STATE OF MICHIGAN

COURT OF APPEALS

RICKY E. SNYDER,

Plaintiff-Appellant,

v

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Defendant-Appellee.

UNPUBLISHED
April 24, 2007

No. 273429
St. Clair Circuit Court
LC No. 06-001405-NI

Before: Meter, P.J., and Kelly and Fort Hood, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court order granting summary disposition in favor of defendant and dismissing with prejudice plaintiff's claim for uninsured motorist benefits. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

On June 5, 2003, plaintiff was injured in an automobile accident with an uninsured motorist who was allegedly operating a vehicle without the owner's permission. Plaintiff sought uninsured motorist benefits, and on June 5, 2006, he filed this suit against defendant. Defendant moved for summary disposition pursuant to MCR 2.116(C)(8) and (10), arguing that plaintiff failed to follow the procedures set forth in the insurance policy by failing to join the uninsured owner or operator as a defendant to the lawsuit. Meanwhile, plaintiff filed a separate action against both the owner and the errant driver. Plaintiff attempted to consolidate that case with the instant lawsuit against defendant. However, the trial court denied plaintiff's motion to consolidate because the statute of limitations precluded the suit against the owner and driver. On September 11, 2006, the trial court entered an order granting summary disposition in favor of defendant and dismissing plaintiff's lawsuit with prejudice.

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). A motion under MCR 2.116(C)(10) tests the factual basis for the plaintiff's claim. *Id*. The reviewing court must consider the pleadings, affidavits, depositions, admissions, and any other admissible evidence in the light most favorable to the nonmoving party to determine whether a genuine issue of material fact exists. *Singer v American States Ins*, 245 Mich App 370, 374; 631 NW2d 34 (2001). Furthermore, questions concerning the proper interpretation of an insurance contract or the legal effect of a contractual provision are also reviewed de novo. *Allstate Ins Co v Muszynski*, 253 Mich App 138, 140-141; 655 NW2d 260 (2002).

Because uninsured motorist coverage is not required by the no-fault act, the rights afforded under such coverage are contractual in nature. *Rory v Continental Ins Co*, 473 Mich 457, 465-466; 703 NW2d 23 (2005). Thus, an insurance contract is to be read as a whole, and its terms are to be accorded their plain and ordinary meaning. *Hellebuyck v Farm Bureau Gen Ins Co of Michigan*, 262 Mich App 250, 254; 685 NW2d 684 (2004). When no ambiguity exists, the terms of an insurance contract are to be enforced as written. *Id*. Ambiguity may be found when the words of a contract may be reasonably understood in different ways or where there is an irreconcilable conflict between the contract provisions. *Cole v Auto-Owners Ins Co*, 272 Mich App 50, 53; 723 NW2d 922 (2006).

The State Farm policy includes the following provision for uninsured-motorist benefits:

> Two questions must be decided by agreement between the *insured* and us:
>
> 1. Is the *insured* legally entitled to collect damages from the owner or driver of the *uninsured motor vehicle*; and
>
> 2. If so, in what amount?
>
> If there is no agreement, then:
>
> * * *
>
> 2. If either party does not consent to arbitrate these questions . . . , the *insured* shall:
>
> a. file a lawsuit in the proper court against the owner or driver of the *uninsured motor vehicle* and us, or if such owner or driver is unknown, against us; and
>
> b. upon filing, immediately give us copies of the summons and complaint filed by the *insured* in that action, and
>
> c. secure a judgment in that action. The judgment must be the final result of an actual trial and an appeal, if an appeal is taken.
>
> 3. If the *insured* files suit against the owner or driver of the *uninsured motor vehicle*, we have the right to defend on the issues of the legal liability of and the damages owed by such owner or driver.
>
> We are not bound by any judgment against any *person* or organization obtained without our written consent. [Emphasis in original.]

