RENDERED: OCTOBER 27, 2000; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-001768-MR

BILLY R. DAVIDSON, IN HIS CAPACITY
AS ADMINISTRATOR OF THE ESTATE
FOR BETTY JOE DAVIDSON; SCOTT
DAVIDSON; AND BRIAN DAVIDSON — APPELLANTS

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE STEPHEN MERSHON, JUDGE
ACTION NO. 98-CI-002745

THE CINCINNATI INSURANCE COMPANIES;
THE CINCINNATI INSURANCE COMPANY;
THE CINCINNATI CASUALTY COMPANY;
THE CINCINNATI INDEMNITY COMPANY;
THE CINCINNATI LIFE INSURANCE COMPANY;
AND CHUCK BALLOU AND ASSOCIATES, INC. — APPELLEES

OPINION
AFFIRMING
** ** ** ** **

BEFORE: BARBER, BUCKINGHAM, AND MILLER, JUDGES.

BUCKINGHAM, JUDGE: The administrator of the estate of Betty Jo Davidson and her beneficiaries (hereinafter collectively referred to as the Davidsons) appeal from an opinion and order of the Jefferson Circuit Court which granted summary judgment to The Cincinnati Life Insurance Company. Because we believe the trial court did not err in granting summary judgment, we affirm.

On June 15, 1995, Betty Jo Davidson entered into a consumer loan agreement with Franklin Bank & Trust Company located in Franklin, Kentucky. The principal amount of the loan was $45,000, and it was secured by Davidson's home, car, and all deposit accounts with Franklin Bank. In connection with the loan, Davidson purchased an insurance policy with The Cincinnati Life Insurance Company which would reduce any debt owed on the loan upon her death. The policy was for $25,000, and the premium of $4,387.50 was added to the loan amount.

A Franklin Bank loan officer, Brad Gregory, assisted Davidson with the application for the insurance. He read her the questions and checked the answers either "yes" or "no" based upon her responses. Questions five and seven of the application are of significance to this case:

> Has either the Proposed Insured or Joint Insured ever had, been told of having, or been treated for any of the following:
>
> 5. Stroke, heart attack, chest pain, arteriosclerosis, or high blood pressure?
>
> . . . .
>
> 7. Cancer, tumor, diabetes, ulcer, or any disorder of the stomach, lungs, brain, liver, intestines, or kidney?

In response to each question, Davidson answered "no." In addition, at the bottom of the application, she executed an irrevocable assignment whereby she assigned the proceeds of the policy to Franklin Bank to the extent of the indebtedness.

Davidson signed the application, and Gregory delivered it to J. Hunter Bowen, an employee of Franklin Bank who was also a licensed agent for Cincinnati Life. Bowen signed the

application, and it was forwarded to Chuck Ballou and Associates, Inc., a sales agency, who then sent it to Cincinnati Life. It is undisputed that a copy was also sent to Davidson.

The policy, with application attached, was issued by Cincinnati Life on June 23, 1995, and was sent to the sales agency who forwarded it to Franklin Bank pursuant to the assignment clause in the application. The policy was never delivered to Davidson. The policy provided that Cincinnati Life could not contest it after it had been in force for two years from the date of issue.

Davidson died on April 16, 1997, within the two-year time period during which Cincinnati Life could contest the policy. Cincinnati Life thereafter conducted an investigation and found medical records indicating that Davidson had been diagnosed with non-insulin dependent diabetes and had taken medication for high blood pressure. Therefore, Cincinnati Life informed the beneficiaries that it was voiding the policy and returning the premium due to the misrepresentations made by Davidson in her application for the insurance.

In May 1999, the administrator and beneficiaries of Davidson's estate filed suit in the Jefferson Circuit Court alleging that Cincinnati Life breached the insurance contract. Cincinnati Life moved the trial court to grant it summary judgment, arguing that Davidson misrepresented her health history. The Davidsons argued that the application and policy delivery process was void because the application was taken by an unlicensed agent, that neither Davidson nor her estate were

subject to a defense under KRS[1] 304.14-110 because the policy and application were never delivered to her, and that Cincinnati Life should be estopped from relying on any alleged misrepresentation on the application. The trial court awarded summary judgment to Cincinnati Life, and this appeal followed.

