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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001393-MR

JAMES D. NICHOLS — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE IRV MAZE, JUDGE
ACTION NO. 05-CI-008961

ZURICH AMERICAN INSURANCE COMPANY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON, COMBS, AND THOMPSON, JUDGES.

THOMPSON, JUDGE: James D. Nichols appeals from the June 28, 2010, order of the Jefferson Circuit Court denying his motion to alter, amend, or vacate the trial court's March 11, 2010, order granting summary judgment in favor of Zurich American Insurance Company ("Zurich"). We find no error with the trial court's orders and thereby affirm.

Nichols was involved in an automobile accident on June 4, 2002. At the time of the accident, Nichols was employed by Miller Pipeline ("Miller") and was operating a truck owned by Miller. The company truck was covered by a commercial fleet auto policy ("policy") provided by Zurich, effective April 1, 2002, through April 1, 2003. There is no dispute that Nichols was operating the vehicle while in the course and scope of his employment with Miller.

As a result of the accident, Nichols suffered severe physical injuries. The other driver involved, who was determined to be at fault, carried $25,000 in liability coverage. On September 17, 2003, Nichols settled with the at-fault driver for the $25,000 limit offered by his insurance company. Shortly thereafter, Nichols sought to collect benefits through the underinsured motorist ("UIM") provision of Miller's Zurich policy. Zurich initially requested documentation of Nichols's injuries and damages. However, Nichols's claim was eventually rejected by Zurich with an explanation that UIM coverage had been rejected by Miller and, therefore, never provided.

On October 17, 2005, Nichols filed a complaint against Zurich in Jefferson Circuit Court. Zurich filed a motion for summary judgment, which was denied. In its November 28, 2006 order, the trial court indicated that it was unclear when the cancellation of UIM benefits occurred and, therefore, genuine issues of material fact existed which should be determined by a jury. Discovery was then conducted by both parties.

On June 18, 2009, Nichols filed a motion for sanctions against Zurich for failure to comply with discovery requests. On July 19, 2009, Nichols moved for partial summary judgment and argued that the UIM provision was in effect at the time of his accident. On July 27, 2009, Zurich filed a second motion for summary judgment in which it argued that any inclusion of UIM benefits was a mutual mistake between the insurer and insured and, therefore, the policy should be reformed to remove those provisions. On September 25, 2009, Zurich moved to amend their answer to include the mutual mistake defense and their motion was subsequently granted on October 5, 2009. The trial court denied Nichols's motion for summary judgment and motion for sanctions and granted Zurich's motion for summary judgment on March 11, 2010. Nichols filed a motion to alter, amend, or vacate, which was subsequently denied on June 28, 2010. Nichols also filed a motion to amend his original complaint, seeking to add a claim of bad faith, which was denied. This appeal followed.

The predominant issue between the parties is whether Miller carried UIM coverage at the time of Nichols's accident. Nichols makes three arguments on appeal: 1) he was entitled to summary judgment; 2) the trial court erred by granting summary judgment in favor of Zurich; and 3) the trial court erred by denying his motion to amend his complaint. Nichols's main contention is that UIM coverage was in effect at the time of his accident, and that the policy could not be retroactively amended to exclude it.

Summary judgment is proper when it appears that it would be impossible for the adverse party to produce evidence at trial supporting a judgment in his favor. *James Graham Brown Foundation, Inc. v. St. Paul Fire Marine Ins. Co.*, 814 S.W.2d 273, 276 (Ky. 1991). When reviewing a trial court's grant of summary judgment, we must determine "whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky.App. 1996). An appellate court must review the record in a light most favorable to the party opposing the motion and must resolve all doubts in his favor. *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991).

In its order granting summary judgment to Zurich, the trial court concluded that Zurich had shown, by uncontroverted clear and convincing evidence, that a mutual mistake existed between the parties and therefore UIM coverage was never included in Miller's 2002 – 2003 policy. The evidence relied upon by the trial court included the deposition testimony of Miller's Director of Risk Management from 1999 until 2004, Jeanne Fuqua, and Kathy Kebo, an employee of M.J. Insurance ("M.J.") and the broker that assisted Miller with obtaining the 2002 – 2003 policy from Zurich.

