STATE OF MICHIGAN

COURT OF APPEALS

ARNOLD GRINBLATT,

Plaintiff-Appellant,

v

ROYAL MACCABEES LIFE INSURANCE COMPANY,

Defendant-Appellee.

UNPUBLISHED
July 24, 1998

No. 199729
Oakland Circuit Court
LC No. 95-507404 CK

Before: McDonald, P.J., and Saad and Smolenski, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting summary disposition to defendant pursuant to MCR 2.116(C)(10). We affirm.

On September 6, 1991, plaintiff, one of defendant's insurance agents, saw Dr. Trivax with a complaint of abdominal numbness. On September 8, 1991, plaintiff went to a hospital emergency room again with a complaint of abdominal numbness. The hospital performed several tests and plaintiff was sent home. In an application dated September 28, 1991, plaintiff applied to defendant for a policy of disability insurance. The application asked, in relevant part, the following questions:

> 5. Has any person proposed for coverage within the past five years:
>
> a. Been examined by or consulted a physician or other practitioner?
>
> b. Been under observation or treatment in a hospital, sanitarium or institution?

Plaintiff answered "No" to both questions.

In October, 1991, defendant approved and subsequently issued to plaintiff a disability insurance policy containing the following clause (referred to by the parties as the "incontestability clause"):

TIME LIMIT ON CERTAIN DEFENSES

> We rely on the statements made in Your application. But after two years from the Policy Effective Date, no misstatements, except fraudulent misstatements, in the application may be used by Us to void the Policy or deny any claim for loss incurred or Disability that begins after the end of the two year period.

In November, 1991, plaintiff was definitively diagnosed with multiple sclerosis.

In approximately December, 1994, plaintiff became disabled by multiple sclerosis. After defendant denied benefits, plaintiff brought this action for breach of contract. Defendant counterclaimed, in part, for rescission of the disability policy on the ground that plaintiff had made fraudulent misrepresentations on the application for the disability policy. Concluding that no question of fact existed that plaintiff had committed fraud on the application, the trial court granted summary disposition in favor of defendant.

Plaintiff appeals this decision as of right. Plaintiff contends that the trial court erred in granting summary disposition in favor of defendant on the issue of fraud because material issues of fact exist.

As explained in *Clark v John Hancock Mut Life Ins Co*, 180 Mich App 695, 701; 447 NW2d 783 (1989):

> In ruling on a motion based on MCR (C)(10), the trial court must give the benefit of all reasonable doubt to the party opposing the motion in determining whether a genuine issue of material fact exists and grant the motion only if satisfied that it is impossible for the claim to be supported at trial due to an insurmountable deficiency. When making such a motion, the moving party must submit some sort of documentary evidence in support of the grounds it asserts. The party opposing the motion then carries the burden of showing that a genuine issue of disputed fact exists. In making that showing, the nonmoving party may not rest upon the allegations or denials of his pleading; rather, he must, by affidavit or other documentary evidence, set forth specific facts showing that a genuine issue for trial exists. If the nonmoving party fails to make such a showing, summary disposition is proper.

This Court reviews de novo a trial court's grant of summary disposition pursuant to MCR 2.116(C)(10). *Countrywalk Condominums, Inc v City of Orchard Lake Village*, 221 Mich App 19, 21; 561 NW2d 405 (1997).

The elements of fraud are a (1) false and (2) material representation (3) made either with the knowledge that the representation is false or recklessly without any knowledge of the truth and as a positive assertion (4) with the intention that it should be acted upon another and (5) the other acted in reliance on the representation and (6) thereby suffered injury. *Kuebler v Equitable Life Assurance Society of the United States*, 219 Mich App 1, 6; 555 NW2d 496 (1996).

Plaintiff first argues that a material issue of fact exists with respect to whether he gave false answers to questions 5a and 5b. With respect to question 5a, plaintiff contends that he viewed Dr. Trivax not as his own physician, but as his health insurer's physician, and that, as with a life insurance application he had filled out a year earlier, he interpreted the disability application as asking whether he had been treated by a physician for the conditions specifically listed in the application. With respect to question 5b, plaintiff contends that the question is ambiguous, that he believed the question concerned whether he had actually been admitted to the hospital for treatment and observation, and that that he did not consider a one-time visit to an emergency room after which he was sent home to be the type of "hospitalization" referred to by question 5b.

