

STATE OF MICHIGAN
COURT OF APPEALS

STEVEN J. POULOS and CHRISTOPHER C.
POULOS, Personal Representative of the Estate of
JOHN G. POULOS, Deceased,

Plaintiffs-Appellants,

v

JAMES R. WEATHERWAX and ROD SUTTON
AGENCY,

Defendants/Cross-Defendants/Cross-
Plaintiffs,

and

WOODBURY FINANCIAL SERVICES,

Defendant/Cross-Defendant,

and

AMERICAN SKANDIA LIFE ASSURANCE
CORPORATION,

Defendant/Cross-Defendant-
Appellee.

UNPUBLISHED
December 20, 2007

No. 274020
Genesee Circuit Court
LC No. 04-079386-CK

Before: Jansen, P.J., and O’Connell and Fort Hood, JJ.

PER CURIAM.

Plaintiffs Steven J. Poulos and Christopher C. Poulos appeal as of right, challenging the trial court’s order granting summary disposition in favor of defendant American Skandia Life Assurance Corporation pursuant to MCR 2.116(C)(10), and denying their own motion for summary disposition. We affirm.

Plaintiffs brought this action asserting various claims, including breach of an annuity contract, misrepresentation, reformation of contract, and unjust enrichment.

Plaintiffs alleged that defendants James Weatherwax, the Rod Sutton Agency, and Woodbury Financial Services were agents or representatives of American Skandia, or intermediaries between American Skandia and interested investors. Plaintiffs Steven Poulos and Christopher Poulos are the sons of decedent John Poulos. In 1999, the decedent consulted Weatherwax regarding an investment annuity. The decedent was interested in exchanging an annuity contract that he held through the Fortis Benefits Insurance Company for an annuity contract issued by American Skandia. The decedent was designated the annuitant on the Fortis annuity, and Steven and Christopher were designated as co-owners. The decedent's wife, Stella Poulos, was the primary beneficiary of the Fortis annuity, and Steven and Christopher were the contingent beneficiaries. The decedent purportedly told Weatherwax that he wanted an American Skandia annuity that would pay a death benefit to the beneficiary upon the decedent's death.

The decedent completed an application to roll over the Fortis annuity into an American Skandia annuity. He listed Steven and Christopher, respectively, in the spaces labeled "Owner (Applicant)" and "Co-Owner." The decedent's name was entered in the space labeled "Annuitant (if other than Owner)." In the beneficiary section, the decedent named Stella as the primary beneficiary, and listed Steven and Christopher as contingent beneficiaries, indicating that they were the owner's wife and sons. Steven's and Christopher's names were signed as owners, and the decedent signed his name on the line for "Proposed Annuitant (if other than Owner)." The assignment of ownership form listed Steven and Christopher as the owners of the Fortis annuity, and the decedent as the "annuitant/insured" of that annuity. In the "Signatures" section of the form, the decedent signed his name and both of his sons' names as owners.

American Skandia issued an annuity certificate that listed Steven and Christopher as the owners and the decedent as the annuitant. Both the annuity contract and the prospectus defined "annuitant" as "[t]he person upon whose life this Annuity is issued," "beneficiary" as "the person designated as the recipient of the death benefit," and "owner" as "[t]he person or entity shown as Owner in the Schedule unless later changed." The annuity contract defines "you" as "The Owner shown in the Schedule," and the prospectus states "'You' or 'your' means the Owner."

The contract included the following provision regarding the death benefit:

In the Accumulation Period, a death benefit is payable. If there is more than one Owner, such Owners being natural persons, the death benefit is payable upon the first death of such Owners. If the Annuity is owned by an entity, the death benefit is payable upon the Annuitant's death, if there is no Contingent Annuitant. . . .

Steven and Christopher became the primary beneficiaries of the annuity shortly before the decedent's death. When the decedent died, plaintiffs contacted Weatherwax to collect the death benefit under the annuity. Weatherwax learned from American Skandia that plaintiffs were not entitled to the death benefit because the benefit was payable upon the death of the owner, and decedent was not listed as the owner, but the annuitant. American Skandia

maintained that the death benefit would not become payable until either Steven or Christopher died, because they were the owners of the annuity.

After plaintiffs filed this action, they moved for summary disposition under MCR 2.116(C)(10), asserting that the American Skandia annuity contract was ambiguous because it could be construed to require payment of a death benefit upon the annuitant's death. They argued that extrinsic evidence established that the parties intended to structure the annuity so that Christopher and Steven would receive the death benefit when the decedent died. They also raised theories of misrepresentation and mistake, arguing that the decedent relied on American Skandia's assurances that a death benefit would be paid upon the decedent's death. They argued that American Skandia should have understood that the decedent intended to structure the annuity with the death benefit payable upon his death, because otherwise the structure did not make sense. In support of their motion, they submitted the deposition testimony of American Skandia representative Todd Gutheil, who acknowledged that it would be unusual to name an individual annuitant, and two other individuals as owners and beneficiaries, because there would be no payable death benefit until one of the owners died.

