

1953

Norma Lois Cooper v. Foresters Underwriters, Inc. : Appellant's Reply Brief

Utah Supreme Court

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IN THE
SUPREME COURT
OF THE
STATE OF UTAH

NORMA LOIS COOPER,
Plaintiff and Respondent,

VS

FORESTERS UNDER-
WRITERS, INC.,
a corporation,
Defendant and Appellant.

APPELLANT'S
REPLY
BRIEF

Case No. 7941

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....., 1953.

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TABLE OF CONTENTS

	Page
STATEMENT OF FACTS	3
STATEMENT OF POINTS	4
POINT I: THE QUESTION OF WAIVER IS NOT BEFORE THE COURT.	
POINT II: THE RIGHT OF FORFEITURE WAS NOT WAIVED.	
ARGUMENT	4
AUTHORITIES CITED:	
Ballard, vs. Beneficial Life Insurance Com- pany 82 Utah 1, 21 Pac. 2d 847	10
Bleicher v. Heeter, 4 N. W. 2d 897, 141 Neb. 787	6
Bonnot vs. Grand Lodge Brotherhood of R. R. Trainmen (Mo.) 81 S. W. 2d 360	9
Commercial Casualty Co. vs. Rice, 157 N. Y. S. 1, 93 Misc. 567	6
Ellerbeck, vs. Continental Casualty Company, 63 Utah 530, 227 Pac. 805	7
General Service Corporation, vs. Allhoff Bros., App., 139 S. W. 2d 1062	6
Huber, vs. New York Life Insurance Company (Cal.) 63 Pac. 2d 318	9
Knarston, vs. Manhattan Life Insurance Com- pany (Cal.) 56 Pac. 773	9
Loftis, vs. Pacific Mutual Life Insurance Com- pany, 38 Utah 532, 114 Pac. 134	8

TABLE OF CONTENTS (*Continued*)

Page

Mass. Union Mut. Casualty Ins. Corporation, v. Insurance Budget Plan, 195 N. E. 903, 291 Mass. 62, 98 A. L. R. 1422	6
N. Y. Great American Indemnity Co., vs. Greenberg Bros. Iron & Steel Corporation, 10 N. Y. S. 2d 656, 170 Misc. 489	6
Sullivan, vs. Beneficial Life Insurance Com- pany, 91 Utah 405, 64 Pac. 2d 351	8
Vinther, vs. Sunset Mutual Life Insurance Company, 53 Pac. 182 (Cal.)	8
Watkins, vs. Brotherhood of American Yoe- men (Mo.) 176 S. W. 516	9
44 C. J. S. 1331	6
45 C. J. S. Page 558	7

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STATEMENT OF FACTS

Respondent has included in her Statement of Facts what purports to be a Stipulation contained in the record which came up from the City Court. No formal Stipulation was entered into in the City Court. After a discussion in a pretrial hearing before Judge J. Patton Neeley, a written memorandum was filed by each of the parties, which contained his version of the facts. The quotation on Pages 2 and 3 of Respondent's Brief is taken from a draft of a proposed Stipulation prepared by Re-

spondent, but which was never executed or agreed to by Appellant. The so-called "fuller Statement of Facts" referred to by Respondent was not agreed to at the time this matter was before the District Court, is not a part of the record on appeal and can not be considered by this Court on this appeal.

STATEMENT OF POINTS

I

THE QUESTION OF WAIVER IS NOT BEFORE THE COURT.

II

THE RIGHT OF FORFEITURE WAS NOT WAIVED.

ARGUMENT

I

THE QUESTION OF WAIVER IS NOT BEFORE THE COURT.

Respondent has tried to enlarge on the facts in an attempt to have this Court consider the question of waiver. As stated heretofore, the "fuller Statement of Facts" of Respondent is not a part of the record and not before the Court. There is nothing whatever in the record which is before the

Court which goes to the question of waiver. This case should be decided on the issues raised in Appellant's Brief.

II

THE RIGHT OF FORFEITURE WAS NOT WAIVED.

Notwithstanding Appellant's contention that the record excludes a consideration of the question of waiver, should this Court for any reason do so, then Appellant maintains there was no waiver either in fact or law.

The circumstances relied upon by Respondent to establish waiver are: The first premium was paid in the afternoon of March 31, 1951, and coverage started at noon of that day; that the payments on October 1, 1951, and October 31, 1951, were accepted unconditionally; that the payments on October 1, 1951, and October 31, 1951, were made in the afternoon of those days, after the grace period had expired; that Appellant never tendered back to Respondent any premiums. No waiver exists by reason of such circumstances.

The policy became effective on March 31, 1951, at noon. That the premium was paid and the policy issued later that day is of no consequence. Had the policy been dated the following day Respondent would not have been covered by insurance until Noon of the following day. Undoubtedly it was to the

advantage of Respondent to have immediate coverage and that is why the policy was dated on the date of the payment of the premium. No inference arises from this incident that a pattern of accepting premiums late was established.

