EDWARD COLLINS	*	**NO. 2008-CA-0790**
VERSUS	*	**COURT OF APPEAL**
STATE FARM INSURANCE COMPANY AND REGGIE GLASS	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**

* * * * * * *

APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2006-9573, DIVISION "L-6"
Honorable Kern A. Reese, Judge

* * * * * *

CHIEF JUDGE JOAN BERNARD ARMSTRONG

* * * * * *

(Court composed of Chief Judge Joan Bernard Armstrong, Judge Patricia Rivet Murray, Judge Max N. Tobias, Jr., Judge David S. Gorbaty, and Judge Roland L. Belsome)

TOBIAS, J., DISSENTS AND ASSIGNS REASONS.
BELSOME, J., DISSENTS WITH REASONS.

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REMANDED.

Edward Collins prosecutes this appeal from the trial court's summary judgment dismissing his suit against State Farm Fire and Casualty Company (State Farm). Mr. Collins filed suit in Civil District Court for the Parish of Orleans (CDC) against State Farm[1], and its alleged claims representative, Reggie Glass. State Farm issued a homeowner's property insurance policy on Mr. Collins' home, located at 7508 Lafourche Street in New Orleans. Mr. Collins alleges that in mid-August of 2005, Mr. Glass informed him that the home was fully covered with flood and homeowner's insurance policies. Mr. Collins filed a timely claim with State Farm for damages sustained by his home on August 29, 2005, in the aftermath of the levee failures associated with Hurricane Katrina. Subsequently, State Farm denied the claim and Mr. Collins alleged that he was informed that State Farm dropped his homeowner's policy without prior written notice.

Mr. Collins claimed against his insurer for the full value of his property pursuant to La.R.S. 22:695, the Louisiana Valued Policy Clause. He sought

[1] The petition names "State Farm Insurance Company." The proper title for the defendant is "State Farm Fire and Casualty Company."

damages for State Farm's allegedly arbitrary and capricious failure to pay or timely initiate loss adjustment pursuant to La.R.S. 22:658. He also sought damages for State Farm's alleged breach of its duty of good faith and fair dealing to adjust the claim fairly and promptly, and to make reasonable efforts to settle the claim, pursuant to La.R.S. 22:1220.

Mr. Collins claimed that Mr. Glass is individually liable for his failure to adjust the claim in good faith and failure to disclose material information to Mr. Collins, thereby causing further delay and damage.

By Supplemental and Amending Petition, Mr. Collins added Hibernia Mortgage Company/Capital One[2] (CONA) as a defendant, claiming that it failed to inform him that his coverage was not in effect at the time of the hurricane.

State Farm removed the suit to United States District Court for the Eastern District of Louisiana, case No. 2006-9573, Division "G-11", claiming that removal was authorized pursuant to 28 U.S.C. § 1367, 28 U.S.C. §1369, and 28 U.S.C. § 1441(e)(1)(A) and (B), asserting that Mr. Glass fraudulently was named as a defendant in order to defeat diversity jurisdiction under 28 U.S.C. §1332.

State Farm filed an answer to the petition in federal court, claiming that: (1) the petition failed to state a cause of action; (2) if a contract of insurance existed between the parties, State Farm pled its exclusions, terms, conditions and limitations specifically in their entirety, including the water damage exclusion; (3) the damage was not caused by a covered peril; (4) the Louisiana Valued Policy

[2] The correct name of this corporate defendant is Capital One, National Association.

Law does not apply to this case; (5) to the extent that Mr. Collins has received any payment from State Farm, that payment was appropriate; (6) the amendments to La.R.S. 22:658 and La.R.S. 22:1220 do not have retroactive effect; (7) State Farm reserved the right to any credits or setoffs to which it may be entitled; (8) Mr. Collins was not damaged by any alleged wrongdoing on the part of State Farm, its agents or representatives; (9) Mr. Collins did not have a homeowner's policy of insurance issued by State Farm covering his residence at 7508 Lafourche Street, in effect at the time of the loss; (10) alternatively, Mr. Collins failed to take reasonable steps to mitigate his damages, if any. State Farm filed a supplemental answer denying the allegations contained in Mr. Collins' Supplemental and Amending Petition.

CONA filed an answer to the petition in federal court, generally denying Mr. Collins' allegations.

State Farm filed a Motion for Summary Judgment in federal court, contending that it determined not to renew coverage on the Collins home, and provided Mr. Collins in early 2005 with notice of that fact in accordance with Louisiana law[3].

