

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-002122-MR

ANNA RUTH MASON

APPELLANT

v. APPEAL FROM LOGAN CIRCUIT COURT
HONORABLE TYLER L. GILL, JUDGE
ACTION NO. 05-CI-00153

MONUMENTAL LIFE INSURANCE CO.,
INC.; U.S. BANK; RONNIE TAYLOR

APPELLEES

OPINION
AFFIRMING

** ** * * * **

BEFORE: STUMBO AND WINE, JUDGES; GUIDUGLI,¹ SENIOR JUDGE.

WINE, JUDGE: Anna Ruth Mason appeals from an order of the Logan Circuit Court dismissing her claims against Monumental Life Insurance Company and U.S. Bank, and denying her motion to file an amended complaint. We agree with the trial court that Mason's damages under the initial complaint would not exceed the jurisdictional

¹ Senior Judge Daniel T. Guidugli sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

threshold for the circuit court. We also agree that the amended complaint fails to plead fraud with sufficient particularity. Hence, we affirm.

For purposes of this appeal, the underlying facts of this action are not in dispute. On August 28, 1990, Commonwealth Life Insurance Company issued a life insurance policy to Mason. The policy insured Mason's life for \$40,000.00, and the lives of her two children for \$5,000.00. The policy provided for a ten-year renewable term, with a monthly premium during the first term of \$25.25. Thereafter, on June 1, 1997, Commonwealth issued a second policy to Mason, insuring her life for \$30,000.00. Like the first policy, the second policy was for a ten-year renewable term, and provided for a monthly premium of \$29.70. Under both policies, the primary beneficiaries were Mason's children, Cynthia and Troy Mason. Monumental acquired responsibility for the policies after it merged with Commonwealth.

The insurance agents for Commonwealth and Monumental, respectively, normally collected the premiums from Mason at her home each month. Beginning in July 1997, the total premium for both policies was \$54.95. But beginning in March 1998, Monumental's agent, Ronnie Taylor began collecting \$48.00 per month on the \$30,000.00 policy, for a total premium of \$73.25 per month.

On August 1, 1999, Monumental canceled the \$30,000.00 policy due to nonpayment of premiums. Taylor approached Mason about reinstating the policy. Mason declined to sign the reinstatement form, maintaining that her premiums were current and her policy had not lapsed.

Taylor ceased working for Monumental in April 2000, and the account was assigned to David Smallwood. On April 20, 2000, Smallwood went to Mason's home to collect the premium for the \$40,000.00 policy. He also informed her that the \$30,000.00 policy had been canceled on August 1, 1999. Mason again maintained that her premiums were current and her policy had not lapsed. She also refused to pay Smallwood the premium on the \$40,000.00 policy. As a result, Monumental canceled the \$40,000.00 policy in May 2000. Mason admits that she made no premium payments after February 2000.

Shortly after meeting with Smallwood, Mason confronted Taylor at his home and questioned him about the lapse of the \$30,000.00 policy. According to Mason, Taylor admitted to taking her money and promised to pay her back. Taylor denies making such a confession.

In June 2000, Mason requested the Kentucky Department of Insurance to investigate whether Monumental had given her proper credit for all her premium payments. After auditing its payment records against Mason's checks, Monumental determined that it had received but failed to credit Mason with \$123.73. Monumental also found that it had over-collected \$18.30 per month on the \$30,000.00 policy for seventeen months, resulting in an overpayment of \$434.83.

On April 7, 2005, Mason filed a complaint against Monumental and Taylor. She alleged that Monumental had breached its contract by wrongfully terminating the insurance policies and she asserted that Taylor had converted her premium payments. As

damages, Mason claimed that she was entitled to recover the death benefits payable under the policies. Mason also asserted a claim against U.S. Bank, alleging that U.S. Bank had wrongfully allowed Taylor to make withdrawals from her account.

The claim against Taylor was stayed after he filed for bankruptcy, but discovery proceeded on Mason's claims against Monumental and U.S. Bank. On June 23, 2006, Monumental filed a motion for summary judgment, arguing that Mason would not be entitled to recover the death benefit under the policies and consequently, her claim failed to meet the minimum jurisdictional amount for circuit court. The trial court denied the motion on July 7, 2006. But on August 10, 2006, Monumental renewed its summary judgment motion on the same grounds. Mason responded to the motion and filed a separate motion to file an amended complaint asserting fraud claims against Monumental and U.S. Bank.

