1961

Joseph Okamura v. Time Insurance Company : Appellant's Brief

IN THE SUPREME COURT
OF THE
STATE OF UTAH

JOSEPH OKAMURA,
Plaintiff-Respondent,

vs.

TIME INSURANCE COMPANY,
Defendant-Appellant.

Case No.
11659

APPELLANT'S BRIEF

Appeal from the Judgment of the
Third Judicial District Court for Salt Lake County
Honorable Stewart M. Hanson, *Judge*

KIPP & CHRISTIAN and
D. GARY CHRISTIAN
520 Boston Building
Salt Lake City, Utah
Attorneys for Respondent

HANSON & BALDWIN and
H. WAYNE WADSWORTH
702 Kearns Building
Salt Lake City, Utah
Attorneys for Appellant

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IN THE SUPREME COURT OF THE STATE OF UTAH

JOSEPH OKAMURA,
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NATURE OF CASE

Action by plaintiff on a group insurance policy to recover expenses of accidental illness.

DISPOSITION IN THE LOWER COURT

Trial court sitting without a jury entered judgment in favor of plaintiff and denied defendant's motion to amend judgment to no cause of action in favor of defendant.

RELIEF SOUGHT ON APPEAL

Reversal of trial court's judgment.

STATEMENT OF FACTS

At all times pertinent to this cause of action, plaintiff and Richard D. Martinez were partners doing business through a corporation known as Garden

Art, Inc. The plaintiff and Mr. Martinez were members of the Utah Association of Nurserymen and as such became insured under a group policy which defendant negotiated with said association. The policy provided coverage for losses arising from accidental injury or illness. The group policy was issued to become effective on June 1, 1967 and premiums thereon were to be paid quarterly (EX. P4). The policy (EX. P5) and the members individual certificate (EX. P4) by their terms provided that an individual member's coverage would terminate "on the date any renewal premium is due, if the required premium for the Member is not paid."

The initial premium payment for the coverage of both the plaintiff and Mr. Martinez was paid April 25, 1967 by check of Garden Art, Inc. drawn by Mr. Martinez (EX. P7). The second quarterly premium payment for both the plaintiff and Mr. Martinez was also paid by a Garden Art, Inc. check drawn by Mr. Martinez on October 5, 1967 (EX. P8), four days after expiration of the 31 day grace period. The third quarter premium payment became due December 1, 1967 and the 31 day grace period expired January 1, 1968. Neither the plaintiff nor Mr. Martinez, nor anyone on their behalf, paid their third quarter premium payment prior to expiration of the 31 day grace period (R. 53 & 57). No attempt was ever made to reinstate Mr. Martinez' coverage (R. 68). Neither the plaintiff, nor anyone on his behalf, made any request to defendant company for an extension of the time

in which to pay his quarterly premium payment which became due December 1, 1967 (R. 5 & 20, 58, 72).

On February 6, 1968, plaintiff's wife telephoned Dr. Harold Lamb regarding plaintiff's ulcer condition (R. 19 & 23, 60) and on February 8, plaintiff was submitted to the St. Mark's Hospital with the chief complaint of "nausea and vomiting and upper abdominal pain for about 48 hours" (EX. D11, R. 62). However, plaintiff had experienced the symptoms for which he was hospitalized for as long as a week prior to February 6, when his wife called Dr. Lamb (R. 61, 65) and perhaps as long as two weeks prior to his hospitalization (R. 66). After talking to Dr. Lamb on February 6, plaintiff's wife on February 7 (EX. D12) mailed a letter (EX. D13) requesting reinstatement of the policy and a check in the amount of the quarterly premium (EX. D14), both of which were dated February 5. Defendant's premium accounting department was unable to identify the account and, therefore, on February 20 wrote to the plaintiff requesting his group or policy number (EX. D16). The plaintiff (R. 74) responded by noting his group and individual number on the bottom of defendant's letter and returning it to the defendant. After identifying the account, defendant by letter of February 29 (EX. D17) advised plaintiff that his coverage had lapsed as of December 1, 1967 since the quarterly premium payment due on that date had not been received during the thirty (31) day grace period and enclosed its check to refund the

February 5 payment made by plaintiff's wife. A reinstatement application was also enclosed for plaintiff's use in applying for reinstatement of his coverage if he desired to do so. The reinstatement application was never returned to the defendant.

