

GORDON v. NEW YORK LIFE INSURANCE COMPANY.

4-3018

Opinion delivered May 29, 1933.

1. INSURANCE—AUTHORITY OF SOLICITING AGENT.—There was no presumption that a soliciting agent had authority to collect premiums on a life insurance policy where the policy stipulated that no person had authority to collect premiums unless he held an official premium receipt.
2. INSURANCE—PAYMENT OF PREMIUM.—While payment of the premium on a life insurance policy could be made without receiving the official premium receipt, as provided in the policy, the burden of proving such fact was on the party claiming insurance to show payment when disputed.
3. INSURANCE—PAYMENT OF PREMIUM.—A beneficiary was not entitled to recover on a policy, which provided that no person could collect premiums unless he held an official receipt, where insured paid a premium to a soliciting agent who had no official receipt, and insurer never received the premium.

Appeal from Conway Circuit Court; *A. B. Priddy*, Judge; affirmed.

STATEMENT BY THE COURT.

On October 11, 1929, the New York Life Insurance Company issued a policy of insurance to Shafter Gordon for the sum of \$2,000 payable in the event of death to Mrs. Ollie E. Gordon as beneficiary.

The policy of insurance so executed contained the following provision in reference to the payment and collection of premiums:

“Payment of Premiums.—All premiums are payable on or before their due date at the home office of the company or to an authorized agent of the company, but only in exchange for the company’s official premium receipt signed by the president, a vice-president, a second vice-president, a secretary or the treasurer of the company, and countersigned by the person receiving the premium. No person has any authority to collect a premium unless he then holds said official premium receipt. The premium may be made payable annually, semi-annually or quarterly in advance at the company’s respective rates for such modes of payment, and the mode of payment may be changed by agreement in writing and not otherwise. The payment of the premium shall not maintain the policy in force beyond the date when the next payment becomes due, except as to the benefits provided for herein after default in premium payment.”

Shafter Gordon died on December 14, 1930, and this suit was instituted by the beneficiary, Mrs. Ollie E. Gordon, against the New York Life Insurance Company, appellee, in the Conway Circuit Court to effect collection of the proceeds of the policy.

In effect, the following facts were developed in the trial of the case:

That one Fiser was the local resident agent of the New York Life Insurance Company and resided at Morrilton in Conway County and solicited the application of Mr. Gordon; that the policy was issued by the New York Life Insurance Company and delivered to Mr. Gordon by Mr. Fiser as its agent; that Fiser collected the first premium on the policy; that the second premium on the policy matured or became due on October 11, 1930. There was a provision in the policy which allowed thirty days’ grace in which to pay the yearly premiums. Within the thirty day period of grace allowed by the policy Mr. Gordon paid to the agent Fiser \$57.62 as the prem-

ium from October 11, 1930, to October 11, 1931, and the agent Fiser executed the following receipt:

"Nov. 5, 1930.

"Rec'd of Shafter Gordon \$57.62 for premium on his Life Ins. for one year for New York Life Ins. Co.

"By R. H. Fiser."

In reference to the payment of the premium to Mr. Fiser and Fiser's authority to collect the same, Mrs. Ollie E. Gordon testified, in effect, that Mr. Fiser was in their home very often while he was working for the company; that her husband had a car, and Mr. Fiser on different occasions induced her husband to go with him to different places to get people to renew their insurance; that Mr. Fiser came to their home often, and her husband drove him over the county to write insurance and collect premiums.

Mr. B. T. Jones, a witness on behalf of Mrs. Gordon, testified in reference to the authority of Mr. Fiser to collect the premiums, in effect, as follows:

That he was present when Mr. Gordon paid his insurance premium on November 4, 1930, to Mr. Fiser; that he loaned Mr. Gordon the money with which to pay it: that the amount was \$57 and some cents; that he knew that Fiser had been representing himself as the agent of the New York Life Insurance Company and had been soliciting business there at his place of business from different people; he knew that Mr. Fiser solicited Mr. Gordon's policy of insurance. The witness was asked the following question: "You know that Fiser wrote it and was collecting the premiums for the company? A. Yes, sir, claimed he was."

The above statement of fact is a fair representation of the facts produced in the trial court in reference to the authority of the agent Fiser to collect the annual premium on the policy of insurance in this controversy.

The trial court held as a matter of law that the above testimony did not establish any authority in the agent Fiser to collect the annual premiums due October 11, 1930; and thereupon directed the jury to return a verdict in

favor of the insurance company, and this appeal is prosecuted to reverse that judgment.

Edw. Gordon, for appellant.

W. P. Strait and Rose, Hemingway, Cantrell & Loughborough, for appellee.

KIRBY, J., (after stating the facts). It is urged that the court erred in directing the verdict against appellant, the beneficiary in the insurance policy sued on.

It is not contended, nor was any testimony introduced tending to show, that the money, the second premium, claimed to have been paid to R. H. Fiser, a former agent who solicited the insurance and collected the first premium, was ever paid to the insurance company or received by it. He was only a special agent with limited authority as shown for soliciting insurance and not a general agent within the meaning of that term.

The policy provides for the payment of all premiums on or before their due date at the home office of the company, "or to an authorized agent of the company, but only in exchange for the company's official premium receipt signed by the president, a vice-president, a second vice-president, a secretary or the treasurer of the company, and countersigned by the person receiving the premium. No person has any authority to collect a premium unless he then holds said official premium receipt."

The testimony also tended to show that Fiser's authority to represent the company as a soliciting agent had been terminated by the company before the money for the payment of the premium was received by him; and, without regard to whether the testimony is undisputed that notice of the discharge of the agent who collected the second premium for the insurance was brought home to the insured before the payment thereof, there is no presumption that his authority to receive payment for premiums continued, since, after such first payment of said first premium, his authority was limited by the terms of the policy, or rather the insured had knowledge by its terms that premiums could be paid only at the home office or to an authorized agent of the company, "but only in exchange for the company's official receipt,

etc.," and, "No person has any authority to collect a premium unless he then holds said official premium receipt."

Of course, due payment of the premium might have been made without receiving such a receipt, but the burden of proof would be on the party claiming said insurance to show that it had been paid, when disputed; and there was no testimony showing the payment of this premium to an authorized agent or that the company itself ever received the money.

If it had been shown that the money was paid in fact to the insurance company, a different question would be presented, but there is no such question in this case of ratification or estoppel of the company to deny the payment.

In *United Friends of America v. Phillips*, 186 Ark. 70, 52 S. W. (2d) 628, cited by appellant, the facts are unlike those in this case, and it has no application here, being altogether different, the dues or premiums therein having been actually paid to and received by the secretary, which was a sufficient payment under the circumstances.

There was no issue to be submitted to the jury upon the undisputed proof herein, and the court did not err in directing a verdict, and the judgment must be affirmed. It is so ordered.