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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-002861-MR

SEAN E. TAYLOR — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JAMES M. SHAKE, JUDGE
ACTION NO. 98-CI-002439

AMERICAN INDEPENDENT INSURANCE CENTERS, INC.;
MUTUAL SERVICE CASUALTY INSURANCE COMPANY;
AND DIRECT GENERAL INSURANCE AGENCY OF
KENTUCKY, INC. — APPELLEES

OPINION
AFFIRMING
** ** ** ** **

BEFORE: GUDGEL, CHIEF JUDGE, BARBER, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: Sean E. Taylor appeals from an order of the Jefferson Circuit Court granting summary judgment to appellees, American Independent Insurance Centers, Inc., Mutual Service Casualty Insurance Company, and Direct General Insurance Agency of Kentucky, Inc. Having determined that no genuine issue of material fact exists and that appellees are entitled to judgment as a matter of law, we affirm the judgment of the Jefferson Circuit Court.

In the morning of December 23, 1997, Taylor went to American Independent Insurance Centers, Inc. (American), located in Louisville, Kentucky, for the purpose of obtaining insurance on his 1994 Toyota Corolla. American is an independent agency which obtains policies from different insurance companies. Taylor had called American earlier, was given a quote over the phone, and told he would need to bring a down payment of $389.12 with him for the insurance. When Taylor went to American on December 23, 1997, he was assisted by customer service representative Carla Washington. Washington informed Taylor that his insurance would be through Direct. (Appellee's brief indicates that Direct General Insurance Agency of Kentucky, Inc. is the managing general agent for Mutual Service Casualty Insurance Company.) Washington filled out an application for insurance for Taylor, which showed that the policy was effective as of December 23, 1997. Washington also filled out a finance agreement, entitled "20/27 Day Payment Plan" which reflected a total price of $3110.37, less a down payment of $389.12 "DUE NOW", leaving $2721.25 as the amount financed. The finance agreement was signed by Taylor, and showed a policy effective date of December 23, 1997. Washington did not discuss the down payment with Taylor. It appears from the record that Taylor was in a hurry, and Washington forgot to ask for the down payment, and that Taylor forgot or did not offer to pay it.

Washington then gave Taylor "Commonwealth of Kentucky Proof of Insurance" cards, showing that Taylor was insured through Mutual Service Casualty Insurance Company effective

December 23, 1997, along with a copy of the finance agreement, after which Taylor left. In her deposition testimony, Washington stated that, shortly after Taylor left, she realized that she had not taken Taylor's down payment. Washington's co-worker, customer service agent Deborah Freemont, then called Taylor's mother, which was the number he had listed, and told her that Taylor did not have coverage because he had not made his down payment. Washington testified that Taylor's mother said that she would let Taylor know.

In the late afternoon of December 23, 1997, Taylor began driving the 1994 Toyota Corolla from Louisville to Dayton, Ohio to attend a Christmas party. According to Taylor's deposition testimony, after perhaps an hour into the drive he received a phone call on his cell phone from his mother, who told him that an American agent had called her and said something to the effect that she (the agent) had forgotten to get the down payment from him or that he didn't give her the money. Taylor told his mother that he was already out of Louisville, and that he would have to give them the money when he got back. Taylor stated that his mother did not relay any messages concerning coverage.

Shortly after receiving the phone call, while traveling north on I-71 towards Cincinnati, Taylor fell asleep at the wheel and collided with another vehicle. Taylor was taken to a Carrollton hospital, and Taylor's vehicle and the vehicle which he hit both sustained damage.

On December 29, 1997, Taylor returned to American's office, and paid the $389.12 down payment by money order, and a new finance agreement, entitled 20/27 Day Payment Plan, was executed. The new finance agreement, signed by Taylor, showed an effective policy date of December 29, 1997, and the date on Taylor's December 23, 1997 application was altered to reflect an effective date of December 29, 1997. No new insurance cards were issued.

It is unclear when and to whom Taylor first reported the December 23, 1997 accident. Taylor could not recall if he informed American of the accident when he was there on December 29. Robin Yates, a claims adjuster with Direct, testified that she first became aware of the claim on January 26, 1998. Yates subsequently informed Taylor that Direct was not responsible for any damages or injuries resulting from the December 23, 1997 incident, as his policy/coverage did not go into effect until December 29, 1997 when he paid the down payment.