On September 6, 2006, the trial court entered a calendar order granting Monumental's motion for summary judgment. Thereafter, Mason filed a motion to set aside the order, stating that she had not received timely notice of its entry. She also renewed her motion to file an amended complaint. On September 27, 2006, the trial court entered an opinion and order again granting Monumental's motion for summary judgment. The court agreed with Monumental that the allegations in Mason's complaint would only support recovery of premiums which she paid but were not credited to her account. Since this amount would not exceed \$4,000.00, the trial court concluded that it lacked subject-matter jurisdiction over the claim. The court also denied Mason's motion

to file an amended complaint, finding that she had failed to plead the alleged fraud with particularity. Although the trial court's order did not specifically address Mason's claims against U.S. Bank, the parties agree that those claims were dismissed as well. This appeal followed.²

The primary question in this case is whether Mason has asserted claims against Monumental and U.S. Bank which are within the circuit court's jurisdiction. The circuit court has jurisdiction over all civil matters not exclusively vested in some other court. KRS 23A.010(1). Since the district court has exclusive jurisdiction over civil matters in which the amount in controversy does not exceed \$4,000.00, KRS 24A.120(1), the circuit court has jurisdiction of amounts in controversy exceeding \$4,000.00. *City of Somerset v. Bell*, 156 S.W.3d 321, 331 (Ky.App. 2005)

Monumental argues that Mason's damages for breach of the life insurance contracts would be limited to any amounts which she paid but were not applied toward her policy. At most, Mason claims that Monumental failed to credit her for \$800.00 to \$900.00 in premium payments. On the other hand, Mason contends that Monumental's wrongful termination of the policies would entitle her to recover the death benefits under the policies, \$70,000.00. She also contends that she would be entitled to punitive damages.

There is little Kentucky case law which directly addresses the remedies for breach of a life insurance contract. But there is considerable authority from other

² Due to Taylor's pending bankruptcy, Mason did not name him as a party to this appeal.

jurisdictions on the subject. *See* Annotation, “Remedies and Measure of Damages for Wrongful Cancellation of Life, Health, and Accident Insurance, 34 A.L.R.3d § 3, 245, 269-72 (1970 & 2007 Supp.). Where an insurer wrongfully cancels, repudiates or terminates a contract of insurance, the insured may pursue any of three courses: (1) she may elect to consider the policy at an end and recover the just value of the policy or such measure of damages the court in its particular jurisdiction approves; (2) she may institute proceedings in equity to have the policy adjudged to be in force; or (3) she may tender the premiums and, if acceptance is refused, wait until the policy by its terms becomes payable and test the forfeiture in a proper action on the policy. *Id.* at 269. *See also Viles v. Prudential Insurance Company of America*, 124 F.2d 78, 80 (10th Cir. 1941). These remedies are mutually exclusive, and a wrongfully-terminated insured must elect one remedy. 34 A.L.R.3d § 4, 272-73. *See also Armstrong v. Illinois Bankers Life Association*, 217 Ind. 601, 29 N.E.2d 415, 421-22 (1940). In her initial and first amended complaints, Mason only asserted claims against Monumental and Taylor for breach of contract. Furthermore, Mason concedes that she has not tendered any payments since 2000, and she is not seeking reinstatement of the policies. Consequently, she has elected the first remedy.

“Damages for breach of a contract are normally that sum which would put an injured party into the same position [she] would have been in had the contract been performed.” *University of Louisville v. RAM Engineering & Construction, Inc.*, 199 S.W.3d 746, 748 (Ky.App. 2005), *citing Hogan v. Long*, 922 S.W.2d 368, 371 (Ky.

1995). In the case of a wrongfully-terminated life insurance policy, the insured may recover the cash value of the policy or recovery of premiums paid by the insured. 34 A.L.R.3d § 17, 309. *See also People's Mutual Insurance Fund v. Bricken*, 13 Ky. L. Rptr. 586, 17 S.W. 625 (Ky. 1891). There are cases suggesting that a wrongfully-terminated insured who is no longer an insurable risk may be entitled to recover the present value of the policy, which is the cash value of the policy less the amount of the unpaid premiums. *Vicars v. Mutual Benefit Health & Accident Association of Omaha*, 259 Ky. 13, 81 S.W.2d 874 (1935), *citing American Insurance Union v. Woodard*, 118 Okl. 248, 247 P. 398, 401 (1926).

However, the policies at issue are term policies and have no cash value. Mason has clearly lost the benefit of her bargain – the right to continuing and renewable coverage under the policies. But she has not suggested a measure of such damages, nor has she even claimed such damages in this action. And we find no authority which allows an insured who has elected this remedy to recover the full death benefits payable under the policy.

Therefore, the only measure of damages would be for the amount of the premiums which Mason paid but for which Monumental did not provide coverage. At most, Mason's claimed damages for breach of the insurance contract would be around \$900.00. Consequently, her claims for breach of contract fail to meet the minimum jurisdictional amount for circuit court.

Likewise, Mason's claims against U.S. Bank arise from two allegedly improper withdrawals from her account in 1997, totaling \$59.40. She also suggests that U.S. Bank is liable for Taylor's conversion of other premium payment checks, but she does not identify any other specific improper withdrawals. Consequently, Mason's claims against U.S. Bank also fail to meet the jurisdictional threshold for circuit court.

