STATE OF MICHIGAN

COURT OF APPEALS

HOME-OWNERS INSURANCE COMPANY,

Plaintiff/Counter-Defendant-Appellee,

v

THOMAS K. WELLINGER,

Defendant/Counter-Plaintiff/Third-Party Plaintiff-Appellant,

GERALD C. GRACE AGENCY, INC.

Third-Party Defendant-Appellee,

and

GARY WEINSTEIN,

Intervening Plaintiff.

UNPUBLISHED
August 5, 2008

No. 275472
Oakland Circuit Court
LC No. 2005-070638-CK

Before: White, P.J., and Hoekstra and Schuette, JJ.

PER CURIAM.

Defendant/counter-plaintiff/third-party plaintiff Thomas K. Wellinger (Wellinger), appeals as of right the trial court's order granting plaintiff/counter-defendant Home-Owners Insurance Company's (Home-Owners) and third-party defendant Gerald C. Grace Agency, Inc.'s (Grace) motions for summary disposition. We affirm.

I. FACTS

On September 30, 2004, Wellinger leased a 2005 GMC Denali from a car dealership. Upon a recommendation from the dealership, Wellinger visited Grace to secure insurance for the newly leased vehicle. The application for insurance, which was signed by Wellinger, indicated that Wellinger resided at 7826 Brandywine, West Bloomfield, Michigan. The application provided that Wellinger would pay $1,468.54 for the automobile insurance. However, the application did not include the expiration date of the subject policy. The second page of the application included the term "Total Semi-Annual Premium"; yet Wellinger testified that he had

not been shown the second page of the application. Wellinger alleged that he was only given two pages of the five-page application and alleged that he was only in the office for 10 to 15 minutes. Craig Grace, owner of Grace, testified that after Wellinger signed the application and paid for the policy by check, he gave Wellinger an invoice for his records. That invoice indicated that the policy covered a six-month period and would expire on March 30, 2005.

In January 2005, Wellinger moved to an apartment on Berkleigh Court in Farmington Hills. Wellinger filed a change of address form and forwarding order with the United States Post Office, but he admitted that he did not provide his new address to either Home-Owners or Grace following his move to the Berkleigh Court address.

On February 21, 2005, Home-Owners mailed Wellinger and Grace an automatically produced notice of renewal on the automobile insurance policy. The renewal notice requested $1,462.54 to pay for insurance coverage from March 30, 2005, through September 30, 2005. Apparently, Home-Owners subsequently mailed a bill for renewing the policy to Wellinger on March 14, 2005, but did not retain a copy of this bill for its records.

Home-Owners subsequently mailed Wellinger and Grace a notice of cancellation because Wellinger had not paid the premium to renew the policy by April 11, 2005. The notice of cancellation indicated that the policy would be cancelled effective May 1, 2005, if Wellinger failed to pay the premium by that time. It is undisputed that Wellinger never paid that premium. On May 3, 2005, Wellinger was involved in a car accident.

The insurance policy issued to Wellinger by Home-Owners provided that the policy applied "only to accidents and losses which happen during the policy period as shown in the Declarations." Accordingly, Home-Owners denied Wellinger's claims in relation to the accident. However, in relation to the lienholder's (GMAC) interest in the vehicle, the cancellation notice was not effective until May 19, 2005. Accordingly, Home-Owners paid GMAC's claim of $41,926.01 for the loss of the vehicle.

On November 18, 2005, Home-Owners filed suit against Wellinger seeking a declaratory judgment that it owed no duty to indemnify, defend, or provide personal injury protection (PIP) benefits to Wellinger in relation to the May 3, 2005, motor vehicle accident. Home-Owners contended that Wellinger lacked coverage because (1) Wellinger failed to renew the insurance policy beyond the March 30, 2005, expiration date; (2) the insurance policy had been cancelled effective May 1, 2005, based on Wellinger's failure to pay the required premium; and (3) Wellinger was a registered owner of a motor vehicle that lacked the statutorily required security.

