

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-001830-MR

HENRY OWENS, III

APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE GEOFFREY P. MORRIS, JUDGE
ACTION NO. 02-CI-005852

KENTUCKY FARM BUREAU
MUTUAL INSURANCE COMPANY

APPELLEE

OPINION

AFFIRMING IN PART - REVERSING IN PART AND REMANDING

** ** * * *

BEFORE: COMBS, CHIEF JUDGE; GUIDUGLI AND KNOPF, JUDGES.

GUIDUGLI, JUDGE: Henry Owens, III (hereinafter "Owens") appeals from an order and judgment granting summary judgment to Kentucky Farm Bureau Mutual Insurance Company (hereinafter "KFB"). The order and judgment entered by the Jefferson Circuit Court on June 12, 2003, provided that KFB recover \$7,831.55 pursuant to Count I of KFB's complaint and \$9,375 pursuant to Counts II and III of the complaint. We affirm in part, reverse in part, and remand.

Owens had a policy of automobile insurance with KFB insuring a 1997 Nissan Ultima GLE. On or about October 26, 2001, the Nissan was reported stolen. Owens notified the police and then contacted his KFB agent. On November 27, 2001, KFB issued a check to Owens in the sum of \$9,375 representing "partial payment of total loss less \$500 policy deductible." It had been determined by KFB that the total loss was \$10,375. KFB paid Owens \$9,375 and told him that once he provided title to the vehicle he would be paid the additional \$1,000 due under the policy.¹

Subsequent to issuing a check to Owens for the loss of the automobile, KFB became aware that the automobile was subject to a lien held by Wells Fargo Financial. Apparently without further contact with Owens, KFB issued payment on February 28, 2002, to Wells Fargo Financial in the amount of \$7,831.55 to extinguish the lien on the vehicle.² Thereafter on May 16, 2002, KFB sent a letter to Owens advising him that pursuant to the terms and conditions of his automobile policy KFB was exercising its right to require him to submit to an "Examination Under Oath" (hereinafter "EUA"). The letter also notified Owens that

¹ Obviously, the figures do not add up. If the loss was \$10,375 and Owen had a \$500 deductible, then he was only entitled to \$9,875. However, the figures listed above are taken from the record and KFB's appellate brief.

² The check issued by KFB to Wells Fargo Financial was actually written for \$7,842.12. However, Wells Fargo then issued a check to KFB in the sum of \$10.57 for "overpayment of payoff #55421365 Henry Owens." Thus, the total paid by KFB to Wells Fargo was \$7,831.55.

KFB had assigned the law firm of Bush Law Office to conduct the EUA. Twelve days later on May 28, 2002, the Bush Law Office sent a letter to Owens advising him that pursuant to a recent telephone conversation, an EUO was scheduled for May 30, 2002, beginning at 9:30 A.M. The letter included the following paragraph:

Please note that if you fail to appear for and submit to your Examination Under Oath, you may be in breach of your contract of insurance. This could constitute reasonable grounds for Kentucky Farm Bureau to deny coverage, with the result that you would lose your right to collect on this claim.

Owens failed to appear at the Bush Law Office for the scheduled EUO. A follow-up letter was sent to Owens on May 31, 2002, requesting that he contact the law firm immediately and reschedule the EUO. On August 5, 2002, KFB filed its complaint against Owens seeking reimbursement for the \$7,831.55 which it had paid to Wells Fargo and to have the automobile insurance policy declared void ab initio, thus requiring Owens to repay the \$9,375 he had recovered for the stolen vehicle. Owens filed an answer and counterclaim in which he sought damages against KFB based upon fraud and damage to his reputation. Following the taking of Owens's deposition, KFB filed for summary judgment. In an order and judgment entered June 12, 2003, the court granted summary judgment in favor of KFB in all respects.

Thereafter, the circuit court denied Owens's motion to set aside the order and this appeal followed.

Owens, who has represented himself throughout this litigation, provides very little legal argument in his appellate brief to this Court. For example, his summary of his arguments set forth in his two-page brief states the following:

In summary: The Appellee should never have been granted Summary Judgment Because the

Appellant never receive the extra payment. It was the Wells Fargo Financial. In this case there was no misrepresentation by appellant or lack of awareness By appellee of the real facts and no action by appellee in reliance upon representations Of appellant which changed appellee's position to his prejudice.

Therefore the judgment should be reversed and a new judgement be entered.

However, we have thoroughly reviewed the record³, the arguments presented by the parties and the cases relied on by KFB relative to the voiding of the insurance policy and have determined that the circuit court has erred in granting summary judgment to KFB on all counts of its complaint.

