NO. COA06-453

NORTH CAROLINA COURT OF APPEALS

Filed: 5 December 2006

DAVID JONATHAN MILLER,
Plaintiff,

v.

Wake County
No. 03CVD9167

PROGRESSIVE AMERICAN INSURANCE COMPANY,
Defendant.

Appeal by defendant from judgment entered 14 October 2005 by Judge Robert B. Rader in Wake County Superior Court. Heard in the Court of Appeals 31 October 2006.

E. Gregory Stott for plaintiff appellee.

Young Moore and Henderson P.A., by Glenn C. Raynor, for defendant appellant.

McCULLOUGH, Judge.

Defendant appeals from a judgment granting plaintiff's motion for summary judgment and denying defendant's motion for summary judgment. We reverse.

FACTS

Plaintiff David Jonathan Miller ("plaintiff") and Amy Miller ("A. Miller") were involved in a two-vehicle automobile accident on 21 December 2000. Plaintiff and A. Miller were in one vehicle, and Carmelo Lule Martinez ("Martinez") and Casimiro Nino ("Nino") were

in another vehicle. Defendant Progressive American Insurance Company ("defendant") was the automobile liability insurance carrier which insured the vehicle operated by Martinez and owned by Nino.

On 24 May 2001, A. Miller filed a complaint against Martinez and Nino seeking damages from the accident. The case went before a jury at the 29 April 2002 Session of Civil District Court, Wake County, North Carolina. The jury found for defendants, and a judgment was filed on 4 June 2002.

On 28 June 2002, plaintiff filed a complaint against Martinez and Nino seeking damages from the accident. A default judgment was entered against Martinez and Nino. Then, defendant filed a motion to set aside the entry of default, set aside the default judgment, and enlarge the time to file responsive pleadings. On 16 June 2003, the trial judge entered an order which denied defendant's motion.

Then, plaintiff filed this action against defendant seeking the damages awarded to plaintiff by the default judgment in the prior action against Martinez and Nino. Defendant denied the existence of coverage under the insurance policy on the basis that Martinez and Nino, as the insureds, failed to notify defendant of the lawsuit prior to entry of default.

Both plaintiff and defendant filed motions for summary judgment. Then, on 13 October 2005, the trial court issued an order requiring defendant to make payment of all damages awarded to

plaintiff by the default judgment in the prior action against Martinez and Nino.

Defendant appeals.

I.

Defendant contends that the trial court erred in granting plaintiff's motion for summary judgment. We agree.

On appeal from a grant of summary judgment, this Court reviews the trial court's decision *de novo*. *Falk Integrated Tech., Inc. v. Stack*, 132 N.C. App. 807, 809, 513 S.E.2d 572, 574 (1999). Granting summary judgment is appropriate only "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 any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2005).

The analysis begins with the language of the insurance policy. "[T]he general rule is that an automobile insurance contract should be interpreted and the rights and liabilities of the parties thereto determined in accordance with the laws of the state where the contract was entered even if the liability of the insured arose out of an accident in North Carolina." *Fortune Ins. Co. v. Owens*, 351 N.C. 424, 428, 526 S.E.2d 463, 465-66 (2000). Our Supreme Court "recognized an exception to this general rule where a close connection exists between this State and the interests insured by an insurance policy." *Id.* at 428, 526 S.E.2d at 466. "However, the mere presence of the insured interests in this State at the

time of an accident does not constitute a sufficient connection to warrant application of North Carolina law." *Id.*

In the instant case, we determine that the insurance policy should be interpreted in accordance with the laws of Georgia. It is uncontroverted that the policy covered a Georgia vehicle, was issued to a Georgia resident, and delivered to him at his Georgia address. Moreover, the insurance policy contained a provision which states "[a]ny disputes as to the coverages provided or the provisions of this policy shall be governed by the law of the State of Georgia" and our courts typically give effect to choice of law provisions. *Tohato, Inc. v. Pinewild Management, Inc.*, 128 N.C. App. 386, 390, 496 S.E.2d 800, 803 (1998).

