

NOT DESIGNATED FOR PUBLICATION

LOUISE YOUNG * **NO. 2002-CA-1141**
VERSUS * **COURT OF APPEAL**
ALLSTATE INSURANCE * **FOURTH CIRCUIT**
COMPANY * **STATE OF LOUISIANA**
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APPEAL FROM
FIRST CITY COURT OF NEW ORLEANS
NO. 00-51331, SECTION "C"
Honorable Sonja M. Spears, Judge
* * * * *
Judge Terri F. Love
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(Court composed of Judge James F. McKay III, Judge Dennis R. Bagneris,
Sr., Judge Terri F. Love)

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AFFIRMED

The plaintiff, Louise Young, appeals the trial court's judgment dismissing her claims against Allstate Insurance Company for the loss of her vehicle. The trial court concluded that Ms. Young's policy had lapsed due to nonpayment of premiums. For the reasons discussed below, we affirm the judgment of the trial court.

FACTS AND PROCDURAL HISTORY

On April 15, 1999, the plaintiff's vehicle, a 1994 Chevy Lumina, was stolen while parked outside of her house. The plaintiff filed a claim with Allstate Insurance Company for the loss of her vehicle. Plaintiff had insured the vehicle with Allstate under an automobile insurance policy, which provided for comprehensive and theft coverage. Allstate denied the claim on the basis the policy had lapsed on March 28, 1999 due to nonpayment of premiums. The plaintiff subsequently filed the present action seeking damages for the theft of her vehicle and penalties and attorney's fees against Allstate for the failure to timely pay the claim. After a bench trial on the merits, the trial court granted judgment in favor of Allstate dismissing

plaintiff's claims.

LAW AND DISCUSSION

On appeal, the plaintiff assigns four errors for review:

1. The lower court committed reversible error when it did not find Ms. Young made the March 1, 1999 payment to Allstate therefore binding Allstate for Ms. Young's loss.
2. The lower court committed reversible error when it did not find Allstate's habit of accepting late payments from Louise Young and further accepting Ms. Young's March 27, 1999 and April 17, 1999 payments binds Allstate for her loss on April 15, 1999.
3. The lower court committed reversible error when it found Allstate properly canceled Ms. Young's policy by sending the Notice of Cancellation by regular mail.
4. The lower court committed reversible error when it did not find Allstate's Insurance Special Notice was ambiguous, incoherent and unintelligible rendering Allstate's cancellation ineffective.

In her first assignment, plaintiff argues the trial court erred when it found that plaintiff did not make a payment to Allstate on March 1, 1999. The trial court did not err in its conclusion. The plaintiff did not produce sufficient evidence to show such a payment was made. The plaintiff produced only a stub from a money order purchased from Schwegmann's. The stub contained information, written by plaintiff, that the money order was for \$110.00. Plaintiff testified the only money orders purchased for that amount were used to pay her monthly Allstate premium. However, defendant produced evidence, via the deposition testimony of Linda Sisson,

a compliance specialist with Allstate, that Allstate never received such a payment on or about March 1, 1999. Ms. Sisson testified that Allstate received all the other payments plaintiff made. Further, plaintiff acknowledged her own confusion over the use of the money orders. In particular, plaintiff originally claimed she used a money order from Travelers Express Company to pay Allstate. However, when the duplicate money order was obtained, it revealed plaintiff had used the money order to pay another bill.

The plaintiff also complains the trial court erred when it did not find that Allstate's habit of accepting late payments from the plaintiff and further accepting her March 27, 1999 and April 17, 1999 payments bound Allstate for her loss on April 15, 1999.

In discussing the same issue, the Third Circuit in Carter v. Benevolent Life Insurance Company, Inc., 300 So.2d 623, 625 (La. App. 3 Cir. 1974) stated:

They say that defendant's custom of accepting overdue premiums caused plaintiffs to reasonably believe that the policies would remain in effect even though the premiums were not paid when due. Plaintiffs rely on jurisprudence which allows recovery in such cases. These cases establish the following general rules: (1) There must be a habit or custom of accepting overdue premiums; (2) The insured must reasonably believe that by reason of this custom the insurer will maintain the policy in effect without prompt payment of premiums."

In the case at bar, the plaintiff cites two occasions in which Allstate reinstated her insurance without a lapse in coverage when she had failed to timely make monthly premium payments. The transaction history attached to the deposition of Ms. Sisson indicates a regular bill was sent to the plaintiff on July 8, 1997. A cancellation notice and bill was sent to the plaintiff on August 8, 1997. Full payment of the amount due was received on September 3, 1997. The policy was reinstated without a lapse effective August 28, 1997, due to the payment received on September 3, 1997. On November 30, 1998, Allstate sent plaintiff notice that her policy was up for renewal. No payment for renewal was received and Allstate sent a cancellation notice to plaintiff on December 8, 1998. Plaintiff made a partial payment on December 10, 1998 and another payment on December 25, 1998. The policy was reinstated effective December 28, 1998 without a lapse in coverage.