In response, Wellinger filed a counter-complaint against Home-Owners and filed a third-party complaint against Grace. Wellinger alleged that Home-Owners breached the insurance contract by failing to pay PIP benefits and by failing to defend and indemnify Wellinger in relation to the accident. Wellinger alleged that Grace acted negligently in failing to gather and submit correct address and previous insurance information from Wellinger. Wellinger alleged that Grace negligently failed to contact Wellinger when it learned that Wellinger's insurance policy was scheduled to be cancelled. Wellinger further alleged that Grace negligently wrote the insurance application for an improper coverage period. As a result of Grace's negligence, Wellinger contended that he lost automobile insurance coverage with no notice and at no fault of

his own. Wellinger also filed an answer to the complaint, generally denying that he received any notice of the need to renew or the subsequent cancellation of his policy.

On August 6, 2006, Home-Owners moved for summary disposition of Wellinger's claims under MCR 2.116(C)(10). In that motion, Home-Owners contended that the renewal and cancellation notices were mailed to Wellinger's address of record. Home-Owners further contended that it was undisputed that Wellinger failed to renew his policy or object to the cancellation. Home-Owners asserted that it complied with MCL 500.3020 and case law in providing notice of cancellation to Wellinger at his address of record, regardless of whether Wellinger actually received the notice. Given that Wellinger was involved in an automobile accident two days after the effective date of the cancellation, Home-Owners was no longer Wellinger's insurance provider and had no duty to defend, indemnify, or provide coverage. Home-Owners further contended that Wellinger's claim of ignorance regarding his policy period was irrelevant because Wellinger had a duty to read his policy and raise any concerns with the insurer.

Wellinger challenged Home-Owners's motion for summary disposition, denying that he applied for a six-month insurance policy and that Home-Owners mailed any further correspondence to his home address, including the declaration page, insurance policy, notice of renewal, or notice of cancellation. Wellinger further argued that any such notices would have reached him if actually mailed because he had filed a change of address form with the United States Post Office. Wellinger asserted that he had seen only one page of the insurance application and that the page did not include the length of the coverage term. Wellinger challenged Home-Owners's assertion that the policy had expired or had been cancelled because Home-Owners paid GMAC's claim related to the accident. Wellinger contended that GMAC's right to collect under the insurance policy was dependent on Wellinger's rights. If Wellinger were no longer insured by Home-Owners, then GMAC would not have been entitled to the payment of its claim. Accordingly, Wellinger contended that there remained a question of fact regarding the length of the coverage term and whether the policy was still in effect at the time of the May 3, 2005, accident. In any event, Wellinger contended that the duplicate cancellation notices allegedly sent to Grace and Wellinger were inconsistent and, therefore, invalid.[1] Wellinger also challenged Home-Owners's failure to provide proof that it mailed the cancellation notices.

Grace also filed a motion for summary disposition under MCR 2.116(C)(10). Grace contended that an independent insurance agent does not have a special relationship with a potential insured creating a duty to advise the insured about coverage. Rather, Grace contended that an insurance agent is merely an "order taker." Moreover, Grace argued that the short-term relationship between Wellinger and Grace contradicted the existence of a special relationship. Accordingly, Grace had no duty to follow up and investigate whether Wellinger moved after purchasing his automobile insurance policy. Grace contended that the imposition of such a duty would overwhelm any insurance agency. Moreover, Grace argued that it was Wellinger's duty

[1] Wellinger did not explain the alleged inconsistency in this pleading.

to read the insurance policy and related documents and ensure that they complied with his expectations. Finally, Grace contended that Wellinger's negligence claim must fail because Wellinger failed to present an expert opinion regarding the standard of care of an independent insurance agent.

Wellinger challenged Grace's motion for summary disposition. Wellinger admitted that he had no standing relationship with Grace and that he did not request a consultation regarding the insurance policy. However, Wellinger asserted that he had requested a one-year policy and that Grace failed to provide the requested service. Wellinger contended that he justifiably believed that he had purchased a one-year policy based on the documentation actually provided to him and based on the cost of the insurance. Wellinger contended that he was only provided a portion of the insurance application and was never given the insurance policy or invoice. Wellinger challenged Grace's failure to contact him or to try to locate him when Grace received a copy of the cancellation notice. Grace even failed to contact Wellinger when Home-Owners requested further information regarding the vehicle's use shortly after the application was filed. Wellinger further argued that the presentation of an expert witness regarding the standard of care was unnecessary because the facts did not require an expert interpretation or specialized knowledge. Grace responded by generally challenging the mischaracterization of Craig Grace's deposition testimony.

