RENDERED: OCTOBER 8, 1999; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-001121-MR

SAMUEL L. MITCHELL — APPELLANT

V.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE STEPHEN P. RYAN, JUDGE
ACTION NO. 97-CI-1545

MIDWEST MUTUAL INSURANCE CO.;
AMERICAN INDEPENDENT INSURANCE
CENTERS; and RICHARD BAKER — APPELLEES

OPINION AFFIRMING

* * * * * * * *

BEFORE: GUDGEL, Chief Judge; HUDDLESTON and KNOPF, Judges.

GUDGEL, CHIEF JUDGE: This is an appeal from a summary judgment entered by the Jefferson Circuit Court. Appellant Samuel L. Mitchell contends that the court erred by finding that a liability insurance policy, which he purchased from appellee Midwest Mutual Insurance Co. (Midwest), was validly canceled due to the nonpayment of premiums due. We disagree. Hence, we affirm.

It is undisputed that on or about April 19, 1996, Mitchell telephoned several insurance agencies, including

appellee American Independent Insurance Centers (American), concerning the purchase of a liability insurance policy providing coverage on a motorcycle he intended to purchase. After American quoted him the lowest premium, Mitchell went to American's offices and obtained from its employee, Theresa Cole, a written premium quote of $1,462.89 for a one-year policy which was to be underwritten by Midwest. Relying upon the quote, Mitchell obtained a loan and purchased the motorcycle. He then returned to American's offices, where he and Cole completed an application for insurance. Mitchell made a down payment on the premium due in the amount of $487.63, and Cole issued him temporary proof of insurance cards which were valid for a one-month period.

Several weeks later, Midwest sent Mitchell an insurance policy and a premium statement for a one-year period commencing April 19, 1996. However, the statement listed a total premium of $2,573.39, rather than the quoted amount of $1,462.89. Mitchell contacted Cole concerning the additional premium charged and she referred him to Lou Lyndon at Midwest, who in turn referred him back to Cole. Finally, Cole advised Mitchell that she would check into the matter and call him back. Mitchell claims that he told Cole he had received lower premium quotes from other insurers, and that if the premium charged him was correct, he wanted his initial premium payment refunded so that he could obtain less-expensive insurance elsewhere. According to Mitchell, Cole reassured him that the original quote was correct,

that his insurance was in force, and that he need not worry about the amount of the premium listed on the statement from Midwest.

After Mitchell received another statement from Midwest indicating that he owed a balance on the premium in the amount of $2,085.76, he again spoke with Cole and Lyndon. Mitchell claimed that he was reassured by Cole during the conversation that his insurance was still in force and that she would check into the matter, but that he did not hear from her again. Mitchell neither made nor tendered any additional premium payments.

On or about September 16, 1996, Mitchell's motorcycle was stolen. His subsequent claim for the loss under the Midwest policy was denied on the ground that the policy had been canceled due to the nonpayment of premiums due. This action alleging fraud, bad faith, and negligence followed. Subsequently, the trial court granted appellees a summary judgment, and this appeal followed.

First, Mitchell contends that a genuine issue of material fact existed as to whether he was mailed a notice of cancellation which precluded a summary judgment. We disagree.

A motorcycle is not a type of vehicle which can be covered by an automobile liability insurance policy. KRS 304.20-040(1)(a). Rather, it must be insured under a casualty insurance policy covering vehicles other than those described in KRS 304.20-040(1)(a). See KRS 304.5-070(1)(a). The cancellation of such a policy is governed by KRS 304.20-320(2), which states

that a policy providing casualty insurance may be canceled as follows:

> (a) A notice of cancellation of insurance subject to KRS 304.20-300 to 304.20-350 by an insurer shall be in writing, shall be delivered to the named insured or mailed to the named insured at the last known address of the named insured, shall state the effective date of the cancellation, and shall be accompanied by a written explanation of the specific reason or reasons for the cancellation; and
>
> (b) The notice of cancellation referred to in paragraph (a) of this subsection shall be mailed or delivered by the insurer to the named insured at least fourteen (14) days prior to the effective date of the cancellation if the cancellation is for nonpayment of premium or occurs within sixty (60) days of the date of issuance of the policy. Such notice of cancellation shall be mailed or delivered by the insurer to the named insured at least seventy-five (75) days prior to the effective date of the cancellation if the policy has been in effect more than sixty (60) days.

Here, the record includes a copy of a properly-addressed letter from Midwest to Mitchell, which was marked as having been mailed on June 10, 1996. The letter bore the caption of "notice of cancellation" and specified that it concerned a "motorcycle." The letter further advised Mitchell "in accordance with the terms and conditions of the mentioned policy that your insurance is canceled effective" June 27, 1996, "for non-payment of premium," but that coverage could be continued before then by paying the entire premium balance due of $2,085.76.

