

STATE OF MICHIGAN
COURT OF APPEALS

JOSEPH T. CORTRIGHT,

Plaintiff-Appellant,

v

FIRE INSURANCE EXCHANGE,

Defendant-Appellee.

UNPUBLISHED

December 16, 2004

No. 249790

Eaton Circuit Court

LC No. 02-000696-CK

Before: Markey, P.J., and Fitzgerald and Owens, JJ.

PER CURIAM.

Plaintiff appeals as of right the order granting summary disposition to defendant pursuant to MCR 2.116(C)(10)¹ and dismissing plaintiff's action with prejudice. We affirm the dismissal of plaintiff's action, but modify the order to provide that the dismissal is without prejudice. This case is being decided without oral argument pursuant to MCR 7.214(E).

In support of its motion for summary disposition, defendant presented evidence that it had requested that plaintiff provide two estimates of the cost to rebuild plaintiff's home as it existed before it was destroyed, and that plaintiff failed to provide the requested estimates. Defendant argued that summary disposition was warranted because plaintiff failed to comply with Section I, Conditions, of the homeowners policy, which provides:

2. *Your Duties After Loss.*

If a covered loss occurs, you will perform the following duties:

* * *

d. as often as we reasonably require:

¹ Although the court did not specify whether it was granting defendant's motion pursuant to MCR 2.116(C)(8) or (10), because it relied on evidence beyond the pleadings, we review the motion under MCR 2.116(C)(10). *Krass v Tri-County Sec, Inc*, 233 Mich App 661, 664-665; 593 NW2d 578 (1999).

* * *

(2) provide us with records and documents we may request, including banking or other financial records, if obtainable and permit us to make copies.

The policy also provides, “We may not be sued unless there has been full compliance with all of the terms of this policy.” The trial court granted defendant’s motion, concluding that plaintiff had failed to comply with the conditions of the policy.

On appeal, plaintiff does not address the applicability or effect of the provision requiring that he provide requested “records and documents.” His failure to address the basis for the trial court’s decision precludes appellate relief on that issue. *Roberts & Son Contracting, Inc v North Oakland Development Corp*, 163 Mich App 109, 113; 413 NW2d 744 (1987).

Plaintiff contends that pursuant to MCL 500.2006(3), defendant was required to specify within thirty days after receipt of the notice of claim what material will constitute a satisfactory proof of loss. Plaintiff argues that defendant failed to notify him of the requirement of two written estimates within the specified period. Plaintiff relies on *Dellar v Frankenmuth Mutual Ins Co*, 173 Mich App 138; 433 NW2d 380 (1988), for the proposition that an insurer that fails to provide notice of the required documentation of proof of loss within the specified period may not raise defects in the insured’s proof of loss to avoid paying the claim. But plaintiff did not preserve this argument by raising it in his response to defendant’s motion or at the hearings on the motion. *Adam v Sylvan Glynn Golf Course*, 197 Mich App 95, 98; 494 NW2d 791 (1992). Similarly, although *Dellar* indicates that an insurer’s failure to comply with its statutory duty under MCL 500.2006(3) is a factor relevant to whether the insurer waived or is estopped from relying on deficiencies in a plaintiff’s proof of loss, plaintiff did not address below, nor does he address on appeal, either waiver or estoppel. In any event, defendant did not seek summary disposition because of a deficiency in plaintiff’s proof of loss, but because of noncompliance with the duty to provide documents.

For these reasons, plaintiff has not established that the trial court erred by granting summary disposition in favor of defendant. Nonetheless, we conclude that the trial court’s order should be modified to reflect that the dismissal is without prejudice. An insured’s noncompliance with conditions precedent in a policy before commencing an action is a basis for dismissal of the action, but dismissal with prejudice is appropriate only when the noncompliance was “wilful.” *Thomson v State Farm Ins Co*, 232 Mich App 38; 592 NW2d 82 (1998).

“[W]ilful noncompliance” in the context at hand refers to a failure or refusal to submit to an EUO [examination under oath] or otherwise cooperate with an insurer in regard to contractual provisions allowing an insurer to investigate a claim that is part of [1] a *deliberate* effort to withhold material information or [2] a *pattern of noncooperation* with the insurer. [*Id.* at 50-51.]

In the present case, defendant’s brief in support of its motion for summary disposition sought dismissal with prejudice for plaintiff’s failure to comply with its request for documents, but defendant did not address the need to show wilful noncompliance. Further, the submitted evidence did not show that there was no genuine issue of material fact with regard to this issue. Defendant presented two letters from defendant’s adjuster to plaintiff’s counsel requesting two

estimates for rebuilding plaintiff's home as it was before the loss. Defendant also attached plaintiff's deposition. Plaintiff testified that he obtained two estimates, but agreed that he had not submitted estimates for replacement of an identical structure. However, he indicated that he was not aware that the insurance company was requesting such estimates. His understanding from his conversations with the adjuster was that the adjuster "asked for me to supply quotes to replace a new home." He was not aware of the adjuster's request to his attorney for two estimates to rebuild the home with the same features. This evidence did not establish that there was no genuine issue of material fact that plaintiff's action was part of "a deliberate effort to withhold material information" or "a pattern of noncooperation with the insurer." *Thomson, supra*. Accordingly, defendant was not entitled to dismissal with prejudice. We therefore modify the trial court's order to reflect that the dismissal is without prejudice.

Affirmed as modified.

/s/ Jane E. Markey
/s/ E. Thomas Fitzgerald
/s/ Donald S. Owens