11-0107

IN THE CIRCUIT COURT OF WAYNE COUNTY, WEST VIRGINIA

ENTERED
AUG 17 2010
CIVIL ORDER
BOOK 117 PAGE 844

TERRY HUNDLEY, Individually and as Administrator of the Estate of AUDREY HUNDLEY, deceased,

Plaintiff,

v.

Civil Action No.: 09-C-158
Judge Pratt

MUNICIPAL MUTUAL INSURANCE COMPANY OF WEST VIRGINIA,

Defendant.

ORDER RESOLVING PLAINTIFF'S CLAIMS FOR BREACH OF INSURANCE CONTRACT

Following the Court's issuance of an "Opinion Order" on July 29, 2010 regarding the parties' cross-motions for summary judgment, which Order is incorporated by reference herein, and a pretrial conference conducted on August 3, 2010, the Court does hereby rule as follows:

1. Defendant, by counsel, has conceded that, in its response to plaintiff's Motion for Partial Summary Judgment, it did not present any evidence to counter the deposition testimony of plaintiff Terry Hundley that he used the two stolen ATVs at issue in this lawsuit to service the property of Audrey Hundley, the named insured. *See* Exhibit E to Plaintiff's Motion for Partial Summary Judgment, Deposition of Terry Hundley at 45-46, 48-49. Accordingly, the Court finds that there is coverage for the loss by theft of Terry Hundley's two ATVs under the provisions of Coverage C of the insurance policy as referenced in the Court's July 29, 2010 Opinion Order as "Coverage C-Property Not Covered." *See* Opinion Order at 3-4.

2. As a result thereof, the Court does ORDER that plaintiff's Motion for Partial Summary Judgment as to Count III of the Complaint is granted. The insurance policy issued by

as agreed by the parties' counsel,

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the defendant to Audrey Hundley provides that "covered property losses" for personal property are to be settled "at actual cash value at the time of loss but not more than the amount required to repair or replace." *See* Exhibit A to Plaintiff's Motion for Partial Summary Judgment, Insurance Policy at Section I-Conditions, ¶ 3.a. at page 8 of 16. The parties have stipulated that the actual cash value at the time of loss of Terry Hundley's 2006 Honda ATV was $4,000 and that the actual cash value at the time of loss of Terry Hundley's 2007 Honda ATV was $6,500. Therefore, the Court enters judgment for the plaintiff Terry Hundley, Individually and as Administrator of the Estate of Audrey Hundley, deceased, in the amount of $10,500 on Count III of plaintiff's Complaint against defendant Municipal Mutual Insurance Company of West Virginia.

3. Because the Court determines that there is no just reason for delay, the Court does ORDER that its prior ruling dismissing Counts I and II of plaintiff's Complaint and the instant ruling granting plaintiff judgment on Count III of plaintiff's Complaint, be considered to be final judgments as to those counts, pursuant to Rule 54(b) of the West Virginia Rules of Civil Procedure.

4. The Court does ORDER that the defendant's motion to bifurcate and stay the remaining counts of plaintiff's Complaint is granted, to allow for an appeal of the Court's final judgments referenced above. The Court specifically defers the resolution of any and all claims that plaintiff may have under Hayseeds, Inc. v. State Farm Fire & Casualty, 177 W.Va. 323, 352 S.E.2d 73 (1986), including the right to a jury determination of consequential and other general damages, and the Court's determination regarding an award of attorney fees, until the appeal process is completed.

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5. Pursuant to the agreement of the parties, the Court does further ORDER that, because the proper name of the defendant is Municipal Mutual Insurance Company of West Virginia, the style of this action is corrected to delete Municipal Mutual Insurance Company as a separate party defendant.

The parties' objections to the Court's rulings are preserved to the extent that their interests are adversely affected.

The Clerk is directed to send a copy of this Order to counsel of record.

Entered this 17 day of August, 2010.