The record also includes, both in Midwest's response to Mitchell's first set of interrogatories and elsewhere, copies of a form which was inscribed with the heading of "CANCELLATION NOTICES MAILED 06-10-96 POST OFFICE RECEIPT." Listed beneath the caption of "INSURED'S NAME AND ADDRESS" on that sheet were the names and addresses of nine insureds, including Mitchell. Each of those entries included a notation regarding a twenty-cent fee, and the page was marked with both a June 10 postage meter stamp in the amount of $1.80 (i.e., nine times twenty cents) and a June 10 postmark.

The foregoing unrefuted evidence established that a cancellation notice was mailed to Mitchell on June 10, 1996, and there is no claim that Mitchell could adduce contrary evidence at a trial. Moreover, as KRS 304.20-320(2) does not require proof to be adduced to show that Mitchell or the Department of Transportation received the cancellation notice or the information contained therein, Mitchell's argument that a summary judgment could not be granted absent such proof is without merit. Further, contrary to Mitchell's argument, a different result is not compelled by our decision in Osborne v. Unigard Indemnity Co., Ky. App., 719 S.W.2d 737 (1986), as the court therein specifically noted that, unlike the matter now before us, its decision was not governed by KRS 304.20-320(2) because that statute became effective after the insured loss occurred.

Next, Mitchell contends that even if a notice of cancellation was mailed to him, a genuine issue of material fact

existed as to whether that notice was valid and effective. We disagree.

In the first place, contrary to Mitchell's contention, KRS 304.20-040(2) is not applicable herein since a motorcycle does not constitute a motor vehicle for purposes of that statute. More important, the notice of cancellation mailed to Mitchell complies with the requirements of KRS 304.20-320(2)(a) and (2)(b), as set out above. We therefore conclude that there was no genuine issue of material fact as to whether the notice of cancellation satisfied statutory requirements.

Further, there is no merit to Mitchell's contention that, pursuant to Kentucky Farm Bureau Insurance Co. v. Gearhart, Ky. App., 853 S.W.2d 907 (1993), a material issue of fact exists as to whether the notice of cancellation was ineffective for failing to adequately identify the vehicle to which it applied. In Gearhart, the insured had three separate automobile liability policies with the insurer. When Gearhart sold an Isuzu vehicle and purchased a Ford van, the insurer issued a temporary certificate of insurance on the Ford which bore the same policy number as that previously used for the Isuzu. Gearhart allegedly was told that he owed no premium for the Ford because of a credit due from the cancellation of insurance on the Isuzu. Although Gearhart subsequently received premium and cancellation notices, he made no payments since the notices specifically referred to the Isuzu rather than to the Ford. Subsequently, the Ford was involved in an accident and the insurer denied coverage based

upon a claim that the premiums due were not paid. A panel of this court, however, concluded that the cancellation notice failed to properly designate the covered vehicle and therefore was inadequate as a matter of law.

Here, by contrast, there is no suggestion of any confusion as to what vehicle was covered by the Midwest policy. The policy was new, it covered only the motorcycle, and the notice clearly referred to a "motorcycle." Further, there is no suggestion that Mitchell had either another motorcycle or another Midwest policy which could have been confused with those at issue. It follows, therefore, that there was no genuine issue of material fact as to whether the cancellation notice adequately designated the covered vehicle.

Finally, Mitchell contends that the court erred by failing to find that a genuine issue of material fact existed as to whether appellees were estopped to assert that the policy was canceled. We disagree.

Clearly, Midwest did not cancel Mitchell's policy without notice. Moreover, even if we assume without deciding for purposes of this opinion that Cole reassured Mitchell that the original quoted premium was correct, that he had coverage, and that he should not pay a higher premium, the fact remains that Mitchell paid only the initial one-third of the original quoted premium. Further, Mitchell stated in his deposition that since he paid one-third of the year's premium, "it would be logical to assume" that the policy was in effect for only one-third of the

year. Mitchell's claim did not arise until some five months after the initial one-third premium was paid, and Mitchell clearly was notified that the policy would expire on June 27 unless he paid the remainder of the premium due. Because Mitchell did not pay the additional sum, we conclude that appellees cannot be estopped to deny Mitchell coverage for his claim which arose on September 16.

For the reasons stated, the court's summary judgment is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

David S. Sprawls
Louisville, KY

BRIEF FOR APPELLEES:

Debbie D. Sandler
Louisville, KY