STATE OF MICHIGAN

COURT OF APPEALS

MARVIN MICHEAU and DEBRAH J. MICHEAU, Plaintiff-Appellants, v HUGHES & HAVINGA INSURANCE AGENCY and STEVEN PATRICK BRAUN, Defendant-Appellees.	UNPUBLISHED May 21, 2013 No. 307914 Delta Circuit Court LC No. 10-020524-CK

Before: RONAYNE KRAUSE, P.J., and GLEICHER and BOONSTRA, JJ.

PER CURIAM.

The circuit court summarily dismissed plaintiffs Marvin and Debrah Micheau's negligence action against the insurance agency and particular agent that sold them homeowners' insurance—defendants Hughes & Havinga Insurance Agency and Steven Braun. The circuit court incorrectly concluded that there was no special relationship between the insurance agent and the insured. However, because the proximate cause of the Micheaus' damages was the fact that the subject house was uninsurable, rather than any breach committed by defendants, we affirm.

I. BACKGROUND

On May 1, 2008, a fire consumed the upstairs bathroom of the Micheaus' Escanaba home. The fire department's efforts to douse the fire resulted in water damage to the first-floor ceiling. The home required extensive remodeling and renovation and the Micheaus rented homes nearby during the repairs.

At the time of the fire, the Micheaus had no homeowners' insurance. After the fire they decided to purchase coverage. Debrah called Hughes & Havinga Insurance Agency to discuss coverage and scheduled a May 16, 2008 meeting with Braun, an independent insurance agent who "writes various lines of insurance for several different companies[.]"

Debrah recounted that she told Braun that the house had been recently damaged in a fire. Braun proceeded to read questions to Debrah "and then explained them." Debrah asserted that she told Braun that her house was not "under construction" based on Braun's explanation of that

condition. Debrah also insisted that Braun knew the home was not occupied on May 16, and that she originally asked Braun to mail the insurance policy to her rental property.

Braun presented an entirely different version of his conversation with Debrah. Braun attested that Debrah represented that the house was "owner-occupied and in good condition, and did not disclose that it was under construction or renovation" or that it had recently been damaged by fire. Based on her "glowing" description of the home, Braun believed it to be a home on North 18th Street with which he was familiar, and he photographed that house for the insurance application. Braun denied that Debrah ever mentioned that she and her family had moved into a rental home, and asserted that had she done so he would not have submitted the insurance application because the house would have been ineligible for coverage.

On August 19, 2008, yet another fire occurred and this time destroyed the Micheaus' North 19th Street home. The Micheaus' submitted a claim under their homeowners' policy, which Pioneer denied. Pioneer filed a declaratory judgment action against the Micheaus seeking a declaration of no coverage. The same circuit judge assigned to the instant case determined that the Pioneer policy "was void *ab initio* as a result of the Micheaus' misrepresentation of the condition of the home at 201 N. 19th Street, at the time of applying for insurance for the subject home." The Micheaus did not appeal that judgment.

The Micheaus then commenced this negligence action against defendants. Their original complaint raised general claims that defendants breached their fiduciary duties to the Micheaus resulting in the denial of insurance coverage. Defendants moved for summary disposition under MCR 2.116(C)(10), asserting that the Micheaus had failed to allege facts "establish[ing] a necessary 'special relationship' which would give rise to the existence of tort duties that the Defendants might owe the Plaintiffs and, thus, without a 'special relationship', the Plaintiffs' claim must fail as a matter of law." Defendants further argued that the Micheaus had misrepresented that the house was in good condition, occupied, and not under construction, and that these misrepresentations formed the "sole cause" of the insurance policy's rescission.

The circuit court granted summary disposition but permitted the Micheaus to amend their complaint pursuant to MCR 2.116(I)(5), to "allege and prove the existence of a duty owed by the defendants." The court instructed plaintiffs to "allege facts which would allow or which would show the existence of . . . a special relationship."

In their amended complaint, the Micheaus alleged counts of breach of fiduciary duty and "breach of duty created by special relationship." As to the breach of fiduciary duty claim, the complaint averred, "That there was a fiduciary relationship between plaintiffs and their insurance agent in plaintiffs' reliance on defendants' judgment and advice to place the insurance coverage[.]" In count II, the Micheaus provided additional details:

> 22. That the special relationship was created by the agent's misrepresentations of the nature and extent of the insurance coverage offered or provided as stated below:

a. Plaintiffs described the premises to be insured as having been damaged by fire and that the premises were being repaired and/or remodeled.

b. Defendants being informed of the condition of plaintiffs' premises prepared an application for insurance and submitted it for insurance coverage.

