STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1454

Joseph Okrakene,
Appellant,

vs.

Governing Board of Directors of the Minnesota FAIR Plan,
a statutorily-created entity,
Defendant,

Nila Grant Agency, Inc.,
Respondent,

Dean Burrington Agency, Inc.,
Respondent.

Filed August 26, 2008
Affirmed in part, reversed in part, and remanded
Connolly, Judge

Hennepin County District Court
File No. 27-CV-04-015151

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Considered and decided by Connolly, Presiding Judge; Toussaint, Chief Judge; and Ross, Judge.

U N P U B L I S H E D O P I N I O N

CONNOLLY, Judge

In this case involving a dispute over whether there was insurance coverage on appellant's home after it was damaged in a fire, appellant challenges the district court's grant of summary judgment in favor of each respondent, arguing that it erred because genuine issues of material fact exist. Because we conclude that there are no genuine issues of material fact concerning the claim against Dean Burrington Agency, Inc., we affirm in part. But, because there are genuine issues of material fact concerning one claim against Nila Grant Agency, Inc., we affirm in part, reverse in part, and remand.

FACTS

Appellant Joseph Okrakene owned a rental property located at 1543 22nd Avenue North, Minneapolis, MN (the property). On June 26, 2004, the property was destroyed by fire. Appellant was under the impression that he had purchased an insurance policy from American Family Insurance, Inc. that would cover this loss. The policy was never purchased. This case centers around the question of who bears responsibility for the property lacking insurance coverage.

Appellant has owned three or four rental properties since 2000. Respondent Nila Grant Agency, Inc. was an insurance agency that worked exclusively for American Family and its associates. It was owned by Nila Grant (Grant). Seeking lower insurance rates for the property, appellant first approached Grant in January 2003. After a

preliminary assessment, Grant determined that the property did not meet American Family's underwriting guidelines. As a result, Grant Agency proceeded to insure the properties through the Minnesota Fair Plan Act (FAIR).[1] Appellant acknowledged that Grant told him that insurance coverage on the property would be through FAIR.

The FAIR policy application was filled out at the January 2003 meeting. Grant filled out the application; appellant signed it. The application lacked a zip code. At the same meeting, appellant obtained insurance through FAIR for another one of his properties. This application contained a zip code; however, instead of containing the correct zip code of 55429, it listed the incorrect zip code of 55430. Grant testified that she might have filled in the wrong zip code, but did not give a definitive explanation. FAIR used the address from the second application in its communications with appellant. Ultimately, in exchange for a premium of $735.98, appellant received a policy that provided coverage of $127,000 of fire and other loss insurance on the property at issue from May 17, 2003 to May 17, 2004.

In August 2003, appellant refinanced the mortgage on the property at issue with Countrywide Financial, Inc. In conjunction with this refinancing, appellant's mortgage broker faxed a request for an insurance "binder" to Grant on August 14, 2003. On August 21, Grant responded by providing documents captioned "Evidence of Property Insurance" and "Payment Receipt." The binder was never submitted to American Family

[1] The Minnesota FAIR plan is a statutorily-created organization of Minnesota insurers intended to make insurance available to properties that are insurable, but which cannot obtain insurance through normal insurance markets because they are in poor condition or are located in high risk areas. Minn. Stat. § 65A.31-42 (2004).

because appellant never submitted payment or completed an application for it. Appellant alleges that he informed Grant that he would be escrowing his insurance premiums with Countrywide, apparently under the assumption that Grant would forward the insurance bills directly to Countrywide. Appellant also claims that his mortgage broker instructed Grant in writing after the refinancing to change the bill-and-loss payee party to Countrywide so that Countrywide would receive any future bills and notices. While funds were ultimately escrowed, they were never used to pay for the insurance premiums because no insurance bills were sent to Countrywide.

On October 31, 2003, respondent Grant Agency ceased operations. Another American Family agency, respondent Dean Burrington Agency, Inc., took over appellant's file at that time. Respondent Burrington is run by Dean Burrington (Burrington). Burrington had no contact with appellant concerning the property prior to the fire.

