NOT DESIGNATED FOR PUBLICATION

FRANKLIN D. BEAHM AND TAWNEY BEAHM	*	**NO. 2009-CA-0018**
	*	
VERSUS		**COURT OF APPEAL**
	*	
FIDELITY HOMESTEAD ASSOCIATION	*	**FOURTH CIRCUIT**
		STATE OF LOUISIANA

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APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2006-8573, DIVISION "J-13"
Honorable Nadine M. Ramsey, Judge

* * * * * *

Judge David S. Gorbaty

* * * * * *

(Court composed of Judge Patricia Rivet Murray, Judge Max N. Tobias, Jr., Judge David S. Gorbaty)

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AFFIRMED

Plaintiffs, Franklin D. Beahm and Tawney Beahm, appeal a summary judgment granted in favor of defendants, Bankers Insurance Company. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY:

Franklin D. Beahm and Tawney Beahm (hereinafter "the Beahms") filed suit against Fidelity Homestead Association (hereinafter "Fidelity") and Bankers Insurance Company (hereinafter "Bankers"), after their home sustained flood damage in Hurricane Katrina. The Beahms claimed that they were not aware that an excess flood policy they had maintained for several years prior to Hurricane Katrina had lapsed or been cancelled; they believed that the premiums for the policy were being escrowed and paid by Fidelity, through whom they had refinanced their mortgage prior to Hurricane Katrina.

Bankers filed a motion for summary judgment seeking to be dismissed from the lawsuit arguing they had no liability for the Beahms' losses because the policy in question had lapsed in September of 2004. In support of the motion, Bankers

submitted copies of two notices sent to the Beahms at the address listed on the policy. The first notice dated August 9, 2004, was a renewal notice explaining that it was time to renew the policy in question. The notice clearly stated that if payment was not received by the expiration date, September 26, 2004, coverage would be terminated. The second notice dated September 11, 2004, was entitled "Final Renewal Notice." The notice expressed Bankers' concern that no premium had yet been received, and that the policy would expire on September 26, 2004. Bankers also submitted the affidavit of Barry Gates, vice president of underwriting for Bankers, which detailed the sequence of events from the initial date that insurance was provided to the Beahms through the termination of the policy. Mr. Gates stated that he had personal knowledge that both notices of renewal had been mailed to the Beahms.

The Beahms opposed the motion stating that they were "under the understanding" that Fidelity was to have responsibility for paying the Beahms' taxes and insurance, including the subject excess flood policy. In support of the opposition, the Beahms attached their own affidavits. The affidavits which were identical in content attested that they "understood" that Fidelity would pay the flood and excess flood insurance on the property from the Beahms' escrow account. Further, they stated that they had not received any renewal or cancellation notices from Bankers, nor did they have knowledge of whether Fidelity had received notices. No affidavits or evidence of any kind was attached from any Fidelity personnel to support the Beahms' position.

Following a hearing, the trial court granted summary judgment on May 2, 2008, dismissing Bankers from the case.

STANDARD OF REVIEW:

Motions for summary judgment are reviewed on appeal *de novo.* The same criteria that govern the trial court's determination of whether summary judgment is appropriate are used by the reviewing court. *Samaha v. Rau*, 07-1726, pp. 3-4 (La. 2/26/08), 977 So.2d 880, 882-883. A motion for summary judgment will be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact, and that mover is entitled to judgment as a matter of law." La. Code Civ. Proc. art. 966 B. The burden of proof remains with the movant. However, if the movant will not bear the burden of proof at trial on the matter that is before the court on the motion for summary judgment, the movant's burden on the motion does not require him to negate all essential elements of the adverse party's claim, action, or defense, but rather to point out to the court that there is an absence of factual support for one or more elements essential to the adverse party's claim, action or defense. 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. Code Civ. Proc. art. 966 C(2).

LAW AND ANALYSIS:

The Beahms make four assignments of error. The first, second and fourth assignments of error are closely related. The first assignment states that the trial court erred in granting summary judgment because there exists a genuine issue of

material fact regarding whether Bankers provided adequate notice of cancellation to the Beahms pursuant to La. R.S. 22:887[1].

Louisiana Revised Statute 22:887 provides, in pertinent part:

> A. Cancellation by the insurer of any policy which by its terms is cancelable at the option of the insurer, or of any binder based on such policy, 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 or to his representative in charge of the subject of the insurance not less than thirty days prior to the effective date of the cancellation except when termination of coverage is for nonpayment of premium.
>
> * * *
>
> (2) Like notice must also be delivered or mailed to each mortgage, pledgee, 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.
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> * * *
>
> 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.

The Beahms acknowledge that Bankers supported its motion for summary judgment with copies of letters dated August 9, 2004, and September 11, 2004, both of which were mailed to the Beahms at the address on the policy, and notified them of the renewal date of the policy. The Beahms, however, argue that there are no tracking numbers or other documentation to prove that the letters were mailed or received.

In their second assignment of error, the Beahms argue that the trial court erred in accepting the affidavit of Bankers' vice president of underwriting as prima facie proof of the mailing, as provided by La. R.S. 22:887 C, because they contend the affiant did not supervise the mailing.

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[1] La. R.S. 22:887 was renumbered from R.S. 22:636 by Acts 2008, No. 415, §1, effective 1/1/2009. We will use the current statute number throughout this opinion.

