RENDERED: June 4, 2004; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-001426-MR

JAMES KINSLOW and
PAULETTE KINSLOW — APPELLANTS

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE DENISE CLAYTON, JUDGE
ACTION NO. 01-CI-007117

HARTFORD INSURANCE COMPANY
OF THE MIDWEST — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: EMBERTON, Chief Judge;[1] COMBS and DYCHE, Judges.

COMBS, JUDGE. The appellants, James and Paulette Kinslow, appeal from a judgment of June 18, 2003 of the Jefferson Circuit Court dismissing their complaint against Hartford Insurance Company of the Midwest (Hartford). They argue that the trial court erred in granting summary judgment and by failing to find that Hartford should be estopped from denying insurance coverage for a fire that destroyed their home. In support of the

[1] Chief Judge Emberton concurred in this opinion prior to his retirement effective June 2, 2004.

judgment, Hartford contends that the Kinslows' policy was not in force or effect at the time of the fire since it had been cancelled more than four months before the fire for non-payment of premiums. After reviewing the record and finding no error, we affirm.

In January 1999, the Kinslows obtained homeowners' insurance coverage from Hartford for the protection of their real property located on Vetter Avenue in Louisville, Kentucky. On January 5, 2000, they renewed their policy with Hartford for another year by mailing the insurer a payment of $150, a portion of the total premium of $480.72. On February 21, 2000, the Kinslows made a second installment payment of $52.32. After the February payment, the Kinslows made no additional payments to Hartford until October.

In April, Hartford mailed the Kinslows a bill which gave them several options for paying the remaining balance: a single payment of $287.40 to be received by Hartford by April 29, 2002; two payments of $145.20 each -- the first due by April 29, 2002; or four equal payments of $74.10 with the first installment to be paid by April 29, 2002. On May 16, 2002, after having received no payment since February and no response to the April billing statement, Hartford sent the Kinslows a notice warning them that their coverage would be cancelled effective June 1 unless it received $74.10, the minimum

installment due by that date. The Kinslows denied receiving this notice of cancellation.

Paulette Kinslow testified that she was unaware that the policy had been cancelled and that she mailed a check to Hartford for the entire remaining balance of $287.40 on October 1, 2000. Tragically, on October 8, 2000, the Kinslows lost their home following a fire; they notified Hartford of their loss the next day -- October 9, 2000. Hartford received the Kinslows' check on October 13, 2000. Because the Kinslows' coverage had lapsed, Hartford placed the check in a pending account while it investigated whether the policy had been cancelled properly or whether it was eligible for reinstatement. On October 20, 2000, Hartford notified the Kinslows that it would not reinstate their policy. It refunded the tendered premium on November 3, 2000.

The Kinslows filed a lawsuit against Hartford to enforce the policy. In addition to their claim for breach of contract, they alleged that Hartford violated Kentucky's Unfair Settlement Practices Act and the Unfair Trade Practices Act. Both the Kinslows and Hartford moved for summary judgment on the issue of the insurer's liability for the fire loss. The Kinslows argued that the case was controlled by Howard v. Motorists Mutual Insurance Company, Ky., 955 S.W.2d 525 (1995). They contended that because it had negotiated their check during

the period of insurance coverage, Hartford was estopped from denying coverage for the fire.

In its motion for summary judgment, Hartford contended that it had complied with both the statutory and contractual requirements in cancelling the Kinslows' policy for non-payment of premiums effective June 1, 2000. Thus, it claimed that there was no dispute that there was no coverage for the loss that occurred more than four months after the proper cancellation of the policy.

In its summary judgment, the trial court distinguished the facts of this case from those in Howard. It concluded that unlike the situation with the Kinslows, the insurer in Howard had a history and pattern of allowing its insured to make late payments –- even after the policy had lapsed -– while continuing coverage. Finding no similar evidence to satisfy the elements of estoppel, the trial court concluded that Howard was not dispositive. The court cited Troutman v. Nationwide Mutual Insurance Co., Ky., 400 S.W.2d 215 (1966), for the principle that "[t]he mere cashing of a premium check by the insurance company does not create an insurance contract." Upon determining that there was no insurance policy to enforce, the trial court dismissed the remaining claims as moot. This appeal followed.

