1970

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

IN THE SUPREME COURT OF THE STATE OF UTAH

JOSEPH OKAMURA,
Plaintiff-Respondent,

vs.

TIME INSURANCE COMPANY,
Defendant-Appellant.

Case No. 11659

BRIEF OF RESPONDENT

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

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TABLE OF CONTENTS

CASES CITED

ENCYCLOPEDIAS

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NATURE OF CASE

This is an action by plaintiff, an insured member of a group health and accident insurance policy wherein the Utah Association of Nurserymen was the group holder, against defendant, the insurance carrier on said policy, to recover expenses for hospitalization and medical treatment for illness after the policy was issued.

DISPOSITION IN LOWER COURT

The case was tried to the Court, Honorable Stewart M. Hanson, sitting without a jury. At the conclusion of the trial, judgment was entered in favor of plaintiff and against defendant for the sum of $1,405.20 plus costs in the sum of $19.00.

RELIEF SOUGHT ON APPEAL

Respondent seeks to have the action of the lower court affirmed in entering judgment in favor of plaintiff and against defendant.

STATEMENT OF FACTS

There is very little, if any, disagreement regarding the facts of this case. Prior to the effective date of the group insurance policy in question the plaintiff Joseph Okamura 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 insurance policy which the defendant Time Insurance Company negotiated by and through its agents with said association. Said insurance policy was introduced at the trial of this matter and is included herein and marked Exhibits P4 and P5. Said policy provides coverage for losses arising from accidental injury or illness. The group policy was issued to become effective June 1, 1967, and the premiums thereon were to be paid quarterly, however, the terms of the policy and the members' individual certificate provide as follows:

> "Consideration, term and renewal: This policy is issued in consideration of the payment of the premium in advance of the effective date, and may be continued in force by payment of the premiums within 31 days of any premium due date."

The initial payment for the coverage of both the plaintiff and Mr. Martinez was paid by a check dated April 25, 1967, drawn on Garden Art, Inc. by Mr. Martinez dated October 5, 1967 (P8) in the amount of $98.70 and mailed October 7, 1967, direct to the company in Milwaukee, Wisconsin. The due date of the second quarterly premium was September 1, 1967; said check was stamped for deposit by the defendant on 11 October 1967; ten days after the expiration of the 31 day grace period, or 41 days after the due date.

The third quarterly payment on behalf of the plaintiff, in the amount of $71.85 (P1) (excluding the portion of the premium attributable to Martinez), was dated the 5th of February, 1968, and mailed on the 7th of February, 1968, this check was stamped for deposit by the company in Milwaukee, Wisconsin on the 14th day of February, 1968: 44 days after the expiration of the 31 day grace period which was December 1, 1967, (R5, 20, 58, 72); the company thereafter by a letter dated the 20th of February, 1968, (D16), thanked the plaintiff for the check and requested information regarding the policy number so the company could credit plaintiff's account with the payment.

The plaintiff was not, in fact, notified that his policy had been cancelled until after receipt of a letter dated February 29, 1968, (D17) from the defendant company on approximately March 4, 1968; this letter dated the 29th of February, 1968, (D17) contained a check in the amount of $71.85 from the defendant to the Okamuras

representing a refund of their premium payment and informed Mr. Okamura his policy had been cancelled December 1, 1967. This notification was received 95 days after the date of cancellation; 24 days after receipt of the third quarterly premium by the company mailed by Mrs. Okamura; and 13 days after the letter wherein the company acknowledged receipt of the payment and thanked the Okamuras for the same.

ARGUMENT

POINT I

DEFENDANT CLEARLY INTENDED BY ACCEPTING OVERDUE PREMIUM PAYMENTS TO CONTINUE PLAINTIFF'S INSURANCE COVERAGE.

As stated above, the first and only notice which Mr. Okamura received regarding his policy coverage from the company and the alleged cancellation thereof, was by letter dated February 29, 1968, (D17), informing him that he no longer had coverage and in fact tendering back his premium payment in the amount of $71.85. This letter was received approximately on the 4th day of March, 1968, some 95 days after the date of the alleged cancellation of said policy; 24 days after the receipt by the company of the premium check which was negotiated; and 13 days after the letter wherein the company acknowledged receipt of the payment from the Okamuras and thanked them for the same (D16).

It is the general rule with respect to policies requiring the periodical payment of premiums and providing for a forfeiture for failing to pay on the day named, that if the insurer customarily receives overdue premium payments from the insured and thereby induces him to believe that a forfeiture will not be incurred by a delay in the payment of premiums it cannot insist on a forfeiture for delay induced by such custom. 43 AmJur 2nd, Insurance, Section 1139 et. seq.

