NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 06-3743

PNC BANK, NATIONAL ASSOCIATION, TRUSTEE OF THE HAROLD G. FULMER, III IRREVOCABLE DEED OF TRUSTEE DATED 8/21/97

v.

AMERUS LIFE INSURANCE COMPANY,

Appellant

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(05-cv-02966)
District Judge: Honorable John P. Fullam

Submitted pursuant to Third Circuit LAR 34.1(a)
September 12, 2007

Before: RENDELL, FUENTES, and CHAGARES, Circuit Judges.

(Filed: October 15, 2007)

OPINION OF THE COURT

FUENTES, Circuit Judge.

This is an appeal from a bench trial in an insurance case, brought in federal court under diversity jurisdiction. The dispute concerns a $10 million life insurance policy (the "Policy") purchased by Harold G. Fulmer III from AmerUs Life Insurance Company ("AmerUs"), appellant in this action. The Policy lapsed when Fulmer failed to make a required premium payment. The District Court held that AmerUs was responsible for the lapse and acted in bad faith by cancelling the policy. For the reasons set forth below, we will reverse the decision of the District Court.

I. Facts and Procedural History

Immediately after purchasing the Policy, Fulmer transferred it to an irrevocable trust (the "Fulmer Trust"). PNC Bank, National Association ("PNC"), appellee, ultimately became the trustee of the Fulmer Trust. Under the terms of the Fulmer Trust, Fulmer was responsible for paying the quarterly premium payments on the Policy. According to the Policy, if Fulmer did not pay his premium, the cash value[1] of the Policy could be applied toward the premiums until the remaining cash value would not cover the monthly deductions made to the Policy. Furthermore, there was a 60-day grace period

[1] The cash value was the "account value" (total premiums paid, plus interest, minus the cost of insurance) less a contractually established "surrender fee."

during which the Policy would stay in effect after the cash value became insufficient to cover the monthly deductions. Under the Policy, AmerUs only had to communicate with PNC and, as a matter of practice, AmerUs sent communications regarding the Policy only to PNC. PNC did not have an obligation under the trust agreement to keep Fulmer informed as to premiums due, but, in general, PNC informed Fulmer about all communications regarding the Policy.

In 1993, Fulmer made the investment decision to fund the Policy premiums with the cash value whenever possible and instructed AmerUs to inform him when payments needed to be made on the account. AmerUs responded that it would send a pending lapse notice whenever funding was required on the account. After Fulmer made this decision, the Policy occasionally entered the grace period and AmerUs sent late payment offers to PNC, which PNC forwarded to Fulmer with cover letters indicating that a premium had to be paid or the Policy would lapse.

On February 3, 2004, Harold Fulmer's wife, Judith Fulmer, called AmerUs to see how long the cash value would cover the premiums. Mrs. Fulmer was told by a customer service representative at AmerUs that a $511 payment would keep the account active through March 2004. The Fulmers paid the $511 to AmerUs that day. The information conveyed in that call was accurate, as the account was in effect through April 2004.

On February 11, 2004, Tonya Allen, an administrative assistant at PNC, called AmerUs to inquire into the status of the Policy. The customer service representative at AmerUs told Allen that the Policy had a cash value of $25,238 and would be "okay" for

about three months. The representation of the Policy's cash value was incorrect.[2]

On February 23, 2004, AmerUs sent PNC a premium notice for the quarterly planned premium payment amount of $22,045.70, due on March 23, 2004. On March 17, 2004, AmerUs sent a late payment offer to PNC, identical to the ones it had sent to PNC in the past. The March 2004 late payment offer required a $24,268.51 payment, and indicated, as the previous ones had, that:

> YOUR POLICY IS NOW IN THE GRACE PERIOD
> BUT IT'S NOT TOO LATE
> The AMOUNT DUE must be paid by the end of the grace period to keep your policy from lapsing. If the AMOUNT DUE is not received by the end of the grace period, your policy's coverage will terminate.

