UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-2524

JUDY K. HAARDT, ET AL.,

Plaintiffs,

versus

BILLY RAY KING and TRUDY KING,

Plaintiffs-Appellants,

versus

CONNECTICUT MUTUAL LIFE INSURANCE COMPANY,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Texas
CA H 90 1901

August 27, 1993

Before REYNALDO GARZA and JONES, Circuit Judges.[*]

EDITH H. JONES, Circuit Judge:[*]

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[*] Judge Jerre S. Williams was a member of the panel that heard oral arguments but due to his serious illness did not participate in this decision. The case is being decided by a quorum. 28 U.S.C. § 46(d).

[*]Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

The district court granted summary judgment for the defendant, Connecticut Mutual Life Insurance Co., on the plaintiffs claims. Finding that there exists a genuine factual issue whether the insurance company waived its right to terminate the policy, we reverse in part, affirm in part, and remand.

I.

On November 10, 1987, William Haardt bought three life insurance policies from Connecticut Mutual Life Insurance Company:

Policy 1,414,721 (721) with a face value of $600,000;

Policy 1,414,722 (722) with a face value of $500,000; and

Policy 7,079,259 (259) with a face value of $100,000.

One year later Policy 722 was converted from a term life policy to a whole life policy and given a new number, 4,818,272 (272). Policy 272 is the one at issue in this case. In January 1988, Judy Haardt, William Haardt's wife, authorized Connecticut Mutual to make automatic drafts from her bank account to pay the premiums for 721 and 722.

In July and August 1989, the automatic drafts for the premium payments on both policies were returned because of insufficient funds. Connecticut Mutual's home office sent written notice of the bounced drafts to its local agent, Mike Martinez, on August 25. Martinez then obtained a check from William Haardt to cover the premium on 721. Connecticut Mutual accepted the check on September 1, but because the check was drawn on a Canadian bank and because of a difference in the currency exchange rate, the payment was short by $86.50. Responding to notice of a shortfall, Judy

Haardt took a money order to Martinez, who reassured her that the payment would bring all her policies current. Martinez then sent the money order to the home office on December 11, 1989. The home office accepted the check as payment in full of the July and August premiums on December 13, 1989. Regarding the premiums for 272, Connecticut agreed on September 26, 1989 to the Haardts' written request that the insurance company make a loan against the cash value of the policy to cover the premium. An automatic policy loan feature was not yet in effect for policy 272, but it was possible to obtain a policy loan upon written request. Meanwhile, in September 1989, Judy Haardt changed the authorized bank account for automatic drafts to University Savings in Houston. A monthly premium was due on September 10, 1989. It was not until November 2, 1989, however, that Connecticut sent Mrs. Haardt a written "checkbook reminder" that on November 15 it would make an automatic withdrawal covering premiums on both policies for September, October, and November. When the automatic draft was presented to University Savings on both November 20 and November 28, the draft was returned for insufficient funds. The home office received the returned draft on December 4, 1989 and notified Martinez on December 13, asking whether he was planning to send money to clear the bad check. During this time, the plaintiffs claim that Judy Haardt had no actual knowledge that the November draft had been dishonored or that the University Savings Account lacked the funds to cover the premium.

On December 14, 1989, William Haardt apparently committed suicide. His beneficiaries filed claims under all three policies, and Connecticut Mutual fully paid claims under policies 721 and 259, for a net total of $698,589.30. Connecticut Mutual, however, refused to pay under 272. Connecticut Mutual did not raise suicide as a defense, but instead claimed that the policy had lapsed for nonpayment of premiums for September, October, and November, 1989. Because the policy provided for a 31-day grace period following nonpayment of the premium due September 10, Connecticut Mutual asserts that the policy lapsed on october 11, 1989 and was no longer in effect when William Haardt died.

Judy Haardt was the beneficiary of policy 272. After Connecticut Mutual refused to pay, she filed suit in Texas state court. Connecticut removed to federal court, citing diversity jurisdiction. In 1990, Judy Haardt died. Her sister, Trudy Rhae King, and their father, Billy Ray King, were substituted as representatives of Mrs. Haardt's estate, and they have continued to pursue Mrs. Haardt's claim on a variety of legal theories. Connecticut Mutual moved for summary judgment on the ground that policy 272 had lapsed on October 11, 1989. The Kings responded that fact issues existed, inter alia, regarding whether Connecticut had waived the lapse. The district court granted summary judgment to Connecticut on all of the appellants' legal theories and the Kings timely appealed. We need write only on the issue of waiver.

II.

A.

