

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2011 CA 1072

ANNETTE JONES MOGABGAB

VERSUS

LINCOLN BENEFIT LIFE COMPANY, ROGER F. FARRIS
INSURANCE AGENCY, LLC, AND DONALD THOMAS



Judgment Rendered: APR 19 2012

On Appeal from the
22nd Judicial District Court,
In and for the Parish of St. Tammany,
State of Louisiana
Trial Court No. 2010-11269

The Honorable Richard A. Swartz, Judge Presiding

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BEFORE: CARTER, C.J., PARRO, PETTIGREW, HUGHES, AND
HIGGINBOTHAM, JJ.

Carter, C.J., concurs in part and dissents in part, with reasons. by [initials]
Parro, J., dissents in part and assigns reasons. by [initials]
Pettigrew, J., dissents in part for the reasons assigned by Parro, J. by [initials]
Higginbotham, J., concurs in part and dissents in part, for the reasons assigned by Carter, J.

HUGHES, J.J.

This is an appeal from a summary judgment dismissing the life insurance claim of plaintiff, Annette Jones Mogabgab. For the following reasons, the judgment of the district court is reversed in part, and the case is remanded to the district court for further proceedings.

FACTS AND PROCEDURAL HISTORY

On August 25, 2009, Jason Mogabgab met with agent Donald Thomas for the purpose of procuring a life insurance policy with Lincoln Benefit Life Company (Lincoln). Thomas had previously obtained a life insurance policy with Lincoln on behalf of Mogabgab in February 2009, but that policy lapsed for non-payment of premiums. At the August 25, 2009, meeting, Mogabgab filled out an application for insurance, submitted a check for the initial premium, and was given a "Receipt and Temporary Insurance Agreement."

The temporary insurance agreement provided that temporary insurance would start on the "later of: (1) the date of the Agreement; or (2) the date when all required medical exams [were] completed, and/or lab specimens (blood/urine, or oral fluid) provided." The agent, Thomas, included special instructions for Lincoln to "use medical results from [Mogabgab's] [February 2009] policy."

Four days later, Mogabgab was killed in a vehicle accident. Mogabgab's mother, Annette Mogabgab, who was named as the beneficiary on the policy, filed a claim for the insurance proceeds. Lincoln denied the claim, asserting that no temporary coverage had begun on the date of Mogabgab's death because no medical exam had been completed and no lab specimens had been provided. After receiving notice of Lincoln's denial of her claim, Annette filed suit to enforce

payment and named Lincoln, Thomas, and Roger F. Farris Insurance Agency, LLC as defendants.¹

The defendants moved for summary judgment pursuant to LSA-C.C.P. art. 966, claiming that insurance coverage had not yet begun at the time of Mogabgab's death. After a hearing, the district court granted the defendants' motions for summary judgment and dismissed plaintiff's suit with prejudice. Plaintiff now appeals, alleging three assignments of error.² In plaintiff's first two assignments of error, she argues that the district court erred in failing to consider the clear language and certain provisions of the insurance application. In her third assignment of error, plaintiff argues that material factual issues are in dispute.

DISCUSSION

Appellate courts review summary judgments *de novo* under the same criteria that govern the district court's determination of whether summary judgment is appropriate. **Dimattia v. Jackson National Life Insurance Co.**, 04-1936 (La. App. 1 Cir. 9/23/05), 923 So.2d 126, 128. Appellate courts are free to look at the summary judgment evidence afresh and decide without deference to what the district court did or did not do. **Dimattia v. Jackson**, 923 So.2d at 128. The summary judgment procedure is expressly favored in the law and is designed to secure the just, speedy, and inexpensive determination of civil actions. LSA-C.C.P. art. 966(A). Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, admissions, and affidavits in the record

¹ Mogabgab first approached the Roger F. Farris Insurance Agency to obtain life insurance. Because the agency did not handle life insurance policies, it referred Mogabgab to Thomas, who is authorized to sell insurance on behalf of Lincoln.

² Plaintiff does not assign error to the part of the district court judgment granting the motion for summary judgment in favor of defendant Roger F. Farris Insurance Agency. The scope of appellate review is limited to issues that are contained in specifications or assignments of error. Uniform Rules Courts of Appeal, Rule 1-3. Thus, "defendants" hereinafter refers only to defendants Lincoln and Thomas.

show that there is no genuine issue as to material fact and that the mover is entitled to judgment as a matter of law. LSA-C.C.P. art. 966(B).

