S T A T E   O F   M I C H I G A N

C O U R T   O F   A P P E A L S

FORTIS BENEFITS INSURANCE COMPANY, f/k/a MUTUAL BENEFIT LIFE INSURANCE COMPANY,

Plaintiff-Appellee,

UNPUBLISHED
April 11, 1997

v

No. 186948
Kalamazoo Circuit Court
LC No. 93-000626-CZ

TRUSTMARK INSURANCE COMPANY, f/k/a BENEFIT TRUST LIFE INSURANCE COMPANY,

Defendant-Appellant.

Before: Reilly, P.J. and MacKenzie, and B.K. Zahra*, JJ.

PER CURIAM.

Defendant appeals of right from the trial court judgment holding it liable for payment of long-term disability insurance benefits to Lola Sweet, a disabled Kalamazoo County employee. We affirm in part and reverse in part.

Defendant was the insurer of county employees under a group disability insurance policy that expired on February 28, 1989. Plaintiff provided similar coverage pursuant to a successor policy commencing on March 1, 1989. On or about January 18, 1989, Lola Sweet sustained a stroke. She was absent from work until February 22, 1989, when she attempted to resume her employment pursuant to her physician's release. However, she experienced difficulty performing her duties and was sent home early on February 28, although she was paid her regular wages for that day and for March 1. She was placed on sick leave on March 2, 1989, and has not worked since.

Defendant denied Sweet's claim for disability benefits on the ground that she did not meet the definition of disabled and the elimination period had not expired on February 28 when defendant's policy expired. Plaintiff disclaimed liability because Sweet was not actively at work on March 1, the

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* Circuit judge, sitting on the Court of Appeals by assignment.

date its coverage began, as required by its policy. Ultimately, plaintiff began paying benefits and initiated this action for declaratory judgment and other relief to determine whether it or defendant is liable to Sweet.

Defendant challenges the trial court's determination that it is liable to pay disability benefits under its policy. The trial court's findings that Sweet satisfied the two-part definition of disability in defendant's policy was not clearly erroneous. We agree with the trial court that, notwithstanding Sweet's abortive return to work, she "did not and could not do the substantial and material duties as a corrections officer at any time after January 18, 1989." We further agree that Sweet's unsuccessful attempt to perform her job duties from February 22 to 28 did not constitute "other work." The fact that defendant's policy provided for a 180-day "elimination period," defined as "[t]hat period of time after Disability starts during which the monthly benefit is not payable," and that Sweet was unable to complete that period before the expiration of defendant's policy, is not relevant to defendant's liability because completion of that period before expiration of the policy is not a prerequisite to liability. *Aetna Life Ins Co v Staggs*, 255 Ky 638; 75 SW2d 214, 215 (1934); 1C Appleman, Insurance Law & Practice, § 613, pp 143-144. Finally, defendant's reliance upon the "transfer provision" in plaintiff's policy to absolve defendant of liability is misplaced. Defendant's liability was vested pursuant to the terms of its own policy. Furthermore, the transfer provision states that benefits payable under it "will be reduced by any benefits . . . payable by the prior plan [i.e., defendant's], as if it had remained in effect." This and defendant's remaining objections to liability are without merit.

Defendant also asserts that the trial court erred in determining that Sweet was entitled to benefits under plaintiff's policy. The trial court recognized that defendant posed many arguments that plaintiff was liable under its policy, but summarily rejected them as specious. Because the facts as found by the trial court indicate that on March 1, 1989, Sweet was not an "active" employee and thus did not meet the requirement for coverage under plaintiff's policy, we agree with the trial court that plaintiff is not responsible for long-term disability overage benefits for Sweet.

Defendant next contends that plaintiff's action is barred by the statute of limitations. Plaintiff's action against defendant is governed by the same contractual time-bar applicable to Sweet pursuant to defendant's insurance policy. *Citizens Ins Co of America v American Community Mutual Ins Co*, 197 Mich App 707, 710; 495 NW2d 798 (1993). It is undisputed that plaintiff commenced this suit after the limitations period had run. However, the trial court, relying upon the evidence produced at trial, held that because Sweet was "insane" at the time her cause of action accrued, plaintiff's suit was timely.

MCL 600.5851(1); MSA 27A.5851(1) provides that where the person first entitled to bring an action is insane at the time the claim accrues, he or she has one year after the disability is removed to bring the action. The word "insane" is a term of art, defined by MCL 600.5851(2); MSA 27A.5851(2) as "a condition of mental derangement such as to prevent the sufferer from comprehending rights he or she is otherwise bound to know and is not dependent on whether or not the person has been judicially declared to be insane." Based on our review of the evidence, we are not persuaded that the trial court erred in its conclusion that Sweet's condition satisfied the statutory definition of "insane" and that plaintiff, as her common-law subrogee, was therefore entitled to bring this action beyond the three-year limitations period.

Defendant also challenges the trial court's imposition of penalty interest upon it. MCL 500.2006(4); MSA 24.12006(4) provides in pertinent part that "[w]hen benefits are not paid on a timely basis, the benefits paid shall bear simple interest from a date 60 days after satisfactory proof of loss was received by the insurer at the rate of 12% per annum, if the claimant is the insured or an individual or entity directly entitled to benefits under the insured's contract of insurance." The penalty interest statute "is intended to provide a penalty to be assessed against recalcitrant insurers who procrastinate or are dilatory in paying meritorious claims in bad faith." *McCahill v Commercial Union Ins Co*, 179 Mich App 761, 779; 446 NW2d 579 (1989).

Defendant correctly notes that plaintiff's claim is based on equitable subrogation relating to its payment of benefits to Sweet, not on its direct entitlement to benefits "under the insured's contract of insurance." Because plaintiff is not an "entity directly entitled to benefits under the insured's contract of insurance," the trial court improperly awarded it penalty interest under the statute. We therefore reverse the penalty interest award.

Affirmed in part and reversed in part. No taxable costs pursuant to MCR 7.219, neither party having prevailed in full.

/s/ Maureen Pulte Reilly
/s/ Barbara B. MacKenzie
/s/ Brian K. Zahra