STATE OF MICHIGAN

COURT OF APPEALS

PARUL ASHOK SHAH,

Plaintiff-Appellant,

v

ROYAL MACCABEES LIFE INSURANCE COMPANY,

Defendant-Appellee,

UNPUBLISHED
January 4, 2000

No. 207765
Oakland Circuit Court
LC No. 95-504205 CK

PARUL ASHOK SHAH,

Plaintiff-Appellant/Cross-Appellee,

v

ROYAL MACCABEES LIFE INSURANCE COMPANY,

Defendant-Appellee/Cross-Appellant.

No. 211888
Oakland Circuit Court
LC No. 95-504205 CK

Before: Gribbs, P.J., and Murphy and Griffin, JJ.

PER CURIAM.

In Docket No. 207765, plaintiff appeals as of right from an opinion and order issued after a bench trial, holding that defendant was not liable under a $500,000 life insurance policy issued to plaintiff's mother, Mrs. Mehta, in which plaintiff was the named beneficiary. In Docket No. 211888, plaintiff appeals by leave granted, and defendant cross-appeals, from the postjudgment order awarding defendant mediation sanctions, comprised of taxable costs of $915.80 and a reasonable attorney fee in the amount of $30,000. We affirm.

In reviewing a trial court's decision to grant or deny declaratory relief, we review questions of law de novo and the court's factual findings for clear error. Clear error occurs when this Court is left with a definite and firm conviction that a mistake has been made. MCR 2.613(C). *Atty Gen v Cheboygan Rd Comm'rs*, 217 Mich App 83, 86-87; 550 NW2d 821 (1996).

An insurance policy is much the same as any other contract, a matter of agreement between the parties. *Burch v Wargo*, 378 Mich 200, 203-204; 144 NW2d 342 (1966). The courts will determine what that agreement was and enforce it accordingly. *Id.* An insurance contract is not binding until all of the conditions and terms of the parties' agreement are satisfied. *Bowen v Prudential Ins Co*, 178 Mich 63, 69; 144 NW 543 (1913).

In the instant case, the insurance application form provides, in pertinent part:

> Except as provided for in the attached Receipt(s), no insurance shall take effect until the policy is accepted by the Owner and the first premium is paid to the Company and the health, habits and occupation of all proposed insureds remain as stated in the application.

As the trial court properly observed, three conditions precedent were necessary for the formation of a binding contract: (1) acceptance; (2) payment of the first premium; and (3) no change in the health, habits or occupation of the proposed insured. The trial court also found that an amendment to the application added a fourth condition, namely, that there was no other insurance coverage in effect on the proposed insured.

Regarding the first condition precedent, plaintiff argues that acceptance of the contract occurred on October 20, 1993, when her husband, Ashok Shah, gave a check in the amount of $2,000 for the deposit on the premium to agent Chhaya Shah (no relation) in response to the agent's statement that the policy was being approved by defendant. Alternatively, acknowledging that defendant's formal approval of the policy was not recorded until October 22, 1993, plaintiff argues that acceptance occurred on October 22, 1993. A review of the trial court's decision reveals that the trial court did not make an explicit finding of fact as to when acceptance of the insurance contract occurred, but analyzed the issue in connection with the second condition precedent, that being payment of the first premium.

The trial court found that the payment of the first premium occurred on December 8, 1993, when the proposed insured, Mrs. Mehta, made full payment of the first premium upon delivery of the insurance policy. In this case, the annual premium for the policy was $11,000, which the insured elected to pay semi-annually. Thus, the amount of the first premium was $5,500. Given that plaintiff and her husband submitted a partial payment of $2,000 in October 1993, the trial court found that the proposed insured's premium payment of $3,550 on December 8, 1993, constituted full payment of the first premium.

Contrary to plaintiff's assertion, the trial court did not err as a matter of contract interpretation when it concluded that the policy would not be effective until full payment of the first premium was made. See *Michigan Law and Practice*, Insurance, § 74, Payment of Premium. Nor did the trial court err in finding that partial payment of $2,000 by the insured on October 20, 1993, did not constitute payment of the first premium. In this respect, both plaintiff's own expert, Mr. Kenneth Coe, and defendant's agent, Mr. Thomas Ores, agreed that the $2,000 payment was only partial payment toward the first premium, which was fully paid on December 8, 1993.