Questions and answers in an application for insurance must be liberally construed in favor of the insured. *Clark, supra* at 698; *Mut Benefit Life Ins Co v Abbott*, 9 Mich App 547, 552; 157 NW2d 806 (1968). In this case, question 5a does not ask whether plaintiff had been examined by or consulted his own personal physician for any of the conditions listed specifically on the application within the past five years. Rather, the language of question 5a is clear in its inquiry concerning whether "within the past five years" plaintiff had been examined by or consulted "a physician or other practitioner?" In addition, the instructions with respect to any "Yes" answers instruct the applicant to include the "names and address of all physicians . . . ." Moreover, the application does not restrict its inquiry to only the illnesses or conditions specifically listed in the application, but rather asks the following in question 7j: "Has any person proposed for coverage had or been treated for . . . any illness, ailment, abnormality, or injury not mentioned above within the past five years?" We conclude that there is no question of fact but that plaintiff's answer to question 5a, viewed in its proper context, was untrue. *Clark, supra*.

Question 5b does not refer to "hospitalization." Rather, the language of question 5b is clear in its inquiry concerning whether, within the past five years, plaintiff "had been under observation or treatment in a hospital . . . . ." The instructions with respect to any "Yes" answers instruct the applicant to include the "names and address of all . . . medical facilities." We again conclude that there is no question of fact but that plaintiff's answer to question 5b, viewed in its proper context, was untrue. *Id*.

Next, plaintiff contends that a question of fact exists concerning whether his misrepresentations were material.

MCL 500.2218(1); MSA 24.12218(1), provides as follows:

> No misrepresentation shall avoid any contract of insurance or defeat recovery thereunder unless the misrepresentation was material. No misrepresentation shall be deemed material unless knowledge by the insurer of the facts misrepresented would have led to a refusal by the insurer to make the contract.

The insurer bears the burden of proving materiality. *Zulcosky v Farm Bureau Life Ins Co of Michigan*, 206 Mich App 95, 97; 520 NW2d 366 (1994).

In this case, defendant supported its motion for summary disposition with the deposition of its chief disability underwriter, who testified that defendant would have declined to issue the disability policy

to plaintiff had plaintiff truthfully disclosed his visits to physicians on the application. On appeal, plaintiff contends that defendant "has not presented any evidence of past practices where such or similar information led to an investigation or to denial of a policy of insurance." In determining the issue of materiality, evidence of the insurer's practices with respect to the acceptance or rejection of similar risks is admissible. *Id*. However, in this case, defendant made the requisite initial showing that plaintiff's misrepresentations were material through the deposition testimony of its chief disability underwriter. The burden then fell to plaintiff to show, by affidavit or other documentary evidence, that a genuine issue of fact exists with respect to the issue of materiality. *Clark, supra*. Plaintiff did not do so. Thus, no question of fact exists on the issue whether plaintiff's misrepresentations were material. Cf *Zulcosky, supra*, with *Clark, supra*.

Finally, plaintiff correctly notes that in this case fraud requires a showing that at the time he made his false material representations he knew they were false and he made them with the intention that they be acted upon by defendant. *Kuebler, supra*. However, plaintiff contends in his brief on appeal that

> [i]n in the context of the present case, Defendant could only prove actual fraud on the part of Plaintiff if the facts established that Plaintiff knew that he had MS before he applied for this policy of insurance and deliberately misstated his answers on the application to hide this information from Defendant. But this cannot be established because, as the facts clearly show, as of September 28, 1991, the Plaintiff had no idea that he had MS or any other serious condition worth mentioning on his application and Defendant cannot prove any <u>fraudulent</u> statements necessary to invalidate this policy.

We disagree that defendant was required to establish that plaintiff knew that he had multiple sclerosis at the time he filled out the application. Rather, the fraudulent misrepresentations in this case relate to plaintiff's denial that he had been examined by or consulted a physician within the past five years (question 5a) and his denial that he had been under treatment or observation in a hospital within the past five years (question 5b). Though we give the benefit of all reasonable doubt to plaintiff, we nevertheless conclude that no question of fact exists on this record that at the time he made these false material representations plaintiff knew that they were false and intended that they be relied on by defendant.

Thus, we conclude that the trial court did not err in granting summary disposition in favor of defendant.

Affirmed.

/s/ Gary R. McDonald
/s/ Henry William Saad
/s/ Michael R. Smolenski