

STATE OF MICHIGAN
IN THE 17th CIRCUIT COURT FOR KENT COUNTY

PIONEER STATE MUTUAL
INSURANCE COMPANY, as
subrogee of Richard Smits and
Commons at Sierrafield,

Plaintiff,

vs.

BILETH SERVICES, INC.,

Defendant.

Case No. 13-03171-CKB

HON. CHRISTOPHER P. YATES

OPINION AND ORDER GRANTING, IN PART, AND DENYING, IN PART,
DEFENDANT BILETH SERVICES'S MOTION FOR SUMMARY DISPOSITION

Lest anyone doubt the verisimilitude of the acclaimed “Mayhem” advertising campaign on behalf of Allstate Insurance Company, this insurance-coverage dispute presents an object lesson in how life imitates art. On May 30, 2011, a Dodge Stratus owned by Richard Smits burst into flames while parked in a garage of a condominium complex. By the time the fire was finally extinguished, it had not only destroyed the car, but also caused significant damage to the condominium complex. In the wake of the fire, Plaintiff Pioneer State Mutual Insurance Company (“Pioneer”), which insured Smits’s car, reimbursed Smits for the loss of the vehicle and paid hundreds of thousands of dollars to the condominium complex to cover the fire damage. Pioneer then stepped into the shoes of Smits and the condominium complex to seek full recovery from Defendant Bileth Services, Inc. (“Bileth”), which had installed a replacement engine in Smits’s Dodge Stratus one year prior to the fire. At this early stage, the Court shall grant summary disposition in part to Bileth under MCR 2.116(C)(8), but the Court shall permit Pioneer to amend its complaint to set forth its potentially viable theories.

I. Factual Background

Although Defendant Bileth has requested summary disposition under MCR 2.116(C)(8) and (10), its arguments rest upon the allegations in Plaintiff Pioneer's complaint, so the Court can assess the motion under MCR 2.116(C)(8).¹ "A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint." Maiden v Rozwood, 461 Mich 109, 119 (1999). Thus, all "well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant." Id. As a result, the Court must limn the facts from Pioneer's complaint.

In June 2010, Richard Smits and his daughter, Jennifer, paid Defendant Bileth to install a new engine in Smits's 2004 Dodge Stratus. See Complaint, ¶¶ 10-11. Approximately one year later, on May 30, 2011, while the Stratus was parked in a garage at a condominium complex owned by the Commons at Sierrafield, the "vehicle's engine caught on fire." See id., ¶ 5. The fire not only caused "significant damage to the motor vehicle, resulting in a total loss[.]" see id., ¶ 6, but also produced "significant damage to the four unit condominium complex . . . owned by Commons at Sierrafield," which "submitted a claim for property protection insurance benefits." See id., ¶ 7. Consequently, Pioneer paid Smits for the Stratus and reimbursed the Commons at Sierrafield for all of the damages to the condominium complex. See id., ¶ 8.

On April 8, 2013, Plaintiff Pioneer filed this action against Defendant Bileth, contending that the fire that caused so much damage resulted from Bileth's faulty installation of the engine in Smits's Stratus. See Complaint, ¶¶ 12-13. Pioneer's complaint, which contains a passel of claims sounding

¹ Neither side has attached affidavits, depositions, or similar materials to its briefs, so analysis under MCR 2.116(C)(8) seems much more appropriate than review pursuant to MCR 2.116(C)(10), which involves testing "the factual sufficiency of the complaint" through consideration of "affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties." See Maiden v Rozwood, 461 Mich 109, 120 (1999).

in both tort and contract, demands recovery of all sums paid in property protection benefits pursuant to the no-fault insurance policy that Pioneer had issued to Smits. In response, Bileth filed a motion for summary disposition on October 3, 2013, asserting that Pioneer has no basis for proceeding on any of its claims. Therefore, the Court must determine at this early stage in the case whether Pioneer can invoke equitable subrogation to pursue recovery from Bileth for the sums paid to Smits and the Commons at Sierrafield to cover the costs of the fire damage.

II. Legal Analysis

Defendant Bileth has moved for summary disposition pursuant to MCR 2.116(C)(8), which permits the Court to grant relief “where the claims alleged are ‘so clearly unenforceable as a matter of law that no factual development could possibly justify recovery.’” See Maiden, 461 Mich at 119. In requesting summary disposition, Bileth has left the issue of causation for another day and focused entirely upon Plaintiff Pioneer’s ability to offload its obligations by recovering sums it paid on losses resulting from the fire that started in Richard Smits’s Dodge Stratus. Thus, the Court’s analysis turns upon the interplay between Pioneer’s obligations as an insurer under the Michigan No-Fault Act and its right to proceed as a subrogee of Smits and the Commons at Sierrafield.