CONA filed a Motion for Summary Judgment in CDC, contending that it did not hold Mr. Collins' mortgage on the date his insurance is alleged to have lapsed or on the date his property allegedly sustained hurricane damage. In support of its motion, CONA supplied, *inter alia,* a copy of the notice sent to Mr.

[3] La.R.S. 22:635 A; La.R.S. 22:636 F (1); and La.R.S. 636.1 A.

Collins on February 9, 2005 advising him that CONA's predecessor, Hibernia Corporation/Hibernia National Bank, would no longer service his mortgage and that, from March 1, 2005 onward, the mortgage would be serviced by CitiMortgage, Inc. The trial court granted the motion on September 28, 2007, dismissing CONA with prejudice, each party to bear his or its own costs.[4]

In support of its Motion for Summary Judgment, State Farm provided the court with a copy of its letter of April 27, 2005, in which it advised that "insurance coverage is no longer acceptable to State Farm Fire and Casualty Company because the condition of your roof is increasing the chance of wind and water loss." The letter noted the policy's expiration date of May 30, 2005 at 12:01 a.m. State Farm also provided a copy of its letters to Hibernia National Bank and Sun Finance Company, Inc. (Sun) under the same date advising the mortgagees that the policy would cease as of May 30, 2005.

State Farm also provided the affidavit of Ann French, its Underwriting Team Manager, who deposed that State Farm on May 30, 1991 issued policy no. 18-43-2712-2 covering property located at 7508 Lafourche Street, effective until May 30, 2005. Furthermore, in January of 2000, Mr. Collins filed a claim and was paid for the repair and/or replacement of the home's roof. During an inspection of the property conducted on September 16, 2004, in connection with another claim by Mr. Collins, it was discovered that he had not made the required roof repairs for which he had been paid in 2000. That failure to repair the roof was the basis of

[4] That judgment was not appealed and is now final and unappealable.

State Farm's decision not to renew the policy upon its May 30, 2005 expiration. Ms. French also averred that on April 27, 2005, State Farm mailed notice of non-renewal to Mr. Collins at the address shown in the policy, and to the two mortgage holders, noting an expiration of coverage on May 30, 2005. Ms. French concluded that on or about the date of loss, August 29, 2005, the State Farm policy was not in effect and no coverage is available for any loss sustained by Mr. Collins in connection with Hurricane Katrina.

State Farm also submitted the affidavit of Reggie Glass, who averred that he is a self-employed, independent agent of the State Farm Insurance Companies and has never been a claims representative for any of those companies. Mr. Glass noted that he was familiar with the State Farm policy issued to Mr. Collins on May 30, 2004 and in effect until May 30, 2005. He denied having represented to Mr. Collins in the month prior to Hurricane Katrina that he was fully insured under his homeowner's policy, and denied having discussed that policy when Mr. Collins visited his office in the month prior to the hurricane.

Mr. Glass also filed a Motion for Summary Judgment in the federal court, filing in support his affidavit and that of Ms. French, together with copies of the non-renewal letters sent to Mr. Collins and the mortgagees on April 27, 2005.

In opposition to the Motions for Summary Judgment, Mr. Collins provided a copy of a letter from Tammie Cavanagh, the manager of Sun's Harvey, Louisiana office. The letter states, in pertinent part:

> Our records indicate we did not receive a renewal notice for Mr. Collins' homeowner insurance policy

> through State Farm for the period of May 30, 2005-May 30, 2006. We also did not receive a cancellation notice in 2005.

Mr. Collins also provided the affidavit of Minnie Ledet, a Sun employee, who averred in pertinent part that:

(1) Sun is a mortgagee on Mr. Collins' home;
(2) She has access to all records and documents pertaining to the mortgage;
(3) Sun never received a notice of non-renewal nor termination of coverage regarding the Collins property; and
(4) Had such documents been received, she would have access to and/or a copy of such documents in Mr. Collins' records.

Mr. Collins also provided an unverified copy of a letter from David Robinson, Underwriting Operations Supervisor for State Farm Fire and Casualty Company to Mr. Collins, showing copies to Mr. Glass, Hibernia National Bank and Sun. The letter, dated May 25, 2004, provides in pertinent part:

> Please disregard our letter sent on April 27, 2004. After receiving additional information, we are reinstating your policy.
>
> Your policy listed above [18-43-2712-2] is hereby reinstated and coverage will continue in force subject to its printed terms and conditions.
>
> We apologize for any inconvenience you may have experienced. We look forward to serving you in the future.

