

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CERTAIN UNDERWRITERS AT	:	CIVIL ACTION
LLOYD'S LONDON, ENGLAND	:	
SUBSCRIBING TO INSURANCE	:	
POLICY/CERTIFICATE	:	
NUMBERED 6905-60492	:	
	:	
v.	:	
	:	
GERALD P. CLARK	:	
AND	:	
KAREN M. GERACE	:	NO. 97-6674

MEMORANDUM AND ORDER

Norma L. Shapiro, J.

July 15, 1998

Plaintiff Certain Underwriters at Lloyd's London, England ("Underwriters") filed this declaratory judgment action against defendants Gerald P. Clark ("Mr. Clark") and Karen M. Gerace ("Ms. Gerace"). Before the court are cross motions for summary judgment.

**BACKGROUND**

On October 29, 1997, Underwriters filed a declaratory judgment action against Mr. Clark and Ms. Gerace to obtain a declaration that it had no obligation to provide coverage and/or indemnify defendants for fire loss.

On March 3, 1997, Underwriters had issued defendants a homeowner's insurance policy covering property located at 3530 Drumore Road, Philadelphia ("the premises"). The policy required that the premises be owner-occupied.

After defendants purchased the premises on February 19, 1997, they contacted America Insurance Agency ("America"), to obtain homeowner's insurance. Mr. Clark then resided at 12303 Medford Road, Philadelphia. When applying for the policy, Mr. Clark, knowing that owner-occupation was a condition of coverage, informed America and Underwriters that he and Ms. Gerace would reside on the premises during the life of the policy. However, a squatter, Mrs. Armstrong, was occupying the land at the time defendants purchased the premises. Defendants told America agent Steve Sarkisian ("Mr. Sarkisian") there were eviction proceedings pending and they would live in the house when Mrs. Armstrong was evicted. On the settlement date, March 4, 1997, Mr. Sarkisian sent defendants a letter requesting they let him know if they would not be living on the premises within thirty days of settlement because coverage would be inappropriate if defendants would not be occupying the premises. Defendants read but never responded to the letter. Neither Mr. Clark nor Ms. Gerace ever lived on the premises.

Underwriters, learning that defendants were not residing at the premises, sent a notice of cancellation on May 7, 1997, effective June 8, 1997, to the insured premises on Drumore Road. Defendants claim they never received the notice because Mrs. Armstrong never forwarded it to them.

Shortly after Underwriters sent the cancellation notice, Mr.

Sarkisian told Ms. Gerace by telephone that the policy would be cancelled. He told her defendants would receive a thirty-day cancellation notice from America four to six weeks from the date of their conversation. He also told her defendants would receive a check for their unearned premium. Ms. Gerace then received a letter from America dated May 15, 1997, that the policy would be cancelled and the unearned portion of the premium would be refunded shortly. On June 30, 1997, Ms. Gerace called America because she had not received her refund check. There was a fire on the premises two days later; defendants claim coverage for their loss.

Underwriters seeks summary judgment on three grounds:

1) Underwriters had the right to cancel the policy as soon as it found that defendants fraudulently represented they would be living at the premises during the life of the policy.

2) Even if defendants never received notice of cancellation from Underwriters, they received oral and written notice from America. Ms. Gerace's claim for a refund demonstrated actual knowledge that the policy was cancelled. Because of this actual knowledge, it was unnecessary for Underwriters to comply with the statutory cancellation process.

3) Defendants, by never occupying the premises, failed to satisfy a condition of the policy.

Defendants also seek summary judgment because the policy,

not having been legally cancelled for failure to comply with the statutory notice requirements, was in effect and provided coverage at the time of the fire.

## **DISCUSSION**

### **I. Standard of Review**

Summary judgment may be granted 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 of material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Uncertified documents may be considered by the court if not challenged by the opposing party. Wright, Miller, & Kane, Federal Practice and Procedure: Civil 3d § 2722 at 384. A party moving for summary judgment bears the initial burden of demonstrating there are no facts supporting the other party's claim; then the adverse party must introduce specific, affirmative evidence that there is a genuine issue for trial. See Celotex Corp v. Catrett, 477 U.S. 317, 322-24 (1986). "When a motion for summary judgment is made and supported as provided in [Rule 56], an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in [Rule 56], must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e).

The court must draw all justifiable inferences in the non-movant's favor. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). A genuine issue of material fact exists only when "the evidence is such that a reasonable jury could return a verdict for the non-moving party." Id. at 248. The non-movant must present sufficient evidence to establish each element of its case for which it will bear the burden at trial. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585-86 (1986).

## **II. Notice of Cancellation**

The insurance policy at issue was issued in Pennsylvania and is governed by Pennsylvania law. Pennsylvania law requires that the following language be included in a fire insurance policy:

This policy shall be cancelled at any time at the request of the insured, in which case this Company shall, upon demand and surrender of this policy, refund the excess of paid premium above the customary short rates for the expired time. This policy may be cancelled at any time by this Company by giving to the insured a five days' written notice of cancellation... [and by either refunding the excess premium or notifying the insured that he will receive the excess premium].