A. The Michigan No-Fault Act.

Citing the Michigan No-Fault Act, MCL 500.3101, *et seq*, Defendant Bileth contests Plaintiff Pioneer’s effort to shift liability for the fire-related losses that, according to Bileth, fall squarely upon Smits’s no-fault insurer. Under the No-Fault Act, an insurer must pay property protection benefits “for accidental damage to tangible property arising out of the ownership, operation, maintenance, or use of a motor vehicle as a motor vehicle” in most instances. MCL 500.3121(1). Pioneer tries

to free itself of this liability under the No-Fault Act by arguing that the parked Stratus was not being used as a motor vehicle at the time of the fire, but our Court of Appeals has held in published and unpublished decisions alike that a spontaneous vehicle fire resulting in property damage falls within the ambit of the No-Fault Act. See, e.g., Cincinnati Ins Co v Pennsylvania Gen Ins Co, 209 Mich App 379, 380, 384 (1995) (vehicle caught fire while parked in garage attached to house that burned); State Farm Fire & Cas Co v Auto-Club Ins Ass'n, No 194426, slip op at 3 (Mich App June 9, 1998) (unpublished decision) (home damaged by fire when truck parked in carport caught fire). Therefore, because Smits's car was being used "as a motor vehicle" when it burst into flames, Pioneer bore an obligation to pay property protection benefits for the resulting loss. See MCL 500.3121(1).

To be sure, the obligation prescribed by MCL 500.3121(1) does not require payment for any property damage "that occurs within the course of a business of repairing, servicing, or otherwise maintaining motor vehicles." See MCL 500.3121(1). But that exception, which applies to damages that occur in vehicle-repair shops, see Universal Underwriters Inc Group v Auto Club Ins Ass'n, 256 Mich App 541, 545-547 (2003), has no application to damage to property that occurs away from the vehicle-repair shop long after the repairs have been completed and the vehicle returned to its owner. Likewise, although the No-Fault Act exempts vehicle-insurance providers from liability for damages to property owned by the insured (or the insured's live-in relative) if that property is covered by "a property protection insurance policy," see MCL 500.3123(1)(b); Cincinnati Ins, 209 Mich App at 380-384, Richard Smits had no property protection insurance policy for the condominium complex, so the so-called household exclusion from MCL 500.3123(1)(b) does not apply in this case. In sum, the No-Fault Act rendered Plaintiff Pioneer principally responsible for the loss caused by the fire that began in the engine of Smits's parked Stratus.

B. Subrogation.

Our Supreme Court has noted that “[e]quitable subrogation is a legal fiction through which a person who pays a debt for which another is primarily responsible is substituted or subrogated to all the rights and remedies of the other.” Auto-Owners Ins Co v Amoco Production Co, 468 Mich 53, 59 (2003). “When an insurance provider pays expenses on behalf of its insured, it is not doing so as a volunteer.”² Id. Accordingly, the insurance provider ordinarily can step into the shoes of its insured and the “nature of the claim asserted by the subrogee is determined by the nature of the claim that the subrogor would have had.” Id. Significantly, “the subrogee acquires no greater rights than those possessed by the subrogor,” id., so Plaintiff Pioneer’s ability to recover from Defendant Bileth depends upon whether Smits and the Commons at Sierrafield could assert claims against Bileth. The Court recognizes that Pioneer has paid at least \$329,232.20 on the loss resulting from the fire in the engine of the Stratus owned by Smits, see Complaint, ¶ 8, so the Court simply must decide whether Smits and the Commons at Sierrafield would have viable claims against Bileth for that loss.

Plaintiff Pioneer’s negligence claim falls prey to the language of the No-Fault Act. “It is well settled that ‘an insurance carrier responsible for no-fault benefits may realize reimbursement from an insured’s third-party tort claim only in the following situations: (1) accidents occurring outside the state, (2) actions against uninsured owners or operators, or (3) intentional torts[.]’” Citizens Ins Co v Pezzani & Reid Equipment Co, Inc, 202 Mich App 278, 279 (1993). That is, “[s]ection 3116 of the no-fault act, MCL 500.3116, essentially limits a no-fault insurer’s right to reimbursement to