CR[2] 56.03 authorizes summary judgment:

> if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is not a genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Summary judgment is appropriate only "where the movant shows that the adverse party could not prevail under any circumstances." Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476, 480 (1991). In ruling on a motion for summary judgment, the circuit court must view the evidence of record "in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." Id. We conduct a *de novo* review, utilizing the same criteria set forth in Steelvest, supra. Goldsmith v. Allied Building Components, Inc., Ky., 833 S.W.2d 378, 381 (1992).

Our review of the record reveals that the Kinslows renewed their homeowners' policy with Hartford for the period January 6, 2000, to January 6, 2001, at the cost of $480.72. It is undisputed that the Kinslows made two installment payments to Hartford in January and February 2000 in the sum of $202.32 and that they made no further payments until sometime in October 2000. Although the Kinslows denied actual receipt of the notice of the impending cancellation of their policy effective June 1,

[2] Kentucky Rules of Civil Procedure.

2000, it is undisputed that the notice mailed by Hartford complied with the provisions of KRS[3] 304.20-320(2) and with the insurance contract. There is no dispute that the policy was cancelled for non-payment of premiums on June 1, 2000, and that four months later the Kinslows suffered the devastating loss of their home as a result of a fire of unknown origin. Hartford presented evidence to question the validity of the appellants' claim that their check was sent prior to the fire. Nonetheless, it is undisputed that Hartford did not receive the check until days after the fire and after the Kinslows reported the loss.

The Kinslows argue on appeal -- as they also argued in the trial court -- that the issue is "directly controlled" by Howard v. Motorists Mutual Insurance Company, supra, as follows:

> If the Hartford wanted to avoid a claim for coverage, it could have returned the Kinslows' check instead of depositing it, or deposited the check and immediately provided notice to the Kinslows that the deposit was conditional. It did neither. Instead, it deposited the money and held on to that money, even after it had denied coverage for this claim.
>
> Under the plain holding of Howard, once the Hartford unconditionally accepted the check and deposited the money, especially *after* it was on notice that the Kinslows were making a claim, the Hartford cannot disclaim coverage for the Kinslows.

Appellants' brief, at pp. 3-4.

[3] Kentucky Revised Statutes.

We agree with the trial court that the appellants cannot rely on Howard. In that highly fact-specific case, the Supreme Court found coverage after reciting the details of an entire "course of dealing" by the insurer of accepting late payments and issuing retroactive coverage. Id. 955 S.W.2d at 528. The court held that the facts "established the required elements of estoppel." Id. at 529. The Kinslows have not recounted the existence of a comparable custom, pattern, or practice that would serve to estop Hartford from denying coverage. We have discovered no evidence in the record that Hartford did anything that would induce the Kinslows to believe that they would continue to have coverage in the absence of their premium payment.

Howard specifically addressed and rejected the Kinslows' waiver argument as to the timing of the refund of their tendered check:

> While Motorists' untimely refund of Appellant's premium might be attributable to flawed procedures, we cannot characterize it as the kind of intentional act that establishes a waiver.

Hartford also cites Troutman, supra, where the insurer negotiated a check received after the termination of the policy and after an accident. No coverage for the insured was found as a matter of law:

> The mailing of the premium by Mrs. Findley on January 15 was not prompted by anything done by the [insurance] company to indicate

> that such late payment might be effective; on the contrary it was done in the face of a statement by the agent that the policy was dead. The cashing of a check by the company and its delay in notifying Mrs. Findley of the termination of the policy and in refunding the amount of the check did not cause Mrs. Findley to change her position to her detriment or in any way create any equities in her favor. We find none of the elements of an estoppel in the facts of this case.

Troutman, 400 S.W.2d at 216-217. We also note Andrus v. Preferred Risk Life Insurance, Ky.App., 777 S.W.2d 610, 612 (1989), in which this Court affirmed a summary judgment for the insurer, holding that accepting a late premium payment did not constitute "a waiver by the [insurance] company of the forfeiture provisions of the policy." Under all relevant precedent, the trial court correctly determined that Hartford's handling of the check that it received after the loss cannot be viewed as a waiver of its right and that it was entitled to disclaim liability under the lapsed insurance contract.

The judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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