23. That the special relationship was created by . . . an ambiguous request made concerning the extent of construction of the premises that required clarification as stated below:

a. Plaintiffs asked defendants for an explanation of what *under construction* meant.

b. Defendants' clarification to plaintiffs was that *under construction* could mean anything from painting and wallpapering to construction of a building.

24. That the special relationship was created by the plaintiffs' inquiry of insurance coverage available to which the defendants gave inaccurate advice as stated below:

a. Plaintiffs made inquiry for purchase of homeowners insurance.

b. Defendants scheduled a meeting with plaintiffs to obtain information to sell plaintiffs insurance coverage, which included a discussion with plaintiffs concerning the property to be insured and the type of insurance coverage available. The advice defendants gave was inaccurate concerning the insurance coverage that plaintiffs could purchase for their house.

25. That special relationship was created by the defendants' assumption of an additional duty by express agreement with or promise to the plaintiffs as stated below:

a. Defendants informed plaintiffs it would be necessary to measure plaintiffs' house and to photograph it for the insurance coverage.

b. Plaintiffs offered to be available to assist with the additional information required for the insurance coverage. Defendants assumed the duty to obtain the additional insurance information and expressly promised plaintiffs it was not necessary for their assistance to obtain the information. [Emphasis in original.]

Defendants filed a second summary disposition motion contending that the Micheaus did not enjoy a special relationship with Braun, that Debrah's misrepresentation was the sole cause for the rescission of their homeowners' policy, and that the Micheaus were ineligible for any

homeowners' coverage given the condition of the home. The Micheaus responded that their amended complaint alleged facts demonstrating a special relationship consistent with *Harts v Farmers Ins Exch*, 461 Mich 1; 597 NW2d 47 (1999). The circuit court granted summary disposition in defendants' favor, finding no evidence suggesting that Debrah's meeting with Braun "transformed" their connection into a special relationship. The circuit court additionally ruled that the Micheaus could not establish the necessary causal link because no insurance company would have provided coverage to the Micheaus' home in its state at that time.

II. SPECIAL RELATIONSHIP

The circuit court erroneously based its summary disposition judgment on its ruling that the Micheaus failed to establish a special-relationship. "We review de novo the circuit court's summary disposition ruling." *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). Defendants' motion for summary disposition invoked MCR 2.116(C)(10), which tests a claim's factual support. "In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Id.* A court may not make findings of fact when deciding a summary disposition motion. *Jackhill Oil Co v Powell Production, Inc*, 210 Mich App 114, 117; 532 NW2d 866 (1995).

The circuit court incorrectly required the Micheaus to plead and prove a "special relationship" pursuant to *Harts*. Because Braun acted as the Micheaus' agent rather than Pioneer's agent, he owed the Micheaus a duty of reasonable care in completing the application. The fiduciary duties owed by an insurance agency vary depending upon "the agent's status as an independent or exclusive agent." *Genesee Foods Services, Inc v Meadowbrook, Inc*, 279 Mich App 649, 654; 760 NW2d 259 (2008). The general rule is that an independent agent or broker acts on behalf of the insured rather than the insurer. *West American Ins Co v Meridian Mut Ins Co*, 230 Mich App 305, 310; 583 NW2d 548 (1998); *Harwood v Auto-Owners Ins Co*, 211 Mich App 249, 254; 535 NW2d 207 (1993). "The presumption is that a broker represents the insured, particularly in matters connected with the application and procurement of insurance." 3 Couch, Insurance, 3d, § 45:4, p 45-9.

In analyzing Braun's fiduciary duties to the Micheaus, it is important to distinguish between various functions performed by an insurance agent. The process of procuring insurance coverage, including accurate preparation of the insurance application, is readily distinguishable from an undertaking to advise an insured concerning the *adequacy or scope* of coverage. The former duty may be described as follows: "An agent employed to effect insurance must exercise such reasonable skill and ordinary diligence as may fairly be expected from a person in his or her profession or situation, in doing what is necessary to effect a policy, in seeing that it effectually covers the property to be insured, in selecting the insurer, and so on." 3 Couch, Insurance, 3d, § 46:30, pp 46-56 - 46-57. This case implicates the duty to procure insurance rather than the duty to advise the Micheaus concerning coverage adequacy or options.

