

**IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PINELLAS COUNTY, FLORIDA
APPELLATE DIVISION**

LAVONNA CASTELLANO,
Appellant,

APPEAL No.: 08-33AP-88A
L.T. CASE NO.: 08-4628-CO-42

v.

MERCURY INSURANCE COMPANY
OF FLORIDA,
Appellee.

ORDER AND OPINION

THIS CAUSE is before the Court on appeal, filed by Lavonna Castellano, from the Trial Court's Final Order granting summary judgment in favor of Mercury Insurance Company of Florida (Mercury). Upon review of the briefs, the record and being otherwise fully advised, the Court reverses the trial court's ruling as set forth below.

The record shows that the underlying proceedings began when Ms. Castellano filed a complaint on May 2, 2008, in the County Court for Pinellas County, Florida. This two-count complaint alleged that Mercury breached its auto insurance policy with Ms. Castellano when it denied her July 18, 2007 claim. Ms. Castellano also requested declaratory relief to determine whether the insurance policy had been properly cancelled prior to the accident and, whether Mercury was estopped by the acts of its agents for its failure to apprise Ms. Castellano of its position regarding her coverage in a timely manner.

Mercury claims that it sent an auto insurance policy renewal offer to Ms. Castellano on June 13, 2007 with a July 17, 2007 premium due date. Mercury alleges that payment was not received before the July 17, 2007 due date and therefore, Ms. Castellano's policy expired on July 18, 2007. Ms. Castellano was involved in an accident occurring on July 18, 2007. Mercury claims to have received a renewal letter from Ms. Castellano attempting to renew her premium and insurance coverage, but this letter was allegedly received on July 18, 2007, which was after the stated due date. Mercury submitted an affidavit to the trial court attesting to the fact that it sent Ms. Castellano a notice of the renewal due date on June 13, 2007 and the affidavit also attested to the existence and receipt of the Ms. Castellano's July 18, 2007 letter. In that affidavit, Mercury swore that they were going to attach these documents as evidence. However, Mercury failed to attach any documents to the affidavit. Nevertheless, the trial court granted summary judgment in favor of Mercury. Ms. Castellano timely files this appeal.

This Court finds that because the affidavit submitted by Appellee, Mercury, lacked the appropriate attachments, it was incomplete. The renewal offer, the notice of premium due date, and the envelope containing the payment were all sworn to in the affidavit, but none of these documents were attached to that affidavit for consideration at the summary judgment hearing. "[I]t is not enough for an opposing party to merely assert that an issue does exist." Reflex, N.V. v. Umet Trust, 336 So.2d 473 (Fla. 3d DCA 1976); Slachter v. Abundio, 566 So. 2d 348, 349 (Fla. Dist. Ct. App. 3d Dist. 1990). In DeMesme v. Stephenson, the Court held that "[t]o fulfill his burden, the movant must offer sufficient admissible evidence to support his claim of the nonexistence of a genuine

issue. If he fails to do this his motion is lost.” See, Harvey Building, Inc. v. Haley, 175 So.2d 780 (Fla. 1965); DeMesme, 498 So. 2d 673, 675 (Fla. Dist. Ct. App. 1st Dist. 1986).

In the instant case, Mercury did not present any evidence, other than an affidavit, to support its claim that no genuine issues of material fact existed.

Furthermore, the record indicates that Ms. Castellano’s complaint was filed on May 6, 2008, and Mercury filed a motion for summary judgment less than one month later. Ms. Castellano argues that there was not enough discovery completed or evidence available to the trial court to make a determination as to whether there was a genuine issue of material fact or not. However, the trial court, without qualification, states that “[t]here is no question of fact that they did not pay the premium at the date and time appointed and that their policy lapsed and subsequently had an accident.” R. 8, 18-21.

Due to the lack of a meaningful discovery period, coupled with Mercury’s failure to attach any supporting exhibits to its affidavit for the trial court’s consideration, this Court is compelled to agree with Ms. Castellano.

Therefore, it is,

ORDERED AND ADJUDGED that the trial court’s Order on Defendant’s Motion for Summary Judgment is reversed and remanded to permit discovery.

DONE AND ORDERED in Chambers, at Clearwater, Pinellas County, Florida

this 30th day of April 2009.

Original order entered on April 30, 2009 by Circuit Judges Pamela A.M. Campbell, George W. Greer, and John A. Schaefer.

Copies furnished to:

James J. Dowling, Esq.
1150 Tampa Road
Palm Harbor, FL 34683
Attorney for Appellant

Scott W. Dutton, Esq.
4921 Memorial Hwy., Suite 200
Tampa, FL 33634
Attorney for Appellee