IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

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<tr><td>SHONDA JOHNSON and
STATE FARM MUTUAL
AUTOMOBILE INSURANCE
COMPANY as subrogee of Shonda
Johnson,

Plaintiffs,

v.

JAMES MICHAEL ROONEY,
And DAVID A. DELLORSE
ANGELA DELLORSE and
PROGRESSIVE INSURANCE
COMPANY,

Defendants.</td><td>)
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Date Submitted: April 16, 2012
Date Decided: July 10, 2012

On Defendants' Motion for Summary Judgment.
DENIED.

ORDER

Amanda L.H. Brinton, Law Offices of Amanda Brinton, 521 N. West Street, Wilmington, DE 19801. Attorney for Plaintiffs.

Richard D. Abrams, Esq., Mintzer, Sarowitz, Zeris, Ledva & Meyers, LLP, 1220 North Market Street, Suite 300, Wilmington, Delaware 19801. Attorney for Defendant.

J. Scott

Introduction

Before the Court is Defendant, Progressive Insurance Company's ("Defendant"), Motion for Summary Judgment pursuant to Superior Court Civil Rule 56. This Court has previously held that a genuine issue of material fact exists as to whether Defendant properly denied coverage prior to the resulting accident.[1] Issues of material fact still exist in this case. Thus, Defendant's Motion for Summary Judgment is **DENIED.**

Facts

This case arises out of a car accident that occurred on May 10, 2002. Shonda Johnson and her insurance carrier, State Farm Mutual Automobile Insurance Company ("Plaintiffs"), filed this subrogation action on April 8, 2005, against David Dellorse and James Michael Rooney seeking recovery of insurance benefits paid to or on behalf of Plaintiff Johnson as well as her deductible. Plaintiffs added Angela F. Dellorse and Progressive Insurance Company ("Progressive") as Defendants. Plaintiffs allege that the vehicle owned by David and Angela Dellorse was covered by liability insurance provided by Progressive.

Progressive issued an insurance policy to Angela and David Dellorse ("the insureds") from the period of April 11, 2002, until October 11, 2002. On April 11, 2002, the insureds paid the $200.00 premium due to Progressive for their insurance

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[1] *Johnson v. Rooney*, C.A. No. 05C-04-087 CLS, at * 5 (Del. Super. Mar. 30, 2007).

policy. Due to a miscalculation on behalf of Progressive that was discovered on April 22, 2002, an additional $20.12 was owned pursuant to the insurance policy. Subsequently on April 26, 2002, Progressive mailed a notice of cancellation and a notice of underpayment[2] to the insureds. Both notices indicated that to maintain continuous coverage, the additional $20.12 was due by May 7, 2012.

In an order dated March 30, 2007, this Court previously held that a genuine issue of fact existed as to whether Progressive provided insurance coverage at the time of the accident.[3]

Parties' Contentions

Defendant argues that the automobile insurance policy was properly canceled on May 7, 2002 after a ten-day notice was mailed pursuant to 18 *Del. C.* §3905(a)[4] and that no issues of material fact exist as to whether the insureds' automobile was covered under the policy when the accident occurred. Plaintiff contends that the policy should not have been canceled until ten days after the payment for the additional $20.12 amount was due. Therefore, according to the Plaintiffs, the policy could not have been canceled for nonpayment on the date of the accident, because Progressive was required to mail notice and wait ten days

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[2] The relevant portions of the notice of underpayment stated the following: "As a result of additional information we recently received, your policy premium is different than originally quoted. New information about your vehicle(s) or about traffic violations, accidents or prior losses may have caused this change. An additional amount is due now as part of your payment." Deft. Mot. Summ. J., Ex. 1.
[3] *Johnson v. Rooney*, C.A. No. 05C-04-087 CLS, at * 5 (Del. Super. Mar. 30, 2007).
[4] 18 *Del. C.* §3905(a).

from May 8, 2002, the first day that the additional $20.12 payment was considered overdue.

Standard of Review

The Court will grant summary judgment 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 the moving part is entitled to summary judgment as a matter of law."[5] The moving party bears the initial burden of showing that no material issues of fact are present.[6] Once such a showing is made, the burden shifts to the non-moving party to demonstrate that there are material issues of fact in dispute.[7] In considering a motion for summary judgment, the Court must view the record in a light most favorable to the non-moving party.[8] "Summary judgment will not be granted when a more thorough inquiry into the facts is desirable to clarify the application of the law to the circumstances."[9]

Discussion

An issue of material fact remains as to whether the proper commencement date of the ten-day notice of cancellation was April 26, 2002 or May 7, 2002. As such, summary judgment is not warranted.

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[5] Super. Ct. Civ. R. 56(c); *Burkhart v. Davies*, 602 A.2d 56, 59 (Del. 1991).
[6] *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979).
[7] *Id.* at 681.
[8] *Burkhart*, 602 A.2d at 59.
[9] *Phillip-Postle v. BJ Prods., Inc.*, 2006 WL 1720073, at *1 (Del. Super. Apr. 26, 2006).

Pursuant to 18 *Del. C.* § 3904(a)(1), an insurer may cancel a policy for nonpayment of premium.[10] "Nonpayment of premium" is defined as the "failure of the named insured to discharge when due any of his/her obligations in connection with the payment of premiums on a policy or any installment of such premium."[11] Further, when an insurer cancels a policy due to nonpayment of premiums, the insurer is required to mail or deliver notice of cancellation and the reason for cancellation at least ten-days prior to cancellation.[12]

Applying the facts of the case most favorable to the non-moving party, there are issues of material fact in dispute. First, there is an issue of material fact as to whether the insureds payment on April 11, 2002 was late because they paid $200.00 and not $220.12. After payment of $200.00 of the premium was timely paid, Progressive informed the insureds that they owed an additional $20.12 under the policy. The insureds did not have notice of this additional amount until after they made the $200.00 payment. Therefore, there is an issue of material fact as to whether the payment was considered overdue.

Secondly, there is an issue as to whether the May 7, 2002 date was the date that the policy could have been properly cancelled altogether or whether that was the date when the payment was considered overdue. If the payment was

[10] 18 *Del. C.* § 3904(a)(1).
[11] 18 *Del. C.* § 3903(a)(3).
[12] 18 *Del. C.* § 3905(a).

considered overdue on May 7, 2002, then the ten-day notice of cancellation due to nonpayment should have been mailed out to the insureds.

The two notices mailed by Defendant on April 26, 2002, requesting payment of the additional portion of the miscalculated premium and providing notice of cancellation with the same "due" date of May 7, 2012, raise an issue in determining the correct date with which to begin the statutorily required ten-day notice of cancellation period. Thus, because material facts are in dispute about coverage, summary judgment must be **DENIED**.

Conclusion

Based on the foregoing, Defendant's Motion for Summary Judgment is **DENIED**.

IT IS SO ORDERED.

/S/CALVIN L. SCOTT
Judge Calvin L. Scott, Jr.