Bankers counters that it did not want to lose the Beahms as customers as evidenced by the second notice. Bankers argues there was no reason to **not** mail the notices seeking renewal of the policy.

To that end, Bankers points to the fact that it did not cancel the Beahms' policy, rather, the policy expired under its own terms for failure of the Beahms to pay the renewal policy premium on or before the due date. Bankers notes that it is undisputed that the renewal premium was not paid. Because this was a non-renewal for failure to pay premium and not a cancellation, La. R.S. 22:887 is inapplicable.

In support of its position, Bankers cites *Adamson v. State Farm Mutual Ins. Co.*, 95-2450 (La.App. 1 Cir. 6/28/96), 676 So.2d 227. In *Adamson*, plaintiff was involved in an accident on July 23, 1992, and sought to collect under his automobile insurance policy's UM coverage. State Farm argued that it did not provide UM coverage to plaintiff on the date of the accident because the policy of insurance had expired prior to the date of the accident. A renewal notice had been sent to plaintiff on June 11, 2002, stating that a renewal premium was due on July 15. This premium was not paid. On July 28, 1992, an expiration notice was sent to plaintiff, indicating that if he paid the premium by August 8, the policy would continue with continuous coverage. Plaintiff did not pay the premium.

Like the Beahms, Mr. Adamson argued that State Farm had not validly cancelled his policy. The trial court found that the line of cases upon which plaintiff relied were "cancellation" cases. Citing *Green v. McCollum*, 535 So.2d 8, 9 (La.App. 4 Cir. 1988), the trial court explained that the term "cancellation" "implies that a policy is being disrupted for some reason, and

terminated prior to its anticipated termination date." When the cancellation of a policy is initiated by the insurer, the statute [La. R.S. 22: 887] requires strict compliance with the prescribed procedure. *Adamson, supra* at 95-2450, p. 9, 676 So.2d at 232, *citing Arceneaux v. Broussard*, 319 So.2d 846, 849 (La.App. 1 Cir. 1975). "However, when a policy expires from the running of its term, it is not being disrupted, but is instead dying a natural death." *Adamson, supra* at p. 9, *citing Green, supra* at p. 9.

Bankers argues that the applicable statute in the case of non-renewal is La. R.S. 22:877 G, which provides in part:

> G. (1) No insurer shall fail to renew a policy providing property or casualty insurance unless a notice of intention to not renew is mailed or delivered to the named insured at the address shown on the policy at least thirty days prior to the effective date of nonrenewal.
>
> (2) Like notice shall also be delivered or mailed to each mortgagee, pledgee, or other known person shown by the policy to have an interest in any loss which may occur thereunder. …"
>
> (3) This Subsection shall not apply:
>
> * * *
>
> (b) If the insurer has manifested its willingness to renew the policy either through the same company or a company in the same group of companies.
>
> (c) In the case of nonpayment of the premium.
>
> * * *

We agree with Bankers on two counts. First, the parts of the statute, La. R.S. 22:887, upon which the Beahms rely do not require that a notice be mailed by certified mail. The only requirement for proof of mailing is an affidavit "of an individual making or supervising such a mailing." La. R.S. 22:887 C. Bankers supplied the affidavit in compliance with the statute. To

the contrary, the Beahms have offered no evidence in opposition to the motion to support the fact that the representative who signed the affidavit attesting to the mailing did not have personal knowledge of same. Indeed, the only evidence in support of their opposition is the Beahms' own affidavits stating what they "believed" to be true, and a statement that they did not receive the notices allegedly sent by Bankers.

Second, we agree that the notices sent by Bankers were notices of willingness to renew that set forth the date that payment was due. Thus, the exceptions to La. R.S. 22:887 G apply, i.e., the provisions of Paragraph G do not apply if the insurer manifests its willingness to renew, or in the case of nonpayment. The Beahms have not offered any reliable evidence to indicate that they did not receive the notices to renew from Bankers. The Beahms' bottom line is that this Court should accept their affidavits as true, but disregard the affidavit submitted by Bankers. We decline to do so. In addition to the affidavit of the Bankers' representative, Bankers submitted copies of letters notifying the Beahms that their policy was up for renewal, and expressing Bankers' concern because it had not yet heard from the Beahms despite an impending payment due date. Clearly, Bankers sought to keep the Beahms as customers and did not want the policy to lapse.

The fourth assignment of error is that the trial court erred in granting summary judgment because genuine issues of material fact exist regarding whether Bankers provided adequate notice of intent to renew. The Beahms argue that Bankers is trying to circumvent the provisions of La. R.S. 22:887 A, B and C, by categorizing its notices as ones to renew rather than cancel the subject policy. The underlying premise of this argument is the same as

that contained in assignment of errors one and two. The Beahms dispute that any notices of any kind were mailed to them, and that the affidavit attesting to the mailing is insufficient. Again, we find no merit to this argument.

In their third assignment of error, the Beahms assert that the trial court erred in granting summary judgment because a genuine issue of material fact exists regarding whether plaintiffs' escrow funds included funds for excess flood payments. This assignment of error is misplaced. Whether money was being held in escrow by Fidelity to pay the Bankers' premium is an issue to be resolved between the Beahms and Fidelity, and should not prevent summary judgment in favor of Bankers.

Accordingly, for the foregoing reasons, we affirm the judgment of the trial court in favor of Bankers.

AFFIRMED