RENDERED: JANUARY 18, 2002; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-002370-MR

WILBUR RIDDLE;
FARMERS DEPOSIT BANK
OF MIDDLEBURG, INC. APPELLANTS

v.

APPEAL FROM LINCOLN CIRCUIT COURT
HONORABLE WILLIAM T. CAIN, JUDGE
ACTION NO. 99-CI-00111

KENTUCKY FARM BUREAU MUTUAL
INSURANCE COMPANY APPELLEE

OPINION
REVERSING
** ** ** ** **

BEFORE: COMBS, JOHNSON, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: This is an appeal by Wilbur Riddle and Farmers Deposit Bank of Middleburg, Inc. (Farmers Bank) from an order of the Lincoln Circuit Court granting summary judgment to Kentucky Farm Bureau Mutual Insurance Company (Farm Bureau) in a lawsuit concerning Farm Bureau's obligation to pay proceeds on a farmowner's insurance policy for damages caused as a result of a barn fire on a farm purchased and occupied by Riddle, but titled in the name of Riddle's daughter and son-in-law. Because there are genuine issues of material fact regarding whether Riddle is

entitled to insurance proceeds under the policy pursuant to KRS 304.14-110, we reverse.

On February 14, 1994, Riddle purchased a 132-acre farm in Lincoln County, Kentucky. On February 26, 1996, Riddle executed a deed conveying the farm property to his daughter, Lena Snelling, and son-in-law, Aaron Snelling (the Snellings). In conjunction with the conveyance, the existing mortgage was paid off, and a new mortgage was executed with Farmers Bank; Riddle cosigned on the note. Riddle transferred title to the property to his daughter and son-in-law because he had been told by employees of the Veterans Administration that his ownership of the farm could jeopardize his $900.00 per month Veterans disability check.

The deed from Riddle to the Snellings recited a consideration of $57,000.00 - the amount of the mortgage at the time of conveyance. However, Riddle maintains that no money changed hands, that he remained the equitable owner of the farm, that he continued to live on and exercise sole authority over the farm, that the transfer was in name only, that the plan was carried out upon the advice of an agent of the Veterans Administration in order to protect his Veterans benefits, and that he continued to make the mortgage and tax payments on the property.

On March 17, 1998, Riddle executed an application for a farmowner's policy with Farm Bureau. In the course of completing the application, Riddle represented to Farm Bureau that he was the owner of the farm, and did not disclose the February 1996

conveyance to the Snellings. Riddle paid the insurance premium and was subsequently issued a farmowner's insurance policy.

On October 29, 1998, a barn on the farm property was destroyed by fire. Also consumed in the fire were a Ford Areostar van, a Ford tractor, a bush hog, tools, and other personal property. Riddle filed a claim for the loss under his farm policy. Farm Bureau paid for the loss of the van under Riddle's car insurance policy; however, it did not pay for the remaining losses under the farmowner's policy on the basis that Riddle had misrepresented to the company that he was the owner of the property.

On March 25, 1999, Farm Bureau filed a Complaint for Declaratory Judgment pursuant to KRS 418.040 in the Lincoln Circuit Court seeking a judgment that the farmowner's policy did not provide coverage for the fire loss on the basis that Riddle had falsely and fraudulently misrepresented that he was the owner of the property, and further, because he had failed to report a fire loss which had occurred within the previous ten years. Farmers Bank was named as a defendant because it was listed as a mortgagee on the insurance policy.

Riddle and Farmers Bank both filed Answers denying Farm Bureau's entitlement to a declaration of rights absolving it of liability. Both also filed a counterclaim seeking payment under the policy.

Following discovery, each of the parties filed a motion for summary judgment. On February 22, 2000, Farmers Bank filed a motion requesting to be dismissed from the case on the basis that

the mortgage it held on the farm had been paid in full, and at the time the trial court ruled on the motions for summary judgment, Farmers Bank was seeking only attorney fees.[1] On May 4, 2000, the trial court entered an order granting summary judgment in favor of Farm Bureau on the basis that Riddle had misrepresented ownership of the farm in his application for insurance in violation of KRS 304.14-110. Riddle and Farmers Bank both filed motions to alter, amend or vacate, which were subsequently denied. This appeal followed.