On May 5, 1998, Taylor filed a complaint in Jefferson Circuit Court, naming as defendants, American, Mutual, and Direct. Taylor's complaint alleged that appellees failed to provide the benefits to which he was entitled under the insurance policy and acted in violation of Kentucky's unfair claims settlement practices statute, KRS 304.12-230. On May 13, 1999, American filed a motion for summary judgment. On October 5, 1999, the court entered an order granting American's motion. On October 7, 1999, Mutual and Direct moved the court to dismiss

Taylor's complaint against them by reason of the summary judgment order entered by the court on October 5, 1999. The motion was granted on October 12, 1999, and this appeal followed.

On appeal, Taylor argues that the trial court erred in granting summary judgment to appellees, as there was a question of material fact as to whether he was covered at the time of the accident on December 23, 1997. Taylor contends that the obligation he incurred by signing the finance agreement was sufficient consideration to form an insurance contract, and having issued written proof of coverage, or at least proof of a binder, American was obligated to follow certain statutory procedures to cancel the policy, which they did not. Additionally, Taylor presents arguments based on principles of waiver and estoppel.

In granting summary judgment to appellees, the trial court found that the down payment was a condition precedent to the insurance coverage, based on the doctrine of reasonable expectations. Although we agree with the trial court that summary judgment was proper, we reach this conclusion on different grounds. The reasonable expectations doctrine is applicable only where the policy at issue is ambiguous. Simon v. Continental Ins. Co., Ky., 724 S.W.2d 210 (1986). Unlike the trial court, we see no ambiguity in the finance agreement or the application regarding the down payment. Rather, we believe the documents show plainly on their face that the down payment is a condition precedent to insurance coverage. The finance agreement states in two places that the down payment is "DUE NOW". The

application states, "DOWN PAYMENT FROM INSURED MUST BE SUBMITTED WITH APPLICATION" and contains a section entitled "APPLICANT'S STATEMENT - READ BEFORE SIGNING", which states "I further agree that if my down payment or full payment check is returned by the bank because of non-sufficient funds, coverage will be null and void from inception." Further, Taylor stated in his deposition testimony that he had been told on the phone by American that he would need to bring the $389.12 down payment with him to get the insurance.

Hence, it is clear that the parties agreed that the down payment was a condition precedent to the creation of the insurance contract, and as such condition did not occur, no insurance contract was formed on December 23, 1997. We believe that the condition failed to occur due to a mutual mistake of the parties - Washington forgot to ask for the down payment, and, accepting Taylor's version of the facts as true, he was in a hurry and forgot to pay it. The parties subsequently recognized the mistake, as demonstrated by the parties' execution of the new finance agreement and modified the application by mutual agreement on December 29, 1997. See, Transport Insurance Co. v. Ford, Ky. App., 886 S.W.2d 901 (1994). It is the December 29, 1997 documents, on which date Taylor tendered the down payment and an insurance contract was thereby created showing a policy effective date of December 29, 1997, which control the expectations and obligations of the parties. Id.; see also, MFA Mutual Insurance Co. v. Black, Ky., 441 S.W.2d 134 (1969). Having determined that no contract was formed on December 23,

1997, it follows that no coverage existed for the December 23, 1997 accident. Further, as no contract was formed on December 23 1997, appellees were not required to follow statutory requirements regarding cancellation of insurance policies, nor did appellees' actions constitute a prohibited retroactive annulment. KRS 304.20-030; KRS 304.20-040.

Taylor cites Republic Life and Accident Ins. Co. v. Hatcher, 244 Ky. 574, 51 S.W.2d 922 (1932) for the proposition that American's acceptance of the payment plan as consideration for insurance is binding on the parties even though the application called for a cash down payment. Republic involved a life insurance policy which called for payment of the premium on or before the delivery of the policy. When the policy was delivered on July 1, the insured gave the agent a check post-dated July 10, which was accepted by the agent who had the authority to do so. The insured died July 9. In finding that the policy was in force, the court held that the acceptance of the check by an authorized agent was binding on the parties, even though the contract called for a cash payment. Hence, we believe Republic can be readily distinguished from the instant case, as there was no such offer and acceptance of an alternate form of consideration.