The burden of proof remains with the mover, but if the mover will not bear the burden of proof at trial on the matter that is before the court, the mover's burden does not require him to negate all essential elements of the adverse party's claim but, rather, to point out to the court that there is an absence of factual support for one or more elements essential to the adverse party's claim. LSA-C.C.P. art. 966(C)(2). Thereafter, if the adverse party fails to produce factual support sufficient to establish that he will be able to satisfy his evidentiary burden of proof at trial, there is no genuine issue of material fact. *Id.* Summary judgment declaring a lack of coverage under an insurance policy may not be rendered unless there is no reasonable interpretation of the policy, when applied to the undisputed material facts shown by the evidence supporting the motion, under which coverage could be afforded. **Green v. State Farm Mutual Automobile Insurance Co.**, 07-0094 (La. App. 1 Cir. 11/2/07), 978 So.2d 912, 914, writ denied, 08-0074 (La. 3/7/08). 977 So.2d 917.

Assignment of Errors

In her assignment of errors, plaintiff avers that the district court erred in its interpretation of the temporary insurance agreement and application for insurance and failed to consider certain actions of defendant Thomas.

Interpretation of an insurance contract is usually a legal question that can be properly resolved in the framework of a motion for summary judgment. **Jackson National Life Ins. Co. v. Kennedy-Fagan**, 03-0054 (La. App. 1 Cir. 2/6/04), 873 So.2d 44, 48, writ denied, 04-0600 (La. 4/23/04), 870 So.2d 307. An insurance policy is a contract between the parties and should be construed employing the

general rules of interpretation of contracts set forth in the Louisiana Civil Code. **Brown v. Manhattan Life Insurance Co.**, 01-0147 (La. 6/29/01), 791 So.2d 74, 77. If the words of the policy are clear and unambiguous, the agreement must be enforced as written. **Brown v. Manhattan**, 791 So.2d at 77. An insurance policy is construed as a whole, and each provision in the policy must be interpreted in light of the other provisions. **Berry v. Paul Revere Life Insurance Co.**, 08-0945 (La. App. 1 Cir. 7/9/09), 21 So.3d 385, 390, writs denied, 09-2241 (La. 12/18/09), 23 So.3d 942, and 09-2220 (La. 12/18/09), 23 So.3d 945. Insurance policies are to be read broadly in favor of coverage, and any ambiguities are construed against the insurer. **Berry v. Paul Revere**, 21 So.3d at 390.

Coverage is determined by the terms and conditions of the “Temporary Insurance Agreement” that Mogabgab signed on August 25, 2009. The Agreement provided that temporary insurance coverage starts:

If the payment has been accepted by us and the application for life insurance has been completed on or before the date of this Agreement, temporary insurance under the Agreement will start on the later of: (1) the date of the Agreement, or (2) the date when all required medical exams have been completed, and/or lab specimens (blood, urine, or oral fluid) provided.

The application for insurance states: “As part of the underwriting process we *may* ask for medical tests or exams to be completed at our expense.” (Emphasis added).

The insured has the burden of proving the existence of a policy and coverage. **Tunstall v. Stierwald**, 01-1765 (La. 2/26/02), 809 So.2d 916, 921. Because plaintiff would bear the ultimate burden of proof at trial, the defendants’ burden is to point out the absence of factual support for one or more elements essential to plaintiff’s claim. In its motion, Lincoln claimed that because no medical exam results had been provided at the time of Mogabgab’s death, plaintiff would be unable to prove an essential element of her claim, namely, temporary

coverage under the agreement. In support of its motion for summary judgment, Lincoln argued that temporary insurance coverage had not yet begun. Under the terms of the agreement, temporary insurance started on the later of the date of the temporary insurance agreement or the date of completion of all "required" medical examinations and/or lab specimens. Lincoln further argues that because the medical requirements were not satisfied on the date of Mogabgab's death, temporary insurance coverage had not started. In support of this argument, Lincoln submitted the affidavit of Janet Dever, a claims consultant. Dever stated that she reviewed the business records, and they reflected that no coverage started nor had any life insurance policy been issued to Mogabgab prior to his death. She further stated that certain medical exams or lab specimens that were required under the terms of the temporary insurance agreement had not been provided.

