IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

TANAE JOHNSON and DEANTHONY PIERCE,	)	
	)	C.A. No. 08C-12-013 JTV
Plaintiffs,	)	
	)	
v.	)	
	)	
NATIONWIDE ASSURANCE COMPANY, a Delaware corporation,	)	
	)	
Defendant.	)	

Submitted: July 8, 2011
Decided: September 21, 2011

William D. Fletcher, Jr., Esq., Schmittinger & Rodriguez, Dover, Delaware. Attorney for Plaintiffs.

Robert J. Leoni, Esq., Shelsby & Leoni, Stanton, Delaware. Attorney Defendant.

Upon Consideration of Defendant's
Motion For Summary Judgment
GRANTED

VAUGHN, President Judge

Johnson, et al. v. Nationwide
C.A. No. 08C-12-013
September 21, 2011

ORDER

Upon consideration of the Motion for Summary Judgment of defendant Nationwide Assurance Company, the opposition of plaintiffs Tanea Johnson and Deanthony Pierce, and the record of the case, it appears that:

1. On July 24, 2002, the plaintiffs were involved in a car accident with James Bennett and Johnny Wilson. They sued both Bennett and Wilson and obtained judgments against them – $5,000 for Deanthony Pierce and $10,000 for Tanea Johnson – on May 20, 2005.

2. On May 15, 2002, the defendant issued an insurance policy to Mr. Bennett for the vehicle he was operating at the time of the accident. Mr. Bennett was the only named insured, but a policy provision defined the insured as "you and your spouse." The application and the declarations page indicated he was married. It would appear that after the policy was issued a representative of the defendant contacted Mr. Bennett to obtain information about his wife. Another representative of the defendant, who was not involved in the transaction, testified at a deposition that the information sought would have been her name, date of birth, and driver's license number. The representative also testified that the information would have been sought to know whether or not she was a driver in the household or whether she needed to be rated on the policy or not and to make sure that she qualified as a driver. On June 24, 2002, exactly one month before the accident, the defendant sent a letter to Mr. Bennett cancelling the policy effective July 7, 2002. Notes in the defendant's file, which appear to have been made contemporaneously at the time, state that the policy was cancelled as a result of Mr. Bennett's refusal to provide information about

his wife. The notes further state that Mr. Bennett did not want his wife excluded from the policy. As a result of the cancellation, the defendant denied coverage for the July 24 accident. The plaintiffs now bring this suit seeking to recover the amount of their judgment against Mr. Bennett from the defendant.

3. The defendant contends that this is a breach of contract/reformation claim and that the plaintiffs have no standing to assert such a claim; that there can be no recovery because the insurance contract was cancelled before the accident; and that the plaintiffs' claims are barred by the three year statute of limitations at 10 *Del. C.* § 8106.

4. In response, the plaintiffs contend that this is not an action for breach of contract/reformation, but is, instead, an action on a judgment – the judgment the plaintiffs obtained against Mr. Bennett; that when the defendant attempted to cancel the Bennett policy, it failed to follow procedures required under 18 *Del. C.* § 3909; that because the defendant failed to follow required procedures, the cancellation was ineffective and the policy remained in effect and was in effect at the time of the accident; that since this is an action on a judgment, there is no statute of limitations but the 20 year presumption of payment; and that even if the three year statute applied, it has not run since the defendant failed to provide notice of the statute of limitations under 18 *Del. C.* § 3914.

5. Summary judgment should be granted when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.[1] The

[1] Super. Ct. Civ. R. 56(c).

moving party bears the burden of establishing the non-existence of material issues of fact.[2] If a motion is properly supported, the burden shifts to the non-moving party to establish the existence of material issues of fact.[3] In considering the motion, the facts must be viewed in the light most favorable to the non-moving party.[4] Thus, the court must accept all undisputed factual assertions and accept the non-movant's version of any disputed facts.[5] Summary judgment is inappropriate "when the record reasonably indicates that a material fact is in dispute or if it seems desirable to inquire more thoroughly into the facts in order to clarify the application of law to the circumstances."[6]

6. The statute which the plaintiffs rely on, 18 *Del. C.* § 3909, provides that an insurance company can exclude, cancel or refuse to renew coverage as to designated individuals and sets forth a procedure to be followed for doing so. It provides, in pertinent part, that cancellation as to a designated individual is subject to the applicable provisions of § 3903 through § 3907; that the notice provisions of those sections shall apply equally to the exclusion, cancellation or refusal to renew coverage as to a designated individual or individuals; that the insurer must offer to

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[2] *Gray v. Allstate Ins. Co.*, 2007 WL 1334563, at *1 (Del. Super. May 2, 2007).

[3] *Id.*

[4] *Pierce v. Int's Ins. Co. Of Ill.*, 671 A.2d 1361, 1363 (Del. 1996).

[5] *Merrill v. Crothall-American, Inc.*, 606 A.2d 96, 99-100 (Del. 1992).

[6] *Mumford & Miller Concrete, Inc. v. New Castle County*, 2007 WL 404771, at *4 (Del. Super. Jan. 31, 2007).

continue to insure the remaining persons covered by the policy with the exclusion of the person whose driving record would have justified cancellation or non-renewal, and that the insurer must offer the excluded driver a policy at rates commensurate with the excluded driver's driving record.

7. I conclude that the chronology of events in this case never progressed to the point where 18 *Del. C.* § 3909 came into play. If Mr. Bennett had given the defendant his wife's name and the other information which the defendant sought, and if the defendant then sought to cancel as to her because of her record, then § 3909 would become applicable. At that point, the defendant would be required to offer to continue to insure Mr. Bennett. It would also have been required to offer his wife a policy of her own at rates commensurate with her driving record. However, the cancellation which occurred in this case was not because of any conduct on the part of Mr. Bennett's wife or her driving record. The defendant, it appears, did not even have her name. I find that the policy was cancelled because Mr. Bennett refused to cooperate in completing the application process. Under these circumstances, I conclude that the cancellation did not occur under § 3909 and that that section does not apply.

8. I also find that the provisions of §§ 3903 to 3907 do not apply in this case. 18 *Del. C.* § 3903(b) provides that §§ 3903 to 3907 are not applicable where the policy has been in effect less than 60 days at the time notice of the cancellation was mailed. That provision applies here. § 3903(b) was not involved in *Liberty*

Mutual Insurance Company v. Progressive Classic Insurance Company,[7] a case relied upon by the plaintiffs, and that case is, therefore, distinguishable.

9. For the foregoing reasons, I find that the policy was lawfully cancelled and was not in effect at the time of the accident. Therefore, the defendant's Motion for Summary Judgment is ***granted***.[8]

IT IS SO ORDERED.

/s/ James T. Vaughn, Jr.

cc: Prothonotary
Order Distribution
File

[7] 2007

[8] Since I decide the case on the cancellation issue, I find it unnecessary to address the other issues raised.