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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-000118-MR

MATTIE BAKER — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE AUDRA J. ECKERLE, JUDGE
ACTION NO. 11-CI-005364

KENTUCKY FARM BUREAU MUTUAL INSURANCE COMPANY AND MARY JO NEWTON — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, CHIEF JUDGE; JOHNSON, AND NICKELL, JUDGES.

JOHNSON, JUDGE: Mattie Baker ("Baker") appeals the following Jefferson Circuit Court orders: entered September 16, 2016, Opinion and Order, granting summary judgment to Kentucky Farm Bureau Mutual Insurance Company ("KFB"); entered December 14, 2016, Opinion and Order, granting summary Judgment to Mary Jo Newton ("Newton"); and entered December 14, 2016 Order

denying Baker's motion to set aside the summary judgment for KFB. After reviewing the record in conjunction with the applicable legal authorities, we AFFIRM the above orders of the Jefferson Circuit Court.

BACKGROUND

Baker is the owner of property located at 1189 Norton Avenue, Jefferson County. Originally, Baker used the property to store furniture connected to a business, Bi-Rite Furniture, which she and her husband owned. When Baker's husband passed away in 2007, she became the owner and manager of the business affairs relating to the property and began relying on her daughters, Sherry Berry and Barbara Jeter ("Jeter") to advise her and assist with the day-to-day business decisions.

According to the record, by 2008 there were no active tenants in the property, and in November 2008, records show that the Louisville Water Company shut off the water to the property. In 2009, Jeter suggested to Baker that the property needed to be insured and recommended Newton, an agent with KFB whom Jeter knew and had obtained insurance from in the past. Baker agreed.

Jeter contacted Newton and on August 14, 2009, based on her discussions with Jeter, Newton provided an insurance binder covering the property. On August 18, 2009, Newton met with Baker for the purpose of having Baker review and sign an application with KBF for coverage of the property.

The application which Baker reviewed, and ultimately signed, indicated that the property was occupied by a church. While Newton did an inspection of the outside of the property, she did not inspect the inside of the property. Newton also took two photographs of the outside of the building for her records. Newton's inspection of the outside of the property showed that the parking lot was vacant and there were no outward signs indicating the property was being used as a church. When she went over the policy with Baker, Newton mentioned to her that the property looked vacant and did not look like it was being utilized as a church, but Baker did not respond. Baker reviewed the policy and signed it.

Within sixty days of the insurance contract being signed, it was discovered that the property had been vandalized. Thieves had stolen copper wiring and water piping from the building apparently over a period of several months. As result, upon discovering the damage to the building, Baker filed a claim with KFB seeking payment for her loss.

After reviewing its records, KFB denied Baker's claim based upon its determination that at the time the policy was issued the property was not occupied by a church and had been at least partially vacant. KFB further stated that, regardless of whether or not Baker had been paying premiums, the application contained material misrepresentations in that it suggested the property was

occupied by a church listing "Churches – Lessor's Risk." KFB then stated that but for the misrepresentation in the application, it would not have issued the policy on the property. KFB stated that if it were to consider insuring the property it would it would have charged significantly higher premiums due to the increased risk of insuring vacant property.

After continued attempts to have KFB honor the policy, Baker filed suit against KFB on August 15, 2011, seeking a declaration of her rights under the policy in addition to seeking both compensatory and punitive damages. Baker alleges that KFB had wrongfully denied coverage, and that Newton, KFB's agent, was negligent in failing to fully explain the policy terms to Baker at the time Baker signed the application and prior to issuing the policy.

On September 16, 2009, the court granted KFB's motion for summary judgment finding that the insurance policy contained material misrepresentations concerning whether there was a church in residence and representing that the property was not vacant. The court also found that Baker had adopted the representations in the policy, regardless of who wrote them down, as her own by reading and signing the insurance application. On October 10, 2016, Baker filed a motion to set aside the September 2009 order granting summary judgment. On December 15, 2016, the court granted summary judgment to Newton and by

separate order and denied Baker's motion to set aside the summary judgment in favor of KFB. On January 13, 2017, Baker filed her Notice of Appeal.

STANDARD OF REVIEW

In reviewing a grant of summary judgment, our inquiry focuses on "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*, 916, S.W. 2d 779, 781 (Ky. App. 1996). The trial court must view the record "in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." *Steelvest v. Scansteel Serv. Ctr., Inc.*, 807 S.W. 2d 476, 480 (Ky. 1991).

As an appellate court we need not defer to the trial court's decision on summary judgment and will review the issue de novo because only legal questions and no factual findings are involved. *Allstate Ins. Co. v. Smith*, 487 S.W.3d 857, 860 (Ky. 2016).