We begin first by setting forth the standard of review by quoting from the recent case of Waddle v. Galen of Kentucky, Inc., Ky.App., 131 S.W.3d 361 (2004), as follows:

³ We should note that there is no record provided as to any hearings that may have taken place before the circuit court.

The standard of review governing an appeal of a summary judgment is well-settled. The appellate court must determine whether the trial court erred by concluding that there was no genuine issue as to any material fact and that the moving party was entitled to a judgment as a matter of law [Scifres v. Kraft, Ky.App., 916 S.W.2d 779, 781 (1996)]. Summary judgment is appropriate "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 56.03]. In Paintsville Hospital Co. v. Rose, [Ky., 683 S.W.2D 255, 256 (1985)], our Supreme Court held that for summary judgment to be proper the movant must demonstrate that the adverse party cannot prevail under any circumstances. The Court has also stated that "the proper function of summary judgment is to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor." [Steelvest v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476, 480 (1991)]. The appellate court need not defer to the trial court since factual findings are not at issue. [Goldsmith v. Allied Building Components, Inc., Ky., 833 S.W.2d 378, 381 (1992)]. "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, 807 S.W.2d at 480]. Furthermore, "a party opposing a properly supported summary judgment motion cannot defeat it without presenting at least some affirmative evidence showing that there is a genuine issue of material fact for trial." [Id. at 482. See also, Kentucky Practice, CR 56.03, cmt. 4]

Waddle, 131 S.W.2d at 364.

With this standard in mind, we believe the circuit court properly granted summary judgment to KFB as to Count I of its complaint. Court I alleges that KFB was required to pay the lien holder of the stolen automobile, Wells Fargo Financial, for the loss incurred. There can be no dispute that since Owens received the benefit of receiving payment from KFB (\$9,375) and then receiving clear title to the vehicle, he must reimburse KFB for the double payment KFB made. See Riverside Ins. Co. v. McDowell, Ky.App., 576 S.W.2d 268 (1979). There is no genuine issue as to any material fact and KFB is entitled to a judgment as a matter of law.

However, the same cannot be said as to the granting of summary judgment pursuant to Counts II and III of KFB's complaint against Owens. In relevant paragraphs of Count II of the complaint, KFB makes the following statements:

14. The policy of insurance issued to the Defendant by KFB provides in PART F - GENERAL PROVISIONS as follows:

"We do not provide coverage for any insured who has made fraudulent statements or engaged in fraudulent conduct in connection with any accident or loss for which coverage is sought under this policy."

15. During conversations regarding the settlement of his claim, the Defendant was specifically asked by representatives of KFB if there was a lien on his vehicle on the Date of

Loss. The Defendant advised KFB that there was no lien on the vehicle and that the Defendant would promptly deliver the vehicle's title to KFB.

16. When the Defendant stated that there was no lien on the vehicle, he knew or reasonably should have know (sic) that his statement was false.
17. The Defendant made this statement knowing and intending that KFB would rely on it.
18. KFB did rely on the Defendant's statement, and consequently issued payment to the Defendant in an amount greater than the Defendant would have received had the truth been known to KFB.
19. The Defendant's action constitute (sic) a breach of the provisions of the insurance contract between the Defendant and KFB.
20. As a consequence, KFB is entitled to a Declaration of Rights voiding the policy *ab initio* and a Judgment requiring the Defendant to refund to KFB all amounts paid under the policy.

There is nothing in the record before this Court that would support KFB's allegations that Owens made fraudulent statements or engaged in fraudulent conduct in connection with the stolen vehicle. Furthermore, there is nothing in the record, other than KFB's self-serving statements contained in its pleadings, which supports KFB's allegations that Owens stated to anyone that there was no lien on the vehicle. Also it should be noted that Owens's automobile policy declaration page attached to the

complaint clearly states that Wells Fargo Financial held a lien on the 1997 Nissan Ultima automobile.⁴ Finally, the record is replete with statements made by Owens that he never made any statements concerning the lien after the theft to anyone connected with KFB. In fact, he states he never was asked about any lien but simply reported the theft and was given the check. In that the declaration page clearly shows Wells Fargo Financial was a named lien holder and that Owens's statements concerning not being asked about the lien have not been refuted, we believe the circuit court erred in granting KFB summary judgment as to Count II of its complaint. Viewing the record most favorable to Owens and resolving all doubts in his favor, we find adequate support for his contention that he did not mislead or engage in any fraudulent act and thus, summary judgment against him was inappropriate.