On April 2, 2004, FAIR sent appellant a "Renewal Premium Due Notice" with a "Premium Statement" and "Renewal Declarations" for a "Dwelling Fire" policy that would be effective from May 17, 2004, to May 17, 2005. The notice stated that the premium of $735.98 was due May 18, 2004, and the premium statement indicated that the current policy would expire on May 17, 2004, and that "[t]o continue your coverage, please send your payment before the Due Date shown." FAIR did not receive appellant's premium payment because he never sent one.

FAIR then sent an "Expiration Notice" and "Premium Statement" to appellant on May 17, 2004. The Premium Statement provided: "Dear Policyholder: As of the

Expiration Date shown above, we have not received your renewal premium payment, therefore, this policy was not renewed and has expired." The expiration date shown was May 17, 2004. FAIR did not receive a premium payment in response to the Expiration Notice.

On May 18, 2004, FAIR sent to appellant a "Policy Lapse Notice" which stated: "Dear Policyholder: Premium payment has not been received for this policy. Your policy is CANCELLED on the Cancellation Date indicted below, at the time specified in the policy." The cancellation date was May 18, 2004. FAIR did not receive a premium payment after this notice. Appellant admitted to receiving a copy of the FAIR policy and FAIR's April 2, 2004 "Renewal Declaration."

After the fire destroyed the property and appellant learned that he was uninsured for the loss, he initially sued FAIR under a theory that the renewal declarations extended his coverage for another year. This action was disposed of in FAIR's favor on a motion for summary judgment. Appellant appealed, and this court affirmed the grant of summary judgment in an unpublished opinion. *Okrakene v. Governing Bd. of Dir. of the Minnesota FAIR Plan*, No. A05-1283 (Minn. App. Mar. 21, 2006), *review denied* (Minn. June 20, 2006).

In the present action, appellant has brought negligence claims against Grant Agency and Burrington Agency. The district court, in an order filed March 2, 2007, granted Grant Agency and Burrington Agency's motions for summary judgment and denied appellant's motion to amend his complaint and answers. The district court considered a number of arguments and concluded that summary judgment in favor of

each respondent was appropriate. Appellant challenges the decision, arguing that (1) genuine issues of material fact exist as to whether Grant breached her duty to appellant, (2) genuine issues of material fact exist as to whether Burrington breached his duty to appellant, (3) the district court abused its discretion by not granting appellant's motion to amend its complaint, and (4) the district court's decision to deny appellant's motion to amend his admissions should be reversed. This appeal follows.

D E C I S I O N

"On an appeal from summary judgment, we ask two questions: (1) whether there are any genuine issues of material fact and (2) whether the [district] court[] erred in [its] application of the law." *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). "A motion for summary judgment shall be granted when 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 either party is entitled to a judgment as a matter of law. On appeal, the reviewing court must view the evidence in the light most favorable to the party against whom judgment was granted." *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993) (citation omitted). Summary judgment "should be employed only where it is perfectly clear that no issue of fact is involved, and that it is not desirable nor necessary to inquire into facts which might clarify the application of the law." *Donnay v. Boulware*, 275 Minn. 37, 45, 144 N.W.2d 711, 716 (1966).

I. Genuine issues of material fact exist as to whether Grant breached her duty to appellant.

An insured possesses "the same burden normally possessed by any other plaintiff when attempting to establish professional liability, to-wit: (a) the existence of the duty, (b) its breach, (c) causation, and (d) damages." *Johnson v. Urie*, 405 N.W.2d 887, 891 (Minn. 1987). The existence of a legal duty is a question of law. *Gabrielson v. Warnemunde*, 443 N.W.2d 540, 543 n.1 (Minn. 1989). Whether a legal duty exists "depends on the factual circumstances of each case." *Id.* The jury's role is to resolve the disputed facts so that a court may then determine whether a duty exists. *Id.*

An insurance agent is expected to use the skill and care which a "reasonably prudent person engaged in the insurance business [would] use under similar circumstances." *Johnson v. Farmers & Merch. State Bank of Balaton*, 320 N.W.2d 892, 898 (Minn. 1982). An agent usually has no "ongoing duty of surveillance." *Kashmark v. W. Ins. Cos.*, 344 N.W.2d 844, 847 (Minn. 1984). Once a policy has been issued

> [t]he insured bears the responsibility to inform the agent of changed circumstances which might affect the coverage of the insurance policy, because the insured is in a better position to communicate those changes than the agent could be expected to discover on his or her own initiative.