The applicable statute concerning representations in insurance applications provides as follows:

> All statements and descriptions in any application for an insurance policy or annuity contract, by or on behalf of the insured or annuitant, shall be deemed to be representations and not warranties. Misrepresentations, omissions, and incorrect statements shall not prevent a recovery under the policy or contract unless either:
>
> (1) Fraudulent; or
>
> (2) Material either to the acceptance of the risk, or to the hazard assumed by the insurer; or
>
> (3) The insurer in good faith would either not have issued the policy or contract, or would not have issued it at the same premium rate, or would not have issued a policy or contract in as large an amount, or would not have provided coverage with respect to the hazard resulting in the loss, if the true facts had been made known to the insurer as required either by the application for the policy or contract or otherwise. This subsection shall not apply to applications taken for workers' compensation insurance coverage.

KRS 304.14-110. There is no question that Davidson's answers concerning her health were false. In Mills v. Reserve Life Insurance Company, Ky., 335 S.W.2d 955 (1960), a case involving the failure of an applicant for insurance to disclose that he was

[1] Kentucky Revised Statutes.

suffering from diabetes, the court stated that "the majority rule is at the present time that a misrepresentation as to the applicant's state of health is material *as a matter of law* and proof of the falsity thereof will avoid the contract", quoting Appleman's Insurance Law and Practice, sec. 214, p. 210. Id. at 958. Therefore, Cincinnati Life may void the contract unless it is otherwise estopped or precluded from doing so.

The Davidsons first argue that Cincinnati Life may not rely on the application or the policy for any defenses it may have because the policy was not delivered to Davidson. They cite several statutes to support their argument. KRS 304.19-070(1) states in relevant part that all credit life insurance policies shall be delivered to the debtor. KRS 304.14-100(1) states in relevant part that "[n]o application for the issuance of any life insurance policy shall be admissible in evidence in any action relative to such policy, unless a true copy of the application was attached to or otherwise made a part of the policy when issued and delivered." KRS 304.14-230(1) provides in relevant part that "every policy shall be mailed or delivered to the insured or to the person entitled thereto within a reasonable period of time after its issuance[.]" Further, the Davidsons cite Breeding v. Massachusetts Indemnity and Life Ins. Co., Ky., 633 S.W.2d 717 (1982), and Twin City Fire Ins. Co. v. Terry, Ky., 472 S.W.2d 248 (1971), for the proposition that a policyholder cannot be bound by the policy or the application unless they are delivered to the policyholder.

The trial court held, however, that the statutory delivery requirements were satisfied and that the policy was properly delivered with the application attached to the Franklin Bank pursuant to the assignment of the proceeds in the application. We agree with the trial court that delivery of the policy and application was proper pursuant to KRS 304.14-250. That statute provides in relevant part that "[a]ny assignment of a policy which is otherwise lawful and of which the insurer has received notice, shall entitle the insurer to deal with the assignee as the owner or pledgee of the policy in accordance with the terms of the assignment . . . ." KRS 304.14-250(3).

The Davidsons next argue that numerous statutory and regulatory violations by Franklin Bank and Cincinnati Life preclude Cincinnati Life from voiding the policy based on the misrepresentations in the application. They first argue that it was illegal for Gregory, an unlicensed agent, to take Davidson's application for insurance. See KRS 304.9-020, KRS 304.9-080, and KRS 304.9-100. They also allege that question nine on the application regarding AIDS was left blank and later altered without Davidson's consent in violation of KRS 304.14-090.[2] Further, the Davidsons assert that Cincinnati Life paid illegal commissions to Gregory in violation of KRS 304.9-421.

The Kentucky Supreme Court stated in Edmondson v. Pennsylvania National Mutual Casualty Ins. Co., Ky., 781 S.W.2d 753 (1989), that estoppel "'offsets misleading conduct, acts, or

[2] This specific argument clearly has no merit because the defense is not premised on that specific alteration as required by KRS 304.14-090(3).

representations which have induced a person entitled to rely thereon to change his position to his detriment.'" Id. at 755, quoting The Law of Liability Insurance, Sec. 17.14. In rejecting the Davidsons' argument that these alleged illegalities should estop Cincinnati Life from relying on the misrepresentations in the application, the trial court held that "there is no evidence that Ms. Davidson relied on any of the alleged illegalities when she signed the application or that Cincinnati intentionally committed the 'illegal' actions in order to cause Ms. Davidson to enter the contract." We agree with the trial court that the alleged violations do not preclude Cincinnati Life from relying on the misrepresentations to void the contract because Davidson clearly did not rely on any of the alleged illegalities when she signed the application and purchased the policy.