At no time between the quarterly premium due date of December 1, 1967 and February 7, 1968 when plaintiff's wife mailed the check dated February 5, did anyone advise defendant company of the symptomatic flare-up of plaintiff's ulcer condition which necessitated his admission to the hospital on February 8 (R. 64). Plaintiff's wife made no mention of said condition in her note mailed February 7 (EX. D13) and plaintiff made no mention of his condition on the note he appended to defendant's letter of February 20, 1968 (EX. D16).

ARGUMENT

POINT I.

PLAINTIFF'S COVERAGE TERMINATED BEFORE LOSS WAS INCURRED.

There is no dispute of the fact that the third quarter premium payment due on or before December 1, 1967 was not paid by that date, or before expiration of the 31 day grace period. Likewise, there is no dispute of the fact that plaintiff never requested an extension of time in which to pay the third quarter premium. Therefore, the first question to be answered is: What legal effect should be given to the policy's automatic termination provision, i.e.,

> "INDIVIDUAL TERMINATION: The insurance of any Member shall terminate: (1) on the date any renewal premium is due, if the required premium for the Member is not paid; . . . " (The provision contains no notice requirement.)

If the automatic termination provision of a policy does not specify that notice of cancellation be given to the insured, then no such notice is required to effect termination of coverage. In *Rogers vs. Columbia National Life Insurance Company,* 213 N.W. 757 (Iowa 1927), the quarterly premium was not paid when due or within the 31 day grace period. Payment was tendered 22 days after expiration of the grace period and the company notified the insured that reinstatement would be necessary and mailed an application for such. The insured died before receiving the company's letter. The policy provided:

> "Upon default in payment of any premium, . . . this policy shall lapse, and the company's only liability shall be such, if any, as is hereinafter provided."

The plaintiff (beneficiary) contended that the termination clause made the policy voidable only, and not void, and that formal declaration of forfeiture and notice to the insured should have been given. The Iowa Supreme Court in sustaining the trial court's summary judgment in favor of the insurance company stated on this point:

> "Declaration and notice were clearly not contemplated by the contract and were not required."

In *Kehoe vs. Automobile Underwriters*, 12 F. Supp. 14 (D.C.M.D. Penn. 1935), the insured was charged with notice of the forfeiture provisons of his policy which rendered it void for nonpayment of premiums. In *Schick vs. Equitable Life Assurance Society*, 59 P.2d 163 (Cal. 1936), the court held that the policy provision providing for a 31 day grace period during which time the policy should be kept in force and that the payment of a premium during the grace period would not maintain the policy in force beyond the date when the succeeding premium became payable provided for the policy to terminate automatically without any action on the part of the company upon nonpayment of the premium on its due date. And in *Long v. Monarch Accident Insurance Company*, 30 F.2d 929 (4th Cir. 1929), it appears that the general rule of long standing is that in the absence of a special agreement (such as a notice of cancellation provision) the failure to pay an insurance premium when due ipso facto forfeits the policy unless there is an amount of money absolutely due the insured with which the company could pay the premium. This case involved the failure of an insured to pay a quarterly premium on a health and accident policy and apparently the policy did not contain a cancellation notice provision. The court in affirming the directed verdict of the trial court stated:

> "We start with the general principal that in the absence of a special agreement, failure to pay an insurance premium when due ipso facto forfeits the policy. (Cases cited)."

POINT II.

DEFENDANT DID NOT WAIVE THE AUTOMATIC FORFEITURE PROVISION OF ITS POLICY.

Since plaintiff does not contend that the third quarter premium payment was made before expiration of the grace period or that an extension of the grace period was requested or granted, the only remaining question is: Did defendant waive the automatic forfeiture provision of its policy.

