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Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000799-MR

MARTIN RUDOLPH AND
JENNIFER POTTER — APPELLANTS

v.

APPEAL FROM GRAVES CIRCUIT COURT
HONORABLE TIMOTHY C. STARK, JUDGE
ACTION NO. 06-CI-00166

SHELTER INSURANCE COMPANIES — APPELLEE

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: CLAYTON AND DIXON, JUDGES; GRAVES, SENIOR JUDGE.

CLAYTON, JUDGE: Martin Rudolph and Jennifer Potter appeal from a Graves Circuit Court's order granting summary judgment in favor of Shelter Insurance Companies (Shelter). Finding error, we vacate the judgment and remand for further proceedings.

Factual Summary

On November 30, 2005, a fire destroyed the home of Mr. Rudolph and Ms. Potter. Thereafter, they filed a claim with their homeowner's insurance carrier, Shelter. A background investigation by Shelter revealed that Mr. Rudolph and Ms. Potter had each been convicted of felony drug offenses. Mr. Rudolph pled guilty in 1999 to manufacturing methamphetamine, possession of marijuana. Ms. Potter pled guilty during the same time to first-degree criminal drug possession.

Question 1 of the "applicant's statement" section of Mr. Rudolph's application for insurance asked, "Have you or any member of your household **ever** been convicted of or plead guilty to a felony offense?" Shelter rescinded the insurance contract under the provision in the application that stated, "I understand if Shelter discovers information contrary to that which has been provided, the policy may be voided, to the extent permitted by law, and if voided absolutely no coverage may exist."

On April 18, 2006, HSBC Mortgage Services Inc. (HSBC) filed a complaint against Mr. Rudolph and Ms. Potter seeking foreclosure. Mr. Rudolph filed a motion to add Shelter as a third party defendant. He also filed a third party complaint against Shelter alleging Shelter was liable under the contract of insurance on the property.

On July 17, 2006, in a request for admissions submitted by Shelter, Mr. Rudolph admitted that he signed an application for insurance coverage, although he did so in a perfunctory manner. Subsequently, on September 7, 2006,

Shelter filed a motion for summary judgment. The trial court denied summary judgment on the basis that Shelter made no showing that the misrepresentation by Mr. Rudolph on the application was material to the acceptance of the risk, or to the hazard assumed by the insurer as required by Kentucky Revised Statutes (KRS) 304.14-110.

On February 12, 2007, HSBC's complaint against Mr. Rudolph and Ms. Potter was voluntarily dismissed upon a motion by HSBC stating the issue had been resolved. With Mr. Rudolph's complaint against Shelter as the only remaining cause of action, Shelter filed a renewed motion for summary judgment. In support of the motion, Shelter attached the affidavit of Lori Meyer, a Personal Lines Underwriting Supervisor with Shelter. Ms. Meyer stated that pursuant to the underwriting guidelines of Shelter, a felony conviction of any type bars the applicant from obtaining personal homeowner's insurance. The trial court granted Shelter's motion for summary judgment finding that Mr. Rudolph's insurance contract with Shelter was void as a matter of law. This appeal followed.

Discussion

As a preliminary matter, Shelter argues that Ms. Potter is not a proper party to this appeal and should be dismissed. We agree. HSBC's complaint against Ms. Potter has been dismissed. Further, Ms. Potter was not a party to the third party complaint against Shelter and was not a signatory to the insurance

application at issue. Thus, we will proceed with only Mr. Rudolph as the Appellant.

Kentucky Rules of Civil Procedure (CR) 56.03 provides, in pertinent part that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, 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." On review of an order for summary judgment, "[t]he record must be viewed in a 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 Serv. Ctr., Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). "The standard of review on appeal of a summary judgment is whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996).

KRS 304.14-110 provides in its entirety:

> 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:
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> (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 the answer to Question 1 on the applicant's statement concerning past felony convictions was material to the decision of whether or not to cover Mr. Rudolph. However, at issue is whether Mr. Rudolph made a misrepresentation when he signed the statement accepting the answers as his own without thoroughly reading the statement or being asked the questions orally by the agent.

Mr. Rudolph argues the false answer was not a misrepresentation that would justify rescinding the insurance policy because the agent for Shelter never asked him whether he had been convicted of a felony and he did not fill out the answers on the insurance application. Further, Mr. Rudolph asserts the answers were not his misrepresentation because he only signed the application in a perfunctory manner without reading the contents.

In support of this argument, Mr. Rudolph cites to the decision in *Ketron v. Lincoln Income Life Insurance Company*, 523 S.W.2d 228 (Ky. 1975). In *Ketron,* this Court held an insurance company liable for an application containing false answers because the applicant fully revealed her condition to the

agent, and "did not know the application contained false answers." *Id*. at 229.