² Indeed, as our Court of Appeals has observed, “where an insurer, whose liability is arguably secondary to that of a primary insurer, pays the claim, it becomes subrogated to the rights of the insured” and may pursue a separate suit so that the insured “recovers for his injuries without delay while the insurers thereafter iron out their respective liabilities.” See Federal Kemper Ins Co v The Western Ins Cos, 97 Mich App 204, 208-209 (1980).

recoveries from motorist tortfeasors or for intentional torts[.]” see id. at 280, and “[t]he provisions of § 3116 explicitly apply to property protection coverage.” See id., citing MCL 500.3127. “None of the circumstances that allow reimbursement under § 3116 are involved in this case.” See id. “The accident at issue did not occur out of state or involve either an uninsured motorist or an intentional tort.”³ As a result, Pioneer “may not seek reimbursement for property protection benefits paid in this case” on a tort theory because neither its subrogor, *i.e.*, Smits, nor the Commons at Sierrafield could pursue any tort claim in light of the No-Fault Act, MCL 500.3116 & 500.3127. See Citizens Ins, 202 Mich App at 278.

Plaintiff Pioneer’s counts for breach of contract, breach of warranties, and violations of both the Motor Vehicle Service and Repair Act (“MVSRA”), MCL 257.1301, *et seq*, and the Michigan Consumer Protection Act (“CPA”), MCL 445.901, *et seq*, require the Court to differentiate between the legal claims available to Smits and the causes of action available to the Commons at Sierrafield. Because Smits took his Stratus to Defendant Bileth and paid for the installation of a new engine, he enjoys privity that enables him to assert claims against Bileth that sound in contract. Moreover, he can advance claims under the MVSRA based upon the “contractual relationship between” Smits and Bileth, see Hengartner v Chet Swanson Sales, Inc, 132 Mich App 751, 758 (1984), and the CPA by dint of his status as a “person who suffer[ed] loss as a result of a violation of” the CPA. See MCL 445.911(2). Therefore, as Smits’s subrogee, Pioneer can seek recovery from Bileth for damages to the Stratus.

³ Plaintiff Pioneer suggests that Defendant Bileth may have committed an intentional tort, but such an argument has no merit. Bileth installed an engine in June 2010, see Complaint, ¶ 10, and the car in which Bileth installed that engine had no problems for an entire year until the fire occurred on May 30, 2011. Id., ¶ 4. If Bileth’s acts can be deemed an intentional tort, every act of defective workmanship can potentially be characterized as an intentional tort if it suits the plaintiff’s purposes.

Plaintiff Pioneer’s demand for recovery from Defendant Bileth for damages suffered by the Commons at Sierrafield tests the outer limits of subrogation under Michigan law. Specifically, the Commons at Sierrafield had no involvement in the commercial transaction between Smits and Bileth for the installation of a replacement engine in Smits’s Dodge Stratus, so the Commons at Sierrafield lacks the privity required to support a claim against Bileth for breach of contract. See National Sand, Inc v Nagel Construction, Inc, 182 Mich App 327, 331 (1990). Similarly, the lack of “a contractual relationship between” the Commons at Sierrafield and Bileth forecloses relief under the MVSRA. See Hengartner, 132 Mich App at 758. Because a subrogee such as Pioneer “acquires no greater rights than those possessed by the subrogor,” see Auto-Owners, 468 Mich at 59, and the Commons at Sierrafield cannot obtain recovery from Bileth under a breach-of-contract theory or the MVSRA, Pioneer’s claims against Bileth for breach of contract and violation of the MVSRA cannot survive Bileth’s motion for summary disposition under MCR 2.116(C)(8).⁴

The claim in Count Four of the complaint for breach of express and implied warranties can withstand Defendant Bileth’s summary-disposition request under MCR 2.116(C)(8). Unlike claims for breach of contract, breach-of-warranty claims do not require privity, even in cases that involve true strangers to the underlying commercial transactions. Our Supreme Court first eliminated privity as a requirement in cases of vertical transactions, freeing ultimate consumers to sue manufacturers

⁴ Plaintiff Pioneer cannot avoid this result through a double-subrogation theory by asserting the rights of the Commons at Sierrafield against its own insured, Richard Smits. “[I]n an action in which the plaintiff seeks property protection benefits arising out of the ownership, maintenance, or use of a motor vehicle the insurer, and not the insured, is the proper party defendant to the action.” Matti Awdish, Inc v Williams, 117 Mich App 270, 275 (1982). Because the “insurer is liable to pay benefits for property damage caused by its insured[,]” see id., Pioneer – as subrogee of the Commons at Sierrafield – cannot augment its rights *vis-a-vis* Bileth by relying upon the privity of contract that exists between its insured, *i.e.*, Smits, and Bileth.

