STATE OF MICHIGAN

COURT OF APPEALS

RICHARD T. GILMAN,

Plaintiff-Appellee,

v

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Defendant-Appellant.

December 8, 1993

No. 143223
LC No. 90004153 CK

Before: Shepherd, P.J., and Holbrook, Jr. and MacKenzie, JJ.

PER CURIAM.

Defendant appeals of right from a July 1, 1991, order granting summary disposition to plaintiff pursuant to MCR 2.116(C)(10). We affirm.

On July 25, 1989, plaintiff, Richard T. Gilman ("Gilman"), was seriously injured in a motor vehicle accident in Indiana while in the course of employment with an Indiana employer, Acoustic Audio, Inc. At the time, plaintiff resided in Michigan and was driving his personal vehicle which was insured by a no-fault automobile insurance policy issued by defendant, State Farm Mutual Automobile Insurance Company ("State Farm").

Because the accident occurred in the course of employment, plaintiff was entitled to worker's compensation benefits, including wage loss and medical benefits, which were paid by his employer's worker's compensation insurer, American States Insurance Company ("American"). State Farm paid no-fault benefits pursuant to MCL 500.3109; MSA 24.13109 to the extent that they were not paid by worker's compensation.

In July, 1990, plaintiff and his wife, Mitzi Gilman, filed a third-party tort claim in the United States District Court for the Northern District of Indiana for both economic and noneconomic losses against the parties involved in the accident. On November 6, 1990, the Gilmans settled the lawsuit for noneconomic losses only, and released the defendants in that suit from any further liability.

Following the settlement, Gilman was required pursuant to Indiana Code, IC 22-3-2-13, to reimburse American for its past worker's compensation payments, even though the settlement was only for noneconomic losses and did not include amounts for medical costs or lost wages. Further, under Indiana law, IC 22-3-2-13, Gilman was no longer entitled to worker's compensation benefits following the date of the tort settlement.

Gilman sued State Farm on December 13, 1990, because State Farm had refused to pay no-fault benefits, MCL 500.3148(1); MSA 24.13148. Plaintiff later moved for summary disposition pursuant to MCR 2.116(C)(10). Plaintiff argued that he was entitled to full no-fault benefits since November 6, 1990, and that he was entitled to no-fault benefits for medical expenses and wage loss incurred prior to November 6, 1990, to the extent that he was required to reimburse American for past worker's compensation payments out of the tort settlement for noneconomic damages. Plaintiff denied that defendant had a lien against the tort settlement, and sought attorney fees and interest for the no-fault benefits which defendant refused to pay.

Defendant responded that there was a genuine issue of fact whether plaintiff had breached the terms of the insurance contract, and whether plaintiff had failed to protect defendant's subrogation rights as set out in correspondence between the parties since the accident. Defendant did not address the substantive merits of plaintiff's claims for no-fault benefits, interest and attorney fees.

The trial court granted plaintiff's motion for summary disposition, stating that defendant did not have a lien against plaintiff's tort recovery; that plaintiff was entitled to full no-fault benefits since November 6, 1990, as well as benefits for medical expenses and wage loss incurred prior to November 6, 1990, to the extent that plaintiff had to reimburse American from the noneconomic settlement recovery; and that plaintiff was entitled to interest and attorney fees. The trial court denied defendant's motion for reconsideration. Defendant appeals of right.

On appeal, the trial court's grant of summary disposition will be reviewed de novo, as this Court must review the record to determine whether plaintiff was entitled to judgment as a matter of law. Adkins v Thomas Solvent Co, 440 Mich 293, 302; 487 NW2d 715 (1992).

First, defendant argues that by entering into the settlement for noneconomic damages, and releasing the defendants in the federal case from further liability, plaintiff breached the following provisions of the insurance contract concerning defendant's right to recover payments:

> c. If the person to or for whom we have made payment has not recovered from the party at fault, he or she shall:
>
> 1) under personal injury protection, property protection and uninsured motor vehicle coverages:
>
> a) keep these rights in trust for us; and
> b) execute any legal papers we need.
>
> * * *
>
> We are to be repaid our payments, costs and fees of collection out of any recovery.
>
> Under personal injury protection and property protection, we have a lien to the extent of our payments. Notice of the lien may be given to:
>
> 1) the party liable;
> 2) that party's agent or insurer; or
> 3) a court of jurisdiction.

We find the above provisions ambiguous with respect to what an insured must do to keep "in trust" an insurer's right to reimbursement. Ambiguity in an insurance contract drafted by an insurer must be construed against the insurer and in favor of the insured. Bianchi v Automobile Club of Michigan, 437 Mich 65, 70; 467 NW2d 17 (1991). We will not construe the above provisions to deny an insured the right to enter into a valid settlement for noneconomic damages. As this Court has previously held under similar facts in State Farm Mutual Automobile Ins Co v Soo Line R Co, 106 Mich App 138, 147; 307 NW2d 434 (1981), "[t]he settlement of lawsuits is desirable and to be encouraged, and we are reluctant to look behind the expressed intent of the parties." Thus, plaintiff was free to enter into the settlement for noneconomic damages without breaching his insurance contract.

In this case, defendant does not have a right to reimbursement from plaintiff since plaintiff settled for strictly noneconomic losses. MCL 500.3116(4); MSA 24.13116(4). To the extent that the insurance policy attempts to obtain reimbursement out of "any recovery" it must be reformed to conform with the statutory language of MCL 500.3116(4); MSA 24.13116(4), which denies reimbursement for recovery of noneconomic losses. Smart v New Hampshire Ins Co, 428 Mich 236, 240; 407 NW2d 362 (1987).

