S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

BARBARA PEARSON, Plaintiff/Counterdefendant-Appellant,	UNPUBLISHED January 24, 2012
v	No. 298359 Iosco Circuit Court LC No. 08-004152-CK
FLOOD PROFESSIONALS, INC., d/b/a ADVANCED CLEANING EXPERTS, Defendant/Counterplaintiff, PIONEER STATE MUTUAL INSURANCE COMPANY, Defendant-Appellee.	

Before: BECKERING, P.J., and FORT HOOD and STEPHENS, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting defendant's motion for summary disposition and denying her motion for relief from judgment.[1] We reverse and remand for proceedings consistent with this opinion.

Plaintiff's vacation residence was damaged because of a water leak that caused the furnace to stop functioning. Plaintiff's neighbor noticed that something was wrong because of steam coming from the residence. He reported the problem to plaintiff, who in turn, contacted defendant, her insurance company. Plaintiff contested the manner in which defendant undertook the remediation of the property. Plaintiff asserted that she sought to prevent the thaw of the property, but defendant had the furnace repaired and ordered it turned on, allegedly causing mold and a mildew smell in the premises. Plaintiff also was concerned about the extent of the removal of drywall in light of the thaw that occurred at defendant's behest.

[1] Defendant Flood Professionals, Inc. d/b/a Advanced Cleaning Experts (Flood) is not a party to this appeal. Therefore, the singular "defendant" refers to the insurance company only.

Plaintiff and defendant were unable to reach an agreement regarding the amount of insurance benefits. Although plaintiff submitted proof of loss, defendant concluded that the document prepared was insufficient. Consequently, on multiple occasions, defendant extended the deadline for filing the proof of loss form. Defendant continued to reject the proof of loss submitted by plaintiff, again deeming them to be insufficient. However, a review of defendant's records reveals that defendant's agent recommended a settlement of the claim, and defendant prepared a proof of loss form for plaintiff's signature. However, defendant referred the matter to counsel who rejected the settlement and advised that the claim was denied for failing to timely comply with the policy provisions. Plaintiff filed suit alleging breach of contract and negligence against this defendant in Genesee Circuit Court. Defendant filed a motion for summary disposition, but Flood filed a motion for change of venue. The Genesee Circuit Court judge granted defendant's motion for summary disposition and granted Flood's motion for change of venue. Plaintiff filed a motion to reinstate the claims against defendant before the successor trial judge in the new venue. However, the trial court denied the motion, holding that it did not have the authority to review the earlier decision. Plaintiff now appeals.

A trial court's ruling on a motion for summary disposition presents a question of law subject to review de novo. *Shepherd Montessori Ctr Milan v Ann Arbor Charter Twp*, 486 Mich 311, 317; 783 NW2d 695 (2010). The moving party has the initial burden to support its claim for summary disposition by affidavits, depositions, admissions, or other documentary evidence. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). The burden then shifts to the nonmoving party to demonstrate a genuine issue of disputed fact exists for trial. *Id*. The nonmoving party may not rely on mere allegations or denials in the pleadings. *Id*. Affidavits, depositions, and documentary evidence offered in support of, and in opposition to, a dispositive motion shall be considered only to the extent that the content or substance would be admissible as evidence. *Maiden v Rozwood*, 461 Mich 109, 120-121; 597 NW2d 817 (1999).

When ruling on a motion for summary disposition, the court does not assess the credibility of the witnesses. *White v Taylor Distrib Co, Inc*, 482 Mich 136, 142; 753 NW2d 591 (2008). "Summary disposition is suspect where motive and intent are at issue or where the credibility of a witness is crucial." *Foreman v Foreman*, 266 Mich App 132, 135-136; 701 NW2d 167 (2005). When the truth of a material factual assertion made by a moving party is contingent upon credibility, summary disposition should not be granted. *Id*. at 136. The trial court may not make factual findings or weigh credibility when deciding a motion for summary disposition. *In re Handelsman*, 266 Mich App 433, 437; 702 NW2d 641 (2005). It is the function of the trier of fact to resolve issues regarding credibility and intent. *Triple E Produce Corp v Mastronardi Produce, Ltd*, 209 Mich App 165, 174; 530 NW2d 772 (1995). When the evidence conflicts, summary disposition is improper. *Lysogorski v Bridgeport Charter Twp*, 256 Mich App 297, 299; 662 NW2d 108 (2003). Inconsistencies in statements given by witnesses cannot be ignored. *White*, 482 Mich at 142-143. When witnesses testify to diametrically opposed assertions of fact, the test of credibility must lie where the system has reposed it – with the trier of fact. *Kalamazoo Co Rd Comm'rs v Bera*, 373 Mich 310, 314; 129 NW2d 427 (1964). Application of disputed facts to the law present proper questions for the jury or trier of fact. *White*, 482 Mich at 143.