The parties agree that Braun served as an agent for the Micheaus. Thus, he owed them a general fiduciary duty of loyalty and good faith. *Burton v Burton*, 332 Mich 326, 337; 51 NW2d 297 (1952). That duty was particularly acute with regard to procuring insurance as requested by

an insured. *Zaremba Equipment, Inc v Harco Nat'l Ins Co*, 280 Mich App 16, 37-38; 761 NW2d 151 (2008). See also *Avery v Diedrich*, 301 Wis 2d 693, 705; 734 NW2d 159 (2007) ("When an insurance agent fails to act with reasonable care, skill, and diligence in procuring coverage he or she agreed to procure, the agent has breached his or her duty to the insured."); *Rocque v Co-Operative Fire Ins Ass'n*, 140 Vt 321, 326; 438 A2d 383 (1981) (an agent bears a duty to "use reasonable care and diligence to procure insurance that will meet the needs and wishes of the prospective insured, as stated by the insured"); *Quality Furniture, Inc v Hay*, 61 Haw 89, 93; 595 P2d 1066 (1979) ("An insurance agent owes a duty to the insured to exercise reasonable care, skill and diligence in carrying out the agent's duties in procuring insurance.").

"[I]n a suit to recover benefits, the accuracy of the information provided on the application is crucial. Insurance companies rely on the truthfulness and completeness of the information on the application in assessing whether to issue a policy and on what terms." *Roe v Sewell*, 128 F3d 1098, 1103 (CA 7, 1997). An agent violates his or her fiduciary duty by negligently or intentionally misrepresenting relevant information in an insurance application, or by supplying patently incorrect information in response to an insured's request for assistance.

Crediting Debrah's testimony, a jury could reasonably conclude that Braun negligently (or deliberately) mis-defined the term "under construction," and inappropriately agreed that her home did not meet the definition despite its serious flaws. Accepting as true that Debrah told Braun that the house was unoccupied, it could be reasonably argued that Braun breached his fiduciary duty to accurately prepare the application by indicating to the contrary in the insurance application. Therefore, a material question of fact existed concerning whether defendants breached their fiduciary duty.

Relying on *Harts*, the circuit court ruled that the Micheaus' initial complaint failed to state a claim because it lacked any allegation that the Micheaus and Braun shared a "special relationship." *Harts* is inapplicable for two reasons. First, *Harts* addresses "whether a licensed insurance agent owes an affirmative duty to advise or counsel an insured about *the adequacy or availability of coverage*." *Harts*, 461 Mich at 2 (emphasis added). This case simply does not involve that sort of advice. Second, the general "no duty to advise" rule emphasized in *Harts* applies to "an insurance agent *whose principal is the insurance company*[.]" *Id.* at 8 (emphasis added). A "special relationship" alters that duty: "However, as with most general rules, the general no-duty-to-advise rule, where the agent functions as simply an order taker for the insurance company, is subject to change when an event occurs that alters the nature of the relationship between the agent and the insured." *Id.* at 9-10. Hence, *Harts* neither holds nor implies that agents of the insured bear no fiduciary duties, even absent a "special relationship."[1]

[1] Indeed, the principal-agent relationship between an independent agent and his or her client is a "special" one, as it inherently implicates "the highest duty of care." *In Re Estate of Karmey*, 468 Mich 68, 74 n 2; 658 NW2d 796 (2003), quoting Black's Law Dictionary (7th ed).

III. PROXIMATE CAUSATION

Even given the fiduciary relationship between Braun and the Micheaus, the Micheaus cannot prevail. Because the Micheaus' home was uninsurable at the time they applied for an insurance policy, they cannot demonstrate that Braun's negligence proximately caused them to be uninsured. The Micheaus have failed to present evidence that accurate disclosures would have permitted them to obtain coverage from any insurance company.

Defendants' second motion for summary disposition asserted that "insurance coverage was not available through any carrier for this home, in the condition that the home was in at the time of the placement of the Pioneer policy on the home and at the time of the August 19, 2008 fire." In support of this argument, defendants submitted an affidavit signed by Calvin (Kelly) Havinga asserting that based on "research of a number of insurance carriers," none would have insured "an unoccupied, unrepaired fire damaged risk." Havinga attached to his affidavit emails he received from agents of several insurance companies and independent insurance agencies. The Micheaus did not file any affidavits in response.

The affidavits establish that had Braun filled out the application in accord with the information Debrah claims to have provided, no homeowners' policy would have been issued. Although the Micheaus contend that they would have sought other coverage if declined by Pioneer, it remains sheer speculation that they would have found a company willing to insure the home. Record evidence supports that the Micheaus unsuccessfully sought coverage before counseling with Braun. "[T]he nonmoving party must produce evidence showing a material dispute of fact left for trial in order to survive a motion for summary disposition under [MCR 2.116(C)(10)]." *Village of Dimondale v Grable*, 240 Mich App 553, 566; 618 NW2d 23 (2000). The Micheaus have not fulfilled this obligation. Accordingly, the circuit court properly granted summary disposition on this ground.

Affirmed.

/s/ Amy Ronayne Krause
/s/ Elizabeth L. Gleicher
/s/ Mark T. Boonstra