In order to show the existence of mutual mistake, the party arguing the defense must prove by clear and convincing evidence that the parties mutually erred and "had actually agreed upon terms different from those expressed in the written instrument." *Campbellsville Lumber Co. v. Winfrey*, 303 S.W.2d 284, 286

(Ky. 1957). The written instrument to which Nichols cites as indicating that UIM coverage existed is actually the proposed policy that was presented to Miller by M.J. in March of 2002.

Ms. Kebo indicated in her testimony that, at the time she assisted Miller with obtaining its 2002 – 2003 policy, Miller's business practice was not to carry any optional coverage in any state unless legally required to do so. She also indicated that during the presentation, in which Zurich's policy was presented to Miller, it was reiterated that Miller did not want to carry any UIM or UM coverage unless legally required to do so. Ms. Kebo further testified that the inclusion of any UIM coverage in Miller's 2002 – 2003 policy from Zurich would have been a mistake.

Ms. Fuqua testified that it had been the custom of Miller, since 1988, to carry only minimum required coverage. She indicated that proposed policies had been requested from M.J. and two other brokers, and that all three brokers had been informed in writing that Miller did not wish to carry any optional coverage not required by law. Ms. Fuqua first became aware that the request had been overlooked by Zurich when Zurich's proposal, which was presented to her by M.J., contained UIM coverage. She testified that she communicated the error to M.J. at that presentation and that she relied upon M.J., as the broker, to provide any necessary rejection forms. She agreed that she signed the rejection letters and returned them to M.J. and that she never received an actual physical copy of the

policy until October of 2002, which did not contain the optional coverage. Ms. Fuqua stated:

> In our minds, we never purchased underinsured or uninsured motorists coverage as presented. Whether it shows it in a proposal which is not the actual policy itself, we would not have been concerned with underinsured, uninsured motorists coverage, which is an optional and enhanced coverage that we never wanted.

In response to whether she would have asked someone to remove the coverage, Ms. Fuqua responded, "I would not have asked for this to be removed, because we never even purchased this coverage, nor did we request this."

The trial court found that the testimony offered by Ms. Kebo and Ms. Fuqua was uncontroverted and sufficiently clear and convincing to prove the existence of a mutual mistake between the contracting parties. We conclude there was no error. Nichols offered no written documentation or testimony regarding the negotiations leading to the formation of the 2002 – 2003 policy. He also failed to provide any documentation or testimony regarding the business practices of Miller prior to the 2002 – 2003 policy. In fact, after ample time to conduct discovery, Nichols failed to offer any evidence that would dispute the defense of mutual mistake. We therefore find no error with the trial court's grant of summary judgment to Miller.

Nichols's final argument on appeal is that the trial court erred by denying his motion to amend his complaint. The Kentucky Rules of Civil Procedure provide that leave to amend a complaint "shall be freely given when

justice so requires." CR 15.01. Kentucky case law further holds that the option of granting a motion to amend lies solely within the discretion of the trial court, "whose ruling will not be disturbed unless it is clearly an abuse." *Laneve v. Standard Oil Co.*, 479 S.W.2d 6, 8 (Ky. 1972) (*quoting Graves v. Winer*, 351 S.W.2d 193 (Ky. 1961)).

It has previously been held that a trial court's denial of leave to amend a complaint is not an abuse of discretion when the action had been pending for several years and a motion for summary judgment has been made. *See Laneve v. Standard Oil Co.*, 479 S.W.2d 6 (Ky. 1972). In this case, Nichols's motion came after both parties moved for summary judgment; after discovery, based upon the initial claim of liability, had been performed and submitted to the trial court; and after summary judgment had been granted. Almost five years had lapsed between the filing of the initial complaint and Nichols's motion to amend. Given the length of time Nichols waited to amend his complaint and the circumstances of the case, we hold that the trial court did not abuse its discretion in denying Nichols leave to amend his complaint.

For the foregoing reasons, the June 28, 2010, and March 11, 2010, orders of the Jefferson Circuit Court are affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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