The construction and interpretation of a contract presents a question of law that is reviewed de novo. *Bandit Industries, Inc v Hobbs Int'l Inc (After Remand)*, 463 Mich 504, 511;

620 NW2d 531 (2001). The occurrence of a default or breach of contract presents a question of fact. See *Detroit v Porath*, 271 Mich 42, 54-55; 260 NW 114 (1935); *State-William Partnership v Gale*, 169 Mich App 170, 176; 425 NW2d 756 (1988). A substantial breach of a contract provides a basis to rescind the contract. *Rosenthal v Triangle Dev Co*, 261 Mich 462, 463; 246 NW 182 (1933). A substantial breach includes a failure to perform a substantial part of the contract or one of its essential terms or where the contract would not have been executed if default regarding a specific provision had been expected or contemplated. *Id*. "It is not every partial failure to comply with the terms of a contract by one party which will entitle the other party to abandon the contract at once." *Id*. A merely technical breach does not fall within the class where rescission is permitted. *Id*. at 464. "One consideration in determining whether a breach is material is whether the nonbreaching party obtained the benefit which he or she reasonably expected to receive." *Holtzlander v Brownell*, 182 Mich App 716, 722; 453 NW2d 295 (1990).

"For equitable estoppel to apply, plaintiff must establish that (1) defendant's acts or representations induced plaintiff to believe that the limitations period clause would not be enforced, (2) plaintiff justifiably relied on this belief, and (3) she was prejudiced as a result of her reliance on her belief that the clause would not be enforced." *McDonald v Farm Bureau Ins Co*, 480 Mich 191, 204-205; 747 NW2d 811 (2008). "A waiver is a voluntary relinquishment of a known right." *Dellar v Frankenmuth Mut Ins Co*, 173 Mich App 138, 146; 433 NW2d 380 (1988). When there is a material factual dispute regarding the acts of the defendant which are claimed to constitute a waiver or estoppel, a question of fact for the jury is presented. *Foiles v Detroit Fire & Marine Ins Co*, 175 Mich 716, 722; 141 NW 879 (1913). The question of whether a satisfactory proof of loss is submitted also presents a question of fact when the facts are in dispute. See *Griswold Properties LLC v Lexington Ins Co*, 276 Mich App 551, 566-567; 741 NW2d 549 (2007); *Dellar*, 173 Mich App at 147-148. A factual dispute regarding an insurer's breach of duty exists when the insurer fails to inform an insured regarding "what would constitute a satisfactory proof of loss" and when the insurer continues to deal with the insured after the examination period for filing a claim expired. *Dellar*, 173 Mich App at 148 citing MCL 500.2006.

As an initial matter, we note that the successor trial judge held that he could not address the summary disposition decision rendered by the prior judge. A circuit court judge is required to follow published decisions of the Court of Appeals and Michigan Supreme Court. *People v Hunt*, 171 Mich App 174, 180; 429 NW2d 824 (1988). There is no requirement that one circuit court judge follow the decision of another. *Id*. Accordingly, the lower court could have reviewed the decision previously rendered.

A review of the record reveals that the trial court erred in granting defendant's motion for summary disposition. In the present case, defendant allowed plaintiff to submit multiple proof of loss forms. Additionally, defendant extended the deadline for filing a "satisfactory" proof of loss, but defendant did not identify the deficiency contained in the proof of loss submitted. In one rejection letter, defendant acknowledged receiving estimates from plaintiff's contractor, but did not specify why the proof of loss was deficient. The issue regarding satisfactory proof of loss in light of the facts and circumstances of this case presented an issue for the trier of fact. See *Reynolds v Great American Ins Co*, 328 Mich 391, 398; 43 NW2d 901 (1950); *Valisano v Continental Ins Co*, 254 Mich 122, 124; 235 NW 868 (1931); *Dellar*, 173 Mich App at 148.

