NO. COA01-797

NORTH CAROLINA COURT OF APPEALS

Filed: 7 May 2002

JOEL A. UNDERWOOD,
Plaintiff

v.

Moore County
No. 00 CVS 1306

NORTHWESTERN MUTUAL
LIFE INSURANCE COMPANY
and DARRELL R. PARKS,
Defendants

Appeal by plaintiff and defendants from judgment entered 10 April 2001 by Judge Steve A. Balog in Moore County Superior Court. Heard in the Court of Appeals 27 March 2002.

Baker Law Firm, P.A., by H. Mitchell Baker, III; and Jackson & Shuttlesworth, P.C., by K. Stephen Jackson and Jeff S. Daniel, for plaintiff.

Poyner & Spruill, L.L.P., by David Dreifus, for defendant-Northwestern Mutual Life Insurance Company.

No brief filed by defendant Darrell R. Parks.

WALKER, Judge.

On 4 January 2001, plaintiff filed a complaint alleging fraud, negligent misrepresentation, and unfair and deceptive trade practices by the defendants. He alleged that, in January 1990, defendant Parks, an agent of defendant Northwestern Mutual Life Insurance Company (Northwestern), attempted to sell plaintiff a life insurance policy from Northwestern. He further alleged that

defendant Parks orally represented to him that plaintiff would only have to pay premiums for nine years before the policy was "paid up."

Defendant motioned to dismiss all of the claims pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6)(1999). After a hearing on 9 April 2001, the trial court granted the motion "on the grounds that the statute of limitations has run as to each of Plaintiff's claims for relief."

The statute of limitations for fraud and negligent misrepresentation is three years from the time the cause of action accrued. N.C. Gen. Stat. § 1-52. A claim for unfair and deceptive trade practices must be commenced "within four years after the cause of action accrues." N.C. Gen. Stat. § 75-16.2.

Plaintiff contends that, in early January 1990, he consulted defendant Parks regarding purchasing life insurance about which he had little knowledge. Northwestern issued him a Whole Life Policy on 10 January 1990. Defendant Parks represented to plaintiff that if he paid an annual premium of $1,250 on the policy for nine years, he never would have to pay premiums again and the policy would be "paid up." Parks reinforced the representations with an illustration (Exhibit A) showing that no premium payments would be necessary after the ninth year of the policy. Exhibit A is entitled "$100,000 90 Life Plan With Short Pay Alternative." For the first nine years, plaintiff paid the annual premium of $1,250. However, in December of 1998, Northwestern informed plaintiff that

he would be required to continue paying premiums beyond the ninth year for the policy to remain in effect.

The actual policy which plaintiff purchased was entitled "Whole Life Paid up at 90." Page one of the policy stated the following:

> **Right To Return Policy** -- Please read this policy carefully. The policy may be returned by the Owner for any reason within ten days after it was received. The policy may be returned to your agent or to the Home Office of the Company at 720 East Wisconsin Avenue, Milwaukee, WI 53202. If returned, the policy will be considered void from the beginning. Any premium paid will be refunded.

The second page of the policy stated, "This policy is a legal contract between the Owner and The Northwestern Mutual Life Insurance Company. Read your policy carefully." Additionally, the last page of the policy stated, "It is recommended that you . . . read your policy . . . . Premiums payable for period shown on page 3." Page three of the policy contained a statement that the policy had an annual premium "payable for 61 years." [1]

In cases where fraud is alleged, "the cause of action shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake." N.C. Gen. Stat. § 1-52(9). "'Discovery' is defined as actual discovery or the time when the fraud should have been discovered in the exercise of due diligence." *Spears v. Moore*, 145 N.C. App. 706, 708, 551 S.E.2d 483, 485 (2001)(*citing Hyde v. Taylor*, 70 N.C. App. 523,

[1]The policy also stated that the annual premium for the waiver of premium was payable for 36 years.

528, 320 S.E.2d 904, 908 (1984)). Ordinarily, whether a person has exercised due diligence is a question for the jury; however, "where the evidence is clear and shows without conflict that the claimant had both the capacity and opportunity to discover the mistake or discrepancy but failed to do so the absence of reasonable diligence is established as a matter of law." *Grubb Properties, Inc. v. Simms Investment Co.*, 101 N.C. App. 498, 501, 400 S.E.2d 85, 88 (1991) (*citing Moore v. Casualty Co.*, 207 N.C. 433, 177 S.E. 406 (1934)). The same test is used for the date of the cause of action in unfair and deceptive trade practice claims. *Nash v. Motorola Communications and Electronics*, 96 N.C. App. 329, 385 S.E.2d 537 (1989), *aff'd*, 328 N.C. 267, 400 S.E.2d 36 (1991).

Plaintiff relies on this Court's opinion in *Baggett v. Summerlin Ins. & Realty, Inc.*, 143 N.C. App. 43, 545 S.E.2d 462 (2001) for the proposition that "the issue of whether the insured should have read his policy was a jury question." In *Baggett*, plaintiffs contended they were mislead into believing they had flood coverage and were excused from their failure to read the policy. *Baggett*, 143 N.C. at 54, 545 S.E.2d at 469. However, our Supreme Court reversed, 354 N.C. 347, 554 S.E.2d 336 (2001), and adopted the dissent of Judge Tyson. The dissent adopted by our Supreme Court held that "policyholders in North Carolina are under a duty to read their insurance policies. . . . Where a party has reasonable opportunity to read the instrument in question, and the language of the instrument is clear, unambiguous and easily understood, failure to read the instrument bars that party from

asserting its belief that the policy contained provisions which it does not." *Baggett*, 143 N.C. App. at 53, 545 S.E.2d at 468-69 (Tyson, J., dissenting).

Our Supreme Court has also held that "where no trick or device had prevented a person from reading the paper which he has signed or has accepted as the contract prepared by the other party, his failure to read when he had the opportunity to do so will bar his right to reformation." *Setzer v. Insurance Co.*, 257 N.C. 396, 401, 126 S.E.2d 135, 139 (1962).

Here, plaintiff alleged that defendant Parks orally communicated to him that he need only make premium payments for nine years before the policy was "paid up," evidenced by the illustration in Exhibit A. However, the written policy, which was issued to the plaintiff and dated 10 January 1990, clearly establishes the payment schedule under the policy would be an annual premium payable for sixty-one years. Further, the policy clearly informed the plaintiff on the first, second, and last pages that he should read the policy.

There is no allegation by plaintiff that he was pressured or tricked into purchasing the policy without reading it or that he was otherwise unable to determine from reading the policy what the actual terms provided regarding the duration of the payment of premiums. Thus, there is no indication that plaintiff lacked the capacity or the opportunity to discover any fraud or misrepresentation made at the time he purchased the policy. Therefore, in the exercise of reasonable diligence, he should have

discovered the fraud or misrepresentation when he received the policy which clearly and significantly differed from the representations made by defendant Parks as illustrated in Exhibit A.

Therefore, any cause of action by the plaintiff accrued on 10 January 1990. The trial court did not err in holding that the claims of the plaintiff were barred by the statute of limitations.

By this opinion, we do not condone any callous misrepresentations by agents in an attempt to sell insurance policies. The order of the trial court is

Affirmed.

Judges McGEE and CAMPBELL concur.

Report per Rule 30(e).