[Cite as *BTM Trucking, Inc. v. Grange Ins. Co.*, 2011-Ohio-851.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 95349

BTM TRUCKING, INC.

PLAINTIFF-APPELLANT

vs.

GRANGE INSURANCE CO.

DEFENDANT-APPELLEE

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-705619

BEFORE: Rocco, J., Gallagher, P.J., and Keough, J.

RELEASED AND JOURNALIZED: February 24, 2011

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KENNETH A. ROCCO, J.:

{¶ 1} Plaintiff-appellant BTM Trucking, Inc., appeals from the trial court order that granted summary judgment to defendant-appellee "Grange Insurance."[1]

[1]This was the name of the defendant-appellant presented in its complaint. In its answer, defendant-appellee indicated it is properly designated "Grange Mutual Casualty Company."

{¶ 2} Appellant presents two assignments of error in which it argues on separate grounds that summary judgment for Grange on the complaint was inappropriate. Since, however, the trial court's decision finds support in the record, and since the two causes of action appellant presents herein were not presented in the trial court, neither of appellant's assignments of error has merit. Accordingly, the trial court's decision is affirmed.

{¶ 3} On October 1, 2009, appellant filed its complaint in this action; appellant stated therein in pertinent part the following:[2]

{¶ 4} 1) Appellant is an Ohio "corporation" that owns a "Mack Truck used in its business."

{¶ 5} 2) Grange issued to appellant a commercial insurance policy, "No. CPP 2129888."

{¶ 6} 3) On October 11, 2005, appellant's "employee" William D. Hager "was operating the truck" on a designated state route in Lorain County.

{¶ 7} 4) Another car was in front of his employee.

{¶ 8} 5) The driver of the car preceding it "negligently struck the Mack Truck" as appellant's employee attempted to pass.

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[2]Since many of the complaint's paragraphs were misnumbered, they are set forth seriatim rather than by the number that preceded them.

{¶ 9} 6) The truck was rendered inoperable, costing appellant "lost income" from the loss of its use "in the amount of eighteen thousand dollars."

{¶ 10} 7) Appellant's loss was compounded by a loss of "additional business in the amount of thirty-five thousand dollars" or more.

{¶ 11} 8) Appellant lost a client because the truck was not in service, costing appellant a loss of "income in the amount of one hundred twenty thousand dollars."

{¶ 12} 9) Appellant was the policy holder of Policy No. CPP 2129888.

{¶ 13} 10) The policy provided uninsured/underinsured motorist ("UM/UIM") coverage "to [Appellant] which included loss to its business caused by the actions of a third party," such as the October 11, 2005 accident.

{¶ 14} 11) The driver who caused the accident was a UM/UIM motorist.

{¶ 15} 12) Appellant "complied with all of the Policy provisions necessary" to present a covered claim.

{¶ 16} 13) Grange wrongly refused to cover the full extent of the damages appellant sustained as a result of the accident.

{¶ 17} Appellant stated that it was "entitled under its contract of insurance" to be fully compensated for its financial losses sustained in the accident. In derogation of Civ.R.

10(D)(1), however, appellant neither attached a copy of the insurance policy nor explained why a copy was absent.

{¶ 18} Grange filed an answer, admitting it issued a policy with the number "212988-09," but asserted that the policy was issued to "Timothy E. Mobley," rather than to appellant. Grange further asserted that appellant "failed to satisfy a condition precedent before making a claim," and sought "items not covered" under the policy. Grange's affirmative defenses included "contractual statute of limitations," and Grange reserved "the right to add additional defenses which discovery discloses to be appropriate."

{¶ 19} Several months later, Grange filed a motion for summary judgment on appellant's complaint. It argued appellant could not state a claim upon which relief could be granted for three reasons: 1) appellant was not the named insured in the policy; 2) the policy covered only "bodily injury" losses, not business losses; and 3) appellant's claim was made outside the policy's three-year statute of limitations.

{¶ 20} Grange attached to its motion a verified copy of "Policy Number: CPP 212988-09." The cover page stated the "named insured" as "Timothy E Mobley," and the declarations page set forth the insured's "legal entity" as an "individual." Moreover, the UM/UIM portion of the policy indicated it covered "Bodily injury" suffered by the "Named

Insured," but "any claim or suit" must be brought "within 3 years after the date of the 'accident' causing the 'bodily injury' * * * ."

{¶ 21} Appellant filed a brief in opposition, arguing a "factual question" existed as to whether Grange was obligated to compensate appellant pursuant to the policy. Appellant contemporaneously filed the affidavit of Timothy E. Mobley.

{¶ 22} Mobley averred that he was the owner of appellant, and "responsible for all the insurance needs of [Appellant,] including negotiation and settlement of all insurance claims made because of damage to fleet vehicles." Mobley thereafter merely restated the allegations of the complaint, except for averring that:[3]

{¶ 23} "Allstate Insurance had a policy of insurance for the [negligent] Driver that would compensate [Appellant] for damages to the Truck * * * . Such coverage was for twenty-five thousand dollars limits for liability. [Grange] without the permission of [Appellant] through the use of internal arbitration obtained from Allstate under the liability part of Allstate Policy repayment of the money that was to be paid to repair [Appellant's] truck * * *. [Grange] obtained such funds out of the liability coverage that [Appellant] was entitled to receive * * *.

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[3]These averments are set forth verbatim. The record also reflects Mobley failed to indicate his statements were made on his personal knowledge, and referred in his affidavit to an "Exhibit A" that was not attached.

{¶ 24} " * * * Grange has wrongfully obtained the funds and failed to pay for repair of the truck.

{¶ 25} " * * * [Grange] has refused to pay any of the business losses claiming it was to be covered by Allstate * * *.

