

STATE OF MICHIGAN
COURT OF APPEALS

LUIS VILLARREAL and JULIE VILLARREAL,

Plaintiffs-Appellants,

UNPUBLISHED
May 27, 2014

v

IDS PROPERTY CASUALTY INSURANCE
COMPANY,

No. 314891
Genesee Circuit Court
LC No. 12-097389-CK

Defendant-Appellee.

Before: CAVANAGH, P.J., and OWENS and M. J. KELLY, JJ.

PER CURIAM.

In this insurance coverage dispute, plaintiffs Luis Villarreal and Julie Villarreal (collectively the Villarreals) appeal by right the trial court's order granting defendant IDS Property Casualty Insurance Company's motion for summary disposition under MCR 2.116(C)(10). For the reasons explained below, we reverse and remand.

The Villarreals had a homeowner's policy with IDS Insurance. In September 2010, the Villarreals' house suffered damage in a fire. The prosecutor eventually charged Julie Villarreal with arson in connection with the fire.

IDS Insurance held examinations under oath for both Julie and Luis Villarreal in January 2011, but because of the pending criminal charge against Julie, they both invoked their Fifth Amendment privilege against self-in crimination. Accordingly, they refused to answer any questions relating to their finances and events on the day of the fire. The Villarreals' lawyer advised IDS Insurance that they would not answer any questions until after the resolution of the criminal case. Julie Villarreal eventually pleaded no contest to an amended charge of attempted insurance fraud in July 2011. Thereafter, the Villarreals offered to appear for new examinations under oath, but IDS Insurance declined the offer and their claim.

The Villarreals sued IDS Insurance for breach of the insurance agreement and violation of the Michigan Uniform Trade Practices Act, MCL 500.2001 *et seq.* IDS Insurance moved for summary disposition under MCR 2.116(C)(10) on the ground that the Villarreals' failure to cooperate at their examinations warranted dismissal of their complaint. The trial court agreed and dismissed the Villarreals' complaint.

The Villarreals now appeal to this Court.

This Court reviews de novo a trial court's ruling on a motion for summary disposition. *Oliver v Smith*, 290 Mich App 678, 683; 810 NW2d 57 (2010). When reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant record evidence in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists warranting a trial. *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). This Court also reviews de novo the proper interpretation of an insurance policy. *Henderson v State Farm Fire & Cas Co*, 460 Mich 348, 353; 596 NW2d 190 (1999).

“An insurance policy is much the same as any other contract. It is an agreement between the parties in which a court will determine what the agreement was and effectuate the intent of the parties.” *Auto-Owners Ins Co v Churchman*, 440 Mich 560, 566; 489 NW2d 431 (1992). An insurance contract is to be read as a whole with meaning given to all its terms. *Royal Prop Group, LLC v Prime Ins Syndicate, Inc*, 267 Mich App 708, 715; 706 NW2d 426 (2005). A clear and unambiguous contractual provision is to be enforced as written. *Coates v Bastian Bros, Inc*, 276 Mich App 498, 503; 741 NW2d 539 (2007).

In the insurance policy at issue, the parties agreed that IDS Insurance would have no duty to provide coverage, and that the Villarreal could not sue, if the Villarreal failed to cooperate with IDS Insurance's investigation of the loss:

Duties After Loss

In case of a loss to covered property, we have no duty to provide coverage under this policy if the failure to comply with the following duties is prejudicial to us. These duties must be performed by you, an **insured** seeking coverage or a representative of either:

* * *

5. Cooperate with us in the investigation of a claim.
6. As often as we reasonably require:
 - a. Show the damaged property;
 - b. Provide us with records and documents we request and permit us to make copies; and
 - c. Submit to examination under oath, while not in the presence of another **insured**, and sign the same.

* * *

Suit Against Us

No action can be brought against us unless there has been full compliance with all of the terms under Section I of this policy. Suit must be brought within one year after the date of loss. The time for commencing an action is tolled from the time the insured notifies the insurer of the loss until the insurer formally denies liability.