At trial, plaintiff argued that since defendant had accepted the second quarter premium payment four days after expiration of the grace period it waived the automatic forfeiture provision of the policy with respect to the third quarter premium payment which was mailed 38 days after expiration of the grace period. The general rule is, however, that an insurer, at its option, may elect not to declare a forfeiture by accepting overdue premium payment and still not waive the requirement that future payments be made when due. Section 32:293 of *Couch on Insurance* 2d reads as follows:

> "An insurer is not obligated to insist upon a forfeiture when it occurs; rather, it may, at its option, elect to continue the policy in force. Furthermore, the right to enforce a forfeiture for nonpayment of a premium or premium note is not necessarily waived by mere silence or inaction on the part of the insurer. Again if, by the terms of the policy or certificate, the non-payment of a premium or assessment on the day specified operates ipso facto to terminate the contract, the failure of the insurer

to declare a forfeiture of the policy for non-payment of the premium or assessuent does not waive the requirement for prompt payment."

Also, it appears to be a rule of long standing that the acceptance of an overdue premium while the insured is in good health does not waive forfeiture of the policy when a subsequent overdue premium payment is made when the insured is in bad health or after a loss has occurred. *Grossman vs. Massachusetts Beneficial Association*, 9 N.E. 753 (Mass. 1887); *Ronald vs. Mutual R. F. Life Association*, 30 N.E. 739 (N.Y. 1892); *Hutchinson vs. Equitable Life Assurance Society*, 335 F.2d 592 (5th Cir. 1964). As stated in *Thomspon vs. Fidelity Mutual Life Insurance Company*, 92 S.W. 1098 (Tenn. 1906):

> "A permission to pay a premium after due date during the life and good health of the insured is not equivalent to a permission to pay after his death. It is well settled that a course of dealing between the parties, under which the insured accepted overdue premiums when the insured was in good health, will not give his representative or himself the right to pay or tender his premiums after maturity, and he is in a bad state of health, or had died.
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> * * *
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> "The reason of this is, there has been an increase in the risk or hazard. An insurer might be willing to accept an over-due premium and re-instate an insured when his condition of health is the same as when the policy was originally issued, but it cannot be argued from this that it should be required to reinsurance or reinstate the same person when he was or

> is in extremis. The course of dealing, if any, was to accept the overdue premiums from a live man, not a dead one." (or an ill one).

The foregoing rationale is somewhat moot since a course of dealing with a man in either a good or a bad state of health could hardly be established by an insurer excepting one overdue premium payment. As stated in *Couch on Insurance* 2d Section 32:391:

> "Since a few cases or intermittent acts do not constitute a custom or usage waiving a requirement of prompt payment, it manifestly follows that a custom or usage is not established by the mere fact that the policy provision was waived or ignored on one occasion. Consequently, evidence of the acceptance of one single over-due premium or assessment is insufficient of itself to establish a custom which will bar the insurer from claiming a forfeiture for non payment of subsequent premums or assessments. . . ."

In the same treatise at Section 32:379 are listed many cases or situations where a custom or usage to accept late premium payments has been established, but there is not a single case annotated therein wherein such a custom or usage has been predicated upon accepting one previous overdue payment.

Also, another fact which precludes a finding of usage between the parties necessary to predicate an estoppel based on reliance is that the previous overdue payment was paid by plaintiff's partner, Mr. Martinez, (R. 53) and consequently, plaintiff would have had no knowledge of whether it was paid before

or after expiration of the grace period. At trial plaintiff testified that he did not even know that the third quarter premium became due on December 1, 1967 (R. 56) although in answer to leading questions propounded at the taking of his deposition, he acknowledged such facts, but it is questionable as to whether or not he actually knew of the fact at the time the premium payment was due.

Regarding the change in plaintiff's health, the record is also clear that there was a substantial change for the worse after expiration of the grace period and before the third quarter premium payment was mailed. The grace period expired January 1, 1968 and although the plaintiff contended that he had suffered from his ulcer syndrome since inception of the policy, he admitted on cross-examination that these symptoms had not been severe enough to require his hospitalization (R. 67) and even during examination by his own counsel, admitted that the symptoms for which he was hospitalized had existed for only one or two weeks prior to his hospitalization on February 8, 1968, (R. 66), which would mean that they commenced approximately three weeks after expiration of the grace period. The defendant was never advised of the change in plaintiff's health (R. 73-74) and, therefore, could not have voluntarily waived an increase in the risk by accepting the overdue premium payment mailed February 7, 1968. As stated in 56 *Am. Jur.*, Waiver, Section 2,

a waiver must be the the intentional relinquishment of a known right. The defendant could not have intentionally relinquished its right to declare a forfeiture of the policy and avoid an increased risk when it had no knowledge of the facts which increased the risk, i.e, plaintiff's nausea, vomiting, and upper abdominal pain which commenced on February 6, forty-eight hours prior to his hospitalization on February 8, 1968. (Ex. D-11, R. 62).