ANALYSIS

Baker raises several issues on appeal. However, we will first review whether or not there was a material misrepresentation in the application Baker submitted to KFB.

Baker argues in her brief that she did not commit fraud in violation of Kentucky Revised Statutes ("KRS") 304.14-110. While we agree that Baker did

not commit fraud, the issue before us is not one of fraud, but rather was there a material misrepresentation in the application for insurance which Baker submitted to KFB.

> All statements and descriptions in any application for an insurance policy or annuity contract, by or on behalf of the insured or annuitant, shall be deemed to be representations and not warranties. Misrepresentations, omissions, and incorrect statements shall not prevent a recovery under the policy or contract unless either:
>
> (1) Fraudulent; or
>
> (2) Material either to the acceptance of the risk, or to the hazard assumed by the insurer; or
>
> (3) The insurer in good faith would either not have issued the policy or contract, or would not have issued it at the same premium rate, or would not have issued a policy or contract in as large an amount, or would not have provided coverage with respect to the hazard resulting in the loss, if the true facts had been made known to the insurer as required either by the application for the policy or contract or otherwise. This subsection shall not apply to applications taken for workers' compensation insurance coverage.

KRS 304.14-110

The court ruled that proving fraud was unnecessary. Kentucky law requires that a misrepresentation in a policy must be material as stated in the statute and we agree. Kentucky has uniformly held that a material misrepresentation in an application for an insurance policy, even innocently made, will void the policy. *Metro. Life Ins. Co. v. Tannenbaum*, 240 S.W.2d 566, 569

(Ky. 1951). Applying KRS 304.14-110 to the facts of this case, the evidence in the record is that KFB would have rejected Baker's application or, at the very least, would have charged a different premium had it known that the property being insured was not occupied by a church. Thus, under KRS 304.14-110(2-3), the misrepresentation was material, and the insurance contract could be voided.

The court found that while Baker counters that Newton filled out the application, Baker acknowledges that she read and signed the document and thus adopted all the representation in the application as her own. In addition, there was discussion between Newton and Baker about the vacancy of the property at the time Baker reviewed the application.

Based upon the record we find that there was no genuine issue in the record even when viewing the record in a light most favorable to Baker. Thus, we affirm the summary judgment as to KFB. Since we concur with the court that the insurance application was void, the issue of whether or not KFB is required to wait 60 days before denying coverage is moot.

The next issue raised by Baker concerns what duty, if any, is owed by Newton to Baker. Under Kentucky law, if an insurer's agent assumes a duty to advise an insured he does so either expressly or impliedly.

> An implied assumption of duty may be present when: (1) the insured pays the insurance agent consideration beyond a mere payment of the premium; (2) there is a course of dealing over an extended period of time which

> would put an objectively reasonable insurance agent on notice that his advice is being sought and relied on; or (3) the insured clearly makes a request for advice.

Mullins v. Commonwealth Life Ins. Co., 839 S.W.2d 245, 248 (Ky. 1992) (citations omitted).

Baker contends that Newton had a duty to her to investigate the property being insured and advise Baker on the need to obtain a different type of insurance policy. Under Kentucky law, Baker could only prevail on her claim against Newton if she could demonstrate that Newton owed such a duty to her. Thus, Baker would have to show that Newton had a duty to her to investigate the property's interior, ascertain that it was not occupied by a church, inform Baker that the insurance policy did not cover the vacant property, and ensure that the resulting application contained no misrepresentations that voided the policy at its inception. The court ruled that, as a matter of law, Newton's duty to Baker was not so broad.

The question of duty is an issue of law which places the burden of proof on the insured. In reviewing the record, even in a light most favorable to Baker, we agree with the court's finding that Newton had assumed no duty, express or implied, to Baker. *Id.* The record does not support that Newton impliedly assumed a duty to Baker other than that which a normal insurance agent and insured have. Baker cites no Kentucky law to support her contention that

Newton owed her a duty of care. As *Mullins* points out, "When circumstances present an issue of an insurance company and/or agent 'holding itself out' as a counselor and/or advisor, proof of the standard in this type of case may require expert testimony at trial." *Id.* at 249. This case does not pose such an issue. Wherefore, we concur with the court that Newton owed no duty to Baker.

Therefore, Baker's argument concerning whether or not Newton breached a standard of care is moot since no duty was owed.

CONCLUSION

Based upon the foregoing, we AFFIRM the September 16, 2016 Opinion and Order, the December 15, 2016 Opinion and Order, and the December 15, 2016 Order of the Jefferson Circuit Court.

ALL CONCUR.

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