in situations where middlemen handled goods in a supply chain. See Hill v Harbor Steel & Supply Corp, 374 Mich 194, 201 (1965), citing Spence v Three Rivers Builders & Masonry Supply, Inc, 353 Mich 120 (1958). Then, in the fullness of time, our Supreme Court completely discarded privity as a requirement for breach-of-warranty claims, reasoning that Michigan jurisprudence had put an end “to the defense of no privity, certainly as concerns an innocent bystander” who “thus injured should have a right of action against the manufacturer on the theory of breach of warranty as well as upon the theory of negligence.” Piercefield v Remington Arms Co, Inc, 375 Mich 85, 98 (1965). Today, although the law on this subject has been muddied a bit,⁵ the rule remains that privity need not be established as an element of a claim for breach of an implied warranty. See Heritage Resources, Inc v Caterpillar Financial Resources Corp, 284 Mich App 617, 637 (2009). In contrast, privity must exist in order to pursue a claim for breach of an express warranty. See id. at 637 n12. Accordingly, the Court concludes that Pioneer – as the subrogee of the Commons at Sierrafield – may proceed on a claim for breach of implied, but not express, warranties against Bileth.

Finally, the CPA claim in Count Five of the complaint can only survive by a tortured reading of that Act. “The intent of the [CPA] is ‘to protect consumers in their purchases of goods which are primarily used for personal, family or household purposes.’” Zine v Chrysler Corp, 236 Mich App 261, 271 (1999). The replacement engine installed by Defendant Bileth may fall within this broad concept, but the transaction involving that installation occurred between Richard Smits and Bileth;

⁵ In 2008, our Court of Appeals rendered a split decision in which the majority reaffirmed “that in a case involving an innocent bystander with no privity of any sort pursuing a breach-of-warranty claim against a manufacturer, ‘[t]he fact is that Michigan, for abundantly worthy reasons, has eliminated lack of privity as a defense to actions as at bar’” Davis v Forest River, Inc, 278 Mich App 76, 87 (2008), quoting Piercefield, 375 Mich at 99. That decision, however, ultimately was vacated by our Supreme Court, see Davis v Forest River, Inc, 485 Mich 941 (2009), which did not mention the subject of privity with respect to claims for breach of warranty.

the Commons at Sierrafield had nothing to do with that transaction. As a general matter, the CPA excludes from its coverage all those “not a ‘party to the transaction’” underlying the CPA claim. See Diehl v R L Coolsaet Constr Co, No 253596, slip op at 2 (Mich App Nov 29, 2005) (unpublished decision), quoting MCL 445.903(1)(n) & (y). To be sure, the CPA states that “a person who suffers loss as a result of a violation of this act may bring an action to recover actual damages or \$250.00, whichever is greater, together with reasonable attorney fees.” See MCL 445.911(2). This capacious authorization of a cause of action seemingly empowers the Commons at Sierrafield – or its subrogee – to advance a claim against Bileth under the CPA if the loss occasioned by the fire resulted from some violation of the CPA. But such a cause of action seems so unmoored from the central purpose of the CPA as to be utterly untenable. Consequently, the Court shall grant summary disposition with respect to the CPA claim pursuant to MCR 2.116(C)(8), but permit Pioneer to amend its complaint in an effort to sharpen its theory under the CPA. See MCR 2.116(I)(5); Ormsby v Capital Welding, Inc, 471 Mich 45, 52-53 (2004).

III. Conclusion

Although the Court cannot yet clean up the complaint to its satisfaction, the Court can grant summary disposition to Defendant Bileth under MCR 2.116(C)(8) for once and for all with respect to Plaintiff Pioneer’s claim for negligence in its entirety as well as Pioneer’s claims as subrogee of the Commons at Sierrafield for breach of contract, breach of express warranties, and violation of the MVSRA . The Court also shall grant summary disposition to Bileth on the CPA claim advanced by Pioneer as subrogee of the Commons at Sierrafield, but Pioneer shall be afforded leave to amend that claim within 14 days of the entry of this opinion and order. In all other respects, the motion for

summary disposition filed by Bileth must be denied pursuant to MCR 2.116(C)(8). Thus, the parties may proceed with discovery, and the Court must await motions for summary disposition under MCR 2.116(C)(10) before further refining the issues in this case.

IT IS SO ORDERED.

Dated: January 7, 2014



HON. CHRISTOPHER P. YATES (P41017)
Kent County Circuit Court Judge