RENDERED: JUNE 8, 2001; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-001354-MR

JEFF GARRETT — APPELLANT

v.

APPEAL FROM MUHLENBERG CIRCUIT COURT
HONORABLE DAVID H. JERNIGAN, JUDGE
ACTION NO. 99-CI-00550

GRANGE MUTUAL CASUALTY COMPANY — APPELLEE

OPINION
REVERSING AND REMANDING
** ** ** ** **

BEFORE: BUCKINGHAM, EMBERTON, AND HUDDLESTON, JUDGES.

BUCKINGHAM, JUDGE: Jeff Garrett appeals from a summary judgment awarded by the Muhlenberg Circuit Court in favor of Grange Mutual Casualty Company. Because we believe there is a genuine issue of material fact to be resolved, we reverse and remand.

Grange Mutual issued an automobile insurance policy to Garrett which provided coverage from September 23, 1998, through September 23, 1999, on three vehicles owned by him. Garrett married on August 21, 1999, and he and his wife went to the Eaves Insurance Agency on August 23, 1999, for the purpose of putting Mrs. Garrett's name on the policy as a named insured. According to an affidavit filed by Garrett in this case, he asked an Eaves'

employee if the policy was up to date and if he owed any money. Garrett further stated in the affidavit that "the answer was that everything was paid up until September 23, 1999."

On the following day, one of Garrett's vehicles listed on the policy was involved in an accident and sustained damage. Grange denied coverage, claiming that the policy had lapsed on August 5, 1999, due to nonpayment of the premium. Garrett then filed a complaint seeking damages in the Muhlenberg Circuit Court.

It was undisputed that Garrett had not paid the premium on the policy. Grange filed a motion for summary judgment alleging that it had given proper and timely notice of the cancellation of the policy to Garrett. The motion was accompanied by a copy of a letter addressed to Garrett and dated July 31, 1999, which stated that the policy would be canceled on August 19, 1999, for nonpayment of the premium. A copy of a letter addressed to Garrett and dated August 20, 1999, confirming cancellation of the policy due to nonpayment of the premium was also attached to Grange's motion. In addition, affidavits from two Grange employees in Columbus, Ohio, were filed in support of the motion.

On May 3, 2000, an order was entered by the trial court that granted Grange's summary judgment motion and denied Garrett's. The order stated in pertinent part as follows:

> IT IS ORDERED AND ADJUDGED that the Motion of the Defendant for Summary Judgment is SUSTAINED since there is no coverage under Defendant's policy as said policy had lapsed for non-payment of premiums on August 19, 1999. As a matter of law, adequate notice of

> cancellation of the policy was mailed to Plaintiff. The case relied upon by the Plaintiff of Kentucky Farm Bureau Insurance Company v. Gearhart, Ky. App., 853 S.W.2d 907 (1993) is distinguishable and is not applicable law to the facts of this case.

This appeal by Garrett followed.

The main issue in this case is whether or not Grange mailed notice of its intent to cancel the policy to Garrett in the manner prescribed by Kentucky law. KRS[1] 304.20-040(3) provides as follows:

> No notice of cancellation of a policy to which subsection (2) of this section applies shall be effective unless mailed or delivered by the insurer to the named insured at least twenty (20) days prior to the effective date of cancellation; provided, however, that where cancellation is for nonpayment of premium, at least fourteen (14) days' notice of cancellation accompanied by the reason therefor shall be given. This subsection shall not apply to renewals.

KRS 304.20-040(9)(b) provides that "[p]roof of mailing of notice of cancellation or of intention not to renew or of reasons for cancellation or nonrenewal to the named insured at the address shown in the policy shall be sufficient proof of notice."

Garrett argues that the trial court erred in awarding summary judgment to Grange and finding as a matter of law that adequate notice of cancellation of the policy had been mailed to him. He asserts that there is, at the very least, a fact issue concerning whether Grange mailed the notice. He argues in this regard that Grange's motion was not adequately supported so as to warrant a summary judgment in its favor and that the affidavits

[1] Kentucky Revised Statutes.

in support of his response to the summary judgment motion clearly created a fact issue.

In support of Grange's motion, it attached the affidavit of Tamara Smith, an employee of Grange in Columbus, Ohio. In her affidavit, Smith made no mention of the cancellation notice being mailed to Garrett. She merely asserted that the policy did not provide coverage for Garrett's loss since it had lapsed five days before the accident. She further stated that no payment had been made to reinstate the policy.

Grange also submitted the affidavit of Earl Blair, an assistant vice-president of process accounting for Grange in Columbus, Ohio. He stated in his affidavit that Grange had mailed a notice of cancellation to Garrett on July 31, 1999, and a confirmation of cancellation to Garrett on August 20, 1999. He also stated in his affidavit as follows:

> 5. Grange mails thousands of notices per day. We are not required to send notices by certified mail. Obviously, Grange does not retain a copy of the stamped, addressed envelopes for their files.
>
> 6. Grange does retain a copy of the notice document in their files but does not create a separate document to verify that the first document was mailed.
>
> 7. However, the affiant is confident that the notices were mailed to Jeff Garrett at the address on his policy in accordance with the standard operating procedures of Grange Mutual Casualty Company.
>
> 8. Based upon the affiant's 33 years of experience at Grange, the presence of the notice in Jeff Garrett's file at the home office is proof that it was indeed mailed.
>
> 9. Furthermore, the Eaves Insurance Agency has informed me that they received their

"Agent's Copy" of the notice sent to Jeff Garrett.