The Davidsons' last argument is that Cincinnati Life's underwriting guidelines authorized coverage and that the policy would likely have been issued regardless of the misrepresentations. As we have noted previously herein, the statute provides in relevant part that misrepresentations shall not prevent a recovery unless

> [t]he insurer in good faith would either not have issued the policy or contract, or would not have issued it at the same premium rate, or would not have issued a policy or contract in as large an amount, or would not have provided coverage with respect to the hazard resulting in the loss, if the true facts had been made known to the insurer as required either by the application for the policy or contract or otherwise. This subsection shall not apply to applications taken for workers' compensation insurance coverage.

KRS 304.14-110(3).

Cincinnati Life's vice president of underwriting, Brad Behringer, stated in his deposition that Cincinnati Life would not have issued the policy had it known of Davidson's diabetes. In response to the Davidsons' argument that Cincinnati Life issued life insurance policies with Type II diabetes like Davidson, Behringer stated that company policy dictated a higher premium for such persons and that the policy sold to Davidson did not allow the premium to be adjusted. The Davidsons assert, however, that just because one payment was made does not mean that the premium could not be raised in accordance with the risk. No evidence was presented to support their argument.

The trial court noted that Behringer testified that, for underwriting purposes, the guidelines were not binding upon Cincinnati Life and that "judgment and experience are probably the main source of decisions." The court also noted that Behringer related that Cincinnati Life could not change the premiums because the policy was a single premium contract. Further, the court noted that the guidelines addressed only a diagnosis of diabetes and that the Davidsons presented no evidence as to the combined risk of diabetes and high blood pressure. The court thus found that Behringer's testimony was uncontroverted.

"[A] party opposing a properly supported summary judgment motion cannot defeat it without presenting at least some affirmative evidence showing that there is a genuine issue of material fact for trial." Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476, 482 (1991). Cincinnati Life's

summary judgment motion in this regard was properly supported, and the Davidsons did not present affirmative evidence showing that there was a genuine issue of material fact concerning whether the amount of the payment for the single premium contract could be changed depending on the risk and concerning whether the policy would have been issued despite the combined risks of diabetes and high blood pressure. In short, we conclude the trial court properly determined that Cincinnati Life would not have issued the policy had it been aware of the material misrepresentations made by Davidson on her application and that there was no fact issue in this regard.

Finally, even if the Davidsons are correct that Cincinnati Life would likely have issued the policy despite the misrepresentations, Cincinnati Life may nevertheless avoid the policy because the misrepresentations made by Davidson were material. KRS 304.14-110(2). KRS 304.14-110 provides three separate ways in which a misrepresentation may prevent a recovery under a policy. It is not necessary that all three apply, but that only one apply. Thus, Cincinnati Life may avoid the policy under section (2) of the statute even if it could not avoid the policy under section (3).

The judgment of the Jefferson Circuit Court is affirmed.

BARBER, JUDGE, CONCURS.

MILLER, JUDGE, DISSENTS.

MILLER, JUDGE, DISSENTING: I dissent. I view the policy at issue as being nothing more than a credit life insurance policy securing a loan already secured by real and personal property.

Under the circumstances, as I am led to believe, I am not convinced the representations in the policy were entirely those of the insured rather than those of the unlicensed agent who shared in the very substantial pre-paid premium. Moreover, I am not convinced that the disabilities of Mrs. Davidson were such as to be considered material in either the issuance or rating of the policy. Her maladies, as I understand them to be, are commonplace. In fact, the record does not clearly describe her disabilities nor, for that matter, the precise cause of her death.

Perforce, I am of the opinion that a better understanding of this case might be gained from additional evidence and that summary judgment was inappropriate.

For the foregoing reasons, I would reverse the summary judgment and remand for further proceedings.

BRIEFS FOR APPELLANTS:

Mike Breen
Casey Hixson
Bowling Green, Kentucky

BRIEF FOR APPELLEES:

Winfrey P. Blackburn, Jr.
Thomas C. Hundley
Louisville, Kentucky