40 P.S. 636. "Without this [five days' written] notice requirement, the insured would be left without insurance coverage without his knowledge. The undesirable ramifications of this possibility need no elaboration. The public policy reasons for the notice requirement are compelling, and our courts have strictly construed notice in this context to mean actual receipt

of notice by the insured." Coppola v. Insurance Placement Facility of Pennsylvania, 563 A.2d 134, 136 (Pa. Super. 1989) (cancellation of fire policy by insured is effective on date insured intends to cancel, not date insurer receives notice of cancellation). In Hendricks v. Continental Insurance Company of City of New York, 183 A. 363, 365 (Pa. Super. 1936), final judgment in favor of the insured was affirmed because the insurance company knew the notice had not been received and took no steps to cancel the policy as required by the terms of the policy. The policy did not provide for constructive notice and there was nothing to put the insured on an inquiry which would have resulted in actual notice. In those circumstances the court held that receipt of the statutory five days' written notice of cancellation was a prerequisite to cancellation.

In Campbell v. Royal Indemnity Company of New York, 389 A.2d 1139, 1142 (Pa. Super 1978), it was also acknowledged that when an insurer cancels a policy, case law construes the statute to require receipt of the five days' notice of cancellation by the insured. However, it was established that notice of cancellation was actually mailed, so a jury verdict for the insurance company was affirmed because of the rebuttable presumption that a properly mailed letter has been received. It is well-established that once the rebuttable presumption is raised by evidence of mailing, merely asserting that the notice was not received is

insufficient to overcome the presumption. Samaras v. Hartwick, 698 A.2d 71, 73-74 (Pa. Super. 1997).

An insurance policy is a contract; the insurer provides coverage in return for payment. See Cleland Simpson Co. v. Firemen's Insurance Co. of Newark, N.J., 140 A.2d 41, 44 (Pa. 1958). "That there is a standard, required form for [an insurance] contract does not alter the policy's status as an expression of the intent of the parties." Coppola, 563 A.2d at 136. "The standard form of contract for fire insurance provided by statute does not affect the status of the policy as a contract between the parties, nor was it the intention of the Legislature to lay down any rule of law for the construction of such contracts." Chauvin v. Superior Fire Insurance Co., 129 A. 326, 327 (Pa. 1925). Where language of an insurance policy is clear and unambiguous it cannot be construed to mean other than what it says and must be given the plain and ordinary meaning of the terms used. See Pennsylvania Manufacturers' Assoc. Insurance Co. v. Aetna Casualty and Surety Insurance Co., 233 A.2d 548, 551 (Pa. 1967).

In all the cases called to the attention of the court where it was recognized that actual receipt of the notice by the insured was required, the insurance policy at issue was silent as to proof of receipt of notice; the common law rebuttable presumption (that a properly mailed notice has been received)

applied.

Underwriters' insurance contract specifically states that, in the event of cancellation by the insurer, "proof of mailing will be sufficient proof of notice," and "[t]his cancellation notice may be delivered to you, or mailed to you at your mailing address shown in the Declarations." (Pl.'s Ex. B at 15.) The Drumore Road address was the address listed in the Declarations. (Id. at Preface.) Defendants concede in their brief that the notice of cancellation "was forwarded to the Drumore Road address." (Def.'s Br. at ¶ 19.) Since they admit the notice was mailed to the address shown in the Declarations, Underwriters provided notice of cancellation as required by statute in accordance with the terms of the policy; defendants received the required notice of the policy's cancellation as a matter of law.

The notice of cancellation sent by Underwriters was effective as to both Mr. Clark and Ms. Gerace, since 1) the Drumore road address was the only address listed on the policy; and 2) both defendants lived together and planned to live together at premises. See Campbell, 389 A.2d at 1143 n.10 (notice to property owner's address effective for both insured owner and insured building contractor as owner's address was the only one listed on the face of the policy).

There is unrefuted evidence that Ms. Gerace demonstrated knowledge of the policy's cancellation by asking Mr. Sarkisian

about the refund check, but mailing notice to the Drumore Road address was legally sufficient regardless of defendants' actual receipt. There can be no disputed issue of fact in view of the policy language and the necessary inferences from the evidence of record.

### **III. Material Misrepresentation**

Even if there was an effective cancellation, the cancellation must be for a valid reason. Plaintiff argues defendants fraudulently represented the premises would be owner-occupied. It had the right to cancel the policy ab initio because 40 P.S. § 3403, providing requirements for notice of policy cancellation by the insurer, also provides:

Nothing in this paragraph shall restrict the insurer's right to rescind an insurance policy ab initio upon discovery that the policy was obtained through fraudulent statements, omissions or concealment of fact material to the acceptance of the risk or to the hazard assumed by the company.

