STATE OF MICHIGAN

COURT OF APPEALS

FISK INSURANCE AGENCY, LLC,

Plaintiff-Appellee,

v

MEEMIC INSURANCE COMPANY,

Defendant-Appellant.

UNPUBLISHED
September 10, 2020

No. 350832
Eaton Circuit Court
LC No. 2019-000337-CK

Before: CAVANAGH, P.J., and BORRELLO and TUKEL, JJ.

PER CURIAM.

Defendant appeals as of right an order granting plaintiff's motion for declaratory judgment and summary disposition on the basis that an arbitration agreement applied to this dispute. We affirm.

Plaintiff, the Fisk Insurance Agency, is a sales agent for defendant Meemic Insurance Company. On November 29, 2016, Shannon Werner purchased a Meemic Michigan Homeowners Insurance Policy through the Fisk Agency, which had an effective date of December 16, 2016. Werner was purchasing real property owned by James Taylor and the closing on the property was supposed to occur by or before January 15, 2017. However, Taylor allowed Werner to move into the property on December 12, 2016, before the closing occurred, and thus, before Werner had an insurable interest in the property.

On December 20, 2016, while Werner was living on the property and before the closing occurred, there was a fire which destroyed Taylor's home and much of Werner's personal property. Subsequently, Werner filed a claim for insurance coverage with Meemic and Taylor filed a claim for coverage under his homeowner's insurance policy with his insurer, Frankenmuth Insurance Company. Frankenmuth then notified Meemic and Werner that Werner was liable for the fire and resulting property damage, and it was pursuing its subrogation rights. On December 8, 2017, Meemic entered into a settlement agreement with Frankenmuth for $100,000, the personal liability limit of Werner's policy that she had purchased through the Fisk Agency.

Meemic then sued the Fisk Agency in circuit court to recover the $100,000 that it paid on Werner's behalf on the ground that the Fisk Agency should not have sold Werner the insurance

policy because she had no insurable interest in the property. That is, the closing on the sale of the property had not occurred when the Fisk Agency sold her the homeowner's policy. After the parties proceeded to arbitration, the circuit court action was dismissed. Subsequently, the Fisk Agency sought to dismiss the arbitration on the ground that Meemic failed to demand arbitration within 90 days of the alleged breach of their Sales Representative Agreement. Meemic responded, arguing that this was a subrogation action and because Werner was not a party to the Sales Representative Agreement, the terms of the Sales Representative Agreement did not apply. The arbitration panel denied the Fisk Agency's motion to dismiss, apparently holding that the Sales Representative Agreement did not apply to this subrogation action, and thus, its arbitration provision was not applicable to this dispute.

The Fisk Agency then filed a declaratory action in the circuit court, requesting the court to summarily determine and declare whether the parties' dispute was subject to the terms of the arbitration agreement included in their Sales Representative Agreement. The Fisk Agency argued that under the express terms of the Sales Representative Agreement, disputes between the parties must be arbitrated and the party seeking arbitration must do so within 90 days of the alleged breach. Meemic did not demand to arbitrate this dispute with the Fisk Agency within 90 days of the alleged breach, and thus, Meemic's claim was barred by the contractual limitation provision of their contract. Accordingly, the Fisk Agency requested the court to declare that the parties' dispute is governed by their contract which includes the arbitration clause and order the arbitrators to address the contractual limitation issue on its merit. However, if the court determined that the parties' contract did not apply, the Fisk Agency requested the court to dismiss the arbitration because it could not be compelled to arbitrate this matter without such an agreement.

Meemic also sought the summary disposition of this matter under MCR 2.116(C)(7), arguing that the Fisk Agency voluntarily submitted the matter to arbitration and could not seek a "second opinion" on its motion to dismiss that was denied by the arbitration panel. Accordingly, Meemic requested the circuit court to dismiss this action and order the parties to proceed with arbitration.

The Fisk Agency responded to Meemic's motion, arguing that it did not "agree" to arbitration; rather, it only submitted to arbitration because it was required under the parties' Sales Representative Agreement. There was no other agreement to arbitrate; only the arbitration provision in their Sales Representative Agreement existed. Thus, if that arbitration provision did not apply here, the arbitration panel had no jurisdiction over this matter and the court should permanently enjoin the arbitration. Arbitration may not proceed without an agreement to arbitrate and the Fisk Agency cannot be forced to arbitrate this dispute.

Meemic responded to the Fisk Agency claims, arguing that arbitration is proper but Meemic's claims were not governed by the Sales Representative Agreement between Meemic and the Fisk Agency. Rather, Meemic was asserting rights that accrued to Werner as her subrogee. Meemic argued that the Fisk Agency breached duties owed to Werner and that she had a viable negligence claim against the Fisk Agency that Meemic was asserting as her subrogee. In short, the Fisk Agency misrepresented the nature and extent of her insurance coverage. And because the Fisk Agency did not object to arbitration until it received an adverse ruling from the arbitration panel, this matter should proceed through arbitration.

Following oral arguments, the circuit court agreed with the Fisk Agency and granted its motion for declaratory judgment and summary disposition. The court held that the matter should be sent back to arbitration pursuant to the arbitration agreement contained in the Sales Representative Agreement. In other words, contrary to the decision reached by the arbitration panel, the Sales Representative Agreement applied to this action, and thus, its arbitration provision that included a 90-day contractual limitation also applied. The court noted in passing that while Werner is referenced in this action, she had absolutely no interest in this case because the claim against her had been paid by Meemic. In any case, the court ordered that arbitration be resumed to address the contractual limitation issue on its merit. Meemic's cross-motion for summary disposition was therefore denied. Thereafter, Meemic's motion for reconsideration was denied and this appeal followed.