The third condition precedent required that the health, habits and occupation of the proposed insured remain as stated in the insurance application form. In this regard, the trial court did not clearly err in finding that Mrs. Mehta experienced a change in health requiring disclosure to defendant when she was diagnosed with coronary artery disease on October 22, 1993. Because the first premium was not paid before the change in Mrs. Mehta's health, the trial court properly concluded that no binding insurance contract came into existence.

Finally, the trial court did not err in finding that plaintiff failed to satisfy the fourth condition precedent, i.e., that there was no other insurance coverage in effect on the life of the proposed insured, inasmuch as it was undisputed that policies from Equitable Life Insurance Company ("Equitable") and United Presidential Life Insurance Company ("UPI") had been procured, providing $500,000 in combined coverage on Mrs. Mehta's life before defendant's policy was in force.

The trial court did not err in rejecting plaintiff's argument that defendant was estopped from relying on the delivery requirement. An insurer is estopped from relying on the delivery requirement when it has delayed in making delivery of the insurance policy. However, when an insurer has not caused the delay, it is not estopped from relying on the delivery requirement. *Bowen, supra*; *Dohanyos v Prudential Ins Co*, 952 F2d 947 (CA 6, 1992); *Shah v General American Life Ins Co*, 965 F Supp 978, 981 (ED Mich, 1997). As the trial court correctly found, agent Shah did not possess the insurance contract when the proposed insured's change in health occurred on October 22, 1993. Rather, agent Shah received the contract sometime after the November 4, 1993, mailing date. Although an insurer has the duty to act with reasonable promptness on applications for life insurance, *id.*; *VanKoevering v Manufacturers Life Insurance Co*, 234 F Supp 786 (WD Mich, 1964), the trial court here properly found that defendant did not breach its duty by failing to deliver the policy to Mrs. Mehta before the change in her health occurred on October 22, 1993.

We further agree with the trial court that, even if a binding insurance contract did come into existence, it was void ab initio because of material misrepresentations concerning Mrs. Mehta's financial status, health status, and the existence of other insurance coverage. MCL 500. 2218; MSA 24.12218.

A material misrepresentation in an application for a life insurance policy requires only that the misrepresentation affect an insurer's risk, and no causal relation need be shown between the misrepresentation and the cause of the insured's death. *Wickersham v John Hancock*, 413 Mich 57; 318 NW2d 456 (1982). Further, MCL 500.2218; MSA 24.12218 permits insurers to void a policy where there has been a material misrepresentation of fact which affected either the acceptance of the risk or the hazard assumed by the insurer. To substantiate a claim of misrepresentation to avoid

payment, an insurer must: (1) demonstrate that the misrepresentation was in fact made; (2) show that the insurer relied on the statement; and (3) show that the misrepresentation was material to the risk and hazard accepted by the insurer. *Howard v Golden State Mut Life Ins Co*, 60 Mich App 469, 477; 231 NW2d 655 (1975). Where there has been a material misrepresentation in the application for a life insurance policy, the policy will be held to be void ab initio and no amount of delay, reasonable or unreasonable, by the insurer in rejecting the application will give rise to a binding insurance contract. *Szlapa v National Travelers*, 62 Mich App 320, 325-326; 233 NW2d 270 (1975). Where an insurance company claims fraud or material misrepresentation to avoid liability, it has the burden of proving its claim. *Id.* at 325.

First, the evidence established that Mrs. Mehta made material misrepresentations concerning her financial status. The trial court did not err in finding that Mrs. Mehta misrepresented that she had an income of $75,000, and a net worth of $500,000, when the evidence established that she had no income or net worth. Further, the materiality of this misrepresentation was established by testimony that Mrs. Mehta would not have been approved for a $500,000 life insurance policy if she had no income or net worth.

The evidence also established that Mrs. Mehta made material misrepresentations concerning whether other insurance was in effect. As already stated, the trial court found that there was other insurance coverage in force on the proposed insurance, namely, the Equitable policy and the UPI policy, each in the amount of $250,000. On December 8, 1993, Mehta signed an amendment to the application, falsely representing that there was no other insurance coverage in force on her life. Mrs. Mehta's false statements regarding other insurance coverage materially affected the defendant's acceptance of the risk. See *Shah, supra*, 965 F Supp at 982-983.