Gabrielson, 443 N.W.2d at 544. This typically means that an insurance agent "has no legal duty toward an insured beyond that specifically undertaken by him or her." *Farmers*, 320 N.W.2d at 898.

But, if special circumstances exist, then "the insurance agent may possibly be under a duty to take some sort of affirmative action, rather than just follow the

instructions of the client." *Gabrielson*, 443 N.W.2d at 543-44. There are no definitive rules for when special circumstances arise. In the past, the Minnesota Supreme Court has found the following considerations relevant: (1) if the agent knew that the insured was unsophisticated in insurance matters, (2) if the agent knew that the insured was relying on the agent to provide appropriate coverage, (3) if the agent knew that the insured needed protection from a specific threat. *Id.* at 544.[2] Whether a prior agent made a misrepresentation to the insured has also been a relevant consideration in the past although it has not, on its own, been previously held to be sufficient to create a special circumstance. *Id.* The testimony of an experienced insurance agent may be important in establishing a standard of care, but it "does not by itself establish a legal duty to exercise that care for the benefit of the insured." *Id.* at 545. Finally, an insured is generally responsible for informing himself about insurance coverage. *Louwagie v. State Farm Fire & Cas. Co.*, 397 N.W.2d 567, 569 (Minn. App. 1986), *review denied* (Minn. Feb.13, 1987).

The district court's grant of summary judgment in favor of respondent Grant Agency must be reversed because there is, when the evidence is viewed in the light most favorable to appellant, genuine issues of material fact surrounding the escrow instructions allegedly given to Grant by appellant referencing payment of the premium for the insurance policy that would have covered the fire loss.

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[2] In *Osendorf v. American Family Ins. Co.*, an insurance agent was found liable for negligence when he made misrepresentations to a barely literate farmer who had difficulty reading the insurance material and, as a result, had to rely on his agent to help select the appropriate coverage. 318 N.W.2d 237 (Minn. 1982).

In its decision, the district court stated: "Neither [appellant] nor anyone else directed that the billing be changed from [appellant] personally to Countrywide." This statement is contradicted by appellant's deposition testimony:

> [RESPONDENT GRANT AGENCY'S ATTORNEY:] Did you instruct Nila Grant at any time prior to the fire to change the "bill to" instructions on the FAIR plan policy from bill to insured to bill to somebody else?
> [APPELLANT:] Yes, when I did--when I gave my--when I refinanced, Nila Grant was informed that the new mortgages company would be Countrywide. She was informed and I can say with real certainty that [appellant's mortgage broker] also informed her.
> [R:] Here's my question, and I want to get real square on this one. Do you have a specific recollection as you sit here under oath of telling Nila Grant I want to change the "bill to" procedures for my insurance payment on 1543 to have the bills sent to the mortgage company instead of me? Yes or no.
> [A:] I told her that I would from this point on escrow all my payments.
> [R:] So the answer to my question is no, I didn't tell her to change it from bill to insured to bill to me, is that true?
> [A:] I did not specify that.

This portion of the record indicates that appellant arguably gave Grant instructions to pay the premium from his escrow account and that these instructions were never changed. Therefore, there is a material fact in dispute and, the matter must be remanded for a trial because a jury might conclude that Grant could be negligent for failing to follow appellant's instructions to have the insurance premiums paid from the escrow account. While a jury might conclude that because appellant had access to his online mortgage account he was therefore on notice that the premium payments were not being made from his escrow account, that is for a jury to decide.

