

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

EDWIN F. GOLDSTEIN AND GRACE F.
GOLDSTEIN

IN THE SUPERIOR COURT OF
PENNSYLVANIA

Appellants

v.

CONTINENTAL CASUALTY COMPANY

Appellee

No. 2808 EDA 2013

Appeal from the Order Entered September 10, 2013
In the Court of Common Pleas of Montgomery County
Civil Division at No(s): 2013-06037

BEFORE: PANELLA, J., LAZARUS, J., and JENKINS, J.

MEMORANDUM BY LAZARUS, J.:

FILED JULY 07, 2014

Edwin F. Goldstein and Grace F. Goldstein (Goldsteins) appeal from the order sustaining the preliminary objections of Appellee, Continental Casualty Company, for lack of legal sufficiency, and dismissing the Goldsteins' breach of contract complaint. Upon review, we affirm.

The trial court set forth the facts and procedural history as follows:

Edwin F. Goldstein and Grace F. Goldstein, (H/W), (hereinafter: Appellants) as residents of Narberth, Montgomery County, Pennsylvania, applied for long-term care insurance policies issued by Defendant/Appellee Continental Casualty Company (hereinafter: Appellee) in February of 1993. Appellee is headquartered in Chicago, IL. Appellants aver that these applications were clear in their intention that the premium notices were to be sent to Arc Water Treatment Co. of MD (hereinafter: Arc) at its offices in Jessup, Maryland. This company was founded by Appellant Edwin Goldstein, who arranged for it to pay the premiums on the policies to be issued by Appellee. The policies were issued on March 1, 1993, and until February of 2011, quarterly notices were sent to Arc, which

timely paid the premiums in full. Appellants alleged that Arc never received the March 2011 quarterly premium notice in the amount of \$408.84, which was due in full by March 31, 2011, nor did Arc or Appellants receive a "Late Payment Offer" so as to correct the delinquency. On May 6, 2011, Appellee provided Arc with a letter informing it that Appellants' policies had lapsed. On May 20, 2011, Appellee provided Appellants with applications for new long-term care insurance. Appellants aver that they refused to respond to these applications, instead sending the amount of \$817.68 for the quarter at issue, March to May 2011. Appellee allegedly deposited this check, then returned the amount to Appellants with a notice that the policies had lapsed for nonpayment. Appellants accordingly brought counts of breach of contract and breach of Appellee's obligation to inform the Appellants as to the impending lapse of their policies and late payment offers. Appellee filed Preliminary Objections on May 6, 2013 in the nature of demurrers pursuant to Pa.R.C.P. 1028(a)(4) to both counts of Appellants' Complaint. Appellants filed a response on May 28, 2013. This matter was duly scheduled for oral argument before the Undersigned on September 5, 2013. On August 30, 2013, Appellee filed a Motion for Pro Hac Vice Admission of Michael W. Kazan, Esquire, an Illinois-barred attorney, which the Undersigned granted by Order of September 4, 2013. Following oral argument, the Undersigned sustained Appellee's Preliminary Objections and dismissed Appellants' Complaint by Order of September 10, 2013. Appellants filed the instant, timely appeal to the Superior Court of Pennsylvania on October 7, 2013.

Trial Court Opinion, 12/12/13, at 1-2 (footnote omitted).

On appeal, the Goldsteins raise the following issues for our review:

(1) Whether the lower court erred in finding that the "Late Payment Offer" made by the defendant, Continental Insurance Company on April 3, 2011, did not contain a waiver of Continental's right to terminate the policies on March 31, 2011 for non-payment of the premiums.

(2) Whether the lower court erred by dismissing the Plaintiffs' Complaint because the "Late Payment Offer" made by Continental did, in fact and under the law, contain a waiver of Continental's right to terminate the insurance policies and the failure of Continental to send the Late Payment Offer to the Goldsteins was the cause of

and prevented the Goldsteins, who were the insured parties and who were the only persons who could accept or reject Continental's waiver of its rights, from acting on and accepting Continental's Late Payment Offer.

Our standard of review is well settled:

A preliminary objection in the nature of a demurrer is properly [sustained] where the contested pleading is legally insufficient. Preliminary objections in the nature of a demurrer require the court to resolve the issues solely on the basis of the pleadings; no testimony or other evidence outside of the complaint may be considered to dispose of the legal issues presented by the demurrer. All material facts set forth in the pleading and all inferences reasonably deducible therefrom must be admitted as true.

In determining whether the trial court properly sustained preliminary objections, the appellate court must examine the averments in the complaint, together with the documents and exhibits attached thereto, in order to evaluate the sufficiency of the facts averred. The impetus of our inquiry is to determine the legal sufficiency of the complaint and whether the pleading would permit recovery if ultimately proven. This Court will reverse the trial court's decision regarding preliminary objections only where there has been an error of law or abuse of discretion. When sustaining the [preliminary objections] will result in the denial of claim or a dismissal of suit, [the preliminary objections may be sustained] only where the case [is] free and clear of doubt.

Hill v. Ofalt, 85 A.3d 540, 547-48, (Pa. Super. 2014) (quoting **Lugo v. Farmers Pride, Inc.**, 967 A.2d 963, 966 (Pa. Super. 2009)).

A breach of contract claim requires the existence of a contract, a breach of an obligation under the contract, and resultant damages.

Williams v. Nationwide Mut. Ins. Co., 750 A.2d 881, 884 (Pa. Super. 2000). When the words of a written contract are plain and unambiguous, the intent of the parties is to be ascertained from the contract's plain

language, and courts are not permitted to alter the meaning of the contract under the guise of contractual interpretation. **LGL Transportation, Inc., v. Pilot Air Freight Corp.**, 962 A.2d 639, 645 (Pa. 2009). Like other contracts, when the language of an insurance policy is plain and unambiguous, the contract should be applied as written. **Telecomm. Network Design v. Brethren Mut. Ins. Co.**, 5 A.3d 331, 335 (Pa. Super. 2010).

