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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2002-CA-000700-MR

MILDRED GRAY APPELLANT

v.

APPEAL FROM WARREN CIRCUIT COURT
HONORABLE JOHN D. MINTON, JUDGE
ACTION NO. 00-CI-01318

FIRST NATIONAL MORTGAGE
COMPANY, INC., OF EVANSVILLE APPELLEE

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

BEFORE: GUIDUGLI, JOHNSON, AND KNOPF, JUDGES.

KNOPF, JUDGE: In 1995, Mildred Gray and her husband, James Gray, contacted First National Mortgage Company, Inc., in hopes of refinancing their home loan. According to Mildred, the mortgage company assured them that the new loan and mortgage would include a policy of credit life insurance. If either Mildred or James died while the loan was outstanding, then insurance proceeds would satisfy the remaining debt. Mildred claims that such a policy covered the Grays' then existing home loan and that she and James were adamant about keeping coverage

because James was suffering from cancer. Thus assured by the mortgage company, the Grays closed on the new loan in July 1995.

James died the following March. Shortly before James's death, Mildred examined the loan documents and discovered that, rather than providing for credit life insurance, the contract included her and James's waivers of such coverage. Mildred says that she phoned the mortgage company to point out this "mistake," but she was told that nothing could be done about it. Following James's death Mildred was unable to make the loan payments, and so, without the insurance, she was soon forced to seek bankruptcy relief. By court order, Mildred's home was sold in 1997.

In October 2000, Mildred filed the present action against the mortgage company. She alleged, in essence, that the company had induced her to give up her insured loan by promising to insure the new loan, but then had either mistakenly or fraudulently left the new loan uninsured. By summary judgment entered February 1, 2002, the Warren Circuit Court dismissed Mildred's complaint. The court ruled that Mildred's admitted failure to read the loan agreement, particularly the express waiver of credit life insurance, precluded her claim that the agreement was actually something other than what the documents reflected. It is from that judgment that Mildred appeals. She contends that her failure to detect the allegedly inaccurate

loan documents was not so unreasonable as to bar her claim. We disagree and so affirm the trial court.

Although Mildred's complaint leaves the nature of her claim somewhat nebulous, the trial court apparently understood her to be asserting a claim for damages based upon a loan contract that included credit life insurance. In effect, the trial court understood Mildred to be seeking the reformation of the written contract she signed to include insurance and then the enforcement of the reformed agreement. Such a claim is recognized in Kentucky. By virtue of their equity powers courts have authority to reform written contracts when, because of fraud or mutual mistake, the writing does not reflect the intentions and understanding of the party seeking relief.[1] Although parol evidence is admissible to establish such a claim, "[t]he rule is that the evidence to sustain such [judicial] interference must be clear and convincing, and the fraud and mistake must be established with reasonable certainty."[2] The courts' goal is to respond meaningfully to genuine instances of fraud or mistake without thereby undermining the ordinary expectation that contracts will be enforced according to their plain terms. In striking this balance, Kentucky's courts have

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[1] Bradshaw v. Kinnaird, Ky., 319 S.W.2d 475 (1958); Mayo Arcade Corporation v. Bonded Floors Company, 240 Ky. 212, 41 S.W. 2d 1104 (1931).

[2] *Id.* at 1108. Deskins v. Leslie, Ky., 387 S.W. 2d 596 (1965); Restatement (Second) of Contracts ' 214 (1981).

insisted that the parties to a contract exercise "at least the degree of diligence which may be fairly expected from a reasonable person."[3] Contract reformation is not available where the complaining party negligently failed to detect the fraud or mistake.[4] As a general rule, a literate party's failure to read a readily legible written contract amounts to such negligence and will preclude that party from later complaining that the writing did not say what she believed it did.[5] Under this rule, we agree with the circuit court that Mildred's failure to read the insurance waiver she signed precludes her disavowal of that waiver now.

Against this result, Mildred notes, correctly, that there are exceptions to the general rule that one will be deemed to know the contents of a writing one signs. Where there is evidence that another has prevented the complainant from reading the contract, for example,[6] or persuaded her not to read it after cultivating her trust,[7] courts have held that the failure to read

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[3] Mayo Arcade Corporation v. Bonded Floors Company, 41 S.W. 2d at 1109 (internal quotation marks and citations omitted).