HONORABLE DARRELL PRATT

Agreed to by:

Ronald H. Hatfield, Jr. (WVSB No. 8552)
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Counsel for Plaintiff

WAYNE COUNTY CIRCUIT COURT
WEST VIRGINIA

A COPY TESTE
Milton J. Ferguson II Clerk
By R. Meddings Deputy

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PAGE 846

IN THE CIRCUIT COURT OF WAYNE COUNTY, WEST VIRGINIA

TERRY HUNDLEY, Individually and as
Administrator of the Estate of
AUDREY HUNDLEY, deceased,

Plaintiff,

ENTERED
JUL 29 2010
CIVIL ORDER
BOOK 117 PAGE 805

VS. CIVIL ACTION NUMBER: 09-C-158

MUNICIPAL MUTUAL INSURANCE
COMPANY and MUNICIPAL MUTUAL
INSURANCE COMPANY OF WEST VIRGINIA,

Defendants.

OPINION ORDER

On the 9th day of July, 2010, this matter came on for hearing upon Motions for Summary Judgment. The Court heard arguments and representations of counsel, reviewed their respective memorandum of law and their respective supplemental memorandum of law, and further reviewed the Insurance Policy and case law.

Defendant's Claim of Non-assignability of the Insurance Policy and Plaintiff's Argument of Estoppel

The Defendant asserts that the Homeowner's Policy issued to Audrey Hundley cannot be assigned to anyone, including her personal representative after her death. The Court accepts this premise of law. An insurance policy is a personal contact between the insured and the insurer. I can not find any claim by the Plaintiff that coverage depends on the policy being assigned to the personal representative of the insured Estate. However, the Policy does intend to cover the insureds premises and property beyond her

death and covers the personal representative in maintaining and protecting insured's property. (Section I and II – Conditions: 9 Death p 16),

Likewise, I find no merit in Plaintiff's argument that the Defendant should be estopped from asserting reasons other than non-assignability as a reason for denial of the claim.

I find these are collateral issues and not pertinent to the Motions for Summary Judgment.

INSURABLE INTEREST

The Insurance Policy is a personal contract between Audrey Hundley, as the homeowner, and Municipal Mutual as the insurer. Having an insurable interest in the property insured is a definitive criteria for obtaining coverage. *WV Code* § 33-6-3. It is clear from the evidence that Audrey Hundley did not own the two (2) stolen ATV's. However, the Policy language provides coverage for property of "others" while located on the insured premises under certain circumstances. Therefore, the coverage issue can not be resolved soley on the homeowner's lack of an insurable interest. The Policy intends to provide coverage to other's property under certain circumstances. The Policy also intends to provide coverage beyond the death of the insured. All premiums were paid on the Policy after the insureds death, keeping the Policy in effect. Defendant's contention that the Policy is void, as a matter of law, is not supported by the facts of this case.

Furthermore, the Court accepts the legal premise that real estate is a non-probate asset to the extent that there are no unsatisfied debts against the decedent's estate. *WV Code* §44-8-3. Therefore, the Policy remains in effect to cover the insured's premises

and property until the assets are properly administered, debts are paid, and ownership of real estate is legally transferred.

The Court is of the opinion that Policy coverage extends beyond the homeowners death, with or without notice of her death. Defendants' claim that lack of notice of the insureds death affects coverage is disengenious.

AMBIGUOUITY IN THE POLICY PROVISIONS

I have reviewed the language of each pertinent policy provision and find that the language of each provision to be clear and unambiguous. Therefore, the policy needs no interpretation or construing by the Court.

COVERAGE C- Personal Property

Personal property covered by the Policy is defined on page 2 of the Policy. This provision provides coverage for property owned by "others" while it is on the insured's premises as long as the insured "requests" such coverage. The language of this provision is clear and unambiguous.

There is no evidence that Audrey Hundley ever requested coverage for Terry Hundley's two (2) ATV's while stored on her premises. Therefore, there is no coverage under this provision of the Policy for Terry Hundley's two (2) ATV's.

