STATE OF MICHIGAN

COURT OF APPEALS

EUGENE HAYNES,

Plaintiff-Appellant,

v

GREGORY BRANHAM and TITAN INSURANCE COMPANY,

Defendants-Appellees,

and

JESSE FAULKNER L.L.C, doing business as PREST APARTMENTS,

Defendant.

UNPUBLISHED
January 13, 2004

No. 243076
Wayne Circuit Court
LC No. 00-018999-NI

Before: Donofrio, P.J., and Griffin and Jansen, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting summary disposition pursuant to MCR 2.116(C)(10) on grounds that a no-fault contract of insurance was never formed since plaintiff's premium check was returned for insufficient funds. Because questions of fact exist as to one of plaintiff's estoppel arguments, summary disposition was inappropriate. We reverse in part and remand for further proceedings. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff submitted a check to pay his insurance premium but it was not covered by sufficient funds. He testified that when he realized his check would be returned, he contacted Titan Insurance Company and explained the situation to a woman who told him that he had until March 22, 1998 to send in the premium. On March 3, 1998, Titan sent plaintiff a notice that a premium payment had to be made by March 22, 1998 to avoid cancellation. Plaintiff claimed that he received this notice before his March 5, 1998 automobile accident. On March 6, 1998, plaintiff sent Titan a money order for the full premium and Titan sent plaintiff a notice of cancellation due to the returned check. Titan received plaintiff's payment on March 10, 1998 and applied it toward a policy with an effective date of March 10, 1998.

Plaintiff first argues that the policy is ambiguous because of the following clause: "I agree that if the premium remittance is not honored by the bank, no coverage will be bound." Although plaintiff asserts that the word "remittance" is unusual, it does not allow the contract to be read in differing ways. While the phrase "no coverage will be bound" is unusual, the entire clause fairly admits of only one interpretation: if a check tendered for the premium is dishonored, there will be no coverage. Therefore, the contract is not ambiguous. See *Farm Bureau Mutual Ins Co v Nikkel*, 460 Mich 558, 566-567; 596 NW2d 915 (1999).

Plaintiff next argues that Titan is estopped from denying coverage because a contract must have initially been formed since Titan purported to reinstate it when plaintiff ultimately tendered the premium, and Titan did not have authority to unilaterally revise the contract once reinstated to change the effective date. However, equitable estoppel requires justifiable reliance and prejudice. *Conagra, Inc v Farmers State Bank*, 237 Mich App 109, 140-141; 602 NW2d 390 (1999). Plaintiff cannot show how he was prejudiced by the retention of the premium. If Titan could not reinstate the contract and/or could not apply the premium toward a reinstated policy, plaintiff's remedy would be an action for return of the premium. His argument that these facts created an estoppel from denying a contract must fail. Although retention of the premium may have led plaintiff to believe that his policy was in place, the injury at issue predated this retained premium. Thus, it could not be the basis for a claim of justifiable reliance.

Plaintiff next argues that the policy was not void at its inception and that it therefore could not be cancelled without the written notice required by MCL 500.3224. However, the misrepresentation created by the insufficient funds check, whether it was innocent or intentional, allowed defendant to rescind the contract such that it was void at its inception. *Lash v Allstate Ins Co*, 210 Mich App 98, 103-104; 532 NW2d 869 (1995); *Hammoud v Metropolitan Property & Casualty Ins Co*, 222 Mich App 485, 488; 563 NW2d 716 (1997). Section 500.3224 does not apply to a rescinded policy. *Cunningham v Citizens Ins Co of America*, 133 Mich App 471; 350 NW2d 283 (1984). However, defendant must return the premium. See *Continental Assurance Co v Shaffer*, 157 F Supp 829 (WD Mich, 1957).

Plaintiff's remaining argument is also based on estoppel and the following factual assertions: (1) plaintiff became aware of the returned check before the accident; (2) plaintiff explained the situation to someone at Titan and was told he would have no problem if he forwarded the premium by March 22, 1998; and (3) plaintiff received the March 3, 1998 premium payment notice indicating that he had to pay $261.00 by March 22, 1998 to avoid cancellation. In *Morales v Auto-Owners Ins Co*, 458 Mich 288, 296-297; 582 NW2d 776 (1998), the Court stated that if an insurance company, by its course of conduct or acts, misled an insured in regard to the payment of premiums, and the insured therefore did not timely pay, "the company will be held to have waived the requirement, and will be estopped from setting up the condition as cause for forfeiture." The Court continued:

> [F]or equitable estoppel to apply, plaintiff must establish (1) that the defendant's acts or representations induced plaintiff to believe that the policy was in effect at the time of the accident, (2) that the plaintiff justifiably relied on this belief, and (3) that plaintiff was prejudiced as a result of his belief that the policy was still in effect. . . .

If plaintiff's averments are found to be true, a jury could conclude that Titan misled plaintiff in regard to the payment of the premium, creating a belief that strict compliance with the letter of the contract would not be exacted and instead, that he would be given until March 22, 1998 to make payment. Thus, a jury could also conclude that Titan should be estopped from setting up the condition of payment of the initial premium with a valid check as cause for cancellation or for viewing the coverage as never having "been bound." Accordingly, summary disposition should not have been granted on this ground.

Defendant asserts that the alleged statement from the Titan employee would be inadmissible hearsay since it would not qualify as the statement of a party's agent under MRE 801(d)(2)(D) since it came from the insurance agency, which was not an agent of Titan. However, plaintiff testified that he spoke with someone at Titan, not at the insurance agent's office. Moreover, this statement is being offered to show that the representation was made, not to show that Titan would have accepted the premium if paid before the 22nd. Since it will not be offered for the truth of the matter asserted, it will not be barred as hearsay. See MRE 801(c).

Defendant also argues that estoppel will not lie because the plaintiff must show that Titan was aware of the true facts when it made the statements relied on. However, this knowledge can be actual or constructive. *Viaene v Mikel*, 349 Mich 533, 542; 84 NW2d 765 (1957). Since plaintiff allegedly told the Titan employee that his check was dishonored, there is an issue of fact regarding whether Titan had notice.

Reversed and remanded for further proceedings on plaintiff's estoppel claim based on Titan's alleged agreement to accept the late premium payment. We do not retain jurisdiction.

/s/ Pat M. Donofrio
/s/ Richard A. Griffin
/s/ Kathleen Jansen