

STATE OF MICHIGAN
COURT OF APPEALS

JULIE ANN ZULKIEWSKI,

Plaintiff/Counter
Defendant/Appellee-Cross
Appellee,

UNPUBLISHED
June 12, 2012

v

AMERICAN GENERAL LIFE INSURANCE
COMPANY,

Defendant/Counter Plaintiff/Third
Party Plaintiff-Appellee-Cross
Appellant,

and

RONALD S. ZULKIEWSKI and SHARON W.
ZULKIEWSKI,

Third Party Defendants/Third Party
Plaintiffs-Appellants-Cross
Appellees.

No. 299025
Marquette Circuit Court
LC No. 09-047293-CZ

Before: MARKEY, P.J., and BECKERING and M. J. KELLY, JJ.

PER CURIAM.

In this case involving the Uniform Electronic Transactions Act (UETA), MCL 450.831 *et seq.*, third-party defendants/third-party plaintiffs Ronald and Sharon Zulkiewski (appellants) appeal by right the trial court's order granting summary disposition in favor of defendant American General Life Insurance Company concerning appellants' breach of contract claim against the company. American General files a conditional cross-appeal. We affirm.

FACTS

This appeal arises out of a contest concerning the proper payee of a \$250,000 life insurance policy payable upon the death of the insured, Dr. Ronald J. Zulkiewski (decedent). On March 19, 1999, decedent applied for a policy with American General's predecessor, The Old

Line Insurance Company. He named his first wife as the primary beneficiary, and appellants, his parents, as the contingent beneficiaries. Pertinent to this appeal, the insurance policy provided that the face amount would be “paid to the beneficiary immediately upon receipt of due proof of death of the insured if death occurs prior to the [expiration] date.” The policy also provided that the beneficiary or beneficiaries would be “as shown in the application unless changed.” The policy further provided that the owner of the policy could change the beneficiaries of the policy “by written notice.” On July 14, 2006, American General received a written change of beneficiary request, on American General’s form, to change the primary beneficiary of the policy to decedent’s mother, and the contingent beneficiary to his father. Subsequently, American General confirmed the change by letter to the decedent.

American General alleges, and appellants do not dispute, that someone purporting to be decedent subsequently enrolled in American General’s online account service (“eService”) on December 17, 2008, at 10:45 a.m. According to American General, this service allows customers to obtain certain policy information and perform online transactions, one of which includes changes to insurance policy beneficiary designations. To enroll in the service, the applicant apparently was required to enter decedent’s policy number, social security number, mother’s maiden name, and an e-mail address. The applicant then chose a password and verified it. Subsequently, American General sent notification to decedent, an email advising he had enrolled in eService warning him to contact the company immediately if he did not intend to enroll in the service.¹

The parties further agree that, also on December 17, 2008, at 10:51 a.m., someone using decedent’s newly created eService account executed an online change of beneficiary request. The request changed the primary beneficiary to decedent’s new spouse, plaintiff Julie Ann Zulkiewski, and the contingent beneficiary to decedent’s mother, Sharon.² Subsequently, American General sent an e-mail on December 17, 2008, and a letter on December 23, 2008, confirming the beneficiary change.

Decedent committed suicide on June 23, 2009. On July 13, 2009, plaintiff Julie Zulkiewski sent American General a claim under the policy. Appellants subsequently submitted a competing claim. Because of the contest, American General notified plaintiff and appellants that it planned to file an interpleader action unless the parties reached an agreement. But, on October 14, 2009, plaintiff filed a complaint for declaratory judgment, seeking payment of the insurance proceeds and interest for failing to timely pay after proof of loss under MCL 500.2006. On November 18, 2009, American General filed a third-party and counter complaint for interpleader pursuant to MCR 3.603. On February 24, 2010, American General filed a motion

¹ American General maintains that it also e-mailed this information to the e-mail address provided in the application.

² Although not noted by the parties, the applicant apparently provided social security numbers for both beneficiaries. The original policy does not contain Sharon Zulkiewski’s social security number nor did the 2006 confirmation letter from American General; however, it is listed on the 2006 written beneficiary change request.

for interpleader. On March 18, 2010, appellants filed their own third-party counter complaint against American General, alleging breach of contract on behalf of Sharon Zulkiewski.