Generally speaking, in the absence of notice by the insurer within a reasonable time before the time of payment of an intention to discontinue a custom of waiving compliance with provisions as to payment, an insurance company cannot avoid the effect of the custom by a refusal to accept payment in accordance with the custom. There is no dispute to the fact that Mr. Okamura had received no notice of the alleged cancellation after the expiration of 31 day grace period to wit: 1 December, 1967, until the letter dated February 29, 1968. The course of custom which was established by the defendant company and its acceptance of the late quarterly payment in October, 1967, which was due September 1, 1967, induced the plaintiff to believe that he in fact was covered by insurance; the company had taken no affirmative steps to inform Mr. Okamura that his policy had been cancelled.

A forfeiture for non-payment of premiums is not favored in law, and courts are prompt to seize upon circumstances which indicate an election to waive the forfeiture. Since forfeitures are not favored, it has been held that unless the circumstances show a clear intention to claim a forfeiture for non-payment of premium, none will be enforced. Appleman, Insurance Law And Practice, Volume 15, Section 8403 et. seq., *Benatti vs. John Hancock Mutual Life Insurance Company,* (1937) 8 N. E. 2d 551, 290 Ill. App. 438. Any course of action which leads the insured to believe that an extension has been granted for the payment of premiums and that in the meantime a forfeiture will not be incurred, constitutes a waiver. *Travelers Protective Association Of America vs. Jones* CCA Fla. (1937), 91 F2d 337.

This Supreme Court in *Cooper vs. Foresters Underwriters, Inc.* 2 Utah 2d 373, 275 2d 675, 1954, reiterated the Utah rule that an insurance company, which by any course of conduct induces in the mind of an insured an honest belief reasonably founded that strict compliance with the stipulation in the contract for prompt payment of premiums will not be insisted on, waives its right to a forfeiture for non-payment of premiums.

POINT II

DEFENDANT WAIVED THE AUTOMATIC FORFEITURE PROVISION OF ITS POLICY AND IS THEREBY ESTOPPED TO ASSERT THE SAME.

In general, any act, declaration, or course of dealing by the insurer with knowledge of the facts constituting a cause of forfeiture or a breach of a condition in the policy, which recognizes and treats the policy as still in force, and leads the person insured to regard himself as still protected, will amount to a waiver of the forfeiture provision; and will estop the insurer from insisting on the forfeiture or setting up the same as a defense when sued for a subsequent loss. Moreover, slight acts of an insurance company may constitute a waiver of technical defenses to liability on the policy. 43 AmJur 2nd, Supra Section 1092 et. seq.

In *Old Surety Life Insurance Company vs. Miller,* 333 P.2d 504 (1958) (Okla), the court held that notwithstanding the fact that the policy provided that it could be reinstated after lapse upon the payment of premiums due, plus evidence of insurability, the insurer by its past conduct in accepting reinstatements of the policy without evidence of insurability was estopped from denying coverage when the insured sent a premium to the company shortly before his death without furnishing evidence of insurability.

The court stated:

> "*In* 20 *Am. Jr. Insurance, Section* 800, *it is said*: 'It is clear that a provision for forfeiture or suspension of an insurance policy for non-payment of premiums or assessments, or for a breach of a condition or warranty, is inserted for the benefit of the insurer, and it may waive such a provision or be estopped to deny its breach * * * and it may waive a provision after, as well as before, a forfeiture has occurred. * * * ' "

See also *Pacific Mutual Life Insurance Co. vs. McDowell,* 141 Pac. 273 (Okla.), *Continental Insurance Co. of N.Y. vs. Hall,* 137 P.2d 908.

And in *Nelson vs. National Guaranty Life Co.* (1933), 131 Cal. 669, 21 P.2d 1022, the court held that an insurer accepting payments late in previous months induced insured to believe late payments would be received in discharge of installments, and therefore, waived provisions respecting forfeiture until *specific notice* was given. See also *Vinther vs. Sunset Mut. Life Ins. Co.* (1936), 11 Cal. 118, 53 P.2d 182.

In the case at hand, the insurer made no effort whatsoever to contact the plaintiff and notify him that his coverage had been cancelled until ninety-five days after the cancellation date of plaintiff's policy. The company, in fact, negotiated plaintiff's check (P-1), and by letter dated February 20, 1968, acknowledged receipt of the same and made no mention whatsoever of the alleged cancellation of said policy to plaintiff's prejudice.

CONCLUSION

It is respectfully submitted that based on the actions of the defendant insurer to wit: Complete failure to notify the plaintiff that his coverage had been terminated; acceptance of the second quarterly payment some forty-one days after the due date; and the acceptance of the third quarterly payment forty-four days after the expiration of the thirty-one day grace period; and subsequent confirmation of the receipt of the payment dated February 20, 1968; a clear indication of defendant's intent to waive its forfeiture provision and continue coverage was evidenced.

Respectfully submitted,

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