Lincoln cites **Holmes v. Jefferson Pilot Financial Insurance Co.**, 39,721 (La. App. 2 Cir. 6/29/05), 907 So.2d 185, 190, writ denied, 05-1985 (La. 2/3/06), 922 So.2d 1185, wherein the Second Circuit found that there was no temporary insurance in place when the plaintiff's husband died within a month of completing the insurance application and having paid his initial premium, but before completing the required medical examination. A medical exam was required and scheduled for the applicant in **Holmes**, but he cancelled it. **Holmes v. Jefferson Pilot**, 907 So.2d at 187. In contrast, at the time of Mogabgab's death, there had been no requirement for him to undergo a medical examination or submit lab specimens. Also, unlike the present case, the insurer in **Holmes** did not have the applicant's medical results from a previous policy, and the agent in **Holmes** did not include written instructions on the insurance application to use medical results from a previous policy. **Holmes v. Jefferson Pilot**, 907 So.2d at 186-87.

Thomas argued in his motion for summary judgment that plaintiff could not prove that he breached the duty of an insurance agent to his client in procuring insurance for Mogabgab. In order to recover for losses arising out of an insurance agent's failure to procure insurance, the plaintiff must establish: (1) an undertaking or agreement by the agent to procure insurance; (2) failure of the agent to use reasonable diligence in attempting to place the insurance and failure to notify the client promptly if he has failed to obtain the insurance; and (3) that the actions of the agent warranted an assumption by the client that he was properly insured. **Opera Boats, Inc. v. Continental Underwriters, Ltd.**, 618 So.2d 1081, 1085-86 (La. App. 1st Cir. 1993). Thomas argues that plaintiff cannot prove two of the three essential elements required of a party asserting a claim against an insurance agent for failing to place coverage. Specifically, he argues that plaintiff cannot show that he failed to use due diligence in attempting to place Mogabgab's policy, nor can plaintiff show that Thomas engaged in any action to make Mogabgab believe that he was insured prior to his death.

Thomas submitted an affidavit in support of his motion for summary judgment wherein he acknowledges requesting that Lincoln use Mogabgab's prior medicals, but that he verbally explained to Mogabgab that he would most likely have to undergo new medical exams and submit new lab specimens. He stated that Mogabgab responded that he understood and would re-submit medical exam results and lab specimens if needed. There was no evidence introduced that Thomas or Lincoln actually requested or scheduled Mogabgab to have a new medical examination or submit new lab specimens.

In response, plaintiff argued that statements in Thomas' affidavit regarding his discussions with Mogabgab at the August 25, 2009 meeting were contrary to

the clear language in the insurance application, which states that Lincoln “*may* ask for medical tests or exams to be completed” at its expense. (Emphasis added). We agree. Under the clear language of the temporary insurance agreement, coverage began on the later of the date of the agreement or the completion of medical examinations if “required.” The policy included the agent’s direction to use prior medical results. There is no evidence that at the time of his death there had been any request that Mogabgab submit to a medical examination or testing. We therefore reverse the summary judgment granted in favor of defendant Lincoln.

As to defendant Thomas, however, we agree with the finding of the trial court that the evidence establishes that Mr. Thomas used reasonable diligence in attempting to place the life insurance policy for Mr. Mogabgab. There is little more he could have done. The summary judgment in favor of defendant Thomas is therefore affirmed.

CONCLUSION

For the foregoing reasons, the judgment of the district court granting summary judgment in favor of defendant Thomas is affirmed. Summary judgment granted in favor of defendant Lincoln is reversed, and the case is remanded to the district court for further proceedings. Each party shall bear its own costs of this appeal.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

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VERSUS


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CARTER, C.J., concurring in part and dissenting in part.

 Although I concur with that portion of the majority opinion reversing the district court's grant of summary judgment in favor of Lincoln, I disagree with that portion of the majority opinion affirming the judgment of the district court granting summary judgment in favor of Thomas. In my opinion, because the issue of temporary insurance coverage remains unresolved, material issues of fact remain in dispute regarding whether Thomas breached his duty as an insurance agent in procuring insurance for Mogabgab, and summary judgment is inappropriate.

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HIGGINBOTHAM, JJ.**

 **PARRO, J., dissenting in part.**

While I agree with the majority that summary judgment in favor of Thomas, dismissing the plaintiff's claims against him, was appropriate, I would affirm the district court's judgment in favor of Lincoln, based on the wording of the temporary insurance agreement signed by Mogabgab four days before his death. That agreement specifically stated that temporary insurance would start on **the later of** the date of the agreement or the date when all required medical exams have been completed. Although Thomas requested that Lincoln use Mogabgab's earlier medical records that were in its files, the evidence does not indicate that Lincoln agreed to do so. Since those medical exams had not been completed and provided to Lincoln, the clear terms of the agreement provide that temporary insurance coverage had not commenced before Mogabgab's death.

Accordingly, I respectfully dissent from the majority's reversal of the district court as to this portion of the judgment.