IN THE TERRITORIAL COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. CROIX AT CHRISTIANSTED

AMERICAN HOME ASSURANCE CO. Plaintiff vs. NICHOLAS NAVARRO FELIX Defendant	CIVIL NO. 1376/81 ACTION FOR DECLARATORY RELIEF

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FINCH, Judge

MEMORANDUM OPINION
June 8, 1983

I. INTRODUCTION

Defendant, Nicholas Navarro Felix, has filed a Motion for Summary Judgment pursuant to Title 5 Appendix I Rule 56 of the Virgin Islands Code. Plaintiff, American Home Assurance Company, has filed an opposition thereto and a cross motion for summary judgment pursuant to the same rules. For the reasons set forth below the plaintiff's motion for summary judgment will be granted.

II. FACTS

On April 3, 1978 plaintiff, American Home Assurance Company, issued to defendant a family automobile policy providing bodily injury and property damage liability coverage on a 1974 Chevrolet Camino Pickup truck. On October 22, 1979, defendant, while driving the insured vehicle, was involved in an automobile accident on St. Croix, U.S. Virgin Islands; this accident resulted in an action being filed against defendant in the Territorial Court (Civil No. 705/1980). Defendant, pursuant to the terms of his automobile insurance policy, requested that plaintiff represent his interests in Civil No. 705/1980. However, plaintiff refused to defend its insured maintaining that defendant's policy had been cancelled before the accident because of arrearages in premium payments. Nevertheless, in order "to protect its interests," plaintiff paid $2,500.00 as settlement in Civil Action No. 705/1980. As a result of settlement, this action was dismissed on March 4, 1982. On November 5, 1981 plaintiff, the insurance company, filed a complaint with this Court seeking a declaratory judgment. It petitioned that the Court declare the policy of insurance was cancelled before October 22, 1979, the date that defendant was involved in the automobile accident and, therefore, was not obligated to defend the defendant in the resulting lawsuit.

Otherwise expressed, plaintiff is now before the Court seeking a declaration that the insurance policy issued to defendant had been effectively cancelled before defendant was involved in the automobile accident on October 22, 1979, and therefore it is entitled to be reimbursed by defendant for the amount paid in settlement of the underlying claim in Civil No. 705/1980.

III. DISCUSSION

Defendant advances three theories in support of his motion for summary judgment. First, defendant argues that since plaintiff failed to send the notice of cancellation of the insurance policy to defendant's correct address, the notice was not an effective cancellation of the policy. Conversely, plaintiff maintains that it adhered to the prescribed terms in the insurance policy setting forth the manner of cancellation of a policy and also complied with the statutory requirements of the Virgin Islands Code in the mailing of the notice of cancellation.

The question of whether the actual receipt by the insured of a notice of cancellation mailed by an insurer constitutes a condition precedent to a valid cancellation of an insurance policy has been reviewed in numerous cases. See State Farm Mutual Automobile Co. v. Chaney, 272 F.2d 20 (10th Cir. 1959); Moynes v. National Sur. Corp., 272 F. 2d 835 (7th Cir. 1959);

Truck Ins. Exchange v. Industrial Acci. Com., 36 Cal. 2d 646, 226 P.2d 583 (1951); See also 17 G. Couch, Couch On Insurance 2d §67:178, at 503-04 (1967). In order to resolve this question, an examination of the statutory provisions of Title 22 of the Virgin Islands Code, which sets forth the proper procedure for the cancellation of a policy of insurance, and the terms of the insurance policy with regard to cancellation is required.

Title 22 of the Virgin Islands Code, Section 827 states in pertinent part:

> (a) Cancellation by the insurer of any policy which by its terms is cancellable at the option of the insurer...may be effected as to any interest only upon compliance with either or both of the following:
>
> (1) [W]ritten notice of such cancellation must be actually delivered or mailed to the insured or to his representative in charge of the subject of the insurance not less than five days prior to the effective date of the cancellation.
>
> (b) The mailing of any such notice shall be effected by depositing it in a sealed envelope, directed to the addressee at his last address as known by the insurer or as shown by the insurer's records, with proper prepaid postage affixed, in a letter depository of the United States post office (emphasis supplied).

It is clear that the above statute provides for cancellation of an insurance policy by mailing the notice of cancellation to the address of the insured as shown by the insurer's records. The Court finds that plaintiff mailed the notice of cancellation to defendant using that address of defendant which appeared on the policy retained in the office files of plaintiff. Therefore, plaintiff has complied with the requirements of the statute by sending the notice of cancellation to the address of the defendant as indicated in its records.[1/]

A reading of paragraph 16 of the conditions of defendant's insurance policy will reflect that <u>mailing</u> of a notice of cancellation was the agreed upon method of cancelling the policy of insurance issued to defendant. Paragraph 16 states in relevant part:

> <u>16 Cancellation</u>: [T]his policy may be cancelled by the company by <u>mailing</u> to the insured named in Item 1 of the declaration at the address shown in this policy written notice stating when not less than 10 days thereafter such cancellation shall be effective. <u>The mailing of notice as aforesaid shall be sufficient proof of notice</u> (emphasis supplied).