Reversed and remanded for proceedings consistent with the opinion. We do not retain jurisdiction.

/s/ Karen M. Fort Hood
/s/ Cynthia Diane Stephens

S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

BARBARA PEARSON, Plaintiff/Counter-Defendant-Appellant,	UNPUBLISHED January 24, 2012
v	No. 298359 Iosco Circuit Court LC No. 08-004152-CK
FLOOD PROFESSIONALS, INC., d/b/a ADVANCED CLEANING EXPERTS, Defendant/Counter-Plaintiff,	
and PIONEER STATE MUTUAL INSURANCE CO., Defendant-Appellee.	

Before: BECKERING, P.J., and FORT HOOD and STEPHENS, JJ.

BECKERING, J. (*concurring*).

I concur with the majority in their conclusion that the trial court erroneously granted summary disposition to defendant; however, my reasoning differs from theirs.

As the majority explains, this case arises out of plaintiff Barbara Pearson's efforts to seek reimbursement from her insurance carrier, defendant Pioneer State Mutual Insurance Company, for damage to her vacation home stemming from a water leak in the winter. One issue on appeal is whether plaintiff provided a satisfactory proof of loss. After citing authority pertaining to an insurer's potential breach of duty when the insurer fails to inform an insured regarding what constitutes a satisfactory proof of loss, the majority concludes that "defendant did not identify the deficiency contained in the proof of loss" submitted by plaintiff. I respectfully disagree. Defendant specifically informed plaintiff that the amounts on her proof of loss form were "inaccurate and incomplete" and that she "failed to provide adequate documentation (written or otherwise) establishing the nature and extent of [her] claimed loss." Defendant instructed plaintiff to again "complete the Proof of Loss [form] and submit it with supporting documentation for the amount being claimed." Defendant told plaintiff that the appropriate supporting documentation included "building estimates, completed and signed inventory sheets, receipts of personal property purchased, etc." When plaintiff submitted the supporting documentation over the next several months, defendant continued to request that plaintiff submit another proof of loss form.

The majority concludes that "the issue regarding satisfactory proof of loss in light of the facts and circumstances of this case presented an issue for the trier of fact." I would frame the issue for factual determination as whether plaintiff substantially performed her contractual duty of submitting a proof of loss.

"Michigan follows the substantial performance [of a contract] rule." *P & M Constr Co v Hammond Ventures, Inc*, 3 Mich App 306, 315; 142 NW2d 468 (1966) (citations omitted). "A contract is substantially performed when all the essentials necessary to the full accomplishment of the purposes for which the thing contracted has been performed with such approximation that a party obtains substantially what is called for by the contract." *Gibson v Group Ins Co*, 142 Mich App 271, 275; 369 NW2d 484 (1985) (quotations omitted). Substantial performance does not apply to the fulfillment of express conditions but, rather, applies to the performance of promises under a contract. See *Fisher v Burroughs Adding Machine Co*, 166 Mich 396, 402-403; 132 NW 101 (1911) (explaining that a party to a contract cannot recover in quantum meruit where there has been substantial performance if an unfulfilled condition precedent has not been waived).[1] "A 'condition precedent' is a fact or event that the parties intend must take place before there is a right to performance. A condition precedent is distinguished from a promise in that it creates no right or duty in itself, but is merely a limiting or modifying factor." *Real Estate One v Heller*, 272 Mich App 174, 179; 724 NW2d 738 (2006)(quotations omitted). "[U]nless the contract language itself makes clear that the parties intended a term to be a condition precedent, this Court will not read such a requirement into the contract." *Id.*

In the present case, the language of the insurance policy does not make clear that the parties intended the proof of loss provision to be a condition precedent. *Id.* The policy does not state that defendant's obligation to perform is contingent on plaintiff submitting a proof of loss. Rather, the policy merely states that plaintiff "must see" that she submits a signed, sworn proof of loss in the "case of a loss to covered property." Thus, the policy's language only creates a duty for plaintiff to perform. Therefore, the proof of loss provision is a promise, and the doctrine of substantial performance applies.[2] *Id.*; *P & M Constr*, 3 Mich App at 315; *Fisher,* 166 Mich at 402-403; *Brown-Marx Assoc*, 703 F2d at 1367-1368.

