STATE OF MICHIGAN

MACOMB COUNTY CIRCUIT COURT

PROGRESSIVE MICHIGAN
INSURANCE,

Plaintiff,

vs. Case No. 2015-692-CB

GRANGE INSURANCE COMPANY and
AUTO-OWNERS INSURANCE COMPANY,

Defendants.
_____/

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OPINION AND ORDER

Defendant Auto-Owners Insurance Company ("Defendant Auto") has filed a motion for summary disposition pursuant to MCR 2.116(C)(7), (8) and (10). Plaintiff has filed a response and requests that the motion be denied. In addition, Defendant Grange Insurance Company ("Defendant Grange") has filed a response in which it requests that Defendant Auto's motion be granted and that Plaintiff's complaint be dismissed. Additionally, Defendant Auto filed a reply brief in support of its motion.

I. Factual and Procedural History

This insurance priority dispute arises out of a March 5, 2014 automobile collision. David McCowan was the operator and title owner of a 2000 Volvo semi-truck involved in the incident (the "Truck"). Mr. McCowan later complained of injuries he claimed were caused by the accident and submitted a claim to Plaintiff. Plaintiff paid $12,000.00 in benefits and settled Mr. McCowan's potential future claims for $40,000.00.

At the time Mr. McCowan was involved in the accident he was an independent contractor of U.S. Cargo Express, LLC ("U.S. Cargo"). Pursuant to Mr. McCowan's

agreement with U.S. Cargo, U.S. Cargo agreed to lease the Truck, with Mr. McCowan remaining responsible for maintenance, fuel, and repairs. Defendant Grange issued a commercial liability policy to U.S. Cargo pursuant to which it agreed to insure several vehicles, including the Truck ("Grange Policy").

After paying/settling Mr. McCowan's claim, Plaintiff filed the instant matter claiming that Defendant Grange was first in order of priority to pay PIP benefits in connection with Mr. McCowan's injuries, and that as a result it is entitled to be reimbursed. On September 15, 2015, Plaintiff filed a motion for summary disposition of its claims against Defendant Grange. On October 9, 2015, Defendant Grange filed its response and requested that Plaintiff's motion be denied and that it be granted summary disposition pursuant to MCR 2.116(I)(2). On January 15, 2016, the Court entered its Opinion and Order in which it held that the Grange Policy was higher in priority that the policy Plaintiff issued.

Defendant Grange subsequently filed a motion for reconsideration of the Court's January 15, 2016 Opinion and Order. In its motion, Defendant Grange contended that it was not liable to Plaintiff even if its policy was higher in priority than Plaintiff's because Defendant Auto had the highest priority to provide the benefits at issue. In support of its position, Defendant Grange presented the Court with evidence that Defendant Auto had issued a policy to Mr. McGowan that was higher in priority than the Grange Policy and Plaintiff's policy. However, based on the fact that Defendant Auto was not a party, and in light of the fact that Defendant Grange was asserting that Defendant Auto had issued the insurance policy with the highest priority, the Court, in its February 12, 2016 Opinion and Order, ordered that Defendant Auto be joined as a defendant to this matter. Defendant Auto was subsequently joined as a defendant.

On April 25, 2016, Defendant Auto filed its instant motion for summary disposition pursuant to MCR 2.116(C)(7), (8) and (10). Plaintiff has since filed a response and requests that the motion be denied. In addition, Defendant Grange has filed a response and requests that Defendant Auto's motion be granted, and that Plaintiff's case be dismissed in its entirety. Defendant Auto has also filed a reply brief in support of its motion. On May 23, 2016, the Court held a hearing in connection with the motion and took the matter under advisement.

II. Standard of Review

MCR 2.116(C)(7) permits summary disposition where the claim is barred because of release, payment, prior judgment, immunity granted by law, statute of limitations, statute of frauds, an agreement to arbitrate, infancy or other disability of the moving party, or assignment or other disposition of the claim before commencement of the action. In reviewing a motion under MCR 2.116(C)(7), the Court accepts as true the plaintiff's well-pleaded allegations, construing them in the plaintiff's favor. *Hanley v Mazda Motor Corp*, 239 Mich App 596, 600; 609 NW2d 203 (2000). The Court must consider affidavits, pleadings, depositions, admissions, and documentary evidence filed or submitted by the parties when determining whether a genuine issue of material fact exists. *Id.* Where a material factual dispute exists such that factual development could provide a basis for recovery, summary disposition is inappropriate. *Kent v Alpine Valley Ski Area, Inc*, 240 Mich App 731, 736; 613 NW2d 383 (2000). Where no material facts are in dispute, whether the claim is barred is a question of law. *Id*

Summary disposition may be granted pursuant to MCR 2.116(C)(8) on the ground that the opposing party has failed to state a claim upon which relief may be granted. *Radtke v Everett*, 442 Mich 368, 373-374; 501 NW2d 155 (1993). A motion

under MCR 2.116(C)(10), on the other hand, tests the factual support of a claim. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). In reviewing such a motion, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in the light most favorable to the party opposing the motion. *Id.* Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. *Id.* The Court must only consider the substantively admissible evidence actually proffered in opposition to the motion, and may not rely on the mere possibility that the claim might be supported by evidence produced at trial. *Id.*, at 121.

III. Arguments and Analysis

In its motion, Defendant Auto contends that Plaintiff's claim against it is barred pursuant to MCL 500.3145(1) because it did not receive notice of the accident in question within one year. MCL 500.3145(1) provides in pertinent part:

> An action for recovery of personal protection insurance benefits payable under this chapter for accidental bodily injury may not be commenced later than 1 year after the date of the accident causing the injury unless written notice of injury as provided herein has been given to the insurer within 1 year after the accident or unless the insurer has previously made a payment of personal protection insurance benefits for the injury....