Mr. Collins' opposition to State Farm's Motion for Summary Judgment refers to his affidavit wherein he avers:

(1) He never received a notice of non-renewal from State Farm regarding his homeowner's policy No. 18-43-2712-2;
(2) He continued to pay insurance premiums through his mortgage company for the said policy;
(3) He suffered complete loss of his home as a result of Hurricane Katrina;
(4) When he requested information from State Farm concerning his policy, he received a letter signed by David Robinson and originating from State Farm's Tulsa Operations Center in Tulsa, Oklahoma.

On April 30, 2007, the federal court remanded the matter to CDC, finding that Mr. Glass and Mr. Collins were both citizens of Louisiana, and that Mr. Collins filed suit against Mr. Glass for negligent misrepresentation within a year of its discovery. The federal district judge also denied Mr. Glass's Motion for Summary Judgment and dismissed as moot State Farm's and CONA's Motions for Summary Judgment. The federal court pleadings were made a part of the CDC record.[5]

On remand, and in connection with its Motion for Summary Judgment, State Farm supplied the affidavit of David Robinson, former State Farm Underwriting Team Manager. Mr. Robinson corroborated the statements contained in Ms. French's affidavit concerning the reason why State Farm determined not to renew Mr. Collins' insurance policy following the September 16, 2004 inspection of the property. He also stated that as part of his duties and in the ordinary course of business on behalf of his employer, State Farm, he approved the notice of non-renewal under his signature and caused it to be mailed to Mr. Collins on April 27, 2005, at the address listed in the policy. The notice indicated the policy's coverage would expire on May 30, 2005. Furthermore, as part of his duties, Mr. Robinson approved mailing of the notice of non-renewal to the first and second mortgage holders on the property. He also stated that he is familiar with a letter mailed to Mr. Collins on March 15, 2006 from State Farm's Tulsa Operations Center, noting that between April 27, 2005 and March 15, 2006, State Farm's Monroe Operations Center was relocated to Tulsa, and that relocation is reflected in the change of address.

[5] State Farm separately filed its Motion for Summary Judgment and supporting documents in CDC on September 7, 2007.

Following a hearing held on April 25, 2008, the trial court on May 6, 2008, granted State Farm's Motion for Summary Judgment, dismissing Mr. Collins' claim against the insurer with prejudice. Mr. Collins appeals from that judgment.

We review summary judgments *de novo.* The summary judgment procedure is designed to secure the just, speedy, and inexpensive determination of actions. The procedure is favored and shall be construed to accomplish these ends. La. C.C.P. art. 966 A. (2). A summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to material fact, and that the mover is entitled to judgment as a matter of law. La. C.C.P. art. 966 B. The burden of proof remains with the mover. Thereafter, if the adverse party fails to produce factual support sufficient to establish that he will be able to satisfy his evidentiary burden of proof at trial, there is no genuine issue of material fact. La. C.C.P. art. 966 C(2).

An adverse party to a supported motion for summary judgment may not rest on the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided by law, must set forth specific facts showing that there is a genuine issue of material fact for trial. La.C.Civ.Pro. art. 967; Townley v. City of Iowa, 97-493 (La.App. 3 Cir. 10/29/97), 702 So.2d 323, 326.

If a defendant in an ordinary civil case moves for summary judgment or a directed verdict based on the lack of proof of a material fact, the judge must ask himself not whether he thinks the evidence unmistakably favors one side or the other, but whether a fair-minded jury could return a verdict for the non-moving party on the evidence presented. See, Anderson v. Liberty Lobby, 477 U.S. 242, 106 S.Ct. 2505 (1986). The Anderson court further held that the mere existence of

a scintilla of evidence on the non-moving party's position would be insufficient; there must be evidence on which the jury could reasonably find for that party.

In determining whether an issue is genuine, courts cannot consider the merits, make credibility determinations, evaluate testimony or weigh evidence. Anaya v. Legg Mason Wood Walker, Inc., 07-0654 (La.App. 4 Cir. 5/14/08), __So.2d__, 2008 WL 2080746, citing Coto v. J. Ray McDermott, S.A., 99-1866, p. 4 (La.App. 4 Cir. 10/25/00), 772 So.2d 828, 830.

A fact is *material* if it is essential to a plaintiff's cause of action under the applicable theory of recovery and without which plaintiff could not prevail. Generally, material facts are those that potentially insure or preclude recovery, affect the litigant's ultimate success, or determine the outcome of a legal dispute. Prado v. Sloman Neptun Schiffahrts, A.G., 91-2450 (La.App. 4 Cir. 12/15/92), 611 So. 2d 691, 699.

Mr. Collins assigns as error that State Farm did not present proper evidence, under La.R.S. 22:636 and La.R.S. 22:636.1, that it mailed notice of non-renewal of its policy No. 18-43-2712-2 to him.

