RENDERED: DECEMBER 27, 2002; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-001748-MR

HARTFORD FIRE INSURANCE COMPANY — APPELLANT

v.

APPEAL FROM NELSON CIRCUIT COURT
HONORABLE LARRY D. RAIKES, JUDGE
ACTION NO. 97-CI-00287

HEAVEN HILL DISTILLERIES, INC.;
MCALEAR ASSOCIATES, INC.;
EUGENE WILSON & COMPANY — APPELLEES

TO BE HEARD WITH: 2001-CA-001874-MR

EUGENE WILSON & COMPANY — APPELLANT

v.

APPEAL FROM NELSON CIRCUIT COURT
HONORABLE LARRY D. RAIKES, JUDGE
ACTION NO. 97-CI-00287

HEAVEN HILL DISTILLERIES, INC.;
HARTFORD FIRE INSURANCE COMPANY;
MCALEAR ASSOCIATES, INC. — APPELLEES

CROSS-APPEAL NO. 2001-CA-001922-MR

HEAVEN HILL DISTILLERIES, INC. CROSS-APPELLANT

v. APPEAL FROM NELSON CIRCUIT COURT
HONORABLE LARRY D. RAIKES, JUDGE
ACTION NO. 97-CI-00287

HARTFORD FIRE INSURANCE COMPANY;
MCALEAR ASSOCIATES, INC.;
EUGENE WILSON & COMPANY CROSS-APPELLEES

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

BEFORE: BUCKINGHAM, COMBS, AND MILLER, JUDGES.

MILLER, JUDGE: Appeal No. 2001-CA-001748-MR and Cross-Appeal No. 2001-CA-001922-MR arise from a judgment of the Nelson Circuit Court entered July 16, 2001. Appeal No. 2001-CA-001874-MR was dismissed as interlocutory by order entered November 1, 2002. We affirm on Appeal No. 2001-CA-001748-MR and Cross-Appeal No. 2001-CA-001922-MR.

The matter involves a question of insurance coverage on a fire loss incurred by Heaven Hill Distilleries, Inc., (Heaven Hill) at its liquor storage facility located in Bardstown, Nelson County, Kentucky, on November 7, 1996. The fire and resulting loss was of large proportion.

The facts are as follows: In 1992, Heaven Hill contacted a local retail insurance agent, Eugene Wilson & Company (EWC) to obtain insurance. EWC could not provide the extensive coverage required by Heaven Hill. As is customary in the industry, EWC contacted an insurance broker, McAlear Associates, Inc., (McAlear), for assistance in placing the coverage. McAlear received Heaven Hill's application, a "submission," consisting of the coverage desired and property to be insured. The submission was presented by McAlear to a number of large insurers with McAlear acting as intermediary between the retail agent, EWC, and the insured Heaven Hill. The object was to receive "quotes" or "bids" for the business.

In 1992, Hartford Insurance Company (Hartford) reviewed the "submission" and agreed to issue its policy for 22.5 million dollars' coverage, in "excess" of 2.5 million, which Heaven Hill was to otherwise obtain as "primary coverage." The initial policy was for a term of one year extending from November 15, 1992 until November 15, 1993. From 1993 through 1995, Hartford renewed its policy on an annual basis. It appears that each year, EWC forwarded the submission to Hartford and apparently other insurers. Each year Hartford received the submission and offered to remain on the risk. Heaven Hill, in turn, received Hartford's "quote" and accepted. Upon acceptance by Heaven Hill, McAlear would issue a document referred to as "cover notes" (a binder) denoting coverage until Hartford issued its policy. Through the years, there was no substantial change in coverage.

A premium was exacted for scheduled property according to assigned values.

The record is vague as to whether the initial submission in 1992 and succeeding years, sought "blanket coverage." In any event, coverage included some forty-two separate locations, including the Bardstown location where the fire occurred.

In the fall of 1995, Heaven Hill began the renewal process for the ensuing year, (November 15, 1995 through November 15, 1996). As in prior years, Heaven Hill presented its submission to EWC, which in turn forwarded it to McAlear. McAlear forwarded the submission to Hartford. Hartford elected to remain on the risk and rendered a "quote" to McAlear, which was forwarded to Heaven Hill for acceptance. On or about November 14, 1995, George Stone of McAlear wrote Bob Lee, an underwriter for Hartford, and directed him to "bind" coverage for the 1995-1996 year. During the negotiations for the 1995-1996 coverage, a question arose as to whether the coverage provided by Hartford was, in fact, "blanket coverage" as desired by Heaven Hill or "scheduled coverage."