Third, the evidence established that Mrs. Mehta made material misrepresentations concerning her health. There was voluminous medical evidence presented indicating that Mrs. Mehta's health had materially changed after the date of the application form, and that defendant would not have issued a life insurance policy to her if it had known the true state of her health. Thus, the trial court did not clearly err in finding that the proposed insured falsely misrepresented that her health had not changed.

Finally, the trial court properly found that, in view of these material misrepresentations, plaintiff was barred from recovering insurance benefits as a result of fraud. *Hi-Way Motor Co v Int'l Harvester Co*, 398 Mich 330, 336; 247 NW2d 813 (1976); *Baker v Arbor Drugs*, 215 Mich App 198, 208; 544 NW2d 727 (1996).

Contrary to plaintiff's contention, defendant was not estopped from voiding the policy on the ground that agent Shah knew about the other insurance policies in force and about the change in the decedent's health While an insurer is estopped from denying coverage based on misrepresentations known to its agent, it is not estopped from denying coverage where the misrepresentations are not known by its agent. *Shah, supra*, 965 F Supp at 982. In this case, the trial court found that agent Shah knew of the existence of the policy issued to Mrs. Mehta by the John Hancock Life Insurance Company as well as Mrs. Mehta's application to General American Life Insurance Company, but had no knowledge of the Equitable and UPI policies, which were issued through applications submitted by

another agent. Moreover, agent Shah testified that she was not informed of any changes in Mrs. Mehta's health and the trial court found this testimony to be credible. Giving regard to the special opportunity of the trial court to judge the credibility of the witnesses who appear before it, we cannot conclude that the trial court clearly erred in rejecting plaintiff's estoppel argument on this basis. MCR 2.613(C).

Plaintiff also claims that defendant is estopped from denying coverage because agent Shah did not read the documents to Mrs. Mehta before directing her to sign them, and that Mrs. Mehta could not have known what she was signing because she did not read or speak English well. We disagree. The mere fact that plaintiff's decedent had a literacy problem did not relieve her of the legal duty "to know that the representations therein contained and which constituted the inducement for the issuance of the polic[y] were true." *Kane v Detroit Life Ins Co*, 204 Mich 357, 364; 170 NW 35 (1918).

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Plaintiff contends that the trial court erred in awarding attorney fees under MCR 2.403. This Court will uphold an award of attorney fees under MCR 2.403 absent an abuse of discretion. *MBPIA v Hackett Furniture*, 194 Mich App 230, 234; 486 NW2d 68 (1992). An abuse of discretion occurs only if the trial court's decision is grossly violative of fact and logic. *Id.*; *Spalding v Spalding*, 355 Mich 382, 384-385; 94 NW2d 810 (1959). Plaintiff first argues, for the first time on appeal, that mediation sanctions were not recoverable because this case, being a declaratory judgment action, is outside the scope of MCR 2.403. Because plaintiff failed to raise this argument before the trial court, it is not preserved for appeal. *Bowers v Bowers*, 216 Mich App 491, 495; 549 NW2d 592 (1996). Moreover, we note that plaintiff participated in mediation without ever objecting to the procedure, and also conceded at the motion hearing that an award of attorney fees was warranted. Nevertheless, contrary to defendant's claim, we find that plaintiff's appeal is not vexatious under MCR 7.216(C). Although plaintiff conceded below that defendant was entitled to mediation sanction, she also claims that the trial court abused its discretion in awarding attorney fees in the amount of $30,000.

The record reveals that plaintiff simply reiterates the same objections to attorney fees that she made before the trial court. As defendant notes, the trial court took plaintiff' s objections into account in its award, reducing the number of hours from 231 to 200 hours, at the rate of $150.00 per hour. Moreover, the record indicates that the trial court addressed the relevant factors in determining the reasonableness of attorney fees. *Jernigan v General Motors Corp*, 180 Mich App 575, 587; 447 NW2d 822 (1989). Finally, it was not improper or an abuse of discretion to include fees incurred through representation by multiple lawyers. *Attard v Citizens Ins Co*, ___ Mich App ___; ___ NW2d ___ (No. 203300, issued 8/20/99).

Accordingly, the court's award of mediation sanctions does not represent an abuse of discretion.

Affirmed.

/s/ Roman S. Gribbs
/s/ William B. Murphy
/s/ Richard Allen Griffin