La.R.S. 22:636, referring to policy cancellation, provides in pertinent part:

> A. Cancellation by the insurer of any policy which by its terms is cancelable at the option of the insurer, . . ., may be effected as to any interest only upon compliance with either or both of the following:
>
> (1)(a) Written notice of such cancellation must be actually delivered or mailed to the insured . . . not less than thirty days prior to the effective date of the cancellation . . . .
>
> (2) Like notice must also be so delivered or mailed to each mortgagee, . . . or other known person shown by the policy to have an interest in any loss which may occur

> thereunder. For purposes of this Paragraph "delivered" includes electronic transmittal, facsimile, or personal delivery.
>
> * * *
>
> B. The mailing of any such notice shall be effected by depositing it in a sealed envelope directed to the addressee at his last address as known to the insurer or as shown by the insurer's records, with proper prepaid postage affixed, in a letter depository of the United States Post Office. . . .
>
> C. The affidavit of the individual making or supervising such a mailing, shall constitute prima facie evidence of such facts of the mailing as are therein affirmed.
>
> * * *

La.R.S. 22:636.1, referring to non-renewal of a policy, provides in pertinent part:

> E. (1) No insurer shall fail to renew a policy unless it shall mail or deliver to the named insured, at the address shown in the policy, at least twenty days advance notice of its intention not to renew.
>
> * * *
>
> F. Proof of mailing of notice of . . . intention not to renew . . . to the named insured at the address shown in the policy, shall be sufficient proof of notice.

There is a strong public policy requiring prior notice of the cancellation of an insurance policy in order that an insured might be afforded sufficient time to obtain new coverage. Rachuba v. Hickerson, 5688 (La.App. 4 Cir. 2/12/87), 503 So.2d 570, 571, citing Broadway v. All-Star Insurance Corporation, 52987 (La.9/24/73), 285 So.2d 536. The insurer must comply strictly with the notice statutorily required by La.R.S. 22:636.1. Id.

Applying that public policy, the Louisiana Supreme Court in the Broadway case held that "mailed to the insured" in La.R.S. 22:636 "connotes a completed process, the transmission of the notice through the United States Mail. . . . An interpretation which permits a deposit in the mails to conclusively terminate coverage undermines the purpose of notice." Broadway v. All-Star Insurance Corp. 285 So.2d at 539.[6]

La.R.S. 22:636.1 F provides that proof of mailing of notice of intention not to renew or of reasons for cancellation, to the named insured at the address shown in the policy, shall be sufficient proof of notice. This language differs from the language of La.R.S. 22:636. Nonetheless, the statutory presumption of notice provided for in the non-renewal statute, like that in the cancellation statute, has been held to be rebuttable. 15 La.Civ.L.Treatise, Insurance Law & Practice, §224 (3d ed.), citing Ray v. Associated Indemnity Corporation, supra. This presumption can be overcome by affirmative proof of non-delivery. See, Beasley v. Puglise, 1466 and 1756 (La.App. 4 Cir. 6/14/84), 454 So.2d 1125[7]; Glynn v. Diamond State Ins., supra.

In Pincus v. Pumilia, 12400 (La.App. 4 Cir. 3/9/82), 412 So.2d 151, 152, this Court affirmed the trial court's finding that the presumption of notice that a taxi driver was excluded from coverage was rebutted by the driver's testimony at

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[6] While the Broadway case was decided under the "cancellation" statute, La.R.S. 22:636, we find no reason in the legislative history of the statutes or by applications of logical principles not to apply this same public policy to the "non-renewal" statute. La.R.S. 22:636.1. See, Ray v. Associated Indem. Corp., 63796 (La.6/25/79), 373 So.2d 166, 169-70; Glynn v. Diamond State Ins., 03-0029 (La.App. 3 Cir. 11/26/03), 864 So.2d 209 at fn. 5.

[7] In Beasley, while the defendant proved he had not received the notice of cancellation mailed by his insurer, the failure of notice was attributable to the defendant by virtue of his refusal to respond to notices from the post office.

trial that he did not receive the notice of termination of coverage and continued to pay premiums after the date of the purported mailing of notice.

Similarly, in Automobile Club Ins. Co. v. Aaron, 5619 (La.App. 4 Cir. 6/12/74), 296 So.2d 464, this Court found that the insured adequately showed that neither he nor his lien holder received the insurer's notice of cancellation.