The insured's obligation to submit to an examination under oath "is a valid one and as a general rule enforceable, and one who without cause refuses to submit to examination should be precluded from maintaining an action on the policy." *Gordon v St Paul Fire & Marine Ins Co*, 197 Mich 226, 230; 163 NW 956 (1917). The pendency of criminal proceedings does not constitute proper cause for refusing to submit to an examination—"a party to a civil action who invokes his Fifth Amendment privilege does so to the peril of his claim." *Allen v Mich Basic Prop Ins Co*, 249 Mich App 66, 73-74; 640 NW2d 903 (2001).

Because the insured's participation in an examination under oath "is a condition that must be satisfied before an insured has the right to bring an action against" the insurer, the action must be dismissed without prejudice if the insured does not submit to the examination on request prior to filing suit. *Yeo v State Farm Ins Co*, 219 Mich App 254, 257-258; 555 NW2d 893 (1996). The action can be dismissed with prejudice if the insured's noncompliance is wilful. *Thomson v State Farm Ins Co*, 232 Mich App 38, 45; 592 NW2d 82 (1998). Wilful noncompliance "refers to a failure or refusal to submit to an [examination] or otherwise cooperate with an insurer in regard to contractual provisions allowing an insurer to investigate a claim that is part of a *deliberate* effort to withhold material information or a *pattern of noncooperation* with the insurer." *Id.* at 50-51 (emphasis in original, footnote omitted). If the insured submits to an examination, but is not entirely forthcoming, it must be determined whether he substantially complied with his obligations under the policy. *Gibson v Group Ins Co of Mich*, 142 Mich App 271, 275-276; 369 NW2d 484 (1985).

We agree with the trial court that the evidence establishes that the Villarreals did not comply with their obligations under the policy because they deliberately withheld material information by refusing to answer under oath any questions relating to their finances and the fire. However, IDS Insurance's policy differs from those in *Gordon*, *Yeo*, *Thomson*, and *Allen* in one significant respect: it provides that the insured's failure to comply with the obligation to submit to an examination mandates denial of a claim only if that failure "is prejudicial to" IDS Insurance.

Here, apart from making general assertions of prejudice, IDS Insurance provided no evidence tending to show that it was prejudiced by the Villarreals' refusal to submit to an examination until after the criminal case had been concluded. IDS Insurance asserts on appeal that it was prejudiced because "the house and content in the home had deteriorated, documents were lost and memories have faded." But it has not explained how the Villarreals' refusal to answer questions impeded its ability to inspect the house or its contents. IDS Insurance has not identified any documents it sought that it could not obtain and, although it does allude to the

possible loss of text messages, it does not explain how its ability to subpoena records from the Villarreal's wireless telephone service providers was hampered by the Villarreal's refusal to answer questions. Because IDS Insurance failed to present evidence to support its contention that it suffered prejudice, the trial court should have denied its motion for summary disposition. See *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 370; 775 NW2d 618 (2009) ("If the moving party fails to properly support its motion for summary disposition, the nonmoving party has no duty to respond and the trial court should deny the motion.").

IDS Insurance argues that the trial court's ruling should be affirmed on the alternate ground that the Villarreal's claim is barred by laches. "Laches is an affirmative defense based primarily on circumstances that render it inequitable to grant relief to a dilatory plaintiff." *Attorney General v PowerPick Player's Club of Mich, LLC*, 287 Mich App 13, 51; 783 NW2d 515 (2010). The primary purpose behind applying the doctrine of laches is to redress the prejudice occasioned by a party's delay in asserting a right that was practicable to assert. *Knight v Northpointe Bank*, 300 Mich App 109, 114-115; 832 NW2d 439 (2013). Absent exceptional circumstances, laches will not apply to bar a plaintiff's claim when filed within the applicable period of limitations. *Eberhard v Harper-Grace Hosps*, 179 Mich App 24, 37; 445 NW2d 469 (1989).

The Villarreal's sued IDS Insurance within the time limit provided under the policy. And IDS Insurance has not demonstrated that the Villarreal's were dilatory or that any delay prejudiced it. Consequently, laches was not a bar to the Villarreal's claims. *Knight*, 300 Mich App at 114-115.

To the extent IDS Insurance suggests that coverage was unavailable under one or more policy exclusions, its failure to present any meaningful argument in support precludes consideration on appeal. *Berger v Berger*, 277 Mich App 700, 712; 747 NW2d 336 (2008).

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Donald S. Owens
/s/ Michael J. Kelly