To resolve this concern, Charles Parrish of EWC contacted Judy Rockwell of McAlear. Judy Rockwell proceeded to contact Hartford. She testified that she did, in fact, phone Bob Lee, the Hartford underwriter, and the latter explained to her that he understood that the "Occurrence Limit of Liability Endorsement" (Endorsement) on the policy provided "Blanket Per Location" coverage. Lee could not answer "yes" or "no" as to

Judy Rockwell's phone call; however, Judy Rockwell maintained contemporaneous notes of the event. Moreover, on or about November 17, 1995, following her stated conversation with Bob Lee, Judy Rockwell prepared a "cover note" that she sent to Lee at Hartford. She also sent the original cover note to EWC so Parrish would provide it to Heaven Hill. Parrish provided the cover note to Heaven Hill on November 29, 1995.

The cover note was accompanied by a letter to Lee, which stated: "Enclosed please find your copy of the cover note for the captioned account. Please review and advise if there are any problems." In the cover note, Rockwell specifically included the following statement "**Coverage is blanket per Location.**"[1] Neither Lee, nor anyone else, on behalf of Hartford, responded to this communication.

It is undisputed that Lee received the cover note. It is also undisputed that Lee never contacted McAlear nor Heaven Hill to advise that the coverage was other than blanket per location.

Upon the foregoing, the trial court rejected Heaven Hill's contention that Hartford's policy afforded blanket coverage. The court reasoned that the Endorsement was unambiguous, and the policy covered only "involved" property and recovery for loss as determined by the schedule of properties listed and their respective values.

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[1]After the fire on November 7, 1996, Hartford honored its excess coverage policy as per "scheduled coverage." Payment of $19,954,516.00 was made. The dispute in this case is the difference between that sum and the $22,500,000.00 policy limits, which Heaven Hill insists should have been due.

Nevertheless, the court chose to submit the issue of blanket coverage to the jury on the basis of equitable estoppel. The jury heard evidence and returned a verdict in favor of Heaven Hill. Judgment was entered accordingly, thus precipitating this appeal.

The Endorsement is set forth as follows:

> OCCURRENCE LIMIT OF LIABILITY ENDORSEMENT
>
> IT IS UNDERSTOOD AND AGREED THAT THE FOLLOWING SPECIAL TERMS AND CONDITIONS APPLY TO THIS POLICY:
>
> 1. THE LIMIT OF LIABILITY OR AMOUNT OF INSURANCE SHOWN ON THE FACE OF THIS POLICY, OR ENDORSED ONTO THIS POLICY, IS A LIMIT OR AMOUNT PER OCCURRENCE. NOTWITHSTANDING ANYTHING TO THE CONTRARY CONTAINED HEREIN, IN NO EVENT SHALL THE LIABILITY OF THIS COMPANY EXCEED THIS LIMIT OR AMOUNT IN ONE DISASTER, CASUALTY, OR EVENT, IRRESPECTIVE OF THE NUMBER OF LOCATIONS INVOLVED.
>
> 2. THE PREMIUM FOR THIS POLICY IS BASED UPON THE STATEMENT OF VALUES ON FILE WITH THE COMPANY, OR ATTACHED TO THIS POLICY. IN THE EVENT OF LOSS HEREUNDER, LIABILITY OF THE COMPANY SHALL BE LIMITED TO THE LEAST OF THE FOLLOWING:
>
> (A.) THE ACTUAL ADJUSTED AMOUNT OF LOSS, LESS AMOUNT (S) OF UNDERLYING INSURANCE AND APPLICABLE DEDUCTIBLE(S);
>
> (B.) THE TOTAL STATED VALUE FOR THE PROPERTY INVOLVED, AS SHOWN ON THE LATEST STATEMENT OF VALUES ON FILE WITH THE COMPANY, LESS AMOUNT(S) OF UNDERLYING INSURANCE AND APPLICABLE DEDUCTIBLE(S);
>
> (C.) THE LIMIT OF LIABILITY OR AMOUNT OF INSURANCE SHOWN ON

THE FACE OF THIS POLICY OR
ENDORSED ONTO THIS POLICY.

After examining the above Endorsement, we are of the opinion the circuit court was correct in concluding, as a matter of law, that the insuring agreement is unambiguous. The Endorsement clearly provides for scheduled coverage, for which a premium is exacted as per the respective values of properties listed.

As the Endorsement was unambiguous, Hartford contends that the issue of equitable estoppel should not have been submitted. Hartford directs our attention to Kentucky Revised Statutes (KRS) 304.14-180(1)(2) which provides that an agreement to modify an insurance contract is invalid "unless in writing and made a part of the policy" and insurers are expressly forbidden from making contracts "other than as is plainly expressed in the policy." Hartford also directs us to the decision of Luttrell v. Cooper Industries, Inc., 60 F.Supp. 2d 629, 631 (E.D. Ky. 1998), indicating that under Kentucky law an unambiguous contract cannot be varied by extrinsic evidence.