A party moving for summary judgment has the burden of proving that there are no genuine issues of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 2552 (1986). An issue of material fact is genuine if the evidence could lead a reasonable jury to return a verdict for the nonmoving party. Hanchey v. Energas Co., 925 F.2d 96 (5th Cir. 1990). The nonmoving party must either present sufficient evidence to show the existence of a material fact issue or point out specific defects in the movant's evidence. The district court must resolve reasonable inferences in favor of the nonmoving party. Rusk v. International Paper Co., 943 F.2d 589, 590-91 (5th Cir. 1990). This court applies the same standards as did the district court in reviewing a grant of summary judgment. Bache v. American Telephone & Telegraph, 840 F.2d 283, 287 (5th Cir. 1988). Therefore, this court reviews de novo the district court's decision. City Public Serv. Bd. v. General Elec. Co., 935 F.2d 78, 80 (5th Cir. 1991).

The district court applied the law of the forum, Texas. The district court found first that policy 272 had lapsed on October 11, 1989, at the end of the grace period following default on the September premium payment. The district court then considered conflicting evidence that Agent Martinez said the policy was up to date and concluded that the agent had no statutory authority to make representations binding on the insurance company. Further, the court found, the Kings had presented no evidence that Connecticut waived the lapse. The district court decided that neither waiver nor estoppel could reinstate a policy that had

lapsed before the insured's death. On appeal, the Kings claim that Connecticut waived the lapse and acted in such a way that it should be estopped from enforcing the lapse. The Kings discuss waiver and estoppel as related concepts, but because estoppel requires a finding of detrimental reliance, of which there was no evidence, we discuss only the issue of waiver.

Waiver occurs when one intentionally relinquishes a known right or acts intentionally in a manner inconsistent with the assertion of that right. Elements of waiver are: 1) an existing right, benefit, or advantage; 2) knowledge, actual or constructive of the right's existence; and 3) actual intent to relinquish the right. Braugh v. Phillips, 557 S.W.2d 155, 158-59 (Tex. App.--Corpus Christi, 1977, writ ref'd n.r.e.). Waiver can be either express or implied. National Life & Accident Insurance Co. v. Harris, 107 S.W.2d 361, 362 (1937). Implied waiver can be based upon conduct occurring after a right exists. Braugh, 557 S.W.2d at 158-59.

The Kings assert that Connecticut waived the time of performance, not the right to receive premium payments. The Kings also contend that Connecticut Mutual's own summary judgment motion contained enough evidence to create an issue of material fact. They maintain that Connecticut's checkbook reminder sent to Judy Haardt was an express waiver of any lapse for nonpayment in September or October. Additionally, the Kings assert that there was much evidence of an implied waiver: the checkbook reminder, Connecticut Mutual's attempt to draw on the account in November,

the home office's request on December 13 for money to cover the bad draft, Connecticut Mutual's acceptance in December of the money order to pay in full the July and August premiums for policy 721, and Connecticut Mutual's computer status reports that listed policy 272 as in force until January 1990.

Connecticut Mutual, for its part, argues that the Haardts breached the contract by failure to pay the premium. This breach resulted in the lapse. Connecticut Mutual next asserts that it did not waive the breach. Connecticut first focuses on Martinez's role as independent agent, asserting that Martinez had no actual or apparent authority to waive provisions in the policy, irrespective of the disputed allegations that Martinez told the Haardts that the policies were all up to date. Martinez was an independent agent; neither under Texas law nor under the express terms of policy 272 could he waive policy provisions. The Haardts were charged with notice of the limits on Martinez's authority. Blanton v. John Hancock Mutual Life Insurance Co., 345 F.Supp. 168, 171 (N.D.Tex. 1971), affirmed, 463 F.2d 421 (5th Cir. 1972). But even if Martinez made such statements, Connecticut argues, the policy had already lapsed, and no waiver occurring after Haardt had died could reinstate it. Connecticut Mutual also takes issue with the Kings' claim that the home office's conduct constituted waiver of the lapse. It argues that the policy had lapsed, and any acceptance of late premiums after the due date would have been a reinstatement of the policy. Because Haardt died before a reinstatement occurred, Connecticut maintains it had no liability under the policy.

Connecticut notes that the computer status reports showed policy 272 as "in force" solely because it had not yet been deleted from the data base; the policy's presence on the status reports had nothing to do with whether or not it had lapsed.

The Kings reply to Connecticut's reinstatement argument by pointing out that the policy provision regarding reinstatement sets forth several express preconditions. To reinstate a policy after lapse, Connecticut Mutual requires the insured to provide evidence of insurability and pay overdue premiums with interest. Because Connecticut made no mention of any reinstatement preconditions in the November 2 checkbook reminder, it did not acknowledge that a lapse had occurred.

B.

