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IN THE
COURT OF APPEALS OF INDIANA

MARY E. WILSON,	)	
	)	
Appellant,	)	
	)	
vs.	)	No. 42A04-0907-CV-431
	)	
UNITED FARM FAMILY LIFE INSURANCE COMPANY,	)	
	)	
Appellee.	)	

APPEAL FROM THE KNOX SUPERIOR COURT
The Honorable W. Timothy Crowley, Judge
Cause No. 42D01-0702-PL-3

April 23, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Mary E. Wilson ("Mary") appeals a judgment in favor of United Farm Family Life Insurance Company ("United Farm") upon Mary's complaint that United Farm breached a contract to insure the life of Mary's husband, Ronald Wilson ("Ronald"), now deceased. We affirm.

Issue

Mary presents a single consolidated issue: whether the trial court's judgment that life insurance coverage was not in force because the policy was not delivered while Ronald was of sound health is clearly erroneous.

Facts and Procedural History

On May 12, 2003, Ronald applied for life insurance to be issued by United Farm in the amount of $500,000, with Mary as the beneficiary. Three days later, Ronald consulted a physician with complaints of weakness and pain in his left leg and foot, and was referred for further testing. On June 6, 2003, Ronald was diagnosed as suffering from Amyotrophic Lateral Sclerosis (also known as "ALS" or "Lou Gehrig's Disease").

On June 13, 2003, United Farm issued the requested life insurance policy ("the Policy"). On June 19, 2003, United Farm agent Wally McGiffen ("McGiffen") delivered the Policy to Mary at her workplace, and Mary signed Ronald's name to the policy receipt, attesting to the lack of change in his health since the time of application.

Ronald died on March 25, 2005 and Mary made a claim for the payment of life

insurance benefits under the Policy.[1] United Farm's review of Ronald's medical records revealed the June 6, 2003 diagnosis of ALS and, on June 29, 2005, United Farm issued a rescission letter and a check equal to the amount of premiums paid for the Policy.

Mary brought a complaint for breach of contract against United Farm and Indiana Farm Bureau, Inc. The latter was dismissed as a defendant and a bench trial regarding the complaint against United Farm commenced on April 7, 2009. The trial court issued a judgment in favor of United Farm, concluding that no coverage was in force because of non-satisfaction of the condition precedent that the Policy be delivered during the "sound health" of the proposed insured. Mary appealed.

Discussion and Decision

I. Standard of Review

United Farm defended the breach of contract claim by asserting that a condition precedent to coverage was not satisfied. Under contract law, a condition precedent is a condition that must be performed before the agreement of the parties becomes a binding contract or something that must be fulfilled before the duty to perform a specific obligation arises. McGraw v. Marchioli, 812 N.E.2d 1154, 1157 (Ind. Ct. App. 2004). Absent waiver, an express condition must be fulfilled or no liability arises upon the promise that the condition qualifies. Id.

At Mary's request, the trial court entered findings of fact and conclusions of law pursuant to Indiana Trial Rule 52. When Indiana Trial Rule 52 special findings and

[1] Mary also made a claim under a prior policy insuring Ronald's life for $250,000, and United Farm paid benefits under that policy.

conclusions are made, we must determine whether the evidence supports the findings and whether the findings support the judgment. In re Estate of Holt, 870 N.E.2d 511, 514 (Ind. Ct. App. 2007), trans. denied. A judgment will not be reversed absent clear error. Id. Findings of fact are clearly erroneous when the record lacks evidence or reasonable inferences drawn from the evidence to support them. Id. We will consider that evidence which is favorable to the judgment and will neither reweigh the evidence nor judge the credibility of any witness. Id. However, while we defer substantially to the trial court's findings of fact, we evaluate questions of law de novo. Id.

II. Analysis

In Ebner, Adm'r v. Ohio State Life Ins. Co., 69 Ind. App. 32, 121 N.E. 315, 321 (1918), this Court stated: "Stipulations and conditions in applications and policies of life insurance, like the one under consideration, that the policy shall not take effect or be binding on the company unless delivered to the insured while he is in good health or the like, are valid. They are regarded as in the nature of conditions precedent to the policy becoming effectual."

The Policy contained a "sound health" clause as follows:

> [N]o insurance will be in force until:
> a) The initial full premium is paid; and
> b) this application is approved; and
> c) a policy is delivered during the lifetime and sound health of the Proposed Insured, and during the lifetime and sound health of the Owner, if Owner Waiver of Premium Benefit is applied for.

(Ex. 11, pg. 8.) The trial court determined in relevant part: Ronald applied for the Policy on May 12, 2003; three days later, Ronald saw an orthopedic surgeon; Ronald was diagnosed

(with Mary present) with ALS on June 6, 2003; ALS is a progressive neurodegenerative disease eventually leading to death; acting on Ronald's behalf, Mary signed a policy receipt attesting to no change in health of the insured since application; United Farm had no knowledge of the ALS diagnosis prior to delivery; the "sound health" provision of the Policy was unambiguous and enforceable as a condition precedent to coverage; Ronald was not in sound health when the policy was delivered; no coverage was in force under the Policy because the condition precedent of delivery during "sound health" was not satisfied; and principles of waiver and estoppel were inapplicable.