Plaintiff moved for summary disposition pursuant to MCR 2.116(C)(10). On April 19, 2010, plaintiff filed an affidavit in which she asserted that she had no knowledge or information in respect to the circumstances or process in which she was made the primary beneficiary of the policy. She also stated that decedent was “extremely computer literate” and “managed all of his financial affairs electronically.” On May 6, 2010, American General moved for summary disposition of appellants’ counterclaim pursuant to MCR 2.116(C)(10). American General argued that the counterclaim should be decided in connection with the pending motion for interpleader but also argued that the counterclaim had no merit because neither appellant had standing to raise a breach of contract claim because they were not parties to the contract, nor beneficiaries of it. American General also argued that it did not breach the contract because it properly sought to pay the benefits to plaintiff.

After hearing arguments concerning the motions, the court found that the evidence presented indicated that decedent made the electronic change. The court then found that appellants’ breach of contract claim failed as a matter of law because they failed to present any evidence that anyone other than decedent executed the eService beneficiary change. The trial court granted plaintiff’s motion for summary disposition, dismissed American General’s interpleader action as moot, and granted American General’s motion for dismissal of appellants’ breach of contract action. American General was ordered to pay plaintiff the full \$250,000.

SUMMARY DISPOSITION

On appeal, appellants argue that the trial court erred in granting American General’s motion for summary disposition. They maintain that while the UETA clearly provides that a record or signature cannot be denied effect simply because it is in electronic form, the act leaves open other possible challenges to the validity or effect of an electronic signature. Appellants contend that in this case, because American General has failed to present sufficient evidence concerning the security of the system used to process the beneficiary designation change request and the lack of admissible evidence that decedent actually made the request, summary disposition was inappropriate.

At the outset, we find without merit American General’s contention that appellants lack standing. Before the 2008 change, appellants were clearly third-party beneficiaries of the contract between American General and decedent and thus entitled to challenge whether the 2008 change, which altered their status, was actually made by decedent. MCL 600.1405; *Lansing Schs Ed Ass’n v Lansing Bd of Ed*, 487 Mich 349, 372; 792 NW2d 686 (2010); *Koenig v South Haven*, 460 Mich 667, 676-677; 597 NW2d 99 (1999).

We review the grant or denial of summary disposition de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). “A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint.” *Id.* at 120. The moving party has the initial burden of supporting its position by affidavits, depositions, admissions or other documentary evidence, and then the burden shifts to the opposing party to establish that a genuine issue of material fact exists. MCR 2.116(G)(3)(b); MCR 2.116(G)(4), *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d

314 (1996). In reviewing a motion granted under (C)(10), we only consider the substantively admissible evidence actually proffered in opposition to the motion. MCR 2.116(G)(6); *Maiden*, 461 Mich at 121. A trial court considers the evidence in the light most favorable to the non-moving party. *Id.* “A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ.” *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). Summary disposition is properly granted if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10). *Quinto*, 451 Mich at 362.

As noted above, the parties agree that the 2008 change of beneficiary request was submitted electronically. They also essentially agree that the question of whether the decedent actually requested the change of beneficiary determines who is entitled to the insurance proceeds, although appellants make somewhat contrary arguments responding to American General’s cross-appeal as to the validity of their breach of contract claim.

At the outset, we note that appellants do not argue that the beneficiary designation change did not actually occur, was a mistake, or occurred as the result of a computer glitch. What appellants assert is that American General’s security process, or lack thereof, allowed plaintiff to forge decedent’s signature.

MCL 450.837 provides:

- (1) A record or signature shall not be denied legal effect or enforceability solely because it is in electronic form.
- (2) A contract shall not be denied legal effect or enforceability solely because an electronic record was used in its formation.
- (3) If a law requires a record to be in writing, an electronic record satisfies the law.
- (4) If a law requires a signature, an electronic signature satisfies the law.^{3]}

Thus the insurance contract, altered in 2008 by the change of beneficiary designation, did not become invalid solely because the change was made electronically.⁴

³ Similarly, MCL 450.843 provides “[i]n a criminal or civil proceeding, evidence of a record or signature shall not be excluded solely because it is in electronic form.”

⁴ We note that the UETA does not apply to all transactions, including most contracts for the sale of goods under the UCC and the formations of wills or testamentary trusts. See MCL 450.833. Additionally, the parties to a contract must agree to conduct transactions electronically for the act to apply. MCL 400.835(2). The parties agree that the UETA is applicable to the contract in dispute here.

Although the UETA permits an electronic signature, it must still represent the act of the party authorized to sign a contract or other document. MCL 450.832(h) defines an “electronic signature” as “an electronic sound, symbol, or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record.” Thus, the signature must be executed or adopted by the person as the embodiment of his or her intent. Similarly, MCL 450.839 provides for an admittedly broad requirement that an electronic signature is, in fact, what it is purported to be:

(1) An electronic record or electronic signature is attributable to a person if it is the act of the person. The act of the person may be shown in any manner, including a showing of the efficacy of any security procedure applied to determine the person to which the electronic record or electronic signature was attributable.