The trial court heard oral arguments on November 29, 2006. It ultimately rejected Home-Owners's assertion that Wellinger's insurance policy automatically lapsed by nonrenewal because there was testimony that Wellinger's insurance policy remained in place until the notice of cancellation was sent to Wellinger. However, the court granted Home-Owners's motion for summary disposition on the ground that the notice of cancellation terminated the policy on May 1, 2005. The trial court also granted Grace's motion for summary disposition. The court concluded that Wellinger failed to present evidence that a special relationship existed with Grace that imposed any additional duty. The court also noted that Wellinger failed to present any expert testimony to establish that Grace violated the standard of care owed by an insurance agent. The trial court entered its order granting Home-Owners's and Grace's motions for summary disposition on December 18, 2006, for reasons consistent with its findings at the hearing. This appeal followed.

II. STANDARD OF REVIEW

We review a lower court's determination regarding a motion for summary disposition de novo. *MacDonald v PKT, Inc*, 464 Mich 322, 332; 628 NW2d 33 (2001). A motion under MCR 2.116(C)(10) tests the factual support of a plaintiff's claim. *Id.* "In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), we consider the affidavits, pleadings, depositions, admissions, or any other documentary evidence submitted in [the] light most favorable to the nonmoving party to decide whether a genuine issue of material fact exists." *Singer v American States Ins*, 245 Mich App 370, 374; 631 NW2d 34 (2001). Summary disposition is appropriate only if there are no genuine issues of material fact, and the moving party is entitled to judgment as a matter of law. *MacDonald*, *supra* at 332.

III. ANALYSIS

Home-Owners sought summary disposition on two alternative grounds: (1) Wellinger's policy automatically terminated on the expiration date of March 30, 2005, because he failed to pay the premium to renew the policy; and (2) Wellinger's policy was cancelled effective May 1, 2005, because Wellinger failed to respond to the cancellation notice by paying the policy premium. The trial court denied Home-Owners's motion on the first ground, but granted the motion on the second. We find that the trial court properly dismissed Wellinger's claims against Home-Owners.

The Michigan Supreme Court noted in *Morales v Auto-Owners Ins Co*, 458 Mich 288, 296-297; 582 NW2d 776 (1998), citing 2 Couch, Insurance, 3d, § 29.45, pp 29-54, that an insurer may be equitably estopped from asserting that a policy had expired and had not been renewed:

> In the context of insurance contracts, this Court has long held:
>
> > "If the company has, by its course of conduct, acts, or declarations, or by any language in the policy, misled the insured in any way in regard to the payment of premiums, or created a belief on the part of the insured that strict compliance with the letter of the contract as to payment of premium on the day stipulated would not be exacted, and the insured in consequence fails to pay on the day appointed, the company will be held to have waived the requirement, and will be estopped from setting up the condition as cause for forfeiture. In determining whether there has been a modification of the terms of the policy by subsequent agreement, or a waiver of the forfeiture incurred by the nonpayment of the premium on the day specified, the test is whether the insurer, by his course of dealing with the insured, or by the acts and dealings of his authorized agents, has induced in the mind of the insured and honest belief that the terms and conditions of the policy, declaring a forfeiture in event of nonpayment on the day and in the manner prescribed, will not be enforced, but that payment will be accepted on a subsequent day or in a different manner; and when such belief has been induced, and the insured has acted on it, the insurer will be estopped from insisting on the forfeiture."[*Pastucha v Roth*, 290 Mich 1, 9; 287 NW 355 (1939), quoting *Wallace v Fraternal Mystic Circle*, 121 Mich 263, 269; 80 NW 6 (1899).]
>
> Therefore, for 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. [*Morales*, *supra* at 296-297.]