---

[1] See also, as persuasive authority, *Star of Detroit Line, Inc v Comerica Bank*, unpublished opinion per curiam of the Court of Appeals, issued February 16, 1999 (Docket No. 198090); *Brown-Marx Assoc, Ltd v Emigrant Savings Bank*, 703 F2d 1361, 1367-1368 (CA 11, 1983).

[2] Defendant's reliance on *Fenton v Nat'l Fire Ins Co*, 235 Mich 147, 150; 209 NW 42 (1926), for the proposition that Michigan courts have consistently held that compliance with a proof of loss provision is a condition precedent to recovery is misplaced. *Fenton* involved a policy specifically for fire insurance, and 1917 PA 256 required fire insurance policies to contain a proof of loss provision that operated as a condition precedent to recovery. *Fenton*, 235 Mich at 148, 150; *Peck v Nat'l Liberty Ins Co of America*, 224 Mich 385, 385-386; 194 NW 973 (1923). Moreover, we have applied the doctrine of substantial performance to determine whether an

When determining substantial performance in the context of a proof of loss provision, courts should consider the intended purposes of a proof of loss: (1) allowing the insurer to investigate the insured's claim; (2) allowing the insurer to investigate its rights and duties; and (3) preventing fraudulent claims. *Wineholt v Cincinnati Ins Co*, 179 F Supp 2d 742, 749-750, 752 (WD Mich, 2001); see also *Jajo v Hartford Cas Ins Co*, unpublished memorandum opinion of the Court of Appeals, issued November 26, 2002 (Docket No. 237955); 16 Williston on Contracts (4th ed), § 49:110; 13 Couch, Insurance, 3d, § 186:22. Whether a party to a contract has substantially performed is a question of fact. *Antonoff v Basso*, 347 Mich 18, 28-29; 78 NW2d 604 (1956); *Franzel v Kerr Mfg Co*, 234 Mich App 600, 619; 600 NW2d 66 (1999).

Under the insurance policy in the present case, plaintiff had a duty to submit a signed, sworn proof of loss to defendant "within 60 days after the loss, unless such time [was] extended in writing by [defendant]." Plaintiff also had a duty to set forth, "to the best of [her] knowledge and belief," the following, among other things: specifications of damaged buildings; detailed repair estimates; receipts for living expenses incurred; and an inventory of damaged personal property, specifying and substantiating with "bills, receipts and related documents" the "quantity, description, actual cash value and amount of loss for each item." Before defendant denied liability for plaintiff's claim, plaintiff submitted a signed, sworn proof of loss form to defendant. The proof of loss form contained the following provision: "Any other information that may be required will be furnished and considered a part of this proof." Plaintiff claimed her policy limits and completed all parts of the form except for two sections that requested amounts for both the actual cash value of the insured property and the whole loss. When defendant later requested "supporting documentation" for plaintiff's claim, plaintiff provided repair and damages estimates and an inventory of personal property. Plaintiff did not, however, comply with defendant's request to submit an additional signed proof of loss form.

Given these facts, reasonable minds may disagree about whether plaintiff substantially performed her duty to submit a proof of loss; therefore, a genuine issue of material fact exists. *Jimkoski v Shupe*, 282 Mich App 1, 4-5; 763 NW2d 1 (2008). I would reverse and remand for the trier of fact to determine whether plaintiff substantially performed her proof-of-loss obligation.

/s/ Jane M. Beckering

---

insured fulfilled his contractual obligation to cooperate with an insurance investigation. *Gibson*, 142 Mich App at 275-276. And, we have also applied the doctrine to determine whether an insured substantially complied with his contractual obligation to submit a proof of loss. *Jajo v Hartford Cas Ins Co*, unpublished memorandum opinion of the Court of Appeals, issued November 26, 2002 (Docket No. 237955). Most jurisdictions do the same. 16 Williston on Contracts (4th ed), § 49:110 ("[M]ost courts require substantial, rather than literal, compliance with proof of loss requirements set forth in insurance policies."); see also *Wineholt v Cincinnati Ins Co*, 179 F Supp 2d 742, 748-749 (WD Mich, 2001) (explaining that the prevailing view is that an insured need only substantially comply with a policy's proof of loss provisions).