COVERAGE C – Property Not Covered

The language in this provision, on page 3 of this Policy, is clear and unambiguous. Initially, this provision excludes coverage for motor vehicles or other motorized land conveyances. However, there is an exception to this exclusion for vehicles "not subject to motor vehicle registration" and is "used to service an insured's residence".

> "*We do cover vehicles...not subject to motor vehicle registration which are: a. Used to service an insureds residence...*"

There are no provisions in the Policy requiring that the non-registered motor vehicle be owned by the insured. There are no Policy provisions requiring that the non-registered vehicle be on the premises prior to the insureds death. There are no Policy provisions requiring the insured to request such coverage during her lifetime.

The clear intent of the Policy language is to cover Terry Hundley's two (2) ATV's if, in fact, they were being used to service the premises. The Policy was still in effect after Audrey Hundleys death and at the time of the claim. Terry Hundley was duly appointed the personal representations of Audrey Hundley's Estate. Terry Hundley was legally obligated to maintain, preserve and protect the premises and property of the decedent. If Terry Hundley used the ATV's to service the premises they could be covered under this provision of the Policy. This is a factual issue to be determined by a jury.

Sections I and II – CONDITIONS

The Policy provision dealing with the death of the insured is on page 16 of the Policy. The language of this provision is clear and unambiguous. The policy intends to extend coverage to the personal representative of the insured's Estate with respect to the premises and property owned by the insured and covered by the Policy before the insureds death. Therefore, there is no coverage under this provision for the two (2) ATV's owned by Terry Hundley. The fact that he was legal representative of the Estate of Audrey Hundley does not extend coverage to property owned by him.

It is, therefore, **ADJUDGED, ORDERED and DECREED** as follows:

Plaintiff's Motion for Summary Judgment on the Breach of Contract, as a matter of law, is hereby **DENIED**. The breach is a factual issue to be determined by a jury;

Plaintiff's Motion for Summary Judgment on the claim for attorney fees as part of his bad faith claim, as a matter of law, is hereby **DENIED** as not being an appropriate issue to be resolved by summary judgment;

Plaintiff's Motion for Summary Judgment on the issue of coverage under the provisions of the Policy, as a matter of law, are hereby **DENIED**. There are coverage provisions that can be excluded, as a matter of law, and other coverage provisions that are dependent upon factual issues that are in dispute and could reasonably to decided in favor of Plaintiff by a jury.

Defendant's Motion for Summary Judgment as to the Policy being void upon failure to give notice of the insureds death, unassignability of the Policy, or subject to cancellation upon the failure of an insurable interest, as a matter of law, are hereby **DENIED**;

Defendant's Motion for Summary Judgment on the issue of denial of coverage under the provisions of ***Coverage C*** as property owned by others, as asserted in Count II of the Complaint, is hereby **GRANTED**, as a matter of law;

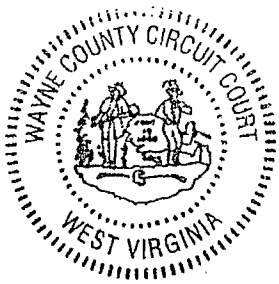
Defendant's Motion for Summary Judgment on the issue of denial of coverage under the provisions of an exception to the motor vehicle exclusion as set forth in **Coverage C- Property Not Covered**, as asserted in Count III of the Complaint, is hereby **DENIED**, as being a factual issue to be determined by a jury;

Defendant's Motion for Summary Judgment on the issue of denial of coverage to the personal representative of the insured, as asserted in Count I of the Complaint, is hereby **GRANTED,** as a matter of law;

It is, therefore, **ORDERED** that Count I and Count II of Plaintiff's Complaint shall be dismissed as no coverage can be provided to Terry Hundley under those Policy provisions, as a matter of law. All other Motions for Summary Judgment are herby denied as being factual issues to be determined by a jury.

Enter this 29 day of July, 2010.

ENTER: _____.
JUDGE



A COPY TESTE
Milton J. Ferguson II Clerk
By J. Scott Deputy