Analyzing the insurance policy in its entirety, Allstate Ins Co v Tomaszewski, 180 Mich App 616, 619; 447 NW2d 849 (1989), a reasonable construction might impose upon the insured a duty to notify the insurer of the initiation of such a tort claim. However, in the instant case, it is undisputed that plaintiff's counsel did notify defendant; and plaintiff's counsel even offered to protect defendant's interest.

This leads to defendant's second argument that there was an agreement made through correspondence that plaintiff was to protect defendant's subrogation rights. On August 28, 1989, plaintiff's counsel sent a letter to defendant referencing the third-party tort claim in Indiana, and offering his services to protect defendant's interests therein. In response - although there is a dispute whether plaintiff's counsel received it - defendant's claim representative sent a very brief letter dated October 30, 1989, requesting plaintiff's counsel to protect defendant's subrogation rights. Viewing the evidence favorably to the nonmoving party, Pemberton v Dharmani, 188 Mich App 317, 320; 469 NW2d 74 (1991), we will assume that plaintiff's counsel received the letter, which included the following paragraph:

> Please accept this letter as notice of our subrogation rights and protect our interests at the time of your settlement.

However, the claims representative testified at her deposition that no retainer agreement, written or oral, was ever entered into with plaintiff's counsel. And, on appeal, nowhere does defendant allege that an attorney-client relationship was established between it and plaintiff's counsel.[1] Clearly, there was no "meeting of the minds" on the essential terms of any contract. Kamalnath v Mercy Hospital, 194 Mich App 543, 548; 487 NW2d 499 (1992). We are not convinced that there was a separate contractual agreement formed through correspondence to protect defendant's right of subrogation. Thus, neither plaintiff nor plaintiff's counsel had a legal obligation to protect defendant's interests.

Concerning attorney fees, defendant does not contest the award thereof, but only the amount, calculated on a one-third contingency arrangement. However, defendant has provided us with no reason for believing that the trial court abused its discretion in this regard. Bloemsma v Auto Club Ins Ass'n (After Remand), 190 Mich App 686, 690; 476 NW2d 487 (1991). We will not disturb the trial court's award of attorney fees.

We agree with the trial court that plaintiff was entitled to judgment as a matter of law.

Affirmed.

/s/ John H. Shepherd
/s/ Donald E. Holbrook, Jr.

[1] We are cognizant of, but need not address the potential conflict of interest arising from any such contract between defendant and plaintiff's counsel.

STATE OF MICHIGAN

COURT OF APPEALS

RICHARD T. GILMAN,

Plaintiff-Appellee,

v

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Defendant-Appellant.

December 8, 1993

No. 143223
LC No. 90-4153-CK-T

Before: Shepherd, P.J., and Holbrook, Jr. and MacKenzie, JJ.

MacKENZIE, J. (dissenting.)

I dissent because I do not agree that plaintiff was entitled to summary disposition as a matter of law.

The majority concludes that the no-fault policy issued to plaintiff by defendant was ambiguous, leaving plaintiff free to enter into a settlement for non-economic damages in his third-party tort action without breaching the insurance contract. I disagree.

The "Reporting a Claim[:] Insured's Duties" section of the no-fault policy includes the following:

5. Other Duties Under Personal Injury Protection, Uninsured Motor Vehicle and Death, Dismemberment and Loss of Sight Coverages.

The person making the claim also shall:

* * *

d. Under the no-fault and uninsured motor vehicle coverages, send us a copy of all suit papers at once when the party liable for the accident is sued for these damages.

Additionally, the "Conditions" section of the no-fault policy includes the following:

Our Right to Recover Our Payments.

a. Death, dismemberment and loss of sight coverage payments are not recoverable by us.

b. Under uninsured motor vehicle coverage, we are subrogated to the extent of our payments to the proceeds of any settlement the injured person recovers from any party liable for the bodily injury.

c. If the person to or for whom we have made payment has not recovered from the party at fault, he or she shall:

1) under personal injury protection, property protection and uninsured motor vehicle coverages:

a) keep these rights in trust for us and

b) execute any legal papers we need.

2) under the uninsured motor vehicle coverage, take action through our representative to recover our payments when we ask.

We are to be repaid our payments, costs and fees of collection out of any recovery.

Under personal injury protection and property protection, we have a lien to the extent of our payments. Notice of the lien may be given to :

1) the party liable,

2) that party's agent or insurer, or

3) a court of jurisdiction.

d. Under all other coverages, the right of recovery of any party we pay passes to us. Such party shall:

1) not hurt our rights to recover, and

2) help us get our money back.

Reading these sections as a whole, the policy unambiguously provides that the policyholder must provide defendant with copies of all suit papers related to a third-party tort action, that defendant has a right to recover its payments, and that defendant's right to recovery must be protected by the policyholder.

Here, defendant has alleged that plaintiff failed "to advise Defendant of the Court in which the [third-party tort] Complaint was initiated, the progress on said lawsuit, and the fact that judgment was going to be taken by consent." This would appear to be a breach of plaintiff's duty to "send [defendant] a copy of all suit papers at once when the party liable for the accident is sued". Further, in entering into the third-party settlement agreement and releasing all rights to further recovery, plaintiff both compromised defendant's lien and breached his obligation to safeguard defendant's right to recover its payments.

A motion for summary disposition under MCR 2.116(C)(10) should be granted only if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. Dafter Sanitary Landfill v Superior Sanitation Service, Inc, 198 Mich App 499, 501-502; 499 NW2d 383 (1993). In light of the unambiguous terms of the parties' policy and the indications that plaintiff breached these terms, I must conclude that material fact issues remain and that plaintiff was not entitled to judgment as a matter of law. Accordingly, I would reverse.

/s/ Barbara B. MacKenzie