WASHINGTON NATIONAL INSURANCE COMPANY *v.* MARTIN.

4-3221

Opinion delivered December 4, 1933.

1. INSURANCE—INSERTION OF FALSE ANSWERS BY INSURER'S AGENT.—Where insurer's agent, without insured's knowledge, inserted false answers in an application for an accident policy and insured did not read the application after a copy of it was returned with the policy, the company is precluded from setting up such false answers in avoidance of the policy.
2. INSURANCE—FALSE ANSWERS IN APPLICATION.—Insured has done his duty when he gives truthful answers to insurer's agent, and the agent's failure to write them correctly, whether the result of mistake or fraud, cannot prejudice insured.
3. INSURANCE—FALSE ANSWERS IN APPLICATION.—The fact that a copy of an application for insurance was attached to the policy and retained by insured upon its delivery did not as matter of law charge insured with knowledge of misrepresentations wrongfully written therein by insured's agent.

Appeal from Pulaski Circuit Court, Second Division; *Richard M. Mann,* Judge; affirmed.

STATEMENT BY THE COURT.

Appellee brought this suit on an accident insurance policy, issued October 21, 1931, by the appellant company, which undertook to pay the insured $100 per month for a period not exceeding five consecutive years "for bodily injury effected during the life of the policy solely through violent, external and accidental means," which policy was in full force from October 29, 1931, when insured was engaged in repairing an automobile and his foot slipped accidentally while he was lifting a motor transmission, which weighed more than 200 pounds, and same fell upon his right leg and side injuring him permanently and totally for a period of 5 months and partially disabling him for a further period of 60 days. The monthly benefit for partial disability provided for in the policy was $50 per month. Appellee prayed judgment for $500 total disability for 5 months, $100 for partial disability, or a total of $600 with 12 per cent. penalty and reasonable attorney's fees.

The appellant company admitted the issuance of the policy; denied that it agreed in said policy to pay $100 per month for a period of 5 years for total disability, and that the policy was in force at the time of the injury complained of, and that plaintiff was engaged in repairing an automobile or injured in the manner and to the extent alleged; denied that plaintiff had complied with the terms of the policy and was entitled to recover, and also that he had given notice of the injury in accordance with the terms of the policy or furnished proof of any claim that he might have under said policy, pleading specially that the plaintiff had failed to give notice of the injury; alleged further that he made misrepresentations as to his health and habits in the application wherein he stated that he was a sober and temperate person, but that he was at the time of and prior to the accident addicted to the excessive use of intoxicating liquors, and that his statement therein was false and known by him to be false and made for the fraudulent purpose of inducing defendant to issue said policy, and

pleaded this as a special defense; that insured fraudulently stated further in his application that he had not been disabled by accident or illness or received medical or surgical attention during the 10 years prior to the making of said application nor collected any claims of any kind for insurance before; that the statements were false, and that he had been insured by certain companies, specifying them, which had paid him eight different claims for accident and sickness during the time, and that such false representation and warranties voided the policy.

It was also claimed that he had falsely stated that no insurance company had refused to issue or renew a life insurance policy on him prior to the application on this policy, which statement was false and known to be so by him, and that two companies, naming them, had refused to issue the plaintiff an insurance policy about a month prior to the application made herein, which facts were pleaded as special defense.

On the trial the insured denied that he had stated in his application that he had not been disabled by accident or injury or had not received medical attention for 10 years prior thereto. He admitted receiving the different amounts from other insurance companies for injury and sickness as alleged and shown by defendant; said no question was asked him about such injuries or money received therefrom by the agent in filling out the application; stated that he answered truthfully the questions asked him, denied answering them as they were written by the agent, and said they were not written as he gave them and were not correctly stated on the copy of the application that was returned to him with the policy.

The doctors testified as to the injury, its extent and as to the time of the resulting total and partial disability therefrom.

Naylor, general agent of the appellant company, testified that he issued the policy, identified a copy of the application attached thereto as a correct copy of the original presented to him; stated that, if the application had shown that insured had had several claims against

other companies for accident and sickness, he would not have issued the policy; said that his company did not issue policies where applicants had made several claims against other companies for accident and sickness; said also he assumed that Martin signed the application, as the company would not have issued the policy without an application, and that the policy was issued from an application he signed, a copy of which was attached to the policy. He did not have the original application as it had been sent to the home office, but would not have issued the policy if he had not thought that plaintiff, Frank Martin, had signed the application. He had never met Martin and did not know him. His agent, Don Cross, brought the application to him, and he did not know whether it was Frank Martin's signature on the application or not. Cross was not with the company at the time suit was brought and had not been for several months. He lived in the city and a subpoena had been issued for him, but he could not be found; that he had not seen Cross for 6 months, but that he had tried to find him and had gone to his house but was unable to locate him.

The other testimony shows the different claims that had been paid by various companies to the insured during the time the application stated that he had received no moneys from other companies, and this was admitted by appellee on the trial, and it was also admitted by him that he had had the policy in his possession since it was issued, and that the purported copy of the application was attached to it.

Judgment was rendered in the sum of $600 together with 12 per cent. penalty and an attorney's fee of $150, from which comes this appeal.

George W. Emerson, for appellant.

Fred A. Isgrig and *Harry Robinson,* for appellee.

KIRBY, J., (after stating the facts). Appellant insists that, since a purported copy of the application was attached to the policy and delivered to the insured, and retained in his possession from the time of the delivery thereof until the trial of the case, without any complaint being made by him to the company of the incorrectness

of the answers in the application, that, by reason of these facts, he is bound by the answers contained therein, as though they had been true, because of his failure to complain within a reasonable time of their incorrectness and untruthfulness, and notify the company thereof, and by accepting the policy, and is precluded from rescinding same or denying that it did not conform to his application; and cites in support thereof the case of *Inter-State Southern Life Ins. Co.* v. *Holzhouer,* 177 Ark. 97, 5 S. W. (2d) 732.