Riddle contends that summary judgment was improper because he is the owner of the subject property and committed no concealment or fraud when he completed the insurance application, and because KRS 304.14-110 does not otherwise void the farmowner's policy.

In order to qualify for summary judgment, the movant must "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56.03. On appeal, the standard of review of a summary judgment is whether the trial court correctly found that there was no genuine issue as to any material fact and that the moving party was entitled to judgment as a matter of law. The record must be viewed in the light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor. Steelvest, Inc. v. Scansteel Service

[1]It does not appear that this specific motion was ever ruled on. Attorney fees were denied in the order granting summary judgment. Farmers Bank has not appealed that issue.

Center, Inc., Ky., 807 S.W.2d 476, 480 (1991). Summary judgment should only be used when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at trial warranting a judgment in his favor and against the movant. Id. at 483 (citing Paintsville Hospital Co. v. Rose, Ky., 683 S.W.2d 255 (1985)). A party opposing a properly supported motion for summary judgment cannot defeat it without presenting at least some affirmative evidence showing that there is a genuine issue of material fact for trial. Steelvest, 807 S.W.2d at 482.

The farmowner's policy contains a provision addressing misrepresentations, which states as follows:

> CONCEALMENT OR FRAUD:
>
> The entire policy will be void if, whether before or after a loss, INSURED PERSON has:
>
> A. Intentionally concealed or misrepresented any material fact or circumstance; or
>
> B. Engaged in fraudulent conduct; or
>
> C. Made false statements;
>
> relating to this insurance.

However, KRS 304.14-110 limits an insurance company's authority to deny claims based upon the grounds that the insured provided false information. KRS 304.14-110 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. . . .

It is uncontested that Riddle failed to fully disclose the complete circumstances concerning the ownership of the farm. Riddle did not tell the Farm Bureau agent who took his application for the policy that he had deeded the farm to the Snellings, and the omission is reflected on the application. Failure to disclose the whole truth amounts to the same thing as directly giving false information. National Life & Accident Ins. Co. v. Fisher, 211 Ky. 12, 276 S.W. 981 (1925).

Under the first prong of KRS 304.14-110, Riddle's omissions and incorrect statements may prevent his recovery under the policy if the statements or omissions were fraudulent. In order to prove fraud, there must be clear and convincing evidence of (a) a material representation, (b) which is false, (c) known to be false or made recklessly, (d) made with inducement to be acted upon, (e) acted in reliance thereon, and (f) causing injury. Investors Heritage Life Ins. Co. v. Colson, Ky. App., 717 S.W.2d 840, 842 (1986).

In his deposition, Riddle testified that he was indeed the actual owner of the farm, and that the deed to the farm had been placed in the Snellings's name for the sole purpose of

avoiding the loss of his Veterans benefits.[2] Riddle's son-in-law provided deposition testimony substantially corroborating Riddle's account of the conveyance, the ownership status of the farm, and the agreement that the Snellings were holding legal title for the benefit of Riddle. It appears that neither Riddle nor the Snellings viewed the conveyance as a transfer of a fee simple interest in the property and, further, that the Snellings hold mere legal title for the benefit of Riddle. There is no disagreement between Riddle and the Snellings on this point. Therefore, the Snellings are holding mere legal title in trust for the benefit of Riddle, and Riddle is the equitable owner of the property. See Stiefvater v. Stiefvater, 246 Ky. 646, 53 S.W.2d 926 (1932).

Under the statute, Riddle's statements regarding ownership are deemed to be representations, not warranties. The distinction between "warranties" and "representations" is that "warranties" must be literally true while "representations" need only be substantially so. John Hancock Mutual Life Ins. Co. v. DeWitt, 259 Ky. 220, 82 S.W.2d 317 (1935).

