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NOT TO BE PUBLISHED

# Commonwealth of Kentucky

# Court of Appeals

NO. 2015-CA-001490-MR

JAMES L. HAMILTON — APPELLANT

v.

APPEAL FROM PIKE CIRCUIT COURT
HONORABLE JOHNNY RAY HARRIS, SPECIAL JUDGE
ACTION NO. 14-CI-01254

KENT D. THACKER INSURANCE COMPANY & KENT D. THACKER, INDIVIDUALLY — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: JONES, D. LAMBERT, AND TAYLOR, JUDGES.

JONES, JUDGE: Appellant, James L. Hamilton, appeals the September 21, 2015, order of the Pike Circuit Court granting summary judgment in favor of the Appellees. After careful review of the record and applicable law, we affirm.

## I. FACTUAL AND PROCEDURAL BACKGROUND

Kent D. Thacker is a Pike County insurance agent who sells insurance for Kentucky Farm Bureau Mutual Insurance ("KFB") through the Kent D. Thacker Insurance Company, Inc.[1] This dispute arose in 2014 when James Hamilton contacted Thacker to obtain a quote for a homeowner's insurance policy for the property located at 190 East Chloe Ridge Drive, Pikeville, Kentucky (the "Property").

The Property had previously been owned by Hamilton from 2002-2009 and was insured by KFB under a policy issued by another independent agent. That policy was cancelled in 2009 for nonpayment. In 2010, the Property came under the ownership of Hamilton's father and, following an inspection of the Property, Hamilton's father acquired a homeowner's insurance policy on the Property through KFB (the "2010 Policy"). Hamilton's father continued owning the Property through September 2013, at which time the Property was sold back to Hamilton. It does not appear that KFB was notified of this change in ownership. However, the 2010 Policy on the Property continued through late 2014.

According to Hamilton, in September 2014, he contacted Thacker and requested that the 2010 Policy on the Property be "re-issued" in his name. Hamilton indicated that Thacker advised him that in order to "re-issue" the policy, Hamilton's father would have to first cancel the 2010 Policy. Hamilton then contacted his father, who contacted Thacker's office and cancelled the 2010 Policy

[1] We refer to Mr. Thacker and his insurance company collectively as "Thacker".

on the Property effective October 10, 2014. On that same day Hamilton, in person at Thacker's office, requested an inspection of the Property immediately so as to avoid any "gap" in coverage. No inspection was made that day. Hamilton then returned to Thacker's office on October 13, 2014, and requested to speak with Thacker. Eventually, Thacker notified Hamilton that his office would not be providing a quote for a homeowner's policy on the Property.

Afterwards, Hamilton requested Thacker provide him a letter authorizing another KFB agent to write him a policy on the Property. Thacker declined to do so and indicated that if another KFB agent were interested in writing a policy, that agent could contact him directly. According to Hamilton, he then contacted two other KFB agents who initially were interested in doing business with him, but then later refused. Hamilton was unable to obtain a homeowner's insurance policy with KFB; he ultimately obtained a policy though another carrier at an alleged higher rate.

Hamilton filed a complaint with the Pike Circuit Court alleging fraud, twisting/churning, slander, and intentional interference with a contract. Hamilton later amended his complaint to include the claims of breach of express and implied contract, and breach of contractual obligation of good faith and fair dealing. Thacker then filed a motion to dismiss with the trial court. Before Thacker's motion to dismiss was ruled on, the case was assigned to a special judge. Thacker then re-filed his motion to dismiss. A hearing was held on the motion. At that

hearing, the trial court dismissed Hamilton's claim for twisting/churning. The trial court then stated that depositions should be re-noticed.

From there, several discovery disputes arose. Eventually, Hamilton and Thacker were scheduled to be deposed on August 18, 2015. Prior to their scheduled depositions, Thacker filed a motion for summary judgment. In his response, Hamilton argued that "it was premature to move for summary judgement at that time as the parties had not yet appeared for their depositions, and Hamilton had not yet been afforded the opportunity to depose Thacker's witnesses regarding their affidavits upon which Thacker was relying in the motion for summary judgment." Hamilton also voluntarily withdrew his claim for slander in his response.

Subsequently, Thacker's counsel sent a letter to Hamilton's counsel. According to Hamilton, this letter advised his counsel that Hamilton's deposition was cancelled and, should Hamilton's claims survive summary judgment, the depositions could be rescheduled. A hearing on the motion for summary judgment was held on August 21, 2015. By order rendered September 21, 2015, the trial court entered summary judgment in favor of Thacker. Specifically, the trial court found:

> [T]he Court can find no statute or case in which a [sic] insurance agent is required to write a policy of insurance to a particular party and it appearing to the Court that membership in Kentucky Farm Bureau entitles members to access to an insurance agent, but the Court can find no document which would entitle that person to a quote. In the present case there was no quote ever issued to Mr.