The Georgia Code requires insurers issuing automobile liability insurance policies covering vehicles principally garaged or used in this state to include in their policies a provision requiring the

> insured to send his insurer, as soon as practicable after the receipt thereof, a copy of every summons or other process relating to the coverage under the policy and to cooperate otherwise with the insurer in connection with the defense of any action or threatened action covered under the policy.

Ga. Code Ann. § 33-7-15(a) (2000). In accordance with this provision, defendant's policy at issue contained a requirement stating that "[a] person claiming coverage under this policy must: . . . send [defendant] any and all legal papers relating to any claim or lawsuit as soon as practicable after receipt[.]"

> "Pursuant to OCGA § 33-7-15(b), a failure to comply with such a policy provision will, *if prejudicial to the insurer*, operate to 'relieve the insurer of its obligation to defend its insureds under the policy and of any liability to pay any judgment or other sum on behalf of its insureds.'" (Emphasis supplied.)

Chadbrooke Ins. Co. v. Fowler, 206 Ga. App. 778, 779, 426 S.E.2d 578, 580 (1992) (citation omitted).

The case of *Champion v. Southern General Ins. Co.*, 198 Ga. App. 129, 401 S.E.2d 36 (1990), discusses the above-referenced statutes and involved similar facts to those of the instant case. In *Champion*, the plaintiff filed suit against a person insured under an automobile liability policy issued by Southern General Insurance Company. *Id.* at 129, 401 S.E.2d at 37. It was uncontroverted that Southern General had been notified about the accident, but Southern General never received any notification regarding the actual lawsuit. *Id.* at 129-30, 401 S.E.2d at 37-38. Southern General did not learn of the action until after final judgment had been entered on default. *Id.* at 130, 401 S.E.2d at 38. On those facts, the Georgia Court of Appeals made the following holding:

> [T]he insurer's introduction of sworn testimony establishing that the insurer received no notification of a suit brought against its insured until after final judgment had been entered in a default situation is sufficient to carry the insurer's burden of showing prejudice under OCGA § 33-7-15(b) so as to relieve the insurer of its obligations under the policy to defend the suit and pay any judgment entered against its insured.

Id. at 132, 401 S.E.2d at 39.

The facts of the instant case are very similar to the facts of *Champion*. Here, the affidavit of James A. Dodrill provides evidence that defendant never received any notice of the lawsuit filed by plaintiff against Nino and Martinez prior to the entry of default judgment on 4 April 2003. In *Champion*, the Georgia Court of Appeals stated:

> "When the defendant-movant for summary judgment presents evidence apparently destroying the plaintiff's cause of action, the movant has met [its] burden, and the burden then shifts to the plaintiff to present any alternative theories, if such exist, which would support his action and within which genuine issues of fact remain."

Id. (citation omitted). North Carolina has essentially the same standard. *Ruff v. Reeves Brothers, Inc.*, 122 N.C. App. 221, 225, 468 S.E.2d 592, 595 (1996) (stating once the moving party has made and supported its motion for summary judgment, section (e) of Rule 56 provides that the burden is then shifted to the non-moving party to introduce evidence in opposition to the motion, setting forth specific facts showing that there is a genuine issue for trial).

Based on our review of the record, there is evidence that defendant did not receive notice of plaintiff's lawsuit against Martinez and Nino prior to the entry of the default judgment. Moreover, plaintiff has not presented any evidence showing there is a genuine issue for trial. Therefore, defendant was prejudiced and is entitled to summary judgment and is relieved of its obligations under the policy to pay the default judgment entered against Martinez and Nino.

Accordingly, we agree with defendant's contention.

II.

Defendant contends that the trial court erred by failing to enter summary judgment in favor of defendant. We have already discussed this issue in part "I" above. Therefore, the trial court erred in granting plaintiff's motion for summary judgment and denying defendant's motion for summary judgment. The judgment of the trial court is reversed and this case is remanded for the entry of summary judgment in favor of defendant.

Reversed and remanded.

Chief Judge MARTIN and Judge ELMORE concur.

Report per Rule 30(e).