American Skandia argued in response that plaintiffs could not prove a breach of contract because the application and annuity contract clearly and unambiguously showed that Steven and Christopher were the owners, and the decedent the annuitant. American Skandia explained that the decedent's Fortis annuity also was structured with the decedent as the annuitant and Steven and Christopher as owners, and that the decedent had to retain this structure when he purchased the American Skandia annuity in order to achieve a "section 1035 tax-free rollover." If the decedent had been designated as the owner of the American Skandia annuity, he would have been taxed on the gains made by the Fortis annuity, thus defeating the purpose of a section 1035 rollover. American Skandia also argued that plaintiffs could not prove misrepresentation or mistake, because the contract clearly explained that the death benefit was payable upon the death of the owner. It emphasized that the decedent had 21 days to cancel the annuity if it was not established in accordance with his intentions.

American Skandia moved for summary disposition in its favor pursuant to MCR 2.116(C)(10), reiterating that the annuity contract clearly designated the decedent as the annuitant, not the owner of the annuity, which precluded the payment of a death benefit upon his death. American Skandia argued that there was no legal or factual basis for finding a breach of contract, or for reforming the contract to designate the decedent as an owner of the annuity.

American Skandia filed its motion on June 13, 2005, and scheduled a hearing date for early July. This rendered the motion untimely under the trial court's scheduling order, which required dispositive motions to be heard no later than June 27, 2005. American Skandia also moved to extend the cut-off date for filing dispositive motions to July 5, 2005. This motion was scheduled for the same day as plaintiffs' summary disposition motion. The trial court stated that it would rule on the extension motion after it addressed plaintiffs' summary disposition motion, if it was still necessary to do so.

At a hearing on June 27, 2005, the trial court determined that there was no genuine issue of material fact in support of plaintiffs' claims because American Skandia issued the annuity exactly as the decedent had requested on the application, and plaintiffs failed to correct any perceived error within the 21-day cancellation period. The trial court therefore granted summary

disposition in favor of American Skandia. The court did not indicate whether it was granting summary disposition pursuant to American Skandia's motion, or pursuant to MCR 2.116(I)(2), which permits the court to grant summary disposition for a nonmoving party. The court also did not address American Skandia's extension motion. However, the trial court's written order states that American Skandia's "cross-motion for summary disposition on Plaintiffs' Complaint directed against it is granted and summary disposition entered in Defendant American Skandia's favor."

II

Initially, we reject plaintiffs' argument that the trial court could not properly grant summary disposition in favor of American Skandia because American Skandia's motion was untimely under the trial court's scheduling order and plaintiffs did not have an opportunity to respond to the motion. Although the trial court stated in its order that it was granting American Skandia's own motion for summary disposition, that motion raised the same arguments that American Skandia raised in response to plaintiffs' motion. Indeed, American Skandia requested that the trial court grant summary disposition in its favor in its response to plaintiffs' motion. MCR 2.116(I)(2) allows a trial court to render judgment in favor of the nonmoving party if it appears to the court that the opposing party is entitled to judgment. Under this rule, the trial court was authorized to grant judgment in favor of American Skandia when ruling on plaintiffs' motion.

III

Plaintiffs also argue that the trial court erred by finding that there was no genuine issue of material fact with respect to the terms of the annuity contract. We disagree. We review de novo a trial court's decision to grant summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Plaintiffs argue that the annuity contract is ambiguous with respect to the identification of the owner, and that extrinsic evidence demonstrates that the decedent was the owner. Alternatively, they argue that the annuity contract should be reformed or rescinded on grounds of mutual mistake or misrepresentation. We disagree.

Contractual language "should be read as a whole and meaning should be given to all terms." *Royal Prop Group, LLC v Prime Ins Syndicate, Inc*, 267 Mich App 708, 715; 706 NW2d 426 (2005). If contractual language is clear and unambiguous, "the terms are to be taken and understood in their plain, ordinary, and popular sense." *Michigan Mut Ins Co v Dowell*, 204 Mich App 81, 87; 514 NW2d 185 (1994). "If provisions of a contract irreconcilably conflict, the contractual language is ambiguous and the ambiguous language presents a question of fact to be decided by a jury." *Cole v Auto-Owners Ins Co*, 272 Mich App 50, 53; 723 NW2d 922 (2006). When an ambiguity exists, extrinsic evidence may be considered to determine the parties' intent. *Id.*

Plaintiffs argue that the annuity contract is ambiguous with respect to the meaning of the term "annuitant" and the effect of the annuitant's death, and should be construed to require the payment of a death benefit upon the death of the annuitant, in this case the decedent. Emphasizing that "annuitant" is defined as "the person upon whose life this Annuity is issued," plaintiffs maintain that the annuitant is the "measuring life" for the annuity, so the annuitant must be considered an owner whose death triggers payment of the death benefit. However, the

contract clearly and unambiguously states that the death benefit is payable upon the death of the *owner* when the annuity is owned by living individuals. The contract provides:

In the Accumulation Period, a death benefit is payable. If there is more than one Owner, such Owners being natural persons, the death benefit is payable upon the first death of such Owners. If the Annuity is owned by an entity, the death benefit is payable upon the Annuitant's death, if there is no Contingent Annuitant. If a Contingent Annuitant was designated before the Annuitant's death and the Annuitant dies, the Contingent Annuitant then becomes the Annuitant.

