STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS

COUNTY OF ANDERSON)

Daryhl Taylor, as the Personal Representative of the Estate of Ruth T. Simpson,

Plaintiff,

vs.

Johnson & Johnson Preferred Financing, ProCentury Insurance Company, FINCO Premium Finance Co., Inc., and Carolina Independent Automobile Dealers Association, Dealers Risk and Insurance Services, Independent Dealers Insurance Management,

Defendants.

Civil Action No.: 2014-CP-04-0398

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND DENYING DEFENDANT PROCENTURY'S AND DEFENDANT FINCO'S MOTIONS FOR SUMMARY JUDGMENT

THIS Matter is before the Court on similar motions for summary judgment filed by Defendant ProCentury Insurance Company's and Defendant FINCO Premium Finance Co., Inc.'s. Plaintiff Darhyl Taylor, as personal representative of the estate of Ruth T. Simpson, filed a counter-motion for summary judgment. The issue before the Court is whether an insurance policy financed by a premium finance company was properly cancelled. Defendants seek a declaration that the automobile liability policy was cancelled before the date of the accident which killed Ruth T. Simpson. The Plaintiff seeks a declaration that the policy was in full force and effect at the time of the accident.

I heard the motions in open court at which time all parties in this matter appeared through their attorneys. I have reviewed the file, all submissions, the applicable law, and have considered the arguments of counsel. All submissions to the court are incorporated into the record. Based upon the record and applicable law, I hereby grant Plaintiff Darhyl Taylor's motion and deny Defendant ProCentury's and Defendant FINCO's motions for the reasons explained below.

I. STANDARD OF REVIEW

Under Rule 56(c), SCRCP: summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Laurens Emergency Med. Specialists v. M.S. Bailey & Sons Bankers,* 355 S.C. 104, 584 S.E.2d 375 (2003). In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party. *Sauner v. Public Serv. Auth.,* 354 S.C. 397, 581 S.E.2d 161 (2003); *Hendricks v. Clemson Univ.,* 353 S.C. 449, 578 S.E.2d 711 (2003). If triable issues exist, those issues must go to the jury. *Baril v. Aiken Reg'l Med. Ctrs.,* 352 S.C. 271, 573 S.E.2d 830 (Ct.App.2002).

Summary judgment is appropriate where the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Russell v. Wachovia Bank, N.A.,* 353 S.C. 208, 578 S.E.2d 329 (2003); Rule 56(c), SCRCP. When plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted. *Hedgepath,* 348 S.C. at 355, 559 S.E.2d at 336; *Pye v. Aycock,* 325 S.C. 426, 480 S.E.2d 455 (Ct.App.1997). The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder. Dawkins v. Fields, 354 S.C. 58, 580 S.E.2d 433 (2003); George v. Fabri, 345 S.C. 440, 548 S.E.2d 868 (2001).

PROCEDURAL HISTORY AND UNDISPUTED FACTS

On June 17, 2011, Ruth T. Simpson was killed in an accident in Anderson County, South Carolina involving a vehicle owned by Autos Nex Store, LLC and driven by Mazen A. Zein.

Plaintiff submitted a claim for payment under Autos Nex's liability policy with Defendant ProCentury (the "Policy"). On October 19, 2011, Defendant ProCentury denied the claim asserting that the Policy had been canceled on May 31, 2011 for non-payment of premium.

Plaintiff filed a civil action against Autos Nex and Mazen Zein in the Anderson Court of Common Pleas. Following a trial, an order and judgment was entered on September 17, 2013 in *Darhyl Taylor, as Personal Representative for the Estate of Ruth T. Simpson, v. Mazen A. Zein and Autos Nex Store, LLC* (C/A No. 2011-CP-04-02407) against Autos Nex Store, LLC in the amount of $500,000 and in favor of Plaintiff Taylor for his wrongful death and survival action claims arising from the Accident. Plaintiff thereafter filed a declaratory judgment action in the above captioned case seeking a declaration that Autos Nex's Policy with Defendant Procentury was in force on the date of the accident. Defendant Procentury filed a counterclaim requesting that the court declare that the Policy was cancelled prior to the date of the Accident.

Autos Nex obtained the Policy, with an effective date of August 10, 2010, through a premium finance security agreement with Defendant FINCO, a premium service company. (Plaintiff's Ex. 1). That agreement contains a power of attorney permitting Defendant FINCO to cancel the insurance contract.