In an effort to establish clear error, Mary argues that (1) the "sound health" provision is ambiguous so as to be strictly construed against the insurer and the trial court should have found that Ronald was in sound health; (2) United Farm waived the right to insist upon the condition precedent because McGiffen accepted premiums after having knowledge of the ALS diagnosis; (3) United Farm should be estopped from relying upon the "sound health" provision because the clause was not specifically referenced in the rescission letter; and (4) she did not act as Ronald's agent in signing his name on the Policy receipt.

Alleged Ambiguity of Sound Health Clause

Mary argues that the trial court misstated the law, failed to construe a poorly drafted "sound health" clause against the insurer, and declined to adopt a reasonable definition of "sound health." First, Mary challenges Paragraph 15 of the trial court's findings, conclusions, and order as an improper legal standard:

> That insurance policies are governed by the same rules of construction as other contracts and should be interpreted to ascertain and enforce the parties' intent as manifested in the contract.

(App. 8.) Our Indiana Supreme Court has reiterated: "Contracts of insurance are governed by the same rules of construction as other contracts." Bowers v. Kushnick, 774 N.E.2d 884, 887 (Ind. 2002). '"If the policy language is clear and unambiguous, it should be given its plain and ordinary meaning."' Id. (quoting Eli Lilly and Co. v. Home Ins. Co., 482 N.E.2d 467, 470 (Ind. 1985)). Here, the trial court's language merely provided a recitation of well-settled law generally applicable to insurance contracts. It is only when an insurance contract provision is ambiguous that the language is construed against the drafter. Am. Home Assur. Co. v. Allen, 814 N.E.2d 662, 666 (Ind. Ct. App. 2004). We turn to Mary's claim that the trial court erroneously found no ambiguity.

Construction of the terms of a written contract presents a pure question of law for the court; accordingly, our review is de novo. Harrison v. Thomas, 761 N.E.2d 816, 818 (Ind. 2002). The Policy did not define "sound health." Nonetheless, the failure to define a term in an insurance policy does not necessarily make it ambiguous. Am. Home Assur. Co., 814 N.E.2d at 666. Rather, an insurance policy is ambiguous only if a provision is susceptible to more than one reasonable interpretation. Id. Moreover, an "ambiguity is not affirmatively established simply because controversy exists and one party asserts an interpretation contrary to that asserted by the opposing party." Beam v. Wausau Ins. Co., 765 N.E.2d 524, 528 (Ind. 2002), reh'g denied.

In 1921, a panel of this Court was called upon to construe a provision of a life insurance policy providing that it would not take effect unless the first premium was paid while the insured was in "good health." Mut. Life Ins. Co. of New York v. Hoffman, 77 Ind. App. 209, 133 N.E. 405, 410 (1921). The Court used the phrases "good health" and "sound health" interchangeably and concluded its discussion with a definition: "Good health, generally speaking, means the absence of any vice in the constitution and of any disease of a serious nature that has a direct tendency to shorten life, the absence of a condition of health that is commonly regarded as a disease, in contradistinction to a temporary ailment or indisposition." Id.

Mary rejects any such definition found in the common law, and suggests that her husband was of sound health when the Policy was delivered because he was of sound mind and performing his normal work, including strenuous farming duties. However, we do not find that reasonable persons would disagree as to whether "sound health" in the Policy contemplates freedom from serious disease or rather concerns the contemporaneous ability to engage in normal tasks. As such, the trial court was not required to address alleged ambiguity by adopting a definition of sound health so narrow as to include an individual diagnosed with a degenerative and fatal disease. See Western & Southern Life Ins. Co. v. Persinger, 101 Ind. App. 522, 199 N.E. 880, 881 (1936) (evidence conclusively showed that a woman who had been diagnosed with advanced cancer was not in sound health when the policy was issued).

Mary also argues that the "sound health" provision was poorly drafted, confusing, and potentially inapplicable to Ronald because it could be construed as applying only to the situation where the applicant had applied for Owner Waiver of Premium Benefit, which was not done in this case.

Subsection (c) of the "sound health" clause requires that "a policy is delivered during the lifetime and sound health of the proposed Insured, and during the lifetime and sound health of the Owner, if Owner Waiver of Premium Benefit is applied for." (Ex. 11, pg. 8.) (emphasis added.) The use of the conjunction and imposes an additional requirement if the potential insured has applied for Owner Waiver of Premium Benefit. It cannot reasonably be construed to obviate the requirement of delivery during the sound health of the proposed insured. The trial court properly concluded that the "sound health" provision was unambiguous.