The only other fact on which a waiver could possibly be predicated is that defendant cashed the check mailed by plaintiff's wife on February 7, 1966 and held the funds until they were returned by defendant's check on February 29, 1968. However, it is clear from defendant's letter of February 20, 1968 (Ex. D-16) that it did not accept the check unconditionally, but only on the basis that the account could be identified and found to be in good standing. As soon as the letter was received back with plaintiff's notation of the policy number, defendant with its letter of February 29 (Ex. D-17) refunded the February 7 payment and enclosed an application for reinstatement, which was never returned.

A leading Utah case on this point is *Ballard v. Beneficial Life Insurance Company*, 82 Utah 1, 21 P. 2d 847 (1933). In that case, the insured's life insurance policy had lapsed for nonpayment of premium, and, after becoming ill, the insured mailed the overdue premium with interest to the insurance company shortly before his death. Not knowing of the in-

sured's recent illness and death, the insurance company deposited the check in its account in the usual course of business, but sent the insured an application for reinstatement since the policy had lapsed. The insured died before receiving the reinstatement application. After learning of the insured's death, the insurance company refunded the overdue premium payment and denied liability under the policy. The trial court granted judgment for plaintiff and the insurance company appealed. The Utah Supreme Court reversed, finding no waiver had taken place. The court quoted extensively from *Cooley's Briefs on Insurance*, Vol. 5, 2d Ed., which in part stated:

> "A waiver of default cannot be predicated on the acceptance of past due premiums after the death of the insured, if the insurer is ignorant of the fact of death . . . It may be said that as a general rule the acceptance of a past due premium on the condition that the insured is in good health or that he furnish a certificate of good health, is not such an acceptance as will waive the forfeiture, such condition not being copmlied with . . . A waiver as to a prior forfeiture will not arise, where a life or accident insurer accepts premiums without knowledge at the time of the insured's death, or serious illness, or serious injury . . . A letter informing the insured of his right to reinstatement, and offering to reinstate on compliance with the conditions of which such right depends, is not a waiver, the conditions not being complied with, . . ."

As in the *Ballard* case, defendant herein did not know that plaintiff had become acutely ill on Febru-

ary 6 necessitating his admission to the hospital on February 8 for an operative procedure when it received the check mailed February 7, since it was not received until February 9 (Ex. Pl. reverse side). As soon as the payment was identified as being made on a policy which had already lapsed, the amount thereof was refunded by the defendant and he was sent an application for reinstatement, which was never returned.

CONCLUSION

The policy provided for automatic forfeiture in the event of nonpayment of quarterly premiums when due. The December 1, 1967 quarterly premium was not paid when due or within the 31 day grace period and no extension of the grace period was requested or granted. Therefore, plaintiff's coverage terminated as of December 1, 1967 pursuant to the terms of the policy. A waiver or estoppel can not be predicated upon the fact that the insurance company previously accepted one quarterly premium payment four days after expiration of the grace period since (1) the payment was made by plaintiff's partner rather than by plaintiff, (2) a custom or course of dealing cannot be established by one transaction, and (3) the previous overdue quarterly premium payment made four days after expiration of the grace period was while plaintiff was still in relatively good health, whereas the second overdue premium payment mailed 38 days after expiration of the grace period was not received by defendant until after plaintiff had been admitted

to the hospital for surgery. Likewise, a waiver cannot be predicated upon the fact that defendant cashed the overdue premium payment check since it was accepted conditionally pending identification of the account and was refunded as soon as it was determined that the policy on which it was paid had lapsed.

WHEREFORE, appellant and defendant below prays that judgment of the trial court be reversed and that it be awarded its costs incurred herein.

Respectfully submitted,

HANSON & BALDWIN
H. WAYNE WADSWORTH
702 Kearns Building
Salt Lake City, Utah
Attorneys for Appellant-Defendant