STATE OF MICHIGAN

COURT OF APPEALS

GARY M. GJERTSON and SUE GJERTSON,

Plaintiffs-Appellants,

v

PIONEER STATE MUTUAL INSURANCE COMPANY,

Defendant-Appellee.

UNPUBLISHED
July 27, 2006

No. 266342
Van Buren Circuit Court
LC No. 05-053771-CZ

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

PER CURIAM.

Plaintiffs appeal as of right from the trial court's order granting defendant's motion for summary disposition. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiffs sustained water damage to their home and personal property on December 21, 2003, as a result of a malfunctioning water heater. On or about December 29, 2003, plaintiffs submitted a claim to defendant, their insurer; plaintiffs supplemented the claim on January 11, 2004. Plaintiffs sought compensation for structural damage to the home and damage to furniture and various items of personal property. In response to defendant's request, plaintiffs submitted a sworn statement of proof of loss in which they sought compensation in the amount of $42,341.98.

Defendant conducted an investigation and concluded that plaintiffs claimed losses for items that were not damaged and exaggerated the extent of their personal property loss. By letter dated April 12, 2004, defendant "fully, finally and formally" rejected plaintiffs' claim on the grounds that plaintiffs engaged in "material misrepresentation and concealment of material facts and circumstances and . . . fraud and false swearing" in connection with the presentation of their claim and failed to comply with "the policy conditions precedent to recovery" by exaggerating losses and failing to provide objective information to support the amounts claimed.

The parties' counsel discussed the matter, and by letter dated January 4, 2005, plaintiffs offered to compromise and settle their claim for the sum of $23,653.52. Defendant declined plaintiffs' offer to settle the matter.

Plaintiffs filed suit on June 24, 2005, alleging breach of contract and violation of the Uniform Trade Practices Act, MCL 500.2001 *et seq*., and sought a declaration of the amount of damages to which they were entitled and an order requiring defendant to pay them that amount.

Defendant moved for summary disposition under MCR 2.116(C)(7). Defendant argued that plaintiffs' suit was precluded by the following policy language:

> **Suit Against Us.** No action can be brought unless the policy provisions have been complied with and the action is started 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.

Defendant asserted that because plaintiffs failed to file suit within one year after their claim was denied on April 12, 2004, their action was time-barred.

In response to defendant's motion for summary disposition, plaintiffs argued that the running of the contractual statute of limitations was tolled in light of the settlement negotiations in which the parties engaged from November 2004 until mid-March 2005. *Bridges v Allstate Ins Co*, 158 Mich App 276, 280; 404 NW2d 240 (1987). Furthermore, plaintiffs asserted that because they lacked a reasonable period of time between the end of negotiations and the expiration of the contractual statute of limitations in which to file suit, defendant should be precluded from asserting the statute of limitations as a defense. *Friedberg v Ins Co of North America*, 257 Mich 291, 293-294; 241 NW 183 (1932).

While defendant's motion for summary disposition was pending, plaintiffs moved to stay the case and remand the matter for appraisal/arbitration pursuant to the following language in the policy:

> **Appraisal.** If you and we fail to agree on the amount of loss, either may demand an appraisal of the loss. In this event, each party will choose a competent appraiser within 20 days after receiving a written request from the other. The two appraisers will choose an umpire. If they cannot agree upon an umpire within 15 days, you or we may request that the choice be made by a judge of a court of record in the state where the **residence premises** is located. The appraisers will separately set the amount of loss. If the appraisers submit a written report of an agreement to us, the amount agreed upon will be the amount of loss. If they fail to agree, they will submit their differences to the umpire. A decision agreed to by any two will set the amount of loss.

Plaintiffs asserted that the parties were unable to agree on the amount of loss, and that, therefore, resort to the appraisal remedy was appropriate. Plaintiffs noted that the policy did not set a time limit on a request for resort to the appraisal remedy.

In response to plaintiffs' motion, defendant argued that the policy's appraisal provision was inapplicable under the circumstances because the parties' dispute concerned whether any coverage was available and not merely the amount of loss sustained by plaintiffs. Defendant asserted that the existence of coverage must be determined before the appraisal process could be invoked. *Auto-Owners Ins Co v Kwaiser*, 190 Mich App 482, 487; 476 NW2d 467 (1991).

At the hearing on plaintiffs' motion, the trial court indicated that it would grant the stay and request for appraisal because knowing the amount of loss would be beneficial. Defendant, however, asserted that its motion for summary disposition should be heard because the contractual limitation of actions might resolve the entire case. The trial court granted plaintiffs' request for an appraisal but ordered that defendant's motion for summary disposition would be heard before the appraisal was conducted.

Thereafter, the trial court heard argument on and granted defendant's motion for summary disposition. In granting the motion, the trial court stated:

> Well, what we have here is a contract provision in the Statute that provides to permit a period of limitations. We have the suit filed after that period. The period tolled from the time the claim was made until there was a clear denial of the claim. For the purposes of this motion and based upon these affidavits, I find that there were negotiations, that those negotiations ended approximately one month prior to the running of the one year and the question is whether or not the suit was brought within a reasonable period of time given the fact there was only one month left in the year period and I think that's the issue here and I am left without a real good definition of what a reasonable period is except for the discussion of the Friedberg case where they say that they had no hesitation in saying that less than 30 days, perhaps nearly three weeks, was not a reasonable time. In this case we had that time when the period ran, but then the suit wasn't filed for over another two months so the question I think is whether or not it was outside a reasonable period of time and I don't think I get a lot of help here in the case law but in looking at the last thing that could be termed a negotiation in mid March, the fact that the suit was filed over three months later, I am going to grant the motion based on the fact that it was not brought within a reasonable period of time after the negotiations terminated so that the limitation period applied and bars the suit.

