposition and remand for trial, at which the jury would first determine whether defendant "specif[ied] in writing the materials that constitute a satisfactory proof of loss not later than 30 days after receipt of [plaintiff's] claim." If the trier of fact determines that defendant did so, then judgment for defendant should be entered. If the trier of fact determines that defendant did not do so, then the jury should determine the remaining issues of fact.

/s/ Douglas B. Shapiro