There is no dispute about the essential facts before us. There is no dispute that Connecticut Mutual sent the checkbook reminder, that it attempted to draw on the account in November, that the home office requested money on December 13 to cover the bad draft, that in December it accepted a money order to pay in full the July and August premiums for policy 721, and that the company's computer status reports listed policy 272 as in force as late as January 1990. At no point did the company assert that the policy had lapsed. Despite what it calls a lapse in the policy, the record shows that Connecticut Mutual aggressively pursued premium payments on that policy. The record as thus far developed also demonstrates that the insurance company made no formal effort at reinstatement.

The only question then is whether these facts were sufficient to preclude summary judgment for the insurer under the substantive law of Texas relating to waiver. Schachar v Northern Assurance Co., 786 S.W.2d 766 (Tex. App. 1990), lays out the test in Texas for waiver of a forfeiture of an insurance policy by non-payment of the premium:

> When, under a policy of insurance, a forfeiture has been worked and the insurer has knowledge of the existence of facts which constitute the forfeiture of the policy, any unequivocal act done after the forfeiture has become absolute which recognizes the continued existence of the policy or which is wholly inconsistent with a forfeiture, will constitute a waiver thereof.

Id. at 767. (citing Bankers Life & Loan Ass'n. of Dallas v. Ashford, 139 S.W.2d 858, 860 (Tex. App. 1940).

Schachar appears to be closest to this case on its facts and therefore controlling in its statement of Texas law. In Schachar, the plaintiffs sued to recover for the theft of their car. Their insurance carrier asserted in response that the policy had lapsed for non-payment of the premiums. The trial court granted summary judgment for the insurer. The appellate court noted that the insurer had retained a dishonored check for the premium and that the insurer had not notified the insured that the bank had refused to honor the check. Id. at 766. The carrier did not notify the plaintiffs of the forfeiture due to non-payment of the premium until after the plaintiffs had submitted their theft claim. The plaintiffs never knew that their check had been returned unpaid. Id. at 767. The appeals court held that this

factual showing entitled the plaintiffs to take their case to the jury and reversed the summary judgment. Id. at 768. If that factual showing is sufficient in Texas to bar summary judgment, it is difficult to see how the facts of this case, in which the insurer pressed even harder for late payment of the premium and never indicated that a forfeiture existed, could justify summary judgment for the insurer. Citations to older cases under Texas law could be multiplied to the same effect. See, for example, State Life Ins. Co. of Indiana v. Little, 264 S.W. 319, 323 (Tex. App. 1924) (retention of a dishonored check under some circumstances will constitute a waiver even where there is no overt act by the insurer).

The cases cited by Connecticut Mutual do not help its cause. In Manning v. American Bankers Ins., 330 S.W.2d 921, 924 (Tex. App. 1959), the insurer sent the insured a letter expressing a desire to reinstate the policy under the terms of the policy. See also Baker v. Penn Mut. Life Ins. Co., 617 S.W.2d 814, 815-16 (Tex. App. 1981). Similarly, in Great Southern Life Ins. Co. v. Peddy, 162 S.W.2d 652, 655 (Tex. App. 1942), the insurance company sent the insured a letter stating that the policy had lapsed and offered to restore the policy upon completion of a health certificate. All of these cases involve unambiguous acts by the insurer inconsistent with the continued existence of the policy. Roberts v. Mass. Indem. & Life Ins. Co., 713 S.W.2d 159 (Tex. App. 1986), is also distinguishable, because it concerned the conditions

under which a policy would become effective initially, and it turned on different policy language.

In this case, by contrast, the insurer not only neglected unequivocally to deny the policy but appears to have actively pursued continued maintenance of that policy. The Kings brought forward summary judgment proof by which a jury could conclude that Connecticut Mutual committed acts which recognized "the continued existence of the policy" or which were "wholly inconsistent with a forfeiture." Schachar, 786 S.W.2d at 767. Moreover, Connecticut Mutual's failure to comply with the formal requisites of reinstatement belie its claim that its efforts to collect the premium were merely an attempt to revive a lapsed policy. Compare Equitable Life Assurance v. Ellis, 147 S.W.2d 1152, 1156-57 (Tex. 1912). At any rate, the issue of waiver in this case is not appropriate for summary judgment.

C.

The Kings' other causes of action bear less fruit. The claims based on a breach of the duty of good faith, the Texas Deceptive Trade Practices Act, and negligence were properly disposed of by the district court. We affirm its conclusions as to these theories.

III.

For the reasons outlined above, we **REVERSE** the district court's decision to grant summary judgment on the waiver issue, and **AFFIRM** its decision in all other respects. The case is **REMANDED**.