It follows from a reading of the above paragraph that plaintiff has complied with the prescribed terms as set forth in

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[1/] The address appearing on the defendant's insurance policy (No.64-270623-8) and retained in the files of plaintiff is P.O. Box 432, Kingshill, St. Croix. The notice of cancellation dated June 6, 1978 was sent to P.O. Box 432, Kingshill, St. Croix.

the policy for effecting cancellation of defendant's insurance. Because plaintiff did comply with the statutory requirements of the Virgin Islands Code and the contractual provisions in the defendant's insurance policy setting forth the proper procedure for cancelling a policy, the Court concludes that plaintiff used the proper means of cancelling the policy, and that the notice of cancellation was sent to the correct address of defendant.

Defendant's next assertion is that plaintiff was under a duty to verify the address it had in its records for him and to use an alternate address in sending the notice of cancellation which, defendant argues, was readily available at the Virgin Islands Department of Public Safety and in the plaintiff's own records. Conversely, plaintiff contends that its only obligation, absent notice from defendant of a change of address, was to notify defendant of a cancellation of his policy using the address of defendant as it appeared in the insurance policy.

The law does not demand that insurance companies inquire and determine which, of several addresses an insured may utilize, is the "correct" address. Security Insurance Company of Hartford v. Smith, 360 So. 2d 280 (1978); Gendron v. Calvert Fire Ins. Co., 47 N.M. 348, 143 P.2d 462 (1943). The notice of cancellation must be sent to that address of insured which appears in the policy unless the insured notifies the insurer of a change of address or unless knowledge of such change is attributed to the insurer. State Farm Mut. Auto Ins. Co. v. Chaney, 272 F.2d 20 (10th Cir. 1959); Midwestern Ins. Co. v. Cathey, 262 P.2d 434 (1953); See generally, 43 Am. Jur. 2d, Insurance §394 (1982). Furthermore, knowledge of additional addresses at which an insured receives mail does not constitute knowledge of a change of address. See Gendron, supra. Accordingly, the Court holds that the notice of cancellation was sent to the "correct" address of defendant--that address which appeared in the policy retained in the files of plaintiff.

Defendant's final argument is that the term "mailing", as used in insurance policies, does not include mailing by registered or certified mail and, since plaintiff mailed the notice of cancellation to defendant via certified mail, this did not constitute a compliance with the requirement in the policy as to mailing of a notice of cancellation.

There exist two distinct views with regard to whether or not the term "mailing" encompasses mailing by registered and certified mail. Some courts and legal commentators have adopted the view that sending a notice of cancellation by registered or certified mail does not constitute compliance with the mailing requirement in a policy of insurance because this method of mailing is a more personalized type of mailing than sending a message by ordinary mail and may make receipt of the notice by the insured less likely in the case of a temporary absence. Wright v. Columbia Gas Co., 235 F. 2d 462 (4th Cir. 1956); Medford v. Pacific Nat. Fire Ins. Co. v. Riley, 168 Md. 430, 178 A. 250 (1935). Concomitantly, there is authority for the proposition that the insurance policy provision providing for the mailing of notices of cancellation is broad enough to cover all types of mailings which are commonly used to convey messages. Westmoreland v. General Accident Fire and Life Assurance Corporation, Ltd., 144 Conn. 265, 129 A.2d 623 (1957); Fields v. Western Millers Mut. Fire Ins. Co., 182 Misc. 895, 50 N.Y.S. 2d 70 (1944). See also 17 G. Couch, Couch On Insurance 2d §67:181, at 506 (1967). This Court feels that the latter approach is the better view and therefore adopts it. Consequently, the Court holds that the mailing of the notice of cancellation by certified mail was an appropriate means of notifying the defendant that his policy of insurance had been cancelled.

ATTORNEY'S FEES

In the instant case counsel for defendant has demanded compensation for a defense provided to his client from July 1980 to March 1982. The Court is of the opinion that defendant's demand for attorney's fees is without legal merit.

Defendant is not entitled to an award of attorney's fees in the present action because there exists neither a contractual nor a statutory basis for such an award. First, since the Court has determined that there was no insurance policy in effect at the time that defendant was involved in the automobile accident on October 22, 1979, there existed no contractual duty of plaintiff to defend him in the lawsuit which arose out of the accident. It follows that counsel for defendant cannot now look to plaintiff to collect attorney's fees. Second, Title 5 of the Virgin Islands Code, Section 541 provides in relevant part:

> The measure and mode of compensation of attorney's shall be left to the agreement, expressed or implied, of the parties; but there shall be allowed to the prevailing party in the judgment such sums as the court in its discretion may fix by way of indemnity for his attorneys fees in maintaining the action or defenses thereto (emphasis added).

Defendant is not the prevailing party in the instant case and therefore does not have a statutory basis to demand that he be awarded attorney's fees. Accordingly, defendant's demand for attorney's fees is denied.

IV. CONCLUSION

For the foregoing reasons, defendant's Motion for Summary Judgment is DENIED and plaintiff's cross motion for Summary Judgment is GRANTED.

DATED: June 8, 1983

Raymond L. Finch, Judge