We wish to emphasize that we are reversing and remanding for trial on only this one narrow issue. In his brief, appellant raises issues regarding Grant's supposed failure to accurately complete his address on some of the insurance forms, the law-of-the-case doctrine, and the effect of an earlier related appeal on this case. *Okrakene v. Governing Bd. of Dir. of the Minnesota FAIR Plan*, No. A05-1283 (Minn. App. Mar. 21, 2006), *review denied* (Minn. June 20, 2006). We are not reversing the district court's decision on any of these issues.

II. Genuine issues of material fact do not exist as to whether Burrington breached a duty to appellant.

Appellant argues that "[a]ny agent upon assuming agency duty, must at least talk to his or her new client and find out what their insurance needs are, and whether they are being met." Appellant cites no support for this proposition, and it runs contrary to the general rule that an insurance agent "has no legal duty toward an insured beyond that specifically undertaken by him or her." *Farmers*, 320 N.W.2d at 898. In this case, Burrington received no special instructions from appellant and appellant did not provide any instructions to Grant after Burrington's receipt of the file; thus, Burrington had no legal duty to appellant. Additionally, considering that Burrington was under no "ongoing duty of surveillance," Burrington did not have a legal obligation to monitor appellant's file. *Kashmark*, 344 N.W.2d at 847.

Appellant argues that a special circumstance is present because Grant, appellant's prior agent, allegedly made misrepresentations to him. As a result, appellant argues that Burrington had an "affirmative duty" to do more. This argument is unavailing because

the three other considerations for determining when a special circumstance exists are not present. First, appellant does not appear to be an unsophisticated insurance customer. He has an undergraduate business degree and two master's degrees, he owns and manages multiple rental properties and he has also used various other insurance providers for his other properties in the past. Second, considering that appellant did not even know who Burrington was, it is doubtful that he can now legitimately claim to have relied on him to provide appropriate coverage. Third, nothing in the record suggests that Burrington had any knowledge regarding special insurance coverage that appellant might have needed. As a result of these considerations, Burrington had no heightened duty to appellant. Therefore, no genuine issues of material fact exist as to whether Burrington was negligent in his handling of appellant's file.

III. The district court did not abuse its discretion in denying appellant's motion to amend his complaint.

Appellant argues that the district court abused its discretion when it denied his motion to amend his pleadings to include a claim against American Family. He argues that the binder was a contract obligating American Family or that American Family was bound under a theory of promissory estoppel because he relied on the binder to his detriment.

A party may amend a pleading by leave of the court. Minn. R. Civ. P. 15.01. A district court has broad discretion to grant or deny leave to amend a complaint, and its ruling will not be reversed absent a clear abuse of discretion. *Fabio*, 504 N.W.2d at 761. Appellant does not explain in his brief why the failure to allow him to amend his

complaint was an abuse of discretion; he merely recites the claims he would have liked to have added. Therefore we conclude that the district court did not err in denying the motion, and the district court properly granted summary judgment to Burrington Agency.

IV. The district court did not abuse its discretion in denying appellant's motion to amend his answers to certain requests for admission.

Appellant moved the district court to amend several of his admissions. The district court denied this motion without comment.

A district court "may permit" amendments to admissions when the "presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice that party in maintaining the action or defense on the merits." Minn. R. Civ. P. 36.02. The decision whether to permit the amendment under the circumstances rests within the district court's discretion. *See Dahle v. Aetna Cas. and Sur. Ins. Co.*, 352 N.W.2d 397, 402 (Minn. 1984) (holding that the district court has the discretion to allow an untimely admission).

Appellant asks that if this court overturns the district court's grant of summary judgment, then it should also order the district court to "revisit" the motion to amend admissions. Appellant cites no legal authority in support of this argument. Appellant also does not explain why it was an abuse of discretion to deny this motion. As such, appellant has not carried his burden of establishing that the district court abused its discretion by not granting his motion to amend his answers.

Affirmed in part, reversed in part, and remanded.