Wellinger's automobile insurance policy provided that Home-Owners could decide not to renew the policy, but did not provide for automatic termination of the policy in the event that the insured failed to pay the renewal premium on a timely basis. In fact, Home-Owners did not immediately terminate Wellinger's insurance coverage based on his nonpayment. Rather,

Home-Owners mailed Wellinger a notice giving him opportunity to pay the premium, stating that it would not cancel the insurance policy until May 1, 2005. This case is akin to *Morales*, *supra* at 290-291, in which the insurer repeatedly renewed the insured's automobile insurance policy although the insured repeatedly failed to pay the premium until a notice of cancellation had been sent. As in *Morales*, Home-Owners's act of failing to terminate the policy until May 1, 2005, in order to allow Wellinger additional time to pay the policy premium, amounted to a waiver of the strict performance requirement. However, Home-Owners indisputably established that Wellinger did not rely to his detriment on any representation that his policy remained in effect on the day of the accident, May 3, 2005. Even if Wellinger had relied on the cancellation notice, he could not have justifiably believed that his insurance coverage extended beyond May 1, 2005. Accordingly, Wellinger would be unable to establish that he suffered any injury as a result of his reliance, and the estoppel defense would not save his claims.

Wellinger challenges the trial court's dismissal of his claims against Home-Owners based on the cancellation of his policy. The Legislature has provided for notification regarding the cancellation of an insurance policy, in relevant part, as follows:

> (1) A policy of casualty insurance . . . shall not be issued or delivered in this state by an insurer authorized to do business in this state for which a premium or advance assessment is charged, unless the policy contains the following provisions:
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> * * *
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> (b) Except as otherwise provided in subdivision (d), that the policy may be canceled at any time by the insurer by mailing to the insured at the insured's address last known to the insurer or an authorized agent of the insurer, with postage fully prepaid, a not less than 10 days' written notice of cancellation with or without tender of the excess of paid premium or assessment above the pro rata premium for the expired time. [MCL 500.3020.]

Wellinger's insurance policy provided for the cancellation of the policy consistent with the statutory language.

Home-Owners presented unrebutted evidence that it met the cancellation requirements provided in the insurance policy and statute. First, the Michigan Supreme Court has held that the insured need not actually receive notice of cancellation in order for the cancellation to be effective. The statute requires the insurer to mail the notice to the insured at the insured's last address known to the insurer or an authorized agent of the insurer's. The statute does not require the insurer to take any further steps to ensure that the cancellation notice actually reached its intended target. *Nowell v Titan Ins Co*, 466 Mich 478, 482-483; 648 NW2d 157 (2002). However, the insured does have a duty to mail the notice of cancellation far enough in advance of the ten-day grace period to allow the insured to take action. *Id.* at 483-484. Home-Owners mailed the notice of cancellation on April 12, 2005, to Wellinger at the address provided by Wellinger, 28 days before the policy would be cancelled. Home-Owners also sent the notice of cancellation to the insurance agency that had sold Wellinger the policy, Grace.

It has long been established that "a letter mailed in the due course of business is received." *Good v Detroit Automobile Inter-Ins Exch*, 67 Mich App 270, 274; 241 NW2d 71 (1976); see also *Morales, supra* at 304 n 8. Such evidence is admissible without further evidence from the records custodian that a particular letter was actually mailed. *Good, supra* at 275. "Moreover, the fact that a letter was mailed with a return address but was not returned lends strength to the presumption that the letter was received." *Id.* at 276. The challenging party may rebut the presumption that the letter was received by presenting evidence to the contrary. See *id.*

Wellinger failed to present any evidence to rebut the presumption that the cancellation notice was duly mailed and received. Wellinger testified that he could not recall receiving certain insurance documents and that he was uncertain what insurance documents he had actually received. An assistant vice-president with Home-Owners testified that none of the various notices and documents sent to Wellinger was returned as undeliverable. Moreover, the records from Home-Owners's computer system indicated that the automated cancellation notice was printed on April 11, 2005, and mailed the next day. In light of this evidence and Wellinger's questionable memory regarding his mail, the trial court properly determined that there was no genuine issue regarding whether Home-Owners duly cancelled the policy.

Wellinger also contends that his insurance policy was still in effect at the time of the May 3, 2005, accident because Home-Owners paid GMAC for damage to the vehicle. In *O'Neill v Auto Club Ins Ass'n*, 175 Mich App 384, 387; 438 NW2d 288 (1989), this Court rejected the plaintiff's argument that one unified insurance policy was issued and, therefore, the policy could not be cancelled in relation to the insured and not in relation to the lessor. In *O'Neill, supra* at 388-389, the insurer validly and properly cancelled the insured's policy based on the policy's cancellation provisions because the plaintiff had not paid his insurance premiums. However, the policy was not cancelled in relation to the lessor because the lessor did not receive notice of cancellation until after the accident. *Id.* at 389-390. Similarly, in the instant case, Home-Owners did not mail notification to GMAC of the policy cancellation until May 4, 2005. Home-Owners gave GMAC a five-day grace period to ensure receipt of the notice and made the cancellation effective as of May 19, 2005. Consistent with *O'Neill*, we conclude that GMAC's rights under the policy were severable from those of Wellinger and GMAC was properly provided coverage for its damages in relation to the accident, while Wellinger was not.