Meemic argues that the trial court erred in granting the Fisk Agency's motion for summary disposition because the Sales Representative Agreement, including its arbitration provision, did not apply to Meemic's subrogation claims since Werner, the subrogor, was not a party to that agreement. We disagree.

We review de novo a trial court's decision on a motion for summary disposition. *Diamond v Witherspoon*, 265 Mich App 673, 680; 696 NW2d 770 (2005). MCR 2.116(C)(7) permits summary disposition when there is an agreement to arbitrate. In reviewing a motion under MCR 2.116(C)(7), we accept all well-pleaded factual allegations as true and construe them in plaintiff's favor unless evidence contradicts them. *Dextrom v Wexford Co*, 287 Mich App 406, 428; 789 NW2d 211 (2010). We review all documentary evidence submitted by the parties to determine whether there is a genuine issue of material fact. *Id*. at 429. If the relevant facts are undisputed and if reasonable minds could not differ regarding the legal effect of them, the question whether the claim is barred is an issue of law for the court. *Id*. "Questions of law relative to declaratory judgment actions are reviewed de novo, but the trial court's decision to grant or deny declaratory relief is reviewed for an abuse of discretion." *Pioneer State Mut Ins Co v Dells*, 301 Mich App 368, 376; 836 NW2d 257 (2013).

Meemic asserts that this is a subrogation action. As Meemic states in its brief on appeal, "subrogation" is "the substitution of one person in the place of another with reference to a lawful claim or right." *Atlanta Int'l Ins Co v Bell*, 438 Mich 512, 521; 475 NW2d 294 (1991) (quotation marks and citation omitted). Equitable subrogation is a legal fiction allowing one party—the subrogee—to stand in the shoes of another party—the subrogor. *Id*. at 521-522. The subrogee acquires no greater rights than the subrogor has, and thus, the nature of the claim asserted by the subrogee must be the same as the subrogor could have asserted. *Auto-Owners Ins Co v Amoco Prod Co*, 468 Mich 53, 59; 658 NW2d 460 (2003) (citations omitted).

Here, Meemic claims that it is the subrogee of Werner who could have asserted a negligence claim against the Fisk Agency. It is well-established that the elements of a negligence cause of action are that (1) a legal duty was owed to the plaintiff, (2) the defendant breached that legal duty, (3) the plaintiff suffered damages, and (4) the breach was a proximate cause of those damages suffered. *Schultz v Consumers Power Co*, 443 Mich 445, 449; 506 NW2d 175 (1993). Meemic's brief on appeal discusses in detail the legal duty that the Fisk Agency owed to Werner and the purported breaches of that legal duty. But even if we accepted Meemic's statements at face value, what damages were suffered by Werner and how were they proximately caused by the

purported breaches of legal duty? If Werner sued the Fisk Agency for negligence, her claim would fail because she has suffered no damages that were proximately caused by the Fisk Agency's breach of legal duty owed to her. Although Frankenmuth held Werner responsible for the fire and resulting loss, Meemic settled that claim and paid Frankenmuth $100,000 pursuant to Werner's policy of insurance. Werner did not personally pay Frankenmuth $100,000. There is no record evidence that Werner paid any of her own money to Frankenmuth as a consequence of the fire and resulting damage. The policy of insurance that Werner purchased from the Fisk Agency actually insulated her from personal liability with regard to the fire and resulting damage, i.e., she got what she was entitled to receive. Therefore, Werner had no claim to enforce against the Fisk Agency so there is no claim for Meemic to enforce against the Fisk Agency through equitable subrogation.

Meemic relies on the case of *Auto Club Ins Ass'n v New York Life Ins Co*, 440 Mich 126, 132; 485 NW2d 695 (1992), to support its claim that it is entitled to invoke the doctrine of subrogation because it paid benefits on behalf of Werner, its insured. But that case is factually distinguishable and does not support Meemic's argument. In that case, the plaintiff's no-fault insurance provider paid most of the injured plaintiff's medical expenses after a motor vehicle accident even though the plaintiff's health insurance provider was primarily responsible for those expenses. *Id*. at 128. Thus, the no-fault insurer, as subrogee, could sue to recover its insured's medical benefits due under his health insurance contract—just as the insured could have sued his health insurance provider for those same medical benefits. *Id*. at 136.

But in this case, Meemic is not claiming that it wrongfully paid for the loss caused by Werner because another insurance company or party was actually liable. Rather, Meemic is claiming that—but for the Fisk Agency's negligence—*Meemic* would not have had to pay for the loss. Thus, the party who suffered damages that were proximately caused by any negligence of the Fisk Agency was not Werner, it was Meemic. Accordingly, as the trial court held, Meemic is not entitled to invoke the doctrine of subrogation. Meemic's right to sue the Fisk Agency arises under the contract that Meemic had with the Fisk Agency, i.e., the Sales Representative Agreement. The Fisk Agency's authority to sell Meemic's insurance policies derived solely from that Agreement. And the Sales Representative Agreement contained an arbitration provision which states, in relevant part:

> 13.01 Any controversy or claim arising out of this Agreement shall be resolved by arbitration and arbitration shall be the sole and exclusive remedy. Either Agency or Sales Representative may demand arbitration. The demand must be made in writing within ninety (90) days of the alleged breach.

The trial court also properly concluded that, in accordance with the plain terms of this Agreement, this matter must be returned to arbitration and the arbitrators must address the 90-day contractual limitation set forth in the Agreement. Therefore, the Fisk Agency's motion for declaratory

judgment and summary disposition was properly granted and Meemic's cross-motion for summary disposition was properly denied.

Affirmed. The Fisk Agency is entitled to costs as the prevailing party. MCR 7.219(A).

/s/ Mark J. Cavanagh
/s/ Stephen L. Borrello
/s/ Jonathan Tukel