{¶ 26} "[Grange] went directly to Allstate Insurance without informing [Appellant] and obtained re-imbursement of the funds it paid to repair the Truck * * *

{¶ 27} " * * * [Grange] has never paid for repair of the Truck * * * ."

{¶ 28} The trial court subsequently granted Grange's motion. In its order, the trial court stated that since the insurance policy covered only the "named insured," appellant could not recover under the policy. The trial court further noted that, even if Mobley had brought the action, since the policy covered only bodily injury, and since the policy had a three-year limitations period for the pursuit of a claim, Grange was entitled to judgment as a matter of law.

{¶ 29} Appellant filed a timely appeal from the trial court's decision. Appellant presents two assignments of error, as set forth below.

{¶ 30} "I. It is error to grant Summary Judgment when there is a question of fact that must be determined which, in the present action, is can Appellee be entitled to funds obtained from a third party contract of automobile insurance when the total of losses by

Appellant caused by the third party holding such Policy exceeds the funds available from such third party Policy.

{¶ 31} "II. It is error to grant Summary Judgment when it has been shown there was a malicious combination of two or more Insurance Companies that conspired to injure Appellant's property in a way not competent for one alone to accomplish that resulted in actual damages. The Appellant by affidavit has shown that the Appellant has set out a claim for unlawful civil conspiracy between Appellee and Allstate Insurance."

{¶ 32} Appellant argues summary judgment on its complaint against Grange was inappropriate. Appellant contends Mobley's affidavit raised genuine issues of material fact with respect to causes of action for "tortious interference with an economic relationship" and "civil conspiracy." Appellant's argument cannot be countenanced.

{¶ 33} A review of the record demonstrates appellant based its complaint on a claim of only UM/UIM coverage under Mobley's policy. Since appellant neither sought to amend its complaint to assert more than a single cause of action, nor obtained leave from the trial court to do so, it is foreclosed from pursuing additional causes of action in this court. See, e.g., *State ex rel. Quarto Mining Co. v. Foreman*, 79 Ohio St.3d 78, 81, 1997-Ohio-71, 679 N.E.2d 706; cf., *Wisner v. Grange Mut. Cas. Co.*, Allen App. No. 1-03-92, 2004-Ohio-2621.

{¶ 34} An appellate court reviews an order of summary judgment de novo. *Hillyer v. State Farm Mut. Auto Ins. Co.* (1996), 131 Ohio App.3d 172, 175, 722 N.E.2d 108. Summary judgment is appropriate when a review of the evidence submitted pursuant to Civ.R. 56(E) demonstrates: 1) no genuine issue of material fact remains to be litigated; 2) the moving party is entitled to judgment as a matter of law; and 3) construing the evidence most strongly in favor of the nonmoving party, it appears that reasonable minds could conclude only in the moving party's favor. Civ.R. 56(C); *Murphy v. Reynoldsburg* (1992), 65 Ohio St.3d 356, 358-59, 1992-Ohio-95, 604 N.E.2d 138.

{¶ 35} The party moving for the summary judgment has the initial burden of producing competent evidence that affirmatively demonstrates the lack of a genuine issue of material fact. *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 1996-Ohio-107, 662 N.E.2d 264. The nonmoving party must then rebut with specific facts showing the existence of a genuine triable issue; it may not rest on the mere allegations or denials of its pleadings. Id.

{¶ 36} The construction of a written contract is a matter of law, reviewed without deference to the trial court's decision. *Nationwide Mut. Fire Ins. Co. v. Guman Bros. Farm*, 73 Ohio St.3d 107, 108, 1995-Ohio-214, 652 N.E.2d 684. When an agreement between two parties is integrated into an unambiguous written instrument, courts must give effect to the

express intentions of the parties that made it. *Skoda Minotti Co. v. DiGioia*, Cuyahoga App. No. 94810, 2010-Ohio-4901, ¶18.

{¶ 37} In this case, appellant alleged it had a commercial insurance policy issued to it by Grange that required Grange to provide UM/UIM coverage with respect to the October 11, 2005 accident. Grange submitted evidence, however, to prove the policy had been issued to Mobley as an individual, rather than to appellant, which claimed to be an Ohio corporation. Under these circumstances, Grange had no contractual obligation to appellant. *Herschell v. Rudolph*, Lake App. No. 2001-Ohio-069.

{¶ 38} At any event, by its express terms, the UM/UIM portion of the policy covered only bodily injury; appellant's claim related only to business losses. Moreover, although the policy contained a three-year limitations period for the filing of suit, appellant did not file its complaint until nearly four years after the October 11, 2005 accident. See *Sarmiento v. Grange Mut. Ins. Co.*, 106 Ohio St.3d 403, 2005-Ohio-5410, 835 N.E.2d 692, clarified at 107 Ohio St.3d 1701, 2005-Ohio-6763, 840 N.E.2d 205 (Table).

{¶ 39} Appellant presented no competent evidence to dispute any of the foregoing facts. Indeed, appellant never presented the trial court with a copy of the policy upon which appellant based its claim. Mobley's affidavit, even if it provided some information about his relationship to appellant, neither contradicted the express policy provisions, nor presented

admissible evidence in support of the allegations appellant made in the complaint. *Wolf v. Big Lots Stores, Inc.*, Franklin App. No. 07AP-511, 2008-Ohio-1837, ¶12.

{¶ 40} Based upon the record, therefore, the trial court correctly granted Grange's motion for summary judgment.

{¶ 41} Appellant's assignments of error, accordingly, are overruled.

Affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

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KENNETH A. ROCCO, JUDGE
SEAN C. GALLAGHER, P.J., and
KATHLEEN ANN KEOUGH, J., CONCUR