> James L. Hamilton and thereby no meeting of the minds and therefore no contract of insurance. The Plaintiff was free to obtain different quotes from different insurance agents and did in fact obtain insurance through American National.

The court concluded that it could find no legal grounds supporting Hamilton's claims and suggested that his concerns may best be addressed by complaint to the Kentucky Department of Insurance.

It is from the order granting summary judgment in favor of Thacker that Hamilton now appeals to this Court.

## II. STANDARD OF REVIEW

Summary judgment serves to terminate litigation where "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." Kentucky Rule of Civil Procedure (CR) 56.03. Summary judgment should be granted only if it appears impossible that the nonmoving party will be able to produce evidence at trial warranting a judgment in his favor. *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc*., 807 S.W.2d 476 (Ky. 1991). Summary judgment "is proper where the movant shows that the adverse party could not prevail under any circumstances." *Id*. (citing *Paintsville Hosp. Co. v. Rose*, 683 S.W.2d 255 (Ky. 1985)).

On appeal, we must consider whether the trial court correctly determined that there were no genuine issues of material fact and that the moving party was

entitled to judgment as a matter of law. *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996). Because summary judgment involves only questions of law and not the resolution of disputed material facts, an appellate court does not defer to the trial court's decision. *Goldsmith v. Allied Bldg. Components, Inc*., 833 S.W.2d 378 (Ky. 1992). Our review is *de novo*. *Cumberland Valley Contrs., Inc. v. Bell Cty. Coal Corp*., 238 S.W.3d 644, 647 (Ky. 2007).

## III. ANALYSIS

On appeal, Hamilton maintains that the trial court erred as a matter of law when it dismissed his claims finding no genuine issue of material fact existed. Specifically, Hamilton raises three arguments. First, he argues that there is a genuine issue of material fact as to whether an "oral agreement/contract" was created between Hamilton and Thacker. Hamilton argues this is a question for a jury to decide. Second, Hamilton argues the trial court erred in granting summary judgement, as he alleged additional causes of action other that the breach of contract claim dismissed by the trial court. And, finally, Hamilton maintains that the trial court's grant of summary judgment was premature as the parties had yet to complete sufficient discovery.

*a. "Oral agreement/Contract"*

Hamilton maintains that he presented evidence to the trial court that was sufficient to create a genuine issue of material fact as to whether an oral agreement was created between him and Thacker, and therefore allow his claims to survive summary judgment. In the record, Hamilton points to his request to Thacker that

the 2010 Policy be re-issued in his name; Thacker's directive that in order to re-issue the 2010 Policy, Hamilton's father would have to first cancel the it; Hamilton and his father both acting as instructed by Thacker; and Hamilton's detrimental reliance on statements made by Thacker and Thacker's office staff.

Hamilton points to various conversations and acts involving Thacker; however, he points to nothing in the record to support his actual contention that the parties created an "oral agreement/contract" for a homeowner's insurance policy.

> It has never been held by this court that an oral contract of insurance may be enforced, unless it contains all of the essential elements necessary to constitute a valid contract. The general rule is that the person claiming under such a contract must prove an oral contract possessing all of the essentials of a written contract of insurance. The subject-matter must be agreed upon, and also the risk insured against, the rate of premium, the duration of the risk, the amount of insurance, and the identity of the parties. The minds of the parties must meet touching these matters.

*Kitchen v. Yorkshire Ins. Co.*, 10 S.W.2d 1074, 1075 (Ky. 1928).

Here, with the exception of the parties' identifying the Property as the subject matter to be insured, nothing exists showing that the parties had come to an agreement sufficient to create an oral agreement or contract for insurance. The record lacks any evidence that the parties had come to an agreement on many essential elements required to create a contract for insurance, including the risk to be insured against, the rate of the premiums to be paid, the duration of the risk, or the amount of insurance to be available. Hamilton's allegations are proof positive that the essential terms had not been reached, as he recounts that he requested

Thacker inspect the property so that Thacker could give him a quote. The request for a quote shows that the parties had not come to an agreement on the essential terms, primarily the premium that Hamilton would have to pay for a policy. Thus, we agree with the trial court no oral contract or agreement for insurance was created between Hamilton and Thacker. As a result, we find no error on this issue.

*b. Additional Causes of Action*

Next, Hamilton argues that the trial court erred by granting summary judgment based only on its finding that no contract existed between the parties, as his claim against Thacker was not limited to breach of contract. Hamilton maintains that he alleged additional causes of action, including fraud, intentional interference with his attempts to obtain insurance from other KFB agents, and breach of good faith and fair dealing practices.

