MASSACHUSETTS PROTECTIVE ASSOCIATION, INC., *v.* JURNEY.

4-3268

Opinion delivered February 12, 1934.

1. INSURANCE—INSTALLMENT BENEFITS—BREACH OF CONTRACT.—In an action against an insurance company to recover the present value of future installments of benefits brought on the theory that the company had repudiated the contract, it was error to refuse to direct a verdict for defendant where undisputed proof showed that insurer neither repudiated the contract nor breached any of its terms.
2. INSURANCE—DISABILITY RIDER.—A continuous disability rider entitling insured to weekly indemnity where his disability continues beyond 60 weeks *held* not to entitle insured, after he had received 60 weeks' indemnity and a period of good health intervened, to benefits for disabilities subsequently arising.

Appeal from Pope Circuit Court; *A. B. Priddy,* Judge; reversed.

STATEMENT BY THE COURT.

On the 15th day of February, 1924, the association issued to the plaintiff, appellee, a certain policy of insurance, indemnifying him against total disability due to accident or disease, in the sum of $25 per week, for the aggregate period of 60 weeks.

There was attached to the policy what is known as a continuous disability rider, which reads:

"CONTINUOUS DISABILITY RIDER

"If total disability arising thereunder prior to the insured's sixtieth birthday continues beyond the sixty weeks described in clause G of the attached policy, the weekly indemnity provided by said policy shall continue to be payable to the insured so long as he thereafter lives and is continuously totally disabled by accident or similarly disabled and necessarily confined within the house by disease, in either case under the regular care of a licensed physician. Total disability due to tuberculosis, paralysis, blindness, insanity, paresis, cancer, locomotor ataxia shall, however, be construed as confining sickness hereunder irrespective of whether or not the insured be strictly confined within the house.

"In all other respects the terms, provisions and conditions of said policy remain the same.

"Attached to and forming a part of policy No. 305233 in The Massachusetts Protective Association, Incorporated, of