Hartford points to what it claims to be the general rule that the unambiguous language of an insurance contract governs, and that oral statements interpreting coverage cannot change the plain meaning of the contract. Hartford does, however, recognize an exception to the effect that estoppel may be available to prevent a "forfeiture." See Howard v. Motorists Mutual Insurance Company, Ky., 955 S.W.2d 525 (1997). Hartford insists, however, that the general rule prevents the use of estoppel to "expand" coverage to insure against risks not

contemplated. See Owens v. National Life & Accident Insurance Company, 234 Ky. 788, 29 S.W.2d 557 (1930). We must disagree.

We are of the opinion that when a policy is issued with knowledge that the insured is relying upon certain coverage, the unauthorized statement of an agent that the desired coverage is afforded may form the basis for equitable estoppel. This rule is announced in L. Russ and T. Segalla, 3 Couch on Insurance 50:10 (3rd Ed. 1997). Moreover, it is consistent with the provisions of KRS 304.9-035, which provides:

> Any insurer shall be liable for the acts of its agents when the agents are acting in their capacity as representatives of the insurer and are acting within the scope of their authority.

We think Hartford's action through its agent, Lee, in assuring McAlear that the policy issued provided blanket coverage per location, coupled with Hartford's failure to reply to the cover note setting forth Heaven Hill's desire for blanket coverage, formed a sufficient basis for estoppel. The circuit court correctly ruled that Heaven Hill relied upon this conduct as a matter of law, there being no indication Heaven Hill sought coverage otherwise.

The question before us is not a matter of estoppel to expand coverage by construction of language within the policy. The terms of the policy are clear. Rather, the question before us is Hartford's failure to provide the coverage requested, and its subsequent conduct in leading Heaven Hill to believe that it had, in fact, purchased such coverage. This, in our view, is a

classic case of equitable estoppel. See Graves County v. Sullivan, 283 Ky. 130, 140 S.W.2d 636 (1940).

Hartford also argues that the terms of the policy prohibit its agent from altering coverage, thus relieving Hartford from liability for alleged misrepresentation of its agent. We view the reasoning of Pan-American Life Insurance Company v. Roethke, Ky., 30 S.W.3d 128, 132 (2000) as dispositive. Therein, the Court stated that an insurer is liable for the act of its agent when the act is committed "within the scope of his authority, the insured reasonably relies upon that act, and the reliance constitutes the cause of the insured's damage." Id. at 132 (citing Grigsby v. Mountain Valley Insurance Agency, Inc., Ky., 795 S.W.2d 372 (1990)). Upon the authority of this decision, we are of the opinion that an agent may bind the insurer by his misrepresentations even though the policy specifically provides otherwise. As such, we must reject Hartford's argument that the terms of the policy bar application of the doctrine of equitable estoppel.

On cross-appeal, Heaven Hill argues that the Endorsement was ambiguous, and perforce, it was entitled to have the policy interpreted in its favor as a matter of law. Heaven Hill directs us to the case of St. Paul Fire & Marine Insurance Company v. Powell-Walton-Milward, Inc., Ky., 870 S.W.2d 223 (1994)(holding that ambiguous insurance contracts are to be construed in favor of the insured). As we have determined that the Endorsement was unambiguous, we must conclude that

interpretation of the policy is unnecessary. See Veech v. Deposit Bank of Shelbyville, 278 Ky. 542, 128 S.W.2d 907 (1939).

Upon the whole of this record, we perceive no error.

For the foregoing reasons, we affirm the judgment of the Nelson Circuit Court on appeal and cross-appeal.

ALL CONCUR.

BRIEFS FOR APPELLANT/CROSS-APPELLEE, HARTFORD FIRE INSURANCE COMPANY:

Dustin E. Meek
Louisville, Kentucky

ORAL ARGUMENT FOR APPELLANT/CROSS-APPELLEE, HARTFORD FIRE INSURANCE COMPANY:

David Trevor
Minneapolis, Minnesota

BRIEFS AND ORAL ARGUMENT FOR APPELLANT/APPELLEE, EUGENE WILSON & COMPANY:

A. Campbell Ewen
Louisville, Kentucky

BRIEFS AND ORAL ARGUMENT FOR APPELLEE/CROSS-APPELLANT, HEAVEN HILL DISTILLERIES, INC.:

Merrill S. Schell
Louisville, Kentucky

BRIEF AND ORAL ARGUMENT FOR APPELLEE, MCALEAR ASSOCIATES, INC.:

H. Frederick Humbracht, Jr.
Nashville, Tennessee