Waiver/Estoppel

Mary next challenges the trial court's conclusion that the principles of waiver and estoppel are inapplicable in these circumstances. The existence of waiver, conduct of an insurer inconsistent with an intention to rely on policy requirements that leads the insured to believe the requirements will not be insisted upon, generally presents a question of fact. Am. Standard Ins. Co. of Wisconsin v. Rogers, 788 N.E.2d 873, 877 (Ind. Ct. App. 2003). The burden of proof is on the party who claims it. Id. The term "estoppel" has a meaning that is distinct from the term "waiver" but the terms have often been used synonymously in insurance matters. Id. Equitable estoppel is available if one party through his or her course

of conduct knowingly misleads or induces another party to believe and act upon his conduct in good faith and without knowledge of the facts. Id. at 879.

Mary maintains that United Farm accepted premiums after its agent had knowledge of facts that would render the insurance contract void, thus waiving the condition precedent. See Prudential Ins. Co. of Am. v. Bidwell, 103 Ind. App. 386, 8 N.E.2d 123, 126-27 (1937) (observing that acceptance of premiums by one entitled to avoid the policy, with knowledge of the facts, constitutes waiver of right to forfeiture or annulment). "A provision that a policy should not take effect unless the insured is in good health on the date of issue is a provision made for the benefit of the insurance company and may be waived by it." Pomerenke v. Nat'l Life & Acc. Ins. Co., 143 Ind. App. 472, 477, 241 N.E.2d 390, 393 (1968). When an insurance company collects and continues to collect premiums on an insurance policy with knowledge that the insured was not in sound health at the time of the issuance of the policy, it waives the provision as to sound health and cannot avoid the policy on that ground. Id.

Mary's argument rests upon evidence that United Farm's agent McGiffen accepted premiums for the second year of the policy after hearing that Ronald had ALS. McGiffen testified that he learned of the ALS diagnosis in July or August of 2003. However, this date is after the June 19, 2003 delivery when Ronald must have been in sound health to satisfy the condition precedent. There is no evidence that McGiffen knew that the diagnosis predated the delivery of the Policy, giving United Farm a reason to know that coverage could be avoided. Thus, the trial court appropriately concluded that acceptance of the second-year

premiums did not constitute United Farm's waiver of the condition precedent to coverage.

Mary also argues that United Farm should be estopped from asserting any defense under the "sound health" clause because United Farm's letter accompanying the return of premiums cited an alleged misrepresentation, purportedly made by Ronald, that there had been "no change in his health" as of the date of delivery of the Policy. (Ex. 20, pg. 1.) Although referencing a change in health as opposed to using the words "sound health," the letter adequately advised Mary that it was United Farm's position that Ronald had not satisfied the condition precedent to coverage by accepting delivery of the Policy while still in sound health. Mary was not misled as to the nature of United Farm's investigation or the crucial fact underlying the denial, that is, Ronald had been diagnosed with ALS after application for the Policy and before its delivery.

Furthermore, the doctrines of waiver and estoppel derive from equitable principles. Am. Standard Ins. Co. of Wisconsin, 788 N.E.2d at 879. The evidence most favorable to the judgment indicates that, at the time the rescission letter was drafted, wherein United Farm alleged that Ronald had signed the attestation of no change in health, the claims adjuster was acting under the assumption that the signature was Ronald's, as purported. On the other hand, when Mary received the rescission letter, she was aware that Ronald had not signed it, as she herself had done so. The application of estoppel in these circumstances would not prevent an injustice caused by a misrepresentation by United Life. The trial court properly concluded estoppel is inapplicable.

Finding of Agency Relationship

Finally, Mary challenges the trial court's finding that she signed Ronald's name on the Policy receipt "on her husband's behalf." (App. 7.) She argues that an agency relationship should not be presumed because of marriage, and United Farm failed to prove that she acted as Ronald's agent; thus, the finding is erroneous.

It is not readily apparent how this argument is favorable to Mary. Had she not signed the Policy receipt and received the Policy on Ronald's behalf, there would have been no delivery as required for the Policy to be in force. Nonetheless, the trial court's judgment that the Policy was not in force rests upon Ronald's lack of sound health at delivery. To the extent that the findings and conclusions suggest that Mary acted as Ronald's agent and misrepresented the state of his health, they are surplusage and do not require reversal. See Borth v. Borth, 806 N.E.2d 866, 870 (Ind. Ct. App. 2004) ("where trial court findings on one legal theory are adequate, findings on another legal theory amount to mere surplusage and cannot constitute a basis for reversal even if erroneous."). Mary has demonstrated no clear error.

Conclusion

The trial court's findings of fact, conclusions of law, and order adjudging that life insurance coverage was not in force because the policy was not delivered while Ronald was of sound health are not clearly erroneous.

Affirmed.

MAY, J., and BARNES, J., concur.