Count III of KFB's complaint alleges the following:

22. The policy issued by KFB to the Defendant provides in PART E - DUTIES AFTER AN ACCIDENT OR LOSS as follows in pertinent part:

"B. A person seeking any coverage must:

1. Cooperate with us in the investigation, settlement or defense of any claim or suit. ...

⁴ Although the insurance declaration page attached to the complaint clearly shows the named lien holder, it should be noted that KFB's appendix number two which sets forth the complaint omits the lien holder from the exhibit to this Court.

3. Submit as often as we reasonably require:

b. To Examination Under Oath and to subscribe same."

23. As part of its investigation of this claim, KFB requested on several occasions that the Defendant submit to an Examination Under Oath regarding the subject loss.
24. The Defendant has refused to submit to an Examination Under Oath, in breach of the requirements of the insurance contract.
25. As a consequence, KFB is entitled to a Declaration of Rights voiding the policy ab initio and a Judgement requiring the Defendant to refund to KFB all amounts paid under the policy.

KFB cites the case of Temple v. State Farm Mutual Ins. Co., Ky., 548 S.W.2d 838 (1977), to support its argument that Kentucky requires an insured to submit to EUO's in connection with a claim filed by the insured for uninsured motorist benefits. On the EUO issue, the Temple Court held:

The basis of the Temples' rights against State Farm is contractual. The terms and provisions of the policy require, as a condition precedent to any action or right of recovery against State Farm, that the Temples provide sworn statements to State Farm as often as may be reasonably required. Although the Temples notified State Farm of the accident and provided an accident report to State Farm's agent, such information was insufficient for State Farm to evaluate the claim for settlement purposes. State Farm was entitled not only

to an explanation of the circumstances of the accident contained in a police report, but was entitled also to the sworn statements of its insureds as to the details of its occurrence and, further, the "nature and extent of injuries, treatment, and other details entering the determination of the amounts payable." Such information, exclusively within the control of the Temples, was essential for State Farm to fulfill its responsibilities under the terms of the policy; and, provisions of the policy reasonably designed to secure a truthful disclosure of such information are valid and reasonable conditions precedent to an insurer's liability.

The ill-considered refusal of the Temples' attorney to allow their statements to be taken, imposed upon State Farm considerable expense and expenditure of time to obtain the information which it had the right to receive without any expense. The information received nearly a year later through depositions did not so remedy the Temples' breach nor the prejudice to State Farm as to enable the Temples to avoid State Farm's denial of coverage.

. . .

By denying State Farm such information reasonably necessary to its performance under the contract, the Temples did not breach the cooperation clause of the policy, but did breach a valid condition precedent to their coverage.

Id. at 840. We believe there are significant differences between the case before us and the Temple case and other cases cited by KFB. First, the terms in the two insurance policies are different. Second, KFB relies upon breach of contract as opposed to breach of a valid condition precedent. Third, Owens

had missed only one scheduled EUO and no other exams had been scheduled. And finally, in this case, KFB had already settled the case by issuing a check to Owens on his claim while in the other cases cited the claims were still pending.

The KFB personal automobile policy at Part E - DUTIES AFTER AN ACCIDENT OR LOSS lists the various duties which an insured must comply with or risk the possibility that KFB will assert the defense of no duty to provide coverage. Owens complied with the duties set forth except that of attending the EUO conference. We believe failure to attend one EUO hearing would be an issue of fact for a jury to decide as to whether or not that act in and of itself would void the insurance policy. Additionally, in that KFB voluntarily issued payment to Owens on his claim with prior knowledge of the lien held by Wells Fargo (it was prominently listed on the declaration page), we question whether or not Owens had a continuing duty to submit to EUO's as often as KFB reasonably requested. While that issue is not before this Court, the language of the policy could reasonably be interpreted to require an EUO only during "the investigation, settlement or defense of any claim or suit." (See Part E section B subsection 1 of the policy).

In any case, we believe there are genuine issues of material facts regarding Counts II and III of KFB's complaint so as to preclude summary judgment on those issues. In that the

matter is being reversed in part and remanded for additional proceedings, we strongly recommend, as did the trial judge, that Owens seek competent legal representation.

Finally, it should be noted that no ruling was made as to Owens's counterclaim against KFB. While one might presume that by granting summary judgment to KFB "in all respects" that terminated the litigation, the better practice would be to specifically rule on the counterclaim so that all pending claims are fully resolved.

For the foregoing reasons, the order and judgment of the Jefferson Circuit Court granting summary judgment to KFB is affirmed in part, reversed in part and remanded for further proceedings consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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