In the two occasions relied upon by the plaintiff, Allstate reinstated coverage once full payment of the minimum amount due was paid. The transaction history does not include the actual cancellation notices sent to the plaintiff on each occasion when she failed to make timely monthly payments. As such, plaintiff has not produced evidence to show the payments made on September 3, 1997, December 10, 1998 and December

25, 1998, were not received prior to the effective date of cancellation. If the payments were received prior to the effective date of cancellation, then these two occasions are different from the present situation.

In the present situation, plaintiff did not pay the full minimum amount due until April 17, 1999. Plaintiff paid one-half of the amount due on March 27, 1999 (the monies were not received by Allstate until March 30, 1999) and the remainder on April 17, 1999 (Allstate received the monies on April 21, 1999). On April 15, 1999, plaintiff still owed Allstate \$110.19 in order to bring the policy up to March 28, 1999. Allstate reinstated coverage effective April 20, 1999, with a lapse in coverage from March 28, 1999 to April 19, 1999.

Plaintiff bore the burden of proving she was entitled to rely upon Allstate's alleged practice of reinstating coverage upon payment of the past due amounts. As plaintiff did not show the payments made in 1997 and 1998 were received by Allstate after the effective dates of termination of coverage, she has not produced sufficient evidence to show that Allstate had a custom or practice of not terminating coverage for failure to pay premiums timely or that she had a reasonable belief Allstate would maintain the policy in effect without prompt payment of premiums.

The plaintiff further argues the trial court erroneously concluded that

Allstate properly canceled the plaintiff's policy by sending the Notice of Cancellation by regular mail. Where the insurer defends on the ground that the policy was cancelled, the insurer carries the burden of establishing facts which will relieve liability. I.C. Realty, Inc. v. Clifton Conduit Company, Etc., 291 So.2d 422, 424 (La. App. 4 Cir. 1974). La. R.S. 22:636.1 permits an insurer to cancel a policy for nonpayment of the premium by the insured.

The relevant provision of the statute provides:

D. (1) No notice of cancellation of a policy to which Subsection B or C of this Section applies shall be effective unless mailed by certified mail or delivered by the insurer to the named insured at least thirty days prior to the effective date of cancellation; however, when cancellation is for nonpayment of premium at least ten days notice of cancellation accompanied by the reason therefor shall be given.... Notice of cancellation for nonpayment of premiums shall not be required to be sent by certified mail.

* * * * *

F. Proof of mailing of notice of cancellation, or of intention not to renew or of reasons for cancellation, to the named insured at the address shown in the policy, shall be sufficient proof of notice.

The statute clearly states that a cancellation notice for nonpayment of premiums does not have to be sent via certified mail. Delivery through regular mail is sufficient. Allstate produced its "Record of Mailing Cancellation Notices" of March 8, 1999 listing cancellation notices sent to insured that day. The plaintiff's name and correct address is on the list. The mailing list is the only documentation produced by Allstate to show the mailing was made. The trial court found such evidence sufficient to prove

Allstate mailed the notice to the plaintiff. Plaintiff rebutted this documentary evidence with her testimony that she did not receive the cancellation notice. Apparently, the trial court made a credibility decision and chose not to believe plaintiff's testimony. The trial court did not abuse its discretion in its position as the trier of fact when it chose to accept the documentary evidence over the testimony of the plaintiff. The trial court did not commit error when it determined that delivery by regular mail was sufficient to satisfy the requirements of La. R.S. 22:636.1.

The plaintiff also asserts as error the trial court's failure to find Allstate's Insurance Special Notice was ambiguous, incoherent and unintelligible rendering Allstate's cancellation ineffective. The notice sent to the plaintiff stated:

Please be advised that your cancellation effective date is/was 12:01 a.m. on March 28, 1999. Your payment of \$110.00 was received on March 30, 1999. This amount has been applied to your policy; however, as of the date of this notice, we still have not received the full minimum amount due. Please note that the Cancellation Notice previously sent to you on March 8, 1999 will be enforced unless the full Minimum Amount Due is received on or before March 28, 1999.

In order to avoid having your policy cancel, we must receive an additional payment of \$110.19 before 12:01 a.m. on March 28, 1999.

Otherwise, your policy will terminate according to the Cancellation Notice we previously sent you.

The initial cancellation notice sent to the plaintiff indicated that the

minimum amount due was \$216.69. The cancellation date and time was 12:01 a.m. on March 28, 1999. The notice also stated the minimum amount due included a past due amount of \$106.71.

The document is not ambiguous, incoherent or unintelligible. The notice clearly provides that plaintiff's policy would be terminated on March 28, 1999, if Allstate did not receive payment of the full minimum amount due by 12:01 a.m. on March 28, 1999. The notice acknowledged Allstate received the plaintiff's partial payment of \$110 on March 30, 1999.

CONCLUSION

Accordingly, for the reasons stated above, the judgment of the trial court is AFFIRMED.