On the other hand, Garrett stated in his affidavit that he had never received the cancellation notice from Grange. He and his wife also stated in their affidavits that they were told by an Eaves' employee on August 23, 1999, that they did not owe anything on the policy and that it was effective through September 23, 1999.

In support of his argument, Garrett cites Goodin v. General Accident Fire & Life Assur. Corp., Ltd., Ky., 450 S.W.2d 252 (1970). In Goodin, the insured's policy had been canceled by the insurer prior to an accident. The insurer denied coverage, but the insured alleged that he had not received the notice of cancellation and that the insurer had failed to adequately prove the mailing of the cancellation notice. Id. at 254. Although this case does not involve the applicability of KRS 304.20-040(3) and (9)(b), it does involve the applicability of a policy provision which provided that upon "notice of cancellation mailed to the address of the insured stated in this contract, proof of mailing from the office of the insurer shall be sufficient notice[.]" Id. at 255. The court in Goodin noted that where this standard contract provision is present, "proof of mailing from the office of the insurer is sufficient to sustain a finding that the notice was effective without proof that such notice was received by the insured and even though the insured denies receipt of the communication." Id.

In affirming the judgment of the trial court that the policy had been effectively canceled by the insurer prior to the

accident, the court noted the testimony of the insurer's employee. Id. Her testimony was that the mailing was accomplished in accordance with regular company procedure. She further stated that the notice of cancellation was prepared and certificates which recited that the original notice had been sent to the named insured by first-class mail were attached to copies of it. A post office receipt was required, and its existence was recited on the company voucher forms. The employee also testified the notices were then delivered by her to another employee whose duty it was to deliver the mail to the post office, procure a receipt stamp on the post office receipt form, and return it to the local state company office. The company's procedure was that the original cancellation voucher with the post office receipt be sent to the company's headquarters in Chicago, Illinois, and that a copy of the cancellation voucher was retained in the local state office of the insurer.

The insurer's employee in Goodin also testified that the post office receipt was returned stamped by the post office, evidencing receipt of the notice of cancellation. She further testified that the original post office receipt had been retained at the insurer's home office in accordance with regular company procedure. Although she stated on cross-examination that she had no independent recollection of this particular mailing, she stated on redirect examination that the cancellation voucher had refreshed her recollection and that she could positively state that the notices were mailed. Id.

In affirming the trial court's findings that the insurer had complied with the notice provision of the policy, the appellate court held that "since mere mailing of a notice of cancellation is sufficient to cause cancellation of insurance protection with an attendant impact of possible economic disaster to the insured, the proof of mailing of such notice should be of a definite and specific character." Id. at 256. The court also held

> Therefore, the proof of mailing may be satisfied by showing compliance with business usage. Provided, however, the business usage relied upon must embody sufficient evidentiary safeguards to satisfy the need for protection of the affected party in the particular transaction concerned. (Citation omitted.) The business usage in this case satisfies the requirements which are necessarily high in the instance of insurance cancellation. A postal receipt is required. A record certification is required. A return address on the envelop is required. First-class mail is the means of transmittal.

Id. at 257.

Other than the Goodin case, neither party has cited any case which states the degree or type of proof necessary to show that the notice of cancellation was mailed by the insurer.[2] In fact, Grange's response in its brief to Garrett's argument on this issue was merely that it had mailed the cancellation notice to the address on the policy. It merely asserts that it complied with the statutory notice requirements and that Garrett's "flimsy

[2] See Acree v. E.I.F.C., Inc., Ky., 502 S.W.2d 43 (1973), where the court followed the standard to establish proof of mailing stated in Goodin. Acree, 502 S.W.2d at 46.

claim that he never received notice is suspicious, desperate, and self-serving."

On the basis of the holding of the court in the Goodin case, we conclude that Grange's proof of mailing the cancellation notice was not of "a definite and specific character." Id. at 256. Furthermore, the business usage relied upon by Grange to prove mailing did not "embody sufficient evidentiary safeguards to satisfy the need for protection of the affected party in the particular transaction concerned." Id. at 257. The affidavit of Tamara Smith made no mention of the mailing whatsoever, and the affidavit of Earl Blair was insufficient under the Goodin standards. In short, we conclude that there was a fact issue concerning whether Grange had mailed the notice.

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, stipulations, 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 a judgment as a matter of law." CR[3] 56.03. "The record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476, 480 (1991). Because there was a fact issue regarding whether Grange had mailed the cancellation notice, the trial court erred in awarding summary judgment in its favor.

[3] Kentucky Rules of Civil Procedure.

The trial court's summary judgment in favor of Grange is reversed, and this case is remanded for a factual determination in accordance with this opinion.[4]

ALL CONCUR.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
Patricia Creager Central City, Kentucky	Jason B. Bell Elizabethtown, Kentucky

[4] Garrett also argued even if he received timely notice of cancellation, the notice itself was legally insufficient. In support of his argument, he cited Kentucky Farm Bureau Ins. Co. v Gearhart, Ky. App., 853 S.W.2d 907 (1993). Although we doubt the validity of his argument, we find it unnecessary to address it in light of our reversal on other grounds.