Thus, we find no error in the trial court's dismissal of Wellinger's claims against Home-Owners.

We also agree with the trial court that Wellinger did not create a genuine issue of material fact regarding whether Grace acted negligently in its relationship with Wellinger. In order to state a claim for negligence, a plaintiff must establish four elements: "(1) that defendant owed [him or her] a duty of care, (2) that defendant breached that duty, (3) that plaintiff[] [was] injured, and (4) that defendant's breach caused plaintiff['s] injuries." *Henry v Dow Chemical Co*, 473 Mich 63, 71-72; 701 NW2d 684 (2005). The determination whether a duty exists is a question of law for the court. *Harts v Farmers Ins Exch*, 461 Mich 1, 6; 597 NW2d 47 (1999). Where the insurance agent is an agent of the insurer, it owes a fiduciary duty to the insurer to act in the insurer's benefit. *Id.* When the insurance agent is an agent of the insurer, the agent's relationship with the potential insured is purely contractual and the agent has no duty to advise the potential insured regarding insurance coverage or the adequacy of insurance coverage. *Id.* at 7. An insurance "agent" merely takes and fills an order for insurance, rather than counseling

clients about insurance needs. *Id.* at 8-9. The insurance agent's role is narrow because the insured has a duty to read his or her own insurance policy and "raise questions concerning coverage within a reasonable time after the policy has been issued." *Id.* at 8 n 4, citing *Parmet Homes, Inc v Republic Ins Co*, 111 Mich App 140, 144; 314 NW2d 453 (1981). The duty of an insurance agent changes only when circumstances are altered and a "special relationship" is created:

> [T]he general rule of no duty changes when (1) the agent misrepresents the nature or extent of the coverage offered or provided, (2) an ambiguous request is made that requires a clarification, (3) an inquiry is made that may require advice and the agent, though he need not, gives advice that is inaccurate, or (4) the agent assumes an additional duty by either express agreement with or promise to the insured. [*Harts*, 461 Mich at 10-11.]

When the insurance agent is independent of the insurer, he or she is considered an agent of the insured in negotiating the insurance contract with the insurer. *Harwood v Auto-Owners Ins Co*, 211 Mich App 249, 254; 535 NW2d 207 (1995). Both Grace and Home-Owners asserted that Grace was an independent agency.

Grace contends that *Harts*, *supra*, governs this case and that Wellinger failed to establish that a special relationship existed. We agree. Wellinger contends that under *Harwood*, Grace owed him a duty to notify him of the notice of cancellation and to advise him that the policy was for six months. We disagree. We conclude that Wellinger's negligence claim regarding Grace's failure to notify him of cancellation cannot be supported. Wellinger cites no authority, nor have we found any, to support that under the circumstances presented, Grace had a duty to track Wellinger down when Grace received a copy of the notice of cancellation (which had been mailed to the address Wellinger had provided to Grace) in order to ascertain whether Wellinger had in fact received the notice or whether Wellinger had moved.

Wellinger also contends that Grace was negligent in failing to inform him that he was not being given a one-year policy. We disagree. The facts do not support a special relationship between Wellinger and Grace, i.e., that Grace misrepresented the nature or extent of the coverage, failed to clarify an ambiguous request, gave inaccurate advice, or expressly agreed or promised to assume any additional duties. *Harts*, *supra* at 10-11. Grace never informed Wellinger that he was purchasing a one-year policy, nor did Grace agree to assume any additional duties. While Wellinger may have believed that he was receiving a one-year policy, his belief appears to rest on the policy's cost in comparison to a one-year policy he had previously purchased. Therefore, at best, Wellinger maintained a subjective expectation that he was receiving a one-year policy, which was inconsistent with the documents in his possession and in no way advanced by Grace's representations. Accordingly, we find that the trial court properly granted Grace's motion for summary disposition on this ground.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Bill Schuette