Respondent contends the premium on October 1, 1951, was paid in the afternoon of said day. There is nothing even in Respondent's so-called "fuller Statement of Facts" which specifies the time of day when the premium was paid. Whether paid in the forenoon or afternoon, makes no difference. If paid in the forenoon Appellant was obligated to accept the premium as the grace period had not expired. If it was paid in the afternoon Appellant had the legal right to accept the payment and apply it to the September coverage. Respondent enjoyed coverage during the month of September, which Appellant was entitled to be compensated for. The authorities hold that even in the event of forfeiture the insured is not relieved of the obligation to pay for the period the policy is in force. 44 C. J. S. 1331, Mass. Union Mut. Casualty Ins. Corporation, v. Insurance Budget Plan, 195 N. E. 903, 291 Mass. 62, 98 A. L. R. 1422. Mo.—General Service Corporation vs. Allhoff Bros., App., 139 S. W. 2d 1062. Neb.—Bleicher v. Heeter 4 N. W. 2d 897, 141 Neb. 787. N. Y. Great American Indemnity Co., v. Greenberg Bros. Iron & Steel Corporation, 10 N. Y. S. 2d 656, 170 Misc. 489—Commercial Casualty Co. v. Rice, 157 N. Y. S. 1, 93 Misc. 567.

The payment of \$12.00 on October 31, 1951, was made in the afternoon of said day, but after

the accident had occurred. Appellant applied \$6.00 of that amount to the October coverage and the remaining \$6.00 was used to reinstate the policy. However, the policy could be reinstated only according to its terms:

“REINSTATEMENT. The right of the insured to have the policy reinstated after default in the payment of a premium, and his rights under the policy as reinstated, are determined by the provisions of the policy.” 45 C. J. S. Page 558.

The only limitation on reinstatement was that *it covered accidental injury thereafter sustained.* (Italics ours.)

The policy does not require a new application or evidence of insurability in order to effect a reinstatement. No reason existed to alter the date of coverage if reinstatement occurred on the last day of the month which had always been the date determining monthly coverage. The policy having been reinstated there was no occasion to tender back any premiums to Respondent.

The cases cited by Respondent are not in point and have no application to the case at bar.

In *Ellerbeck, vs. Continental Casualty Company*, 63 Utah 530, 227 Pac. 850, the insurance company had forwarded statements to the insured demanding payment of the annual premium. There had been a conversation between a representative of the insurance company and the insured wherein

a credit arrangement had been granted by the company to the insured and the company had accepted a partial payment of the premium for the period in question.

In *Loftis, vs. Pacific Mutual Life Insurance Company*, 38 Utah 532, 114 Pac. 134, arrangements had been made with the employer of the insured to deduct premiums from his wages. The insurance company submitted a list to the employer containing the names of policy holders and the amount of premiums owing for the months involved. It was made to appear that the insurance company knew other employees who had not earned sufficient wages each month to pay insurance premiums promptly when due. Several instances of default of payment had occurred, which the insurance company had disregarded. The company had demanded and received payment of premium and treated them as though they had been timely paid.

In *Vinther, vs. Sunset Mutual Life Insurance Company*, 53 Pac. 182 (Cal.) it was made to appear that ten payments had been made late and accepted by the company, one of which was as much as 38 days late.

In *Sullivan, vs. Beneficial Life Insurance Company*, 91 Utah 405, 64 Pac. 2d 351, the wife of the insured was told before the expiration of the grace period by a representative of the company that "When Mr. Sullivan sends the money to you, bring it in." She was also told it would be all right to bring

it in after the grace period expired, and was also advised that in case the money does not arrive for some time she could take an application for reinstatement form and have Mr. Sullivan fill it out and bring it in when he returned home.

In *Watkins, vs. Brotherhood of American Yoe-men* (Mo.) 176 S. W. 516, it was made to appear that it was the practice of the company to permit payments to be made after the due date in 80% to 90% of the cases and in such instances to reinstate the policy.

In *Bonnot, vs. Grand Lodge Brotherhood of R. R. Trainmen* (Mo.) 81 S. W. 2d 360, the Court found the company had waived a forfeiture where it was shown the Treasurer of its local lodges had been permitted to accept premiums late.

In *Knarston, vs. Manhattan Life Insurance Company* (Cal.) 56 Pac. 773, it was made to appear that a general agent had granted a ten day extension and had attempted to collect the premium on two occasions after the ten days had elapsed and the general agent had testified that he would have accepted the premium had it been tendered to him on the date of the death of the insured.

In *Huber, vs. New York Life Insurance Company* (Cal.) 63 Pac. 2d 318, it was held that the company was estopped under the circumstances to deny that an agent to whom payment had been made within the time allowed by the policy had authority to collect the premium.

The test of waiver is stated by this Court in Ballard, vs. Beneficial Life Insurance Company, 82 Utah 1, 21 Pac. 2d 847, as follows:

“Insurance company which, by any course of conduct, induces in mind of insured honest belief, reasonably founded, that strict compliance with stipulation for prompt payment of premiums will not be insisted on, waives right to forfeiture for nonpayment.”

According to this test none of the elements of waiver exists in the case at bar. No “course of conduct” was “reasonably founded” which could have induced in the mind of Respondent an honest belief that strict compliance would not be insisted upon. There is no question but what all payments prior to October 1st had been made within the grace period. There is nothing in the record to show that the October 1st payment was not made within the grace period. Assuming the October 1st payment to have been made in the afternoon of that day such does not establish a “course of conduct” upon which waiver can be predicated. None of the cases cited by Respondent so hold, and such is not the law.

Respectfully submitted,

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