This provision of the insurance policy unambiguously requires that the owner or driver of the uninsured motor vehicle be added to any lawsuit against defendant for uninsured motorist benefits. The policy further provides that there is no right of action against defendant "until all the terms of this policy have been met…." This provision unambiguously requires compliance with every term in the policy in order to sue defendant for benefits. Plaintiff brought suit against

defendant but did not include either the owner or operator of the vehicle as a defendant. Therefore, plaintiff failed to comply with the unambiguous terms of the policy.

Plaintiff also argues that, even if he failed to include the uninsured owner or driver, his claim should not be barred because defendant suffered no prejudice. Our Supreme Court has held that "[o]nly recognized traditional contract defenses may be used to avoid the enforcement of [an unambiguous] contract provision." *Rory*, *supra* at 470. The absence of prejudice is not a traditional defense to the enforceability of a contract. See *Id*. at 470 n 23 (listing examples of such traditional defenses as duress, estoppel, waiver, fraud, or unconscionability). Because the insurance policy at issue clearly requires that either the owner or the driver of the uninsured vehicle be included in a lawsuit against defendant, we hold that the trial court properly granted summary disposition in favor of defendant.[1]

Relying on MCR 2.504(B)(3), plaintiff further argues that the trial court should have dismissed his claim against defendant *without* prejudice rather than *with* prejudice to allow him to pursue other remedies. We disagree.

We will affirm a trial court's decision regarding whether to dismiss a claim with or without prejudice unless the record demonstrates that the trial court abused its discretion. See generally *North v Dep't of Mental Health*, 427 Mich 659, 661; 397 NW2d 793 (1986). Furthermore, we review de novo the construction and interpretation of a court rule. *ISB Sales Co v Dave's Cakes*, 258 Mich App 520, 526; 672 NW2d 181 (2003).

"When construction of a court rule is required, the legal principles that govern the construction and application of statutes are utilized." *ISB Sales Co*, *supra* at 526. The ultimate goal of statutory interpretation is to give effect to the intent of the Legislature. *Id*. at 526-527. This purpose is accomplished by examining the plain language of the statute. *Id*. at 527. If the statutory language is unambiguous, the reviewing court must presume that the Legislature intended the meaning clearly expressed and further judicial construction is not permitted or required. *Id*. Statutory language must be reasonably construed, while keeping in mind the statute's purpose. *Id*.

Under the involuntary dismissal rule, MCR 2.504(B)(3), "unless the court otherwise specifies in its order for dismissal, a dismissal under this subrule or a dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or *for failure to join a party* under MCR 2.205, operates as an adjudication on the merits." (Emphasis added.) This court rule provides a trial court with discretion to dismiss a case with or without prejudice with two exceptions, one of which is the failure to join a party. Our interpretation is supported by MCR 2.207, which specifies that misjoinder is not a proper ground for dismissal of an action and

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[1] We note that plaintiff discusses the unpublished case of *Elser v State Farm Mut Automobile Ins Co*, unpublished opinion per curiam of the Court of Appeals, issued May 24, 2005 (Docket No. 260351). However, because our application of Michigan case law to the relevant contractual language is dispositive, we need not address this nonbinding authority.

provides that "[p]arties may be added or dropped by order of the court on motion of a party or on the court's own initiative at any stage of the action and on terms that are just."

Nevertheless, we conclude that the joinder of the uninsured owner or operator at this time in the proceedings is improper. The three-year statute of limitations applicable to actions for injury to a person bars plaintiff from filing suit against the vehicle's owner and driver. See MCL 600.5805(10); *Rory*, *supra* at 465 n 9. Therefore, plaintiff can no longer satisfy the contract provision requiring joinder of the uninsured party as a defendant in this action. We note that even plaintiff fails to specify the "other remedies" he would seek assuming this Court agreed that dismissal should have been without prejudice. To the extent plaintiff suggests this Court should craft a remedy for him, we decline to further address the matter. See *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959) (stating that an appellant must "prime the pump; only then does the appellate well begin to flow"). Because compliance with the contract provision is no longer possible, we hold that the trial court did not abuse its discretion by dismissing plaintiff's lawsuit with prejudice.

Affirmed.

/s/ Patrick M. Meter
/s/ Kirsten Frank Kelly
/s/ Karen M. Fort Hood