Ketron relied upon *Pennsylvania Life Insurance Co. v. McReynolds*, 440 S.W.2d 275, 278-79 (Ky. App. 1969), which details a relevant summary of the law in this area. It states, in pertinent part,

> While the insurance carrier, by inserting limitations in its application forms, has thus brought the transaction of obtaining insurance further into the operation of ordinary contract law, it has not changed the nature of the applicant who still relies on the agent and is little more likely to read the application form he signs than the policy he gets. Especially is this true when it is the agent who writes in the answers on the application form which the applicant then signs. If the applicant, or his agent . . . writes in the answers on the application form, and then signs it or makes his mark, he obviously is bound by it as a matter of contract law.
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> . . . .
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> In order to effect a better balance between the interests and responsibilities of the carrier and the applicant in the field of nonmedical health and accident insurance, we no longer will place the full responsibility on the applicant as stated in Ky. Central Life Ins. Co. v. Combs, supra [432 S.W.2d 955 (Ky. 1960)] to see that the application is correctly filled out except where the applicant, or his agent, inserts the answers on the application form signed by or for him. Of course if the applicant knows that false answers are being put down he will be responsible for them. However, his knowledge of the falsity may depend on how fully he understands exactly what information the application questions seek.
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> . . . .
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> Under our statute [KRS 304.14-110][1] misrepresentations will defeat recovery on the policy if material or fraudulent. The question is whether there was in fact any

[1] At the time of this opinion KRS 304.14-110 was still under KRS 304.656.

> misrepresentation in the circumstances of this case. If good faith be found, we think there was not.
>
> According to Couch on Insurance, 2d (1959 Ed.) Section 35:199, "If the insurer's agent, by misleading statements, induces the insured to make false answers and the latter acts in good faith, the insurer is bound[.] The question whether or not an applicant was, through ignorance and good faith, misled by the agent into believing that his answers were truthful, is for the jury to decide. . . ."

However, *Ketron* and *McReynolds* are both distinguishable from the case at hand because in both those cases the applicant provided the correct answer to the agent, and for whatever reasons, the agent did not enter the information into the application correctly.

Shelter directs us to *Hornback v. Bankers Life Insurance Company*, 176 S.W.3d 699 (Ky. App. 2005), in support of its position that as signatory to the application, Mr. Rudolph adopted the false answers as his own, and therefore made material misrepresentations that justify rescinding the insurance application pursuant to KRS 304.14-110. *Hornback* provided that, "whether they read the application or not, [the applicants] are held to have actual or constructive knowledge of its contents. Further, by signing the application, the [applicants] adopted the answers as their own." *Id*. at 704. However, *Hornback* is distinguishable because the agent read the question from the application directly to the applicants.

Without findings of fact, we are left to guess whether Mr. Rudolph was asked by the insurance agent whether he or Ms. Potter had been convicted of a

felony prior to signing the application for insurance coverage from Shelter. There also remains the question of whether Mr. Rudolph signed the application in good faith, without knowledge of the false answer. Neither *McReynolds* nor *Hornback* address the effect of an insurance agent's failure to read material questions to an applicant on the resulting false answers contained within the application.

In *Osborne v. American Select Risk Ins. Co.*, 414 F.2d 118, 122 (6th Cir. 1969), the 6th Circuit stated, "[t]he District Court found that the disputed testimony as to whether defendant's agent asked Osborne the questions was immaterial, but we in the light of *McReynolds* find this factor to be material and a factual question for the jury." Further, in *Cook v. Life Investors Ins. Co. of America*, 126 Fed. Appx. 722, 725 (6th Cir. 2005), the Court noted, "[u]nder *McReynolds*, the presence of a material misrepresentation in [the insured's] insurance application does not compel a judgment in favor of [insurer] if a reasonable jury could find (1) that [insurance agent] wrote the false answer to Question 2 and (2) that [the insured] signed the application in good faith."

We find that the critical inquiry here is whether the circumstances surrounding the failure of Shelter's agent to ask Mr. Rudolph whether he or Ms. Potter had been convicted of a felony, along with the agent's filling out of the application, and Mr. Rudolph's signing in good faith demonstrated a genuine issue as to the source of the false answer. Based on the existing case law in Kentucky, and the persuasive opinions by the Federal 6th Circuit, we feel that it does. In sum, we think that a jury must decide who was the source of the "NO" answer to

Question 1 on the applicant's statement and whether Mr. Rudolph was aware of that false answer when he signed the application.

The judgment of the Graves Circuit Court is vacated and the case remanded for further proceedings not inconsistent with this opinion.

ALL CONCUR.

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