The Goldsteins claim that the Late Payment Offer was a waiver of Continental's right to terminate their policies for the non-payment of premiums. The Goldsteins argue that such a waiver should have been mailed to their residence, relying on the argument that they "were the insured parties" and "the only persons who could have accepted or rejected Continental's waiver of its right to terminate the policies." Brief for Appellants, at 11. The Goldsteins also claim that Continental's failure to mail the Late Payment Offer to their residence prevented them from knowing of or accepting Continental's waiver, and that Continental was, thus, estopped from terminating the policies.

Despite these arguments, we agree with the trial court that the Late Payment Offer was not a waiver of Continental's right to terminate the insurance policies. Quarterly premiums for the Goldsteins' policies were due on March 1, 2011, with a grace period lasting until March 31, 2011. When premium payments were not made within the grace period ending March 31, 2011, the policies terminated by their terms. Instantly, the Late Payment

Offer was sent to Arc on April 3, 2011, after the grace period had expired. Instead of operating as a waiver of Continental's right to cancel the policies for non-payment, however, the Late Payment Offer functioned as an offer to reinstate the policies. **See Counties Contracting and Constr. Co. v. Constitution Life Ins. Co.**, 855 F.2d 1054, 1061 (3d Cir. 1988) (Pennsylvania law dictates that where insurance policy lapsed for non-payment at end of grace period, subsequent letters offering to accept payment within specific period were offers to reinstate policy); **Donovan v. New York Cas. Co.**, 94 A.2d 570, 572 (Pa. 1953) (waiver cannot apply to or create an insurance contract where none exists). Thus, Continental preserved its right to cancel the policies for non-payment.

When the Goldsteins did not make payments according to the Late Payment Offer, Continental sent a letter to Arc indicating that the Goldsteins' policies were indeed canceled. By this point, the Goldsteins had failed to pay their premiums, either within the grace period built into the contract or according to Continental's offer to reinstate the policies per the Late Payment Offer. The Goldsteins argue, however, that they had no knowledge of the Late Payment Offer because it was mailed to Arc. According to the Goldsteins, the Late Payment Offer should have been mailed to their residence because they, alone, could accept or reject it. However, the policies do not specify who may accept or reject such offers, and this argument ignores that they contractually agreed to have a third party, Arc, handle all aspects of payment throughout the life of the policies. **See**

Continental Casualty Company's Application for Long-Term Care Policy issued to Edwin F. and Grace F. Goldstein, 2/11/93.

The Goldsteins assert that their long-term care insurance policies unambiguously directed Continental to send *only* premium notices to Arc and that the Late Payment Offer was not a premium notice. Thus, the Goldsteins claim that Continental breached the insurance contract by sending the Late Payment Offer to the billing address belonging to Arc rather than to their home address. In their applications for insurance with Continental, the Goldsteins provided Arc's address as the billing address, and the applications specified that premium notices would be sent to the billing address. However, no other part of the insurance contracts address where notices or correspondence of any kind should be mailed.¹ In fact, the Goldsteins never requested, and the policies do not require, Continental to send any notices, bills or other correspondence to their home address. Additionally, "premium notices" and "late payment offers" are not defined in the policies. The only reasonable interpretation for the designation of a billing address in the policies is that Continental was required to mail notices relating to payment, such as the Late Payment Offer, to that address.

¹ At oral argument on the preliminary objections, the Goldsteins' counsel stated that 31 Pa. Code § 89a.106(a)(3) (providing notice requirements in the event of lapse for non-payment of premiums) did not apply because the Goldsteins' policies were issued before March 16, 2002, the effective date of the provision. **See** Brief of Appellee, at 4 n.1.

Here, Continental fulfilled its contractual obligations by sending notices to the designated billing address.² Nothing in the policies could be construed to indicate an affirmative duty on Continental's part to send notices to the Goldsteins' residence, either while the policies were in force or after they were canceled. The Goldsteins provide no support for their position, either based upon the language of the contract or at common law.³ Continental operated within its rights to terminate the policies, and the Goldsteins cannot recover for a lack of notice that Continental was not contractually required to make.

Because the contractual obligations upon which the Goldsteins base their claims do not exist, a breach of contract cannot occur. **Williams, supra.** The Goldsteins present no other legitimate basis for relief. Thus, because the pleadings are insufficient, the trial court properly sustained

² The trial court succinctly points out the inconsistency in the Goldsteins' argument in that "while they arranged for Arc, a third party and not one to this action, to pay the premiums from and receive notice in Maryland, [Continental] owed them a duty to notify them at their home addresses in Pennsylvania." Trial Court Opinion, 12/12/13, at 5.

³ The Goldsteins stated that Continental is "estopped from terminating the policies" for failure to send the Late Payment Offer to the Goldsteins' residence. Brief for Appellants, at 12. However, the Goldsteins do not develop an estoppel argument beyond this bald statement. Further, the Goldsteins admit they had no knowledge of the Late Payment Offer and did not rely on it, such that they cannot meet the justifiable reliance element of an estoppel claim. **Guerra v. Redevelopment Authority of City of Philadelphia**, 27 A.3d 1284, 1290 (Pa. Super. 2011).

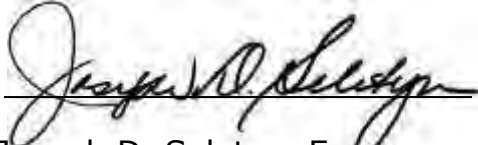
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Continental's preliminary objections and dismissed the Goldsteins' complaint.

Hill, supra.

Order affirmed.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 7/7/2014