Specifically, Hamilton argues that sufficient evidence existed to support his claim "that the parties had an oral agreement that Thacker would reissue a homeowner's insurance policy to Hamilton which had previously been in his father's name . . . ." Hamilton maintains that Thacker made material representations, which were relied on and acted on by Hamilton, and in turn caused Hamilton's father to cancel the 2010 Policy. Hamilton believes this to be sufficient evidence rising to the level "fraud, trickery and deceit," which should have been addressed by the trial court.

KRS[2] 304.14-060, entitled "Insurable interest, property," states as follows:

[2] Kentucky Revised Statutes.

> (1) No contract of insurance of property or of any interest in property or arising from property shall be enforceable as to the insurance except for the benefit of persons having an insurable interest in the things insured as at the time of the loss.
> (2) "Insurable interest" as used in this section means any actual, lawful, and substantial economic interest in the safety or preservation of the subject of the insurance free from loss, destruction, or pecuniary damage or impairment.
> (3) When the name of a person intended to be insured is specified in the policy, such insurance can be applied only to his own proper interest. This section shall not apply to life, health or title insurance.

In Kentucky, it is well settled that the law requires a person to have an insurable interest in the insured property "both at the time of the making of the contract and at the time of the loss[.]" *Crabb v. Calvert Fire Ins. Co.*, 255 S.W.2d 990, 991 (Ky. 1953). "A person is usually regarded as having an insurable interest in the subject matter insured when he will derive pecuniary benefit or advantage from its preservation, or will suffer pecuniary loss or damage from its destruction or injury by the happening of the event insured against." *Id*.

Here, Hamilton's father acquired the Property in 2010, at which time he also acquired the 2010 Policy. The 2010 Policy was maintained and continued until September 2013, at which time Hamilton's father sold the Property back to Hamilton. When Hamilton's father no longer owned the Property, he no longer had any "insurable interest" in the Property as defined by KRS 304.14-060(2).

Consequently, when Hamilton contacted Thacker in October 2014, the 2010 Policy was no longer in effect and, therefore, Thacker's alleged direction and/or

advice to Hamilton could not have caused him or his father to cancel the 2010 Policy. Thus, Thacker's alleged conduct or statements could not have possibly caused Hamilton or his father to cancel the 2010 Policy and given rise to any of Hamilton's alleged claims. Given the undisputed evidence of record, we find no error in the trial court's dismissal of Hamilton's legal claims. Accordingly, we find no error.

*c. Discovery Opportunities*

Finally, we turn to the argument that the trial court erred by prematurely granting summary judgment in favor of Thacker, and effectively prevented Hamilton from conducting discovery. However, our review of the record reveals sufficient discovery opportunities were afforded to Hamilton.

Under Kentucky law, "[i]t is not necessary to show that the respondent has actually completed discovery, but only that respondent has had an opportunity to do so." *Hartford Ins. Grp. v. Citizens Fidelity Bank & Trust Co.,* 579 S.W.2d 628, 630 (Ky. App. 1979) (six months between filing of complaint and granting motion for summary judgment was sufficient opportunity to complete discovery). Moreover, "[a] party responding to a motion for summary judgment cannot complain of the lack of a complete factual record when it can be shown that the respondent has had an adequate opportunity to undertake discovery." *Cargill v. Greater Salem Baptist Church,* 215 S.W.3d 63, 69 (Ky. App. 2006).

In this case, the span of time from the date Hamilton filed his initial complaint (November 19, 2014) and the date the trial court granted summary

judgment (September 21, 2015) was approximately ten months. Certainly, this was a sufficient amount of time for the parties to complete discovery. Moreover, in his appeal, Hamilton's focuses on his lack of opportunity to depose Thacker and Thacker's employees, and Thacker's subsequent "unilateral" cancellation of the depositions scheduled for August 18, 2015. But, what Hamilton fails to acknowledge is the approximate ten-month period prior the granting of summary judgment, which was available to him to undertake discovery. During that time, Hamilton could have obtained Thacker's deposition and any other discovery materials he so desired. In the record, Hamilton relies only on the canceled August 18, 2015, depositions, but given the approximate ten months prior that Hamilton had available to him to depose Thacker, we cannot say he was prevented from conducting discovery. Most importantly, the facts upon which the trial court predicated its order granting summary judgment are based on Hamilton's allegations. Nothing Thacker could have testified to would have changed the fact that no oral agreement existed, where Hamilton was only able to prove that he requested that Thacker give him a quote. Nothing Thacker could have testified to would have changed the fact that Hamilton's father did not have an insurable interest in the Property when he cancelled the 2010 Policy in 2014. Therefore, we find no error regarding this issue.

## IV. CONCLUSION

For the foregoing reasons, we affirm the order of the Pike Circuit Court granting summary judgment in favor of the Appellees.

D. LAMBERT, JUDGE, CONCURS.

TAYLOR, JUDGE, DISSENTS.

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