The above case is quite different from the one at bar, the insured there bringing an action to reform the policy, alleging that it did not contain certain clauses and agreements that the agent who had written the policy assured him would be in it, and the suit to reform the policy was brought after the lapse of 4 months after its issuance, to add something to the policy which it did not contain.

In this case, the answers to the questions in the application claimed to constitute false representations and warranties were not written or made by Martin, but by the company's agent, Cross. Martin had only had the policy in his possession 8 days before he sustained the injury, which is the basis of this action. Cross knew of the injury within a short time after it happened, and accepted Martin's proof of loss.

In *Remmel* v. *Griffin,* 81 Ark. 296, 99 S. W. 84, this court said: "It was his duty to examine the policy in a reasonable time after he received it—that is, in such time as he could have done so—and, if he rejected it, to so inform the insurance company or its agent, and, failing to do so, he is deemed to have accepted it. After such acceptance, he cannot avoid the payment of his note on the ground that he did not read the policy, unless he was induced by the insurance company or its agent not to do so."

There is no question here of a failure to accept the policy as in the Griffin case, or a failure to accept it within a reasonable time, as the injury occurred within 8 days after the delivery of the policy, and, although the undisputed testimony shows that the answers in the application as appeared on the purported copy attached to

the policy were false and may have constituted false representations and warranties that might have voided the policy, it is also true that the undisputed proof shows that this application was not signed by the insured, who testified that he had not made any such representations and warranties, but stated the truth to the agent, who procured the application, and same were falsely written by him without the knowledge or consent of the applicant. It was also shown that insured did not read his policy, was not aware of the false answers inserted therein by the company's agent, and, of course, was not bound thereby; and the company is estopped to set up such false answers and representations in avoidance of the policy. *Providence Life Ins. Co.* v. *Reutlinger,* 58 Ark. 529, 25 S. W. 835; *Southern Insurance Co.* v. *Hastings,* 64 Ark. 257, 41 S. W. 1093; *Insurance Co.* v. *Brodie,* 52 Ark. 11, 11 S. W. 1016; *Kister* v. *Lebanon Mutual Ins. Co.,* 128 Pa. 553, 18 Atl. 447, 5 L. R. A. (Pa.) 646; *Otte* v. *Hartford Life Ins. Co.,* 88 Minn. 423, 93 N. W. 608, 97 Am. St. Rep. 532; *Bennett* v. *Massachusetts Mutual Life Ins. Co.,* 107 Tenn. 371, 64 S. W. 758.

The insured has done his duty in the premises when he imparts to the agent the requisite truthful information to enable him to write the answers correctly in the application in conformity to the information given him, and the insured had the right to rely upon his performing that duty, and his failure to do so, whether the result of a mistake or a deliberate fraud, cannot operate to prejudice the insured. *Fireman's Fund Ins. Co.* v. *Norwood,* 16 C. C. A. 136, 32 U. S. Appeals 490, 69 Fed. 71; *Germania Life Ins. Co.* v. *Lunkenheimer,* 127 Ind. 536, 26 N. E. 1082; *Michigan Mutual Life Ins. Co.* v. *Leon,* 138 Ind. 636, 37 N. E. 584; *Howe* v. *Providence Fund Society,* 7 Ind. App. 586, 34 N. E. 830; *Stone* v. *Hawkeye Ins. Co.,* 68 Iowa 737, 28 N. W. 47; *Dryer* v. *Security Fire Ins. Co.,* 82 N. W. 494; *Continental Ins. Co.* v. *Pearce,* 39 Kan. 396, 18 Pac. 291, 7 Am. St. 557; *Kansas Mill Owners' & Mfrs. Mutual Fire Ins. Co.* v. *Central National Bank,* 60 Kan. 630, 57 Pac. 524; *Dowling* v. *Merchants' Ins. Co.,* 168 Pa. 234, 31 Atl. 1087; *Cottrill* v. *Krum,* 100 Mo. 400, 13 S. W. 753, 18 Am. St. Rep. 549;

McCarty v. *New York Life Ins. Co.*, 74 Minn. 530, 77 N. W. 426; *Baker* v. *Ohio Farmers' Ins. Co.*, 70 Mich. 199, 38 N. W. 216; *State Ins. Co.* v. *Taylor*, 14 Colo. 499, 24 Pac. 333, 20 Am. St. Rep. 281; *Welsh* v. *Fire Association of Philadelphia*, 120 Wis. 456, 98 N. W. 227.

The fact that a purported copy of the application was attached to the policy and retained by the insured upon its delivery does not of itself as a matter of law charge him with knowledge of the misrepresentations wrongfully written therein by the company's agent, or estop the beneficiary from showing that they were not in fact made by the insured. *Busboom* v. *Capital F. Ins. Co.*, 111 Neb. 855, 197 N. W. 957; *Olsson* v. *Midland Ins. Co.*, 138 Minn. 424, 165 N. W. 474; *Welch* v. *Fire Ass'n of Phila.*, 120 Wis. 456, 98 N. W. 227; *Baker* v. *Ohio F. Ins. Co.*, 70 Mich. 199, 38 N. W. 216, 14 S. W. Rep. 485; *State Ins. Co.* v. *Taylor*, 14 Colo. 499, 24 Pac. 333, 20 Am. St. Rep. 281; and *Donnelly* v. *Cedar Rapids Ins. Co.*, 70 Iowa 693, 28 N. W. 607.

We do not find that the court erred in the assessment of the penalty and attorney's fee, nor any other prejudicial error in the record, and the judgment is affirmed.