The parties submitted into the record letters entitled "Notice of Intent to Cancel" and "Cancellation Notice" that the Defendants claim are the cancellation notices sent to Autos Nex to cancel the Policy. Defendant FINCO prepared the notices and included a line of text that denotes the purported date of mailing. The notice of intent to cancel contains a mailing date of May 16, 2011. (Plaintiff's Ex. 3). The cancellation notice contains a mailing date of May 26, 2011, and purports to state that the effective date of cancellation is May 31, 2011. (Plaintiff's Ex. D). The cancellation notice lists the insured, the policy agent Defendant Dealer's Risk and Insurance

Service, but not the insurance company Defendant Procentury. Additional cancellation correspondence was also submitted into evidence, this time addressed to the managing agent for Defendant Procentury and dated for July 28, 2011. (Plaintiff's Ex. 5).

Between May 26, 2011 and June 17, 2011, the date of the accident, the Defendants took no further action to effectuate the cancellation. Specifically, it was not until July 29, 2011, almost a month after the accident, that ProCentury created the cancellation endorsement reflecting a cancellation date of May 31, 2011 and calculating a return premium of $381.00. (Plaintiff's Ex. 7). Defendant Procentury thereafter returned the premium refund to Defendant FINCO by August 17, 2011. (Plaintiff's Ex. 2). On that same date, Defendant FINCO issued a check refunding the premium, minus agency fees, to Autos Nex for $166.89. (Plaintiff's Ex. 8). All told, sixty-one days lapsed between the date of the accident and return of the premium to Autos Nex.

DISCUSSION

S.C. Code § 38-39-90 is the exclusive means for cancellation of an insurance contract by a premium service company. *Bowman v. State Roofing Co.*, 365 S.C. 112, 121 (2005). An insurance contract "may not be canceled by the premium service company unless the cancellation is effectuated in accordance with this section." § 38-90-90(a). Any violation of this section therefore invalidates cancellation. *Id.* citing *South Carolina Ins. Co. v. Brown*, 280 S.C. 574, 313 S.E.2d 348 (Ct. App. 1984).

Failure to return unearned premium prior to the date of the accident

Plaintiff moved for summary judgment arguing that the policy remained in force until the Defendants returned the unearned premium on August 17, 2011. Defendants maintain that the timing of return of the unearned premium is a mere ministerial act that does not affect cancellation. Section 38-39-90 requires the following when a policy is cancelled:

(e) If an insurance contract is canceled, the *insurer shall return whatever gross unearned premiums are due under the insurance contract to the premium service company* which financed the premium for the account of the insured. The gross unearned premiums due on personal lines insurance contracts financed by premium service companies must be computed on a pro rata basis.

(f) *If the crediting of return premiums to the account of the insured results in a surplus over the amount due from the insured, the premium service company promptly shall refund the excess to the insured or the agent of record.* A refund is not required if it amounts to less than five dollars.

(Emphasis added.)

The cardinal rule of statutory construction is to ascertain and effectuate the legislative intent whenever possible. *Joint Legislative Comm. v. Huff*, 320 S.C. 241, 464 S.E.2d 324 (1995). If a statute's language is plain and unambiguous and conveys a clear and definite meaning, there is no occasion for employing rules of statutory interpretation and the court has no right to look for or impose another meaning. *City of Columbia v. ACLU of S.C., Inc.*, 323 S.C. 384, 475 S.E.2d 747 (1996).

Our Court of Appeals addressed the importance of the return of the refund of a premium when cancelling a policy of insurance obtained through a premium service company in *Bowman v. State Roofing Co.* 365 S.C. 112, 616 S.E.2d 699 (2005). In *Bowman*, the trial court found that the cancellation of an insurance policy was invalid because the insurer failed to return the unearned premium as required under S.C. Code § 38-39-90(e). The insurer argued on appeal that the failure to return the premium was an accounting matter that did not invalidate cancellation. In affirming the decision of the trial court, the court held that "a return of unearned premiums as required under § 38-39-90(e) is in effect part of Carrier's obligation under its policy and **is therefore a condition precedent to an effective cancellation.**" (Emphasis added). Further, the

court held that the return of the premium subsection (f) requires the premium service company to credit any return of unearned premiums to the account of the insured and "promptly refund" any surplus over five dollars. "This provision works to the benefit of the insured and is an added protection ensuring notice to the insured." *Id at* 122, 704 (2005). Therefore, cancellation is not effective unless and until the premium is refunded.

Here, it is undisputed that premium was not refunded until August 17, 2013. (Plaintiff's Ex. 8). This Court finds as a matter of law that the policy was not cancelled until the premium was refunded on that date. Therefore, the Policy is in effect on June 17, 2013, the date of the accident.