Furthermore, the trial court reasoned that, based on its ruling that the suit was time-barred, the appraisal need not go forward.

We review a trial court's decision on a motion for summary disposition de novo. *Auto Club Group Ins Co v Burchell*, 249 Mich App 468, 479; 642 NW2d 406 (2001).

An insurance contract should be read as a whole and meaning given to all terms. *Auto-Owners Ins Co v Churchman*, 440 Mich 560, 566; 489 NW2d 431 (1992). An insurance contract is clear and unambiguous if it fairly admits of but one interpretation. *Farm Bureau Mutual Ins Co v Nikkel*, 460 Mich 558, 566; 596 NW2d 915 (1999). If the language of an insurance contract is clear, its construction is a question of law for the court. *Taylor v Blue Cross & Blue Shield*, 205 Mich App 644, 649; 517 NW2d 864 (1994). "An insurance contract is ambiguous if, after reading the entire contract, its language reasonably can be understood in differing ways." *Id.* Ambiguities are to be construed against the insurer. *State Farm Mutual Auto Ins Co v Enterprise Leasing Co*, 452 Mich 25, 38; 549 NW2d 345 (1996). Exclusions are strictly construed in favor of the insured. *McKusick v Travelers Indemnity Co*, 246 Mich App 329, 333; 632 NW2d 525 (2001).

Initially, plaintiffs argue that the trial court erred by concluding that their request for an appraisal was moot in light of its ruling that their suit was time-barred. Plaintiffs emphasize that, as defense counsel conceded, the one-year limitation period did not apply to the appraisal procedure, and they contend that the availability of this alternative remedy was not dependent on any other ruling made by the trial court. We disagree.

The appraisal process contained in defendant's policy is derived from the statutory requirements for a fire insurance policy. See MCL 500.2833(1)(m). This process has been referred to as "a 'substitute for judicial determination of a dispute concerning the amount of a loss,'" and "'a simple and inexpensive method for the prompt adjustment and settlement of claims.'" *Kwaiser*, *supra* at 486, quoting *Thermo-Plastics R & D, Inc v General Accident Fire & Life Assurance Corp, Ltd*, 42 Mich App 418, 422; 202 NW2d 703 (1972). However, the appraisal process is not a proper vehicle for determining the issue of the existence of coverage. The issue of coverage must be determined by a court before an appraisal of damage can proceed. *Kwaiser, supra* at 486-487.

We reject plaintiffs' assertion that the appraisal procedure exists as an alternative to their lawsuit and may be pursued notwithstanding the fact that the suit has been dismissed. The unambiguous language of defendant's policy provides that the appraisal process is available only when the parties "fail to agree on the amount of loss." Defendant denied plaintiffs' claim in its entirety on the ground that plaintiffs engaged in fraud and misrepresentation. The trial court determined that no coverage was available because plaintiffs' suit was not filed within a reasonable time after negotiations ended; therefore, defendant was not obligated to compensate plaintiffs in any amount. *Id*. The trial court correctly concluded that the appraisal process should not go forward.

Plaintiffs next argue that the trial court erred in granting defendant's motion for summary disposition on the ground that their suit was time-barred. Plaintiffs concede that they filed suit more than one year after defendant denied their claim, but they contend that the one-year period had been tolled by ongoing settlement negotiations and that they filed suit within a reasonable time after those negotiations ended. We disagree.

The unambiguous language of defendant's policy provides that suit cannot be brought unless an action is started within one year after the date of the loss but that the one-year period is tolled from the date defendant is notified of the loss until the date it formally denies the claim. Plaintiffs' loss occurred on December 13, 2003. Plaintiffs notified defendant of the loss on or about December 29, 2003, and defendant formally denied plaintiffs' claim by letter dated April 12, 2004. The one-year period was tolled from December 29, 2003 until April 12, 2004, a period of fifteen and one-half weeks. Thus, under the terms of the policy, plaintiffs had until the final week of March 2005 to file suit. However, plaintiffs did not file suit until June 24, 2005, or nearly three months after the extended deadline expired. The trial court concluded that, under *Friedberg*, *supra*, because defendant had engaged in settlement negotiations, it was not entitled to rely on a date at the end of March 2005 as the deadline for commencement of the action and

that plaintiffs were entitled to a reasonable time after that date in which to file suit.[1] The trial court then concluded that plaintiffs acted unreasonably by waiting nearly three months after the extended deadline expired to file suit. Plaintiffs have provided no justification for the length of the delay, especially given that all facts necessary to commence an action were known when the negotiations ended.[2] We conclude that under all the circumstances, the trial court did not err in granting summary disposition to defendant on the ground that plaintiffs' suit was time-barred.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Jane E. Markey
/s/ Patrick M. Meter

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[1] In *Rory v Continental Ins Co*, 473 Mich 457; 703 NW2d 23 (2005), our Supreme Court held that "an unambiguous contractual provision" providing for a limitations period must be enforced as written unless to do so would violate law or public policy and that a judicial determination that the provision is unreasonable is "an invalid basis upon which to refuse to enforce contractual provisions." *Id*. at 470. However, a traditional contract defense such as waiver may be used to avoid the enforcement of a particular contractual provision. *Id*. at 470 n 23. *Friedberg*, *supra*, relied on the doctrine of waiver as the basis for its holding that settlement negotiations can render inapplicable a contractual limitations period. *Rory*, *supra* at 466 n 15.

[2] Plaintiffs note that under certain circumstances a medical malpractice claimant has six months to file suit after an injury is discovered, even if the statute of limitations has expired. MCL 600.5838(2). However, in such a case, extensive fact-finding is often necessary before suit can be filed. No such in-depth investigation was necessary in this case.