In Norred v. The Employers Fire Insurance Company, 16650 (La.App. 2 Cir. 12/5/84), 460 So.2d 1147, the appellate court reversed a trial court finding of adequate notice of intention not to renew the plaintiff's policy. The insurer produced a certificate of mailing showing that the letter was deposited with the post office. The insurance agency received a copy of the notice by mail. The plaintiff testified that he did not receive the notice. The appellate court held that while the trial court correctly found that the insurer convincingly proved the mailing of the notice of intent not to renew, it should have considered the plaintiff's affirmative proof of non-delivery.

State Farm relies on this Court's opinion in Talley v. First Georgia Underwriters Co., 91-1014 (La.App. 4 Cir. 3/26/92), 596 So.2d 408. In that case, we affirmed the trial court's summary judgment dismissing plaintiff's claim for damages under a fire insurance policy issued by the defendant insurer. The insurer mailed a notice of cancellation effective August 9, 1981, to the plaintiff at the address shown on the policy. When that letter was returned "undelivered" by the postal service, the insurer had the letter mailed to the plaintiff at the insured location. That letter was not returned. On November 3, 1981, the plaintiff met with his insurance agents and was shown a copy of the cancellation notice. The agents advised the plaintiff that, in its present condition, the formerly insured premises did not meet underwriting requirements, and that they would inspect the

property after he had completed its remodeling to determine whether a new policy could be purchased. In March of 1982, the plaintiff advised his agent that the house had burned to the ground, and asked the status of his homeowners' insurance. When advised that the policy had been cancelled, the plaintiff asked his agent to "back date" a policy to cover the house that had burned down. The agent refused the request. On appeal, the plaintiff argued that he had not received the notice of cancellation, relying on his affidavit to that effect filed in the trial court in opposition to the insurer's Motion for Summary Judgment. This Court held that neither La.R.S. 22:636 nor La.R.S. 22:636.1 requires proof of receipt of the notice, but only of proper mailing, citing Harang v. Sparacino, 4555 (La.App. 4 Cir. 12/6/71), 257 So.2d 785, a case decided prior to the Louisiana Supreme Court's opinion in the Broadway case. The Talley opinion does not discuss the effect, *vel non*, of the Broadway opinion. Talley is further distinguishable from the instant case because the plaintiff had actual knowledge of the cancellation through his pre-loss meeting with his agent, which took place after the cancellation and at which he was shown the notice of cancellation.

The following language from the Supreme Court's opinion in Ray v. Associated Indemnity Corporation, 373 So.2d at 169-70, applying the summary judgment standard, supports our conclusion that State Farm's reliance on Talley is misplaced:

> In arguing for the propriety of summary judgment on this issue, [the insurer] relies on the case of Cuccia v. Allstate Ins. Co., 250 So.2d 60 (La.App. 1971 [sic]), in which the Fourth Circuit held a summary judgment proper even though the insured denied having received a cancellation notice. However, the insurance company failed to note that this court reversed the Fourth Circuit's decision, Cuccia v. Allstate Ins. Co., 262 La. 545, 263 So.2d 884 (1972). In that case we agreed that the insurance company presented prima facie evidence that the notice was mailed according to the statute's requirements, but

> concluded that the presumption raised was rebuttable by the insured who adamantly contended that he had not received the notice. Therefore, the court decided that Cuccia was entitled to his day in court.
>
> Although the instant case does not involve a cancellation notice, the rationale of Cuccia, that disputed facts should not be decided by summary judgment, is equally applicable to the case at hand. Ms. LaCour may not persuade the trier of fact that she indeed did not receive a premium notice, but the law affords her the opportunity to do so.
>
> For the reasons assigned, the ruling of the district court granting the motion for summary judgment is reversed, and the case is remanded to the district court for further proceedings consistent with the views expressed herein; the defendant [insurer] is cast for costs.

Applying the burden of proof standard for summary judgments together with the controlling jurisprudence of the Louisiana Supreme Court, we are compelled to conclude that while State Farm in this case made a *prima facie* showing that it mailed notice of its intention not to renew the policy to the insured and the mortgagees, the sworn affidavits of the insured and of a Sun Financing representative denying receipt of that notice create a genuine issue of material fact. The Louisiana Supreme Court's decisions in the Broadway and Ray cases make it clear that actual receipt of notice by the insured is material to the determination of whether the non-renewal of a policy is effective. We express no opinion as to whether or not the insurer may be able to prove at trial that Mr. Collins received the notice it claims it mailed to him. It is clear at this point in the litigation, however, that the conflict created by the contradictory affidavits supplied by the insurer on the one hand and by Mr. Collins and Sun on the other hand is inappropriate for resolution by summary judgment.

For the foregoing reasons, we vacate the summary judgment of May 6, 2008 and remand this case to the trial court for further proceedings consistent with this opinion.

REMANDED.