(J.A. 1459-60.) PNC did not forward AmerUs's request for payment to Fulmer, believing it to be an unnecessary request for a premium, and did not take any other action on the account. As no payment was made on the account, the Policy lapsed. AmerUs then determined that Fulmer was uninsurable and refused to reinstate his policy.

PNC initiated a law suit against AmerUs in Pennsylvania state court for breach of contract, seeking reinstatement of the policy. In its complaint, PNC alleged that AmerUs had breached the *express* terms of the Policy by failing to continue coverage under the policy despite receiving a premium payment during the Policy's grace period. The state court dismissed the non-diverse parties and AmerUs removed the action to the Eastern District of Pennsylvania, based on diversity jurisdiction. The case went to trial before the

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[2] Note that the representation that the Policy would be "okay" for "about" three months was not far off, as the Policy did not lapse for another 72 days.

District Court. At trial, PNC abandoned the theory that AmerUs breached the express terms of the Policy and, instead, argued that AmerUs had breached the implied covenant of good faith and fair dealing because AmerUs cancelled the Policy after causing the breach.

The District Court found that AmerUs had improperly cancelled the Policy, holding that but for AmerUs having provided incorrect information to PNC, the premiums would have been paid and the Policy would not have lapsed. The Court held that AmerUs did not act in good faith by cancelling the policy after causing the default and directed AmerUs to indicate the amount of premium payments necessary to sustain the Policy and Fulmer to pay the overdue premiums.

II. Jurisdiction

The District Court had diversity jurisdiction over this case pursuant to 28 U.S.C. §§ 1332 and 1441. We have jurisdiction over the appeal pursuant to 28 U.S.C. § 1291.

III. Standard of Review

We will review the District Court's determination of contract law *de novo*. Martin v. Monumental Life Ins. Co., 240 F.3d 223, 232 (3d Cir. 2001). We will review the District Court's factual determinations for clear error. Fed. R. Civ. P. 52(a). Any legal conclusions drawn from the facts will be reviewed *de novo*. Martin v. Selker Bros., Inc., 949 F.2d 1286, 1292 (3d Cir. 1991).

IV. Analysis

A. Proximate Cause of the Policy Lapse

In its decision, the District Court found that AmerUs was responsible for the Policy lapsing because Fulmer would have paid the necessary premium but for AmerUs providing PNC with incorrect information during the February 11, 2004 phone call. As previously stated, AmerUs sent PNC a premium notice indicating the amount due on the account and a late payment offer, which clearly indicated that the Policy would lapse if payment was not made on the account. PNC ignored the late payment offer.

Under Pennsylvania law:

> Proximate causation is defined as a wrongful act which was a substantial factor in bringing about the plaintiff's harm. Proximate cause does not exist where the causal chain of events resulting in plaintiff's injury is so remote as to appear highly extraordinary that the conduct could have brought about the harm.

Dudley v. USX Corp., 606 A.2d 916, 923 (Pa. Super. Ct. 1992) (citations omitted). In this case, we conclude that PNC's failure to heed or follow up on the premium notice or late payment offer, and not AmerUs's misrepresentation on the telephone, was the proximate cause of the Policy's lapse. Moreover, though not argued by the parties, we believe that PNC's failure to act on the March 2004 late payment offer from AmerUs constituted the superseding cause of the policy's lapse that removed the initial misrepresentation by AmerUs as the proximate cause.[3]

In its analysis, the District Court cited to cases in which the insurer prevented the insured from performing on the policy. Amrovcik v. Metro. Life Ins. Co., 180 A. 727

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[3] Superseding cause is an intervening act or force that the law considers sufficient to override the cause for which the original wrongdoer was responsible, thereby exonerating that wrongdoer from liability. Black's Law Dictionary 213 (7th ed. 1999).

(Pa. Super. Ct. 1935) (insurer could not deny coverage for failure to submit proof of disability where insurer refused to provide the necessary proof of disability forms to the insured); Aetna Cas. & Sur. Co. v. Netz, No. 91-6944, 1993 WL 89766, at *8 (E.D. Pa. Mar. 29, 1993) (insurance company could not deny coverage where it misled insureds into believing that their vehicle was covered). These cases are inapposite, however, as AmerUs did not prevent PNC from performing.