In this case, Plaintiff asserts that it paid benefits to Mr. McGowan that either Defendant Auto or Defendant Grange should have paid. The Michigan Court of Appeals has held that when a plaintiff insurance company mistakenly pays no-fault benefits, while another defendant insurance company had the obligation to pay the benefits in the first place because of it having a higher priority in the no-fault statutory scheme, the plaintiff's claim for reimbursement from the defendant is one of subrogation, and the limitations period in MCL 500.3145(1) applies. *Titan Ins v. North*

Pointe Ins, 270 Mich App 339, 343–344, 347; 715 NW2d 324 (2006). Further, in instances of subrogation, "the subrogee, upon paying an obligation owed to the subrogor as the primary responsibility of a third party, is substituted in the place of the subrogor, thereby attaining the same (and no greater) rights to recover against the third party." *Morrow v. Shah*, 181 Mich App 742, 749; 450 NW2d 96 (1989); see also *Yerkovich v. AAA*, 461 Mich 732, 737; 610 NW2d 542 (2000). Accordingly, Plaintiff, as Mr. McGowan's subrogee, possesses only those rights as Mr. McGowan. Consequently, Plaintiff may only recover from Defendant Auto or Defendant Grange if Mr. McGowan could recover under the same facts.

In this case, Defendant Auto's claim representative has presented evidence that Mr. McGowan was covered by a policy Defendant Auto issued at the time of the accident, but that Defendant Auto did not receive any notice of the accident underlying this matter until March 7, 2016, over 2 years after the accident. (*See* Defendant Auto's Exhibit D.) Plaintiff does not contest that testimony. Nevertheless, Plaintiff avers that the statute of limitations under MCL 500.3145(1) does not apply to bar its claim against Defendant Auto because a party joined as a necessary party may not assert a statute of limitations defense.

The general rule is that where a defendant is brought into an action for the first time upon the filing of an amended complaint, the filing of the amendment constitutes the commencement of the action in so far as the new defendant is concerned. *Forest v Parmalee (On Rehearing)*, 60 Mich App 401, 406; 231 NW2d 378 (1975), aff'd on other grounds, 402 Mich 348 (1978). However, an exception to this rule is that the additional defendant may be brought in after the expiration of the statute of limitations where the new party is a necessary party. *Id.*

In this case, the Court ordered, *sua sponte*, that Defendant Auto be joined to this matter based on the fact that the outcome of Plaintiff and Defendant Granger's dispute depends on whether Defendant Auto had issued a policy that was higher in priority than the policies issued by Defendant Granger. However, upon further review, the Court is persuaded that although the issue of whether Defendant Auto had issued a policy higher in priority needed to be resolved in order to effectuate complete relief in the determination of Plaintiff's claim against Defendant Granger, Defendant Auto's presence was not needed in order to make such a determination. Even without Defendant Auto's presence in this matter as a party, Plaintiff and Defendant Grange retained the ability to conduct discovery directed to Defendant Auto related to the issue of whether Defendant Auto had issued a policy which existence would impact their dispute. *See* MCR 2.306, MCR 2.310(B)(2). Consequently, joining Defendant Auto is not needed in order for Plaintiff and Defendant Grange to determine whether Defendant Auto had issued a policy that was higher in priority.

Parties may be added or dropped by order of the court on motion of a party or on the court's own initiative. MCR 2.207. In this case, the Court is convinced that Defendant Auto need not have been joined to this matter as a necessary party. Consequently, the portion of the Court's February 12, 2016 Opinion and Order holding to the contrary must be vacated.

With regards to the dispute between Plaintiff and Defendant Grange, it appears undisputed that the policy issued by Defendant Auto was higher in priority than the policies issued by Plaintiff and Defendant Grange. Plaintiff, as Mr. McGowan's subrogee, was required to first seek to collect from Mr. McGowan's personal insurance carrier, which in this case was Defendant Auto. *See* MCL 500.3114(1); *Farmers Ins*

Exchange v Allstate Ins Co., unpublished per curiam opinion of the Court of Appeals, decided November 17, 2015 (Docket No. 322955). Plaintiff failed to make any attempt to collect from Defendant Auto within the limitations period set forth in MCL 500.3145(1). Accordingly, Plaintiff failed to first look to Defendant Auto, as Mr. McGowan's personal insurer, before seeking reimbursement from Defendant Grange. Consequently, Plaintiff failed to comply with the requirements of MCL 500.3114(1). As a result, Plaintiff may not seek reimbursement from Defendant Grange and its claim in this case must be dismissed.

IV. Conclusion

For the reasons discussed above, Defendant Auto's motion for summary disposition is GRANTED based on the Court's finding that it was not a necessary party to this matter and was misjoined. Accordingly, the portion of the Court's February 12, 2016 Opinion and Order holding that Defendant Auto is a necessary party is hereby VACATED. Further, based on Plaintiff's failure to comply with MCL 500.3114(1) by failing to first seek reimbursement from Mr. McGowan's personal insurer, its complaint is hereby DISMISSED WITH PREJUDICE.

Pursuant to MCR 2.602(A)(3), the Court states this Opinion and Order resolves the last claim and CLOSES the case.

IT IS SO ORDERED.

Date: AUG 01 2016

Kathryn A. Viviano

Hon. Kathryn A. Viviano, Circuit Court Judge