On appeal, Mason focuses on her fraud claim which she attempted to assert against Monumental and Taylor in her third amended complaint. She asserts that Taylor, while acting as Monumental's agent, fraudulently increased her insurance premium, retained her premium payments, and removed funds from her bank account. Mason contends that, had the trial court allowed her to amend the complaint, she would have been able to recover the full benefit of her bargain with Monumental, which would be the death benefits payable under the policies. In addition, the fraud claims would support an award of punitive damages. She concludes that such damages would be more than sufficient to meet the jurisdictional limit of circuit court.

In support of her position, Mason notes the long-standing rule that a person who is "induced by fraudulent representations to enter into a contract is entitled to recover as damages, not only what he actually parted with, but benefits of the bargain." *Investors Heritage Life Ins. Co. v. Colson*, 717 S.W.2d 840, 842 (Ky.App. 1986), citing *Dempsey v. Marshall*, 344 S.W.2d 606 (Ky. 1961). In *Colson*, the insured purchased credit life insurance as part of an installment credit contract. During the transaction, the insured informed the agent of his health problems, but the agent assured the insured that

coverage would still be provided. After the insured's death, however, the insurance company denied the claim on the grounds that the "sound health" provision precluded coverage and because the agent did not have the authority to waive the provision. The agent argued, among other things, that no damages were proven because the insurance company refunded the premium. This Court rejected the argument, concluding that the amount of the premiums was not the proper measure of damages. Rather, the insured's estate was entitled to the benefit of the bargain, which would be coverage under the policy. *Colson*, 717 S.W.2d at 842.

Unlike in *Colson*, Mason does not allege that there was any fraud by Monumental or Taylor in inducing her to sign the insurance contract. The alleged fraud concerns Monumental's and Taylor's performance of the contract. While every contract includes an implied covenant of good faith and fair dealing, *Ranier v. Mount Sterling National Bank*, 812 S.W.2d 154, 156 (Ky. 1991), the elements for such a claim are different than a claim alleging fraud.

Moreover, the benefit of Mason's bargain was coverage for the term of the policies. Even if Taylor fraudulently converted Mason's premium payments, causing the \$30,000.00 policy to lapse, Mason has never become entitled to receive the benefits payable under the policies. At most, she was deprived of the opportunity to continue coverage, which she herself precluded when she refused to tender any additional payments. Consequently, even under her tendered fraud claims, Mason's damages would be limited to the coverage period of which Taylor's alleged fraud deprived her.

Of course, the fraud claim could support an additional award of punitive damages. However, we agree with the trial court that Mason failed to plead the alleged fraud with particularity, as required by CR 9.02. To be sufficient, “it is enough to plead the time, the place, the substance of the false representations, the facts misrepresented, and the identification of what was obtained by the fraud.” *Scott v. Farmers State Bank*, 410 S.W.2d 717, 722 (Ky. 1966). In her third amended complaint, Mason alleged that Taylor retained her premium payments for his own benefit and made unauthorized withdrawals from her account at U.S. Bank.

But at the time Mason attempted to file this complaint, the parties had already conducted extensive discovery. Monumental’s records showed that Taylor deposited all of Mason’s premium payments into Monumental’s bank account. While some of those deposits may not have been timely, Mason did not identify any payments which were not properly credited to her apart from the two electronic fund transfers charged to Mason’s account in 1997. Likewise, Mason did not plead that U.S. Bank would have had reason to know that any of the electronic fund transfers or other withdrawals were improper.

CR 15.01 allows a trial court to amend pleadings when justice so requires. But while amendments should be freely allowed, the trial court has wide discretion and may consider such factors as the failure to cure deficiencies by amendment or the futility of the amendment itself. *First National Bank of Cincinnati v. Hartman*, 747 S.W.2d 614, 616 (Ky.App. 1988), *citing* CR 15.01; Bertelsman and Philipps, 6 *Ky. Practice*, at 310

(1984). Under the circumstances, Mason failed to plead fraud against Monumental and U.S. Bank with sufficient particularity as would support a claim for damages in excess of the minimum jurisdictional amount for circuit court. Therefore, the trial court did not abuse its discretion in denying her motion to file the amended complaint.

Given this holding, the remaining issues in Mason's appeal are moot. Mason makes no showing that the information which she sought to discover from Monumental and U.S. Bank would have allowed her to recover damages of more than \$4,000.00. Since the circuit court lacked subject-matter jurisdiction, the court did not err by denying her motion to compel further discovery without a hearing.

Finally, Mason contends that the trial court violated her due process rights by granting Monumental's summary judgment motion by use of a calendar order entered on September 6, 2006. But even if this practice was error, Mason does not show that she suffered any prejudice as a result. The trial court did not designate its September 6, 2006, calendar order as final and appealable. And upon her motion, the trial court entered a memorandum opinion and order on September 27, 2006, formally dismissing the action. Since Mason properly brought her appeal from this order, any due process violation was harmless.

Accordingly, the summary judgment of the Logan Circuit Court dismissing Mason's claims against Monumental and U.S. Bank is affirmed.

ALL CONCUR.

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