Defendants ProCentury and FINCO argue that this case is distinguishable from *Bowman* because they returned the premium whereas the insurer in *Bowman* never returned the premium. Defendants' argument fails to recognize that the return of the premium is a condition precedent to cancellation. Additionally, they ignore the promptness requirement for the return of the premium in subsection (f) of the statute that provides the insured additional notice of cancellation. As a practical matter, accepting the Defendants' argument would allow an insurer and premium service company to wrongfully withhold the return of an unearned premium and avoid paying under a policy. An insurer and premium service company could simply refund the premium after a claim is received and backdate the cancellation to the date of the cancellation notice, even after significant delay. Such a reading is contrary to the clear and unambiguous language of the statute and the holding in *Bowman. See Strother v. Lexington County Recreation Comm'n*, 332 S.C. 54, 62, 504 S.E.2d 117, 121 (1998) (the cardinal rule of statutory construction is for a court to ascertain the intent of the legislature and to give it effect); *Rosenbaum v. S-M-S*

32, 311 S.C. 140, 143, 427 S.E.2d 897, 898 (1993) (a court should give a statute a practical, reasonable, and fair interpretation consonant with the purpose, design and policy of lawmakers.)

Mailing of Notices

Plaintiff moved for summary judgment arguing that the cancellation of the Policy is invalid under S.C Code 38-39-90 because the cancellation notice was delivered to the insured less than fifteen days after the mailing of the notice of the intent to cancel. Additionally, Plaintiff argues that there is no proof of mailing as required under the statute. Because this court finds the first issue dispositive of Plaintiff's motion, the court need not address the latter issue and makes no determinations as to whether the Defendants provided sufficient proof of mailing.

S.C Code 38-39-90 mandates the following timeline for the mailing of notices:

> (b) The premium service company shall deliver to the insured *at least ten days' written notice of its intent to cancel the insurance contract* if there is a default. This notice must be mailed or delivered not more than ten days before the due date.
>
> (c) *Not less than five days after the expiration of the notice required pursuant to the provisions of subsection (b),* the premium service company may after that time request in the name of the insured cancellation of the insurance contract *by delivering to the insurer a notice of cancellation.* The insurance contract must be canceled as if the notice of cancellation had been submitted by the insured himself, but without requiring the return of the insurance contract. The premium service company also *shall deliver a notice of cancellation to the insured at his last address as provided for in its records by the date the notice of cancellation is delivered to the insurer.* It is sufficient to give notice either by delivering it to the person or by depositing it in the United States mail, postage prepaid, addressed to the last address of the person. Notice delivered in accordance with the provisions of this section is sufficient proof of delivery. If a notice of cancellation effected in accordance with this chapter is issued, a nonrefundable cancellation charge is permitted. The amount of the cancellation charge must be filed with and promulgated by the department.

(Emphasis added). The statute requires a "five day waiting period" after the expiration of the notice of intent to cancel before the premium service company may deliver to the insurance company and the insured the notice of cancellation. *S. Carolina Ins. Co. v. Brown*, 280 S.C. 574, 575-76, 313 S.E.2d 348, 348-49 (Ct. App. 1984)

Assuming that Defendant FINCO mailed the notices on stated dates of mailing, Defendant FINCO failed to comply with five day waiting period. The notice of intent contains a mailing date of May 16, 2011, and would have expired on May 26, 2011. (Plaintiff's Ex. 3). The cancellation notice is dated for March 26, 2011. (Plaintiff's Ex. 4). In *S. Carolina Ins. Co. v. Brown*, our Court of Appeals held a cancellation invalid because the cancellation notice was mailed the day after the expiration of the notice of intent to cancel. *Id.* Consequently, Defendant FINCO failed to comply with the waiting period required by the statute, and therefore the Policy was not canceled.

Additionally, the record shows that the initial cancellation notice was not addressed to the insurance company. Due to the failure of one or more of the other named Defendants, the cancellation notice was not delivered to Defendant ProCentury until July 28, 2011, some 41 days after the accident. Therefore cancellation notice was not delivered soon enough to cancel the policy before the accident. *See Brown*, 280 S.C. at 576, 313 S.E.2d at 349.

ORDER

Viewing the evidence as contained in the record and all inferences which can be reasonably drawn from the evidence in the light most favorable to the non-moving parties, this Court finds as follows:

1. Plaintiff's motion for summary judgment is granted and therefore the Policy with Defendant ProCentury was in force at the time of the accident on June 17, 2011.

2. Defendant ProCentury's motion for summary judgment and Defendant FINCO's motion for summary judgment are denied.

Accordingly, and based upon the foregoing, it is therefore

ORDERED, ADJUDGED AND DECREED that Plaintiff's Motion for Summary Judgment be, and is hereby granted, and Defendants' Motions for Summary Judgement be, and are hereby denied.

IT IS SO ORDERED.

J. Cordell Maddox, Jr., Judge
Tenth Judicial Circuit

3/24, 2016
Anderson, South Carolina

A TRUE COPY
MAR 30 2016
ANDERSON CLERK OF COURT

FILED-CLERK'S OFFICE
ANDERSON SC
2016 MAR 25 PM 3:30
COMMON PLEAS AND
GENERAL SESSIONS