The case that is most instructive here is McGowan v. Prudential Ins. Co. of Am., 372 F.2d 39 (3d Cir. 1967).[4] In McGowan, the insured sought to have his life insurance policy stay in force without payment of premiums. The insurance agent represented to the insured that he thought that he would be able to add an automatic loan feature to the policy so that the premiums would be paid automatically from the cash equity of the policy. However, it turned out that the feature was not available for the policy. The agent then sent the insured a letter instructing him to sign a loan agreement in order to keep the policy active, indicating that he intended to use the proceeds from the loan to pay the insurance premiums. The insured never returned the loan agreement to the agent and never paid the premiums. Thereafter, the insured received notice that his policy would lapse for nonpayment of premiums and, ultimately, he was informed that his policy had lapsed. Thereafter, the insured was killed in an accident. The plaintiff argued that because the agent gave the insured assurance that payment would be made from the loan,

[4] Note that, as in this case, McGowan was a diversity case governed by Pennsylvania law. 372 F.2d at 40.

the insurer could not disclaim liability on the policy. The Court rejected this argument, holding that the "insured had [no] reasonable basis . . . to assume that the premiums were being loaned." Id. at 43.

PNC distinguishes McGowan on the basis that the insured in McGowan was attempting to alter the terms of the policy by obtaining a loan to pay the premiums and, here, Fulmer was acting within the existing contract to apply the cash value of the policy to the premiums. This is a distinction without a difference. In both cases, the insurer suggested that the insured did not need to pay a premium because the cash value could be applied to the premium payment. In both cases, this representation turned out to be wrong. Moreover, in both cases, the insurer subsequently sent a notice indicating that action needed to be taken or the policy would lapse. Finally, in both cases, the premium deficiency notice was ignored and the policy ultimately lapsed because the insured failed to pay the required premiums.[5] PNC could not rely on one false representation after subsequent communications made clear that additional actions were necessary to preserve the account.

Drelles v. Mfrs. Life Ins. Co., 881 A.2d 822, 840-41 (Pa. Super. Ct. 2005), does not command a different result. In Drelles, the Pennsylvania Supreme Court held that policyholders are not obligated to read insurance policies and can rely upon an insurance

[5] Note that in McGowan the insurance agent expressed that the premium *probably* could be skipped, whereas in this case, apparently, AmerUs conveyed that the premium could be skipped. This difference does not excuse PNC for ignoring the notices it received from AmerUs.

agent's representations as to the contents of a policy. PNC advances this case as support for its argument that it could rely on the representation made by AmerUs on February 11, 2004. However, the Drelles court held that "the recipient of a fraudulent misrepresentation . . . cannot recover if he blindly relies upon a misrepresentation the falsity of which would be patent if he had used his opportunity to make a cursory examination or investigation." Id. at 840. PNC cannot recover here because it blindly relied on misleading information it received in a telephone call without making a cursory examination of the late payment offer from AmerUs. The late payment offer should have alerted PNC to the fact that a premium needed to be paid, or, at the very least, should have put PNC on inquiry notice of a possible problem on the account. PNC completely disregarded AmerUs's premium payment and potential lapse notices and, therefore, did not have "any reasonable basis. . . to assume that the premiums were being" paid. McGowan, 372 F.2d at 43.

B. Implied Duty of Good Faith

The District Court found that AmerUs was obliged to act in good faith and fair dealing, citing to Dercoli v. Pa. Nat'l Mut. Ins. Co., 554 A.2d 906 (Pa. 1989) and Huang v. BP Amoco Corp., 271 F.3d 560 (3d Cir. 2001). As we find that AmerUs did not cause the lapse, it violated no implied duty by cancelling the Policy.

V. Conclusion

For the reasons set forth above, the decision of the District Court will be reversed.