[4] *Id.*

[5] Amlung v. First National Lincoln Bank of Louisville, Ky., 411 S.W. 2d 465 (1967); Cecil v. Cecil, Ky. App., 712 S.W.2d 353 (1986); Cline v. Allis-Chalmers Corporation, Ky. App., 690 S.W. 2d 764 (1985).

[6] Hetchkop v. Woodlawn at Grassmere, Inc., 116 F.3d 28 (2nd Cir. 1997).

[7] Hanson v. American National Bank & Trust Company, Ky., 865 S.W. 2d 302 (1993).

did not bar relief.[8] We agree with the circuit court, however, that the circumstances of this case do not justify an exception to the general rule.

Mildred testified at her deposition that the closing of the new loan took place in her car because her husband was too weak to walk to the company's attorney's office. The attorney, she claims, merely indicated where she and her husband should sign or initial the many documents but did not encourage her to read them. She did not remember his mentioning the insurance waiver, and insisted that had he done so she would have refused to sign it. A fact-finder could reasonably infer, she insists, either that at some point in the process of reducing the loan agreement to writing the life-insurance provision was mistakenly left out, or that the company deliberately left it out and hastened Mildred through the closing so that she would not detect the omission.

As noted above, however, unless the company actually thwarted Mildred's attempt to read the contract or improperly persuaded her not to read it, her failure to read it precludes the inferences she urges. Mildred neither alleged nor offered to prove either of those conditions. She does not claim that she tried to read the waiver but that the attorney rushed her or

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[8] Rosenthal v. Great Western Financial Securities Corporation, 58 Cal. Rptr. 2d 875 (Cal. 1996).

told her not to bother, nor does she claim that the attorney assured her that an insurance provision was included and that she need not read it. She alleges only that her husband's discomfort may have led her and the others to be less careful than otherwise they would have been. This is not enough to relieve her from the insurance waiver she signed.

Kentucky's courts have also recognized a cause of action, sounding in tort, for misrepresentations that led the complainant to enter a damaging contract.[9] On appeal, Mildred suggests that her allegations amount to a triable claim for damages under this alternative theory of relief. Because Mildred failed to raise this issue before the trial court, we are not authorized to address it.[10] We may note, however, that, even under this tort theory, the complainant's reliance upon the alleged misrepresentation must be justifiable.[11] It is doubtful whether Mildred's allegations include any such justification for her failure to know what she signed.

The Warren Circuit Court having thus correctly determined that it would be impossible for Mildred to present sufficient evidence at trial to warrant a judgment in her

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[9] Hanson v. American National Bank & Trust Company, *supra;* Cline v. Allis-Chalmers Corporation, *supra.*

[10] Regional Jail Authority v. Tackett, Ky., 770 S.W.2d 225 (1989); Morton v. Bank of the Bluegrass, Ky. App., 18 S.W.3d 353 (1999).

[11] Hanson v. American National Bank & Trust Company, *supra;* Cline v. Allis-Chalmers Corporation, *supra.*

favor,[12] we affirm that court's February 1, 2002, summary judgment dismissing her complaint.

GUIDUGLI, JUDGE, CONCURS.

JOHNSON, JUDGE, CONCURS IN RESULT ONLY AND FILES SEPARATE OPINION.

JOHNSON, JUDGE, CONCURRING IN RESULT: I concur with the Majority Opinion on all the issues except its discussion of the viability of a tort claim for fraud. I am of the opinion that the rule requiring a liberal reading of the complaint would allow for consideration of this claim[13] and that there was a genuine issue as to a material fact concerning whether First National Mortgage deceived Mildred and James into giving up death benefits when James was terminally ill.[14] However, I must agree that Mildred failed to preserve the tort claim by not presenting it to the trial court in opposition to the motion for summary judgment.[15]

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
Mark H. Flener Bowling Green, Kentucky	W.C. Wilson, III Kurt R. Denton Neel, Wilson & Clem

[12] Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476 (1991).

[13] Pike v. George, Ky., 434 S.W.2d 626, 627 (1968).

[14] Cline, supra at 767.

[15] Regional Jail Authority v. Tackett, Ky., 770 S.W.2d 225, 228 (1989). Cf. Gailor v. Alsabi, Ky., 990 S.W.2d 597, 604 (1999).

Henderson, Kentucky