

STATE OF MICHIGAN
COURT OF APPEALS

ALLEN BARBARICH,

Plaintiff-Appellee,

v

CIVIC PROPERTY & CASUALTY COMPANY,

Defendant-Appellant.

UNPUBLISHED

August 1, 2006

No. 264986

Wayne Circuit Court

LC No. 05-509552-CZ

Before: Kelly, P.J., and Markey and Meter, JJ.

PER CURIAM.

In this interlocutory appeal, defendant appeals by leave granted from the circuit court's order denying its motion for summary disposition predicated on the statute of limitations. We affirm. This appeal is being decided without oral argument in accordance with MCR 7.214(E).

Warren Sanford owned a building in Detroit, subject to a mortgage held by plaintiff as mortgagee, and insured the building with defendant. The building was destroyed by fire in early 2002. Although there is some uncertainty concerning the actual date of the fire, the parties agree for present purposes to recognize the date as February 24 of that year as the date of loss.

Sanford provided notice of the loss to defendant in April 2002. There is some uncertainty concerning the actual date of the notice, but the parties agree for present purposes to presume that the date was the first of that month.¹ In a letter dated August 9, 2002, defendant denied Sanford's claim on the ground that the policy of insurance was out of force on the date of the loss. However, plaintiff, still acting as mortgagee, separately provided notice of the loss, on January 7, 2003, in response to which defendant assigned a new claim number.

In October 2003, Sanford assigned his interest in any insurance proceeds under the policy in question to plaintiff. Defendant mailed a partial settlement to plaintiff for \$37,775 that same

¹ In its reply brief, defendant asserts that Sanford in fact submitted his claim no earlier than April 18, 2002, suggesting that the April 1 notice date no longer need be presumed. However, we decline to allow defendant in its reply to withdraw from a stipulation offered earlier. The several-day differential involved is not outcome-determinative, in any event.

month and followed with another payment, of \$95,003.11, as described in a letter dated March 15, 2004. The latter characterized that total as “Net Payment to conclude claim.”

Plaintiff demanded additional payment, however, and sent correspondence, dated August 19, 2004, naming an appraiser. Defendant responded with a letter, dated September 14, 2004, stating that the March payment was a “final settlement,” asserting that the one-year statute of limitations for bringing an action on the policy had run, and announcing that no appraiser would be named or further payments made. Plaintiff commenced its action on April 1, 2005.²

MCL 500.2833(1)(q) provides that policies of fire insurance must specify that an action on the policy “may be commenced only after compliance with the policy requirements,” that such an action “must be commenced within 1 year after the loss or within the time period specified in the policy, whichever is longer,” and that “[t]he 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 parties do not dispute that the one-year period of limitation applies here. The question is when defendant formally denied liability. In denying defendant’s motion for summary disposition, the trial court made its findings on the basis of a loss date of February 24, 2002, which is not in dispute, and of Sanford’s notice provided in April 2002 and defendant’s denial of further benefits to plaintiff as announced on September 14, 2004. At issue is whether the court erred in selecting the latter two dates as the operative ones. We conclude that it did not.³ The trial court stated:

The loss occurred in this case on February 24, 2002 and the notice of the losses provided to [defendant] two months later in April 2002, that tolled the statute of limitations and the company made some payments and their refusal to cooperate with the appraisal was September 14, 2004. That’s an important date because that starts the one year statute of limitations. This suit could be filed up until September 14, 2005.

² In its reply brief, defendant asserts that it was not named in the original complaint and thus that the filing of the first amended complaint on April 29, 2005, marked the filing date for purposes of the statute of limitations. However, defendant’s correspondence concerning the loss underlying this case clearly indicates that Farmers Insurance Group, the defendant originally named, and Civic Property & Casualty Company, the defendant named in the amended complaint, share substantial identity, such that the two may be treated, for present purposes, as one. In any event, the twenty-nine days’ difference between the two dates is not outcome-determinative.

³ The trial court in fact erroneously stated that plaintiff had until September 14, 2005, to file suit, having simply counted one year after the date that defendant informed plaintiff that no further payments would be made. However, the court failed to take into account the thirty-five days between the date of loss and the date of Sanford’s provision of notice, which, given those two occurrences as the operative ones, caused the period of limitations to run out in early August 2005. However, because this error was not outcome-determinative, it was harmless.

This Court reviews a trial court's decision on a motion for summary disposition de novo as a question of law. *Ardt v Titan Ins Co*, 233 Mich App 685, 688; 593 NW2d 215 (1999). MCR 2.116(C)(7) authorizes motions for summary disposition premised upon a statute of limitations. When deciding a motion under that rule, the court must consider 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. See *Amburgey v Sauder*, 238 Mich App 228, 231; 605 NW2d 84 (1999). The question whether a claim is barred by a statute of limitations is also one of law, subject to review de novo. *McKiney v Clayman*, 237 Mich App 198, 201; 602 NW2d 612 (1999).

By recognizing Sanford's provision of notice, and defendant's September 14, 2004, letter announcing that no further payments would be made, as the operative dates, the trial court chose the only two among competing dates that render plaintiff's cause of action timely. Defendant, however, argues that plaintiff, having separately provided notice and obtained benefits, cannot rely on Sanford's earlier notice, but that if that is the operative notice, then the operative date of denial of the claim should be its August 9, 2002, letter of denial to Sanford. Defendant alternatively argues that its March 15, 2004, letter purporting to conclude plaintiff's claim should be construed as the letter of denial. We must reject these arguments.

Plaintiff, having purchased Sanford's contractual interest in insurance benefits, effectively stood in Sanford's shoes upon doing so. Plaintiff is thus entitled to the benefit of Sanford's provision of notice. Plaintiff's own, later, provision of notice, then acting as only the mortgagee, duplicated, but did not nullify or subsume, Sanford's more timely notice.

Because of plaintiff's status as successor to Sanford's interest, had defendant refused to act on the claim after its initial denial of benefits to Sanford, that denial would indeed stand as the one triggering the resumption of the running of the period of limitations. However, defendant in fact made payments on the loss in response to plaintiff's own subsequent claim, thus effectively withdrawing its initial denial of benefits. Defendant thus rendered its letter denying benefits to Sanford inoperable.

Moreover, defendant's March 15, 2004, letter, listing an earlier payment, plus other factors, and describing a final sum as "Net Payment to conclude claim," was not a denial of benefits, but in fact reflected a payment of them. Because that letter nowhere denies any benefit still sought, it cannot mark the date of denial for purposes of recommencing the applicable limitations period.

Defendant's September 14, 2004, letter stating that the March 15, 2004, payment was a final settlement, asserting that the applicable period of limitations had run, and refusing to appoint an appraiser or provide further benefits does constitute an unambiguous denial of benefits. Because defendant points to no earlier such statement, we conclude that the trial court correctly recognized September 14, 2004, as the date of denial.

Because the trial court correctly identified Sanford's provision of notice and defendant's September 14, 2004, denial of benefits to plaintiff as the operative occasions, the court correctly denied defendant's motion for summary disposition predicated on the statute of limitations.

Affirmed.

/s/ Jane E. Markey
/s/ Patrick M. Meter