40 P.S. 3403.

The insurance contract states: "We do not provide coverage for an insured who has... intentionally concealed or misrepresented any material fact or circumstance... relating to this insurance." (Pl.'s Ex. B at 15.) It also states:

We may cancel this policy only for the reasons stated below...:

(3) When this policy has been in effect for 60 days or more, or at any time if it is a renewal with us, we may cancel:

(a) if there has been a material misrepresentation of fact

which if known to us would have caused us not to issue the policy; or

(b) if the risk has changed substantially since the policy was issued.

This can be done by letting you know at least 30 days before the date cancellation takes effect.

Id.

A misrepresentation is considered "material" if the transaction would not have been consummated if the misrepresentation had not been made. See Sewak v. Lockhart, 699 A.2d 755, 760 (Pa. Super. 1997). The omission of a material fact may be actionable in a misrepresentation claim. See Commonwealth of Pennsylvania v. Monumental Properties, Inc., 329 A.2d 812, 829 (Pa. 1974).

At the time of the application, defendants knew they would not be residing on the premises at the beginning of the policy period, and they informed Mr. Sarkisian that the premises would be owner-occupied when the squatter was evicted. (Clark Dep. at 25.) Mr. Sarkisian later sent defendants a letter on March 4, 1997 that they inform him if they did not move into the property within thirty days of the settlement date, as the policy covered only owner-occupied premises. (Pl.'s Ex. D.) Defendants admit they received and read that letter, but they never responded and misled America and Underwriters that they were living on the premises. (Clark Dep. at 36.)

Whether the premises would be owner-occupied was material to

the transaction; defendants' residing at the premises was a condition to coverage. The policy was subject to cancellation when Underwriters discovered they were not in fact living at the insured premises. Based on defendants' omission of a material fact, a material misrepresentation, Underwriters never had a duty to provide coverage and had a permissible reason to cancel the contract.

#### **IV. Residence Premises**

A "condition" is an event, not certain to occur, which must occur before performance under the contract becomes due. Restatement (Second) of Contracts § 224. No particular words are necessary to make the term of an agreement a condition; in general, the usual rules of contract interpretation should be employed in light of the general purpose of the agreement. American Leasing v. Morrison Co., 454 A.2d 555, 559 (Pa. Super. 1982), Restatement (Second) of Contracts § 226, Comment a.

Underwriters argues defendants never resided on the premises, so they failed to satisfy a condition of coverage under the policy. Section I of the contract provides coverage to:

1. the dwelling on the **residence premises** shown in the Declarations, including structures attached to the dwelling.
- (Pl.'s Ex. B at 2.) "Residence premises" is defined as
- a. the one family dwelling, other structures, and grounds:

or  
b. that part of any other building:

where you reside and which is shown as the "**residence premises**" in the Declarations.

Id. Every clause in the contract relating to insured areas refers to the "residence premises," and the policy covers nothing but the residence premises. Defendants by definition must reside at the residence premises; coverage was expressly conditional upon Mr. Clark's and Ms. Gerace's living in the house. The policy does not cover the Drumore Road house when defendants reside elsewhere. It is undisputed that defendants never resided at the premises, so the policy provided no coverage at the time of the fire or any time prior thereto.

#### **V. Defendants' Motion for Summary Judgment**

Defendants failed to file their cross-motion in a timely manner. The court's order of January 7, 1998 required that any motions for summary judgment be filed on or before February 23, 1998, the due date of the joint pretrial memorandum. The cross-motion was filed on April 22, 1998 without leave for late filing. Even if timely, defendants' cross-motion is without merit for reasons already discussed. It is not clear if a refund was ever tendered, but it is owed to defendants because the policy was never in effect for failure to satisfy a condition precedent.

#### **VI. Conclusion**

Summary judgment will be granted in favor of plaintiff. It

is undisputed that defendants never lived at the premises; Underwriters had the right to cancel based on defendants' material misrepresentation, and cancellation was effective. Furthermore, defendants failed to satisfy a condition of coverage under the policy. Defendants cannot recover as a matter of law. An appropriate order follows.

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KAREN M. GERACE	:	NO. 97-6674

ORDER

AND NOW, this 15th day of July, 1998, upon consideration of cross-motions for summary judgment, in accordance with the attached memorandum, it is hereby **ORDERED** that:

1. Plaintiff's motion for summary judgment on its claim is **GRANTED**. Plaintiff has no obligation to indemnify defendants for fire loss. Judgment is **ENTERED** in favor of plaintiff.

2. Defendants' motion for summary judgment on plaintiff's claim is **DENIED**, but plaintiff is liable to defendants for the unearned premium.

3. The Clerk of Court is directed to mark this action **CLOSED**.

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Norma L. Shapiro, J.