STATE OF MICHIGAN

COURT OF APPEALS

AUTO OWNERS INSURANCE COMPANY,

Plaintiff-Appellee,

v

MARK M. BRENDLY,

Defendant-Appellant.

JAN 30 1989

No. 104278

Before: Beasley, P.J., and Gillis and W.G. Schma,* JJ.

PER CURIAM.

Defendant appeals by right the trial court's October 8, 1987, grant of summary disposition to plaintiff in this declaratory judgment action.

On February 15, 1986, defendant was employed by Robo Carwash. Defendant was fixing the track of one of the washers when a red pickup truck entered the car wash stall where defendant was working. Defendant was injured when, unaware of the truck's presence, he turned around and hit his knee on the front bumper of the truck.

Defendant, the named insured in an automobile insurance policy issued by plaintiff, obtained neither the name of the truck's driver nor its license number, did not report the incident to the police, and failed to notify plaintiff until 10 months after the incident. Under the policy, defendant was insured for accidents involving uninsured motor vehicles. Because defendant did not obtain the identity of the truck's driver, the incident fell within the hit-and-run section of the policy. However, coverage for the incident was subject to the enumerated conditions precedent: that defendant contact the police within 24 hours and contact plaintiff within 30 days of the accident. Defendant admits that he fulfilled neither condition.

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*Circuit judge, sitting on the Court of Appeals by assignment.

Defendant was unaware of the notification requirements, and it was not until he spoke with his attorney that he discovered the policy conditions. On December 18, 1986, defendant notified plaintiff of the incident and made a demand for arbitration pursuant to the uninsured motorist provision of his insurance policy. Plaintiff filed its appearance and response to defendant's demand for arbitration, and an arbitration hearing was scheduled for May 14, 1987. However, on May 7, 1987, plaintiff filed a complaint for declaratory judgment in the Saginaw Circuit Court requesting a legal ruling that because defendant had failed to comply with the conditions precedent in the insurance policy, defendant therefore had no claim that was subject to arbitration.

Defendant moved to dismiss the complaint pursuant to MCR 2.116(C)(6) and (7), contending that because the dispute was scheduled for arbitration, plaintiff was barred for bringing suit in the circuit court. Plaintiff then moved for summary disposition pursuant to MCR 2.116(C)(9) and (10), contending that defendant had failed to state a valid defense and that there was no genuine issue of material fact.

Following a hearing on both motions, the trial court ruled that defendant had not satisfied the conditions precedent contained in the policy which would give rise to defendant's right to arbitrate, therefore defendant had lost the right to arbitrate or make a claim under the uninsured motorist provision of the policy. Underlying this ruling were the trial court's findings that defendant had failed to cite a valid reason why he did not comply with the terms of the insurance policy and that the policy provisions were clear and unambiguous. The trial court granted plaintiff's motion and held that there was no policy coverage for defendant to be subject to arbitration.

We first address defendant's claim that plaintiff is estopped from seeking relief in the circuit court because

plaintiff initially entered into the arbitration process. Defendant argues that because plaintiff submitted to the arbitration procedure and made ample discovery of defendant's claims, defendant's claim was properly before the arbitrator and plaintiff's complaint in the circuit court should be dismissed. Plaintiff, however, argues that the arbitrator had no authority to rule on the coverage question because the coverage matter was expressly excluded from arbitration due to defendant's noncompliance with the mandatory conditions precedent to the coverage.

We agree with plaintiff. Whether an issue is arbitrable or not is a matter of judicial determination under the terms of the policy. Kaleva-Norman-Dickson School Dist No 6 v KND Teachers' Assn, 393 Mich 583; 227 NW2d 500 (1975); Port Huron Area School Dist v Port Huron Education Assn, 426 Mich 143, 162; 393 NW2d 811 (1986). Because plaintiff filed its action for declaratory judgment before the arbitration hearing was held, plaintiff did not waive its right to dispute arbitrability. SCA Services, Inc v General Mills Supply Co, 129 Mich App 224, 227-228; 341 NW2d 480 (1983), lv den 419 Mich 895 (1984), citing Detroit Demolition Corp v Burroughs Corp, 45 Mich App 72, 77-78; 205 NW2d 856 (1973).

We next address the issue of whether the terms of the insurance policy so clearly and unambiguously preclude coverage that the trial court correctly granted plaintiff's motion for summary disposition as a matter of law. Although defendant admitted that he did not comply with the policy notification requirements, defendant argues on appeal that plaintiff was required to show prejudice in order to deny defendant's claim for coverage, and that the notification requirements were unreasonable and operated to deny defendant access to a procedure for recovery under his purchased benefits and eliminated a reasonable recovery for his damages under the terms of the policy.

We agree with the trial court that defendant gave no valid reason for failing to comply with the policy notification requirements. Defendant's excuse that he was unaware of those provisions must fail. An insured must be held to knowledge of his insurance policy even if he may not have read it. Farm Bureau Ins Co v Hoag, 136 Mich App 326, 332; 356 NW2d 630 (1984), lv den 422 Mich 920 (1985). We also agree with the trial court's finding that the policy notification requirements are clear and unambiguous, and should be enforced. Id. No genuine issue of material fact existed, therefore summary disposition was properly granted to plaintiff. Rizzo v Kretschmer, 389 Mich 363, 372; 207 NW2d 316 (1973); Metropolitan Life Ins Co v Reist, 167 Mich App 112, 118; 421 NW2d 592 (1988).

Affirmed.

/s/ William R. Beasley
/s/ John H. Gillis
/s/ William G. Schma