(2) The effect of an electronic record or electronic signature attributed to a person under subsection (1) is determined from the context and surrounding circumstances at the time of its creation, execution, or adoption, including any agreements of the parties, and otherwise as provided by law.

And once a signature is found to be attributable to the authorized party, “[w]hether an electronic record or electronic signature has legal consequences is determined by [the UETA] and other applicable law.” MCL 450.835(5).

Many of appellants’ arguments below and on appeal center around the “requirement” that a person purporting to authenticate an electronic signature show “the efficacy of any security procedure” in order to survive any challenge to authenticity. Appellants maintain that the trial court improperly accepted American General’s assertions that its security procedures were adequate to prevent deception by an imposter. But appellants misread MCL 450.839(1), which as the trial court noted, does not require a showing concerning the efficacy of any applicable security procedure; it merely lists this as one method by which to show attribution. The trial court found that the evidence plaintiff and American General presented satisfied the requirements in MCL 450.839(1).

In support of the electronic signature plaintiff and American General submitted evidence concerning the safeguards used to sign up for the eService system and those used during the subsequent beneficiary change. As noted by the trial court, these safeguards consisted of not only knowledge of various items of decedent’s personal information, including having access to the insurance policy number, his social security number, his mother’s maiden name, and an e-mail address, but also of e-mail and regular mail notifications after the initial establishment of the e-Service account and the subsequent beneficiary change.⁵ Plaintiff and American General also submitted an affidavit by plaintiff denying her lack of involvement in making the disputed change, stating that decedent was highly computer-literate and had also made plaintiff the beneficiary of other insurance policies.

⁵ The e-Service registrant was also required to establish a password and verify it.

Appellants appear to argue that the step-process evidence submitted by American General concerning the steps and information necessary to sign up for the eService account and then to change the beneficiary designation was somehow inadmissible because it was submitted in American General's reply brief below. However, appellants provide no support for this assertion, and it is not the job of this Court to do so for them. *Mudge v Macomb Co*, 458 Mich 87, 104-105; 580 NW2d 845 (1998). Appellants further argue that this step process evidence was the "only" evidence before the trial court; however, this argument ignores the affidavit from plaintiff.

While appellants appear to argue that the trial court should have had a broad distrust of American General's processes in general, they have specifically limited their arguments in such a way as to limit the evidence necessary to support a finding that the signature was genuine. Appellants do not claim, for example, that the change was made erroneously or randomly, which might require an affidavit from an expert witness familiar with appellant's processes and error-correcting protocols so as to refute such a claim. Instead, while they try to couch it in general terms, they essentially maintain that someone perpetrated a fraud on the company by illicitly opening up an eService account and making the beneficiary change in decedent's policy. However, the extent of the personal information required to do so would limit the number of possible suspects—either an unknown computer "hacker" who presumably would perpetrate such a fraud randomly, or the only person who could actually benefit, namely plaintiff. In support of the claim that plaintiff did not perpetrate the fraud, plaintiff submitted her affidavit that she did not change the beneficiary designation. This evidence and the reasonable inferences drawn from it would, if believed by a fact-finder, support a finding that decedent made the beneficiary change. This, in turn, would support plaintiff's and American General's motions for summary disposition.

Thus, we conclude that the trial court did not abuse its discretion in determining that the evidence submitted by plaintiff and American General met the criteria in MCL 450.839(1). Plaintiff and American General thus met their burden under MCR 2.116(C)(10) and (G)(6).

In contrast, appellants have presented nothing more than conjecture to support their alternate claim that decedent did not set up the eService account and change the designated beneficiary. Appellants argue that the trial court placed them, as well as any party finding themselves in appellants' position, in the impossible situation of having to prove a negative. We disagree. Under the facts of the instant case, appellants have failed to provide any substantively admissible evidence that decedent did not execute the beneficiary change. But, this does not equate to a conclusion that no circumstances could exist to allow appellants, or someone in a similar position, from meeting their burden of creating a question of fact concerning the authenticity of a similar beneficiary change.

Therefore, because the appellants cannot show that American General improperly changed the decedent's beneficiary designation and have no other claim under the contract between decedent and American General, the trial court did not err in granting American General's motion for summary disposition and awarding the insurance proceeds to plaintiff.

Given our determination, we need not reach the issues raised on cross-appeal.

We affirm. As the prevailing party Defendant/Appellee, American General Life Insurance Company may tax costs pursuant to MCR.219.

/s/ Jane E. Markey
/s/ Jane M. Beckering
/s/ Michael J. Kelly