Taylor further argues that by accepting the finance agreement without discussing the down payment, and by issuing proof of insurance cards, appellees waived any claim to lack of consideration. We disagree. Waiver involves the "voluntary and intentional relinquishment of a known, existing right or power

under the terms of an insurance contract." Edmondson v. Pennsylvania National Mutual Casualty Insurance Co., Ky., 781 S.W.2d 753, 755 (1989), quoting Long, The Law of Liability Insurance, § 17.14. See also, Howard v. Motorists Mutual Insurance Co., Ky., 955 S.W.2d 525 (1997). Having determined that no contract existed on December 23, 1997, the doctrine of waiver does not apply. Further, it is clear that appellees did not knowingly and intentionally relinquish the right to receive the down payment as a condition precedent to insurance coverage, particularly in light of the fact that American immediately tried to contact Taylor as soon as it was discovered that the down payment had not been made.

Taylor finally argues that the appellees should be estopped from denying the existence of insurance coverage, as he reasonably relied on appellees' representations that he was covered. A party seeking estoppel must prove the following elements:

> (1) Conduct, including acts, language and silence, amounting to a representation or concealment of material facts; (2) the estopped party is aware of these facts; (3) these facts are unknown to the other party; (4) the estopped party must act with the intention or expectation his conduct will be acted upon; and (5) the other party in fact relied on this conduct to his detriment.

Gray v. Jackson Purchase Production Credit Association, Ky. App., 691 S.W.2d 904, 906 (1985).

Accepting Taylor's version of the facts as true, although questions of material fact could arguably exist regarding some of the above factors, with regard to the third

factor in particular, there was no evidence presented to indicate that Taylor did not know that he was required to make the down payment. To the contrary, Taylor's own testimony showed that he knew that a down payment was required:

> Q. Now did she explain to you the payment plan?
>
> A. I can't remember.
>
> Q. Did she tell you anything about making a payment?
>
> A. Not then or I would have gave her the money. I got on the phone and called up there earlier and asked them how much the down payment was, and I brought it with me.
>
> Q. They gave you a quote over the phone?
>
> A. Yes.
>
> Q. She did not ask you for the payment or did not mention anything at all about the payment when you were there?
>
> A. No.
>
> Q. Did you offer the payment?
>
> A. No.
>
> . . . .
>
> Q. Now when you went out there on the 23rd, you had phoned around prior to that and gotten some quotes?
>
> A. Yes.
>
> Q. And you knew when you went out there on the 23rd that you needed three hundred and eighty-nine dollars and twelve cents as a down payment for this insurance coverage?
>
> A. Yes.
>
> Q. You understand that insurance coverage is not free.
>
> A. Yes.

Q. And you had that in your pocket?

A. Yes.

Q. Cash money?

A. Cash.

As Taylor cannot establish that he was unaware that the down payment was required to effect coverage, he cannot establish the elements of estoppel. We further note that Taylor had no prior dealings with appellees, and hence could not justify any expectation that appellees would accept a late down payment and issue retroactive coverage. See, Howard, 955 S.W.2d 525.

The standard of review of a trial court's granting of 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, Ky. App., 916 S.W.2d 779, 781 (1996). We are to view the record in the light most favorable to the party opposing the motion and resolve all doubts in its favor. Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476, 480 (1991). Having viewed the record in the light most favorable to Taylor, and having determined that no genuine issue of material fact exists, appellees were properly entitled to summary judgment as a matter of law.

The judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Robert M. Klein
Louisville, Kentucky

BRIEF FOR APPELLEES, MUTUAL SERVICE CASUALTY INSURANCE COMPANY AND DIRECT GENERAL AGENCY OF KENTUCKY, INC.:

Michael J. Darnell
Louisville, Kentucky

BRIEF FOR APPELLEE, AMERICAN INDEPENDENT INSURANCE CENTERS, INC.:

Ridley M. Sandidge, Jr.
Lynn K. Fieldhouse
Louisville, Kentucky