This section does not conflict with the contractual definition of "annuitant." The phrase "upon whose life this annuity is issued" in the definition of annuitant does not refer to the death benefit. Instead, this phrase serves to measure the length of time the company must pay installments when the annuity's owner opts to receive periodic payments for "life." Accordingly, there is no actual conflict between the definition of annuitant and the death benefit provision. The plain and unambiguous language of the annuity contract designates the decedent as the annuitant, and Christopher and Steven as owners and beneficiaries. These designations were assigned in accordance with the decedent's application. Accordingly, there is no ambiguity, and this Court may not look to the parties' extrinsic evidence to construe the parties' intentions.

Plaintiffs argue that the contract should be rescinded because American Skandia made a material misrepresentation to defendant Weatherwax in order to induce the decedent to purchase an annuity that did not provide the benefit he sought. A plaintiff claiming a misrepresentation must prove reasonable reliance on the misrepresentation. *Novak v Nationwide Mut Ins Co*, 235 Mich App 675, 688; 599 NW2d 546 (1999).

Plaintiffs allege that American Skandia's agent, Todd Gutheil, misrepresented the terms of the annuity when he verbally assured Weatherwax that a death benefit would be paid upon the decedent's death. However, Weatherwax also testified that when he requested written verification of Gutheil's statement, Gutheil responded that American Skandia would treat the situation the same way Fortis had, and sent Weatherwax a copy of the relevant prospectus. The prospectus clearly states, "If the annuity is owned by one or more natural persons, it is payable upon the first death of such Owners. If the Annuity is owned by an entity, the death benefit is payable upon the Annuitant's death, if there is no Contingent Annuitant." Plaintiffs cannot establish that any reliance on Gutheil's alleged representation was reasonable because it was contrary to the plain language of the prospectus and, eventually, the annuity contract. In fact, the evidence demonstrates that Weatherwax and the decedent had copies of the prospectus before the group filled out the annuity application. It is well established that an individual who applies for an insurance contract and later receives it is obligated to read the contract and raise questions about its terms within a reasonable time after it is issued. *Casey v Auto Owners Ins Co*, 273 Mich App 388, 394-395; 729 NW2d 277 (2006). The rule is equally applicable to individuals who apply for annuities. "A contracting party has a duty to examine a contract and know what the party has signed, and the other contracting party cannot be made to suffer for neglect of that duty." *Montgomery v Fidelity & Guaranty Life Ins Co*, 269 Mich App 126, 130; 713 NW2d 801 (2005).

Both the prospectus and the annuity contract clearly state that the death benefit is payable upon the death of the oldest owner whenever the owners are live individuals. Thus, it was not reasonable for the decedent to rely on Gutheil's alleged statement to Weatherwax, because the verbal statement was directly contradicted by the prospectus and the application materials. It was also unreasonable for the decedent to continue to rely on Gutheil's statement after he received the actual annuity contract that contained contradictory information. The final contract denounces any oral representation that would alter the contract's written terms and only acknowledged written modifications adopted by certain company executives. If the contract did not accurately reflect the decedent's intent, the decedent had the right to cancel it within 21 days. He did not cancel it. Accordingly, there was no genuine issue of material fact regarding plaintiffs' misrepresentation claim.

Plaintiffs also argue that the annuity contract should be reformed because of a mutual mistake, but they have not established any mutual mistake. They allege only that they were mistaken about the terms of the contract. Although Gutheil may have perpetuated an existing misunderstanding about how the contract would function if the primary annuitant died without being an owner, any "mistake" in this regard already infected plaintiffs' perception of the mimicked Fortis contract. This alleged misperception existed, and should have been dispelled, before decedent even submitted an application, so plaintiffs fail to demonstrate that American Skandia, on the basis of the presented application, mistook its obligations under the contract if the non-owning annuitant predeceased the annuity's owners. A mistake by one side regarding the legal effect of an agreement is not a basis for reformation of a contract. *Casey, supra* at 398-399. Accordingly, there is no genuine issue of material fact with respect to this issue. The trial court did not err in granting summary disposition in favor of American Skandia.

Affirmed.

/s/ Kathleen Jansen
/s/ Peter D. O'Connell
/s/ Karen M. Fort Hood