Viewing Riddle's representations regarding ownership of the farm in the light most favorable to him, and resolving all doubts in his favor, we are persuaded that it was improper to enter a summary judgment which in effect found that Riddle

[2]While Farm Bureau portrays the conveyance as an artifice to defraud the Federal Government, because we are reviewing a motion for summary judgment, we accept as true Riddle's assertion that he was advised to undertake the conveyance by an agent of the Veterans Administration, and we draw no adverse inference from the circumstances surrounding the conveyance.

committed fraud. As Riddle holds equitable title to the property, his representation that he was the owner of the property was substantially, if not literally, true. Further, considering that Riddle is a layman with a fifth-grade education, that he was paying the mortgage and insurance on the farm, that he occupied the farm, that he exercised sole authority over the farm, and that he had received advice to undertake the conveyance, a jury could reasonably conclude that Riddle subjectively considered himself to be the owner of the property, and that he did not knowingly make a false representation to the insurance agent regarding ownership of the property. For substantially the same reason, it would not be impossible for a jury to conclude that Riddle's ownership misrepresentations were not recklessly made. Since there are genuine issues of material fact regarding whether Riddle's representations were fraudulent, we are persuaded that summary judgment is not proper under KRS 304.14-110(1).

Under KRS 304.14-110(2), Farm Bureau is entitled to deny coverage if Riddle's misrepresentations and incorrect statements concerning ownership were material either to the acceptance of the risk, or to the hazard assumed by the insurer. There is no allegation, nor is there anything in the record, to suggest that by virtue of the Snellings holding record title, as opposed to Riddle, the risk of loss to Farm Bureau was increased. Accordingly, Farm Bureau is not entitled to summary judgment under this prong of the statute.

Under KRS 304.14-110(3), Farm Bureau is entitled to avoid the insurance contract if it in good faith (1) would either not have issued the policy or contract, or (2) would not have issued it at the same premium rate, or (3) would not have issued a policy or contract in as large an amount, or (4) would not have provided coverage with respect to the hazard resulting in the loss, if it had known that the Snellings held legal title to the farm. Farm Bureau contends that it would not have issued the policy if it had known that the Snellings held legal title to the property. In corroboration of this, Farm Bureau filed the affidavit of Elisa Fulkerson, an Underwriting Regulatory Specialist for the company. In relevant part, the affidavit stated as follows:

> Farmowners Policy Number 0213585 would not have been issued to Wilbur Riddle had Kentucky Farm Bureau known that Wilbur Riddle was not the owner of the insured premises. Farmowner policies may only be issued to owner-occupants of a farm dwelling, purchaser-occupants of a farm dwelling, occupants of a farm dwelling under a life estate arrangement, or to the intended owner-occupant of a farm dwelling under construction pursuant to Section 7A of the Farmowners/Farm Policy General Rules filed with the Kentucky Department of Insurance.
>
> This has been and is currently the standard business practice of Kentucky Farm Bureau Mutual Insurance Company when confronted with the same or similar factual circumstances.

This affidavit is insufficient to entitle Farm Bureau to summary judgment. In light of our previous determination that it appears that Riddle is the equitable owner of the property, the term "owner" is an ambiguous concept in this transaction, and

there remains a genuine issue of material fact as to whether Riddle is an "owner-occupant" of the farm.

Moreover, as we construe the statute, the issue is not whether Farm Bureau would have executed an identical application and an identical policy in every respect. Rather, the issue is whether, if it had known the truth of the matter, would it, in the exercise of good faith, have issued an analogous policy to Riddle with the same premium in as large of an amount? If so, we do not construe the statute to permit the insurance company to avoid liability just because a different box would have been checked or slightly different information would have been entered on certain lines of the application.

In summary, we are persuaded that there is a genuine issue of material fact as to whether Farm Bureau would have issued Riddle an insurance policy on the property for the same amount and at the same rate if it had been aware that the Snellings held legal title to the property while Riddle held equitable title. Accordingly, summary judgment is not proper.

For the foregoing reasons the judgment of the Lincoln Circuit Court is reversed, and the case is remanded for additional proceedings consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANTS:	BRIEF FOR APPELLEE:
James W. Williams III Stanford, Kentucky	Brian C. House London, Kentucky