STATE OF MICHIGAN

COURT OF APPEALS

UNIVERSITY NEUROSURGICAL ASSOCIATES,

Plaintiff-Appellee,

v

BLUE CROSS BLUE SHIELD OF MICHIGAN,

Defendant-Appellant.

UNPUBLISHED
November 24, 1998

No. 199731
Wayne Circuit Court
LC No. 95-504099 CZ

Before: Wahls, P.J., and Holbrook, Jr., and Fitzgerald, JJ.

PER CURIAM.

Defendant appeals as of right from an order granting plaintiff's motion for summary disposition. We affirm.

Between 1992 and 1993, plaintiff provided medical services to Lorraine Foster totaling more than $50,000. Plaintiff alleged that Lorraine was covered under an insurance policy issued by defendant. Plaintiff sent invoices and requests for payment to defendant, and defendant initially paid plaintiff for the services rendered. However, in mid-1992, defendant began making payments directly to Lorraine. Plaintiff alleged that some payments were never made to either itself or Lorraine, and that other payments were sent to William Foster, Lorraine's husband. Plaintiff further alleged that William endorsed the checks which were made payable to Lorraine, and cashed those checks. Plaintiff filed suit against defendant under theories of breach of contract, third-party beneficiary, and negligence. The trial court granted plaintiff's motion for summary disposition stating that, because Lorraine's signature had been forged on all of the checks except for one, defendant's obligation had not been discharged.

On appeal, defendant first contends that the trial court erred in granting summary disposition under MCR 2.116(C)(9) and (C)(10). We disagree. In granting plaintiff's motion for summary disposition, the trial court did not specify under which section of MCR 2.116(C) it granted plaintiff's motion. However, because the trial court relied on matters outside the pleadings in granting plaintiff's motion for summary disposition, we will construe the motion as having been granted pursuant to MCR

2.116(C)(10). *Driver v Hanley (After Remand)*, 226 Mich App 558, 561-562; 575 NW2d 31 (1997).

"A trial court's determination regarding a motion for summary disposition is reviewed de novo." *Id.*

> A motion pursuant to MCR 2.116(C)(10) tests the factual basis underlying the plaintiff's claim. In ruling on the motion, the trial court must consider the affidavits, pleadings, depositions, admissions, and other admissible documentary evidence submitted by the parties. Giving the benefit of all reasonable doubt to the opposing party, the trial court must determine whether a record might be developed that would leave open an issue of material fact upon which reasonable minds could differ. [*First Security v Aitken*, 226 Mich App 291, 304; 573 NW2d 307 (1997) (citations omitted).]

"The moving party must specifically identify the issues on which there are no disputed facts, and that party also must support its position with affidavits, depositions, or other documentary evidence. The opposing party bears the burden of showing by evidentiary materials that a dispute exists regarding a genuine issue of material fact." *Munson Medical Ctr v Auto Club Ins Ass'n*, 218 Mich App 375, 386; 554 NW2d 49 (1996).

Defendant argues that summary disposition for plaintiff was improper because a genuine issue of material fact exists with regard to whether the checks had been properly negotiated. Conversely, plaintiff argues that defendant's obligations have not been discharged because although the sixteen checks at issue were endorsed with the name "Lorraine Foster," there was uncontroverted evidence that fifteen of those signatures were forgeries. Further, plaintiff argues that defendant has provided no evidence or law to support its assertion that the trial court should have presumed that William Foster had authority to sign the checks.

Under Michigan law, an obligation is discharged by check when the check is paid to a person that is entitled to enforce the check. MCL 440.3310(2)(a); MSA 19.3310(2)(a); MCL 440.3602(1); MSA 19.3602(1). Once plaintiff came forward with documentary evidence that Lorraine's signature had been forged, the burden was on defendant to show by evidentiary materials that a genuine issue of material fact existed. *Munson, supra* at 386. Defendant has failed to meet this burden. Defendant's arguments are nothing more than speculation, which is insufficient to raise a genuine issue of material fact. *Libralter Plastics, Inc v Chubb Group of Ins Cos*, 199 Mich App 482, 486; 502 NW2d 742 (1993). We also conclude that defendant's reliance on MCL 440.3308(1); MSA 19.3308(1) is misplaced. By its express terms, MCL 440.3308(1); MSA 19.3308(1) applies only to "an action with respect to an instrument."[1] Therefore, the trial court did not err in granting plaintiff's motion for summary disposition.

Defendant also argues that plaintiff was not a third-party beneficiary, and therefore could not enforce the contract. We disagree. "When determining whether the parties to the contract intended to make a third person a third-party beneficiary, a court should examine the contract using an objective standard. Third-party beneficiary status requires an express promise to act to the benefit of the third

party . . . . Thus, a person who incidentally benefits from the performance of some duty required under a contract has no rights under the contract." *Dynamic Constr Co v Barton Malow Co*, 214 Mich App 425, 427-428; 543 NW2d 31 (1995) (citations omitted).

The following paragraph is set forth in defendant's Comprehensive Health Care Copayment Certificate:

> [Defendant] will make the benefit payment directly to the provider for service performed by a participating provider and directly to the subscriber for services performed by a non-participating provider. *For covered services performed out-of-state, [defendant] will pay the subscriber or physician as indicated on the bill.* [Emphasis added.]

We conclude that this language constitutes an express promise to act to the benefit of plaintiff. Therefore, plaintiff could enforce the contract as a third-party beneficiary. *Dynamic*, *supra* at 428.[2]

Finally, defendant claims that plaintiff's suit is barred by a two-year limitation of actions contained in the contract between itself and Lorraine. Again, we disagree. Interpretation of a contract with clear language is a question of law, which we review de novo. *Auto Club Ins Ass'n v Lozanis*, 215 Mich App 415, 418-419; 546 NW2d 648 (1996). "An insurance policy is much the same as any other contract. It is an agreement between the parties in which a court will determine what the agreement was and effectuate the intent of the parties." *Moore v First Security Casualty Co*, 224 Mich App 370, 375; 568 NW2d 841 (1997). In interpreting a contract, the language contained therein should be given "its ordinary and plain meaning so that technical and strained constructions are avoided." *Royce v Citizens Ins Co*, 219 Mich App 537, 542; 557 NW2d 144 (1996).

At issue is the following contractual provision:

> CONTEST: A subscriber seeking payment from [defendant] directly or indirectly will be furnished the specific reason or reasons for denial of a claim with reference to the applicable provisions of this certificate and an explanation of additional information required from or on behalf of the subscriber for reconsideration of the claim . . . . No action or suit at law may be commenced upon or under this contract until thirty (30) days after notice by the subscriber has been given to [defendant] that the reconsidered decision . . . is unacceptable, nor may such an action be brought at all later than two (2) years after such claim has arisen.

A plain reading of the clause demonstrates that it does not apply to the present situation. The procedure outlined is not applicable because there was never a denial of payment in the case at hand. Defendant never disputed the claims submitted by plaintiff and Lorraine. In fact, defendant mailed checks to pay for the services rendered. Accordingly, the present action is not barred by the cited two-year limitations period.

Affirmed.

/s/ Myron H. Wahls
/s/ Donald E. Holbrook, Jr.
/s/ E. Thomas Fitzgerald

[1] Further, the official comment to the statute indicates that any presumption that is raised regarding the validity of a signature is overcome when the party challenging the signature puts forth evidence showing that the signature is forged or unauthorized. MCL 440.3308; MSA 19.3308, Comment 1. "Once such evidence is introduced the burden of establishing the signature by a preponderance of the evidence of the total evidence is on the plaintiff." *Id.* See also MCL 440.1201(37); MSA 19.1201(37) (defining "presumed" to "mean[] that the trier of fact must find the existence of the fact presumed unless and until evidence is introduced which would support such a finding").

[2] Defendant also argues that assignments under the contract between itself and Lorraine were prohibited. Defendant concludes that since assignments are prohibited, plaintiff cannot enforce the contract. Our review of the record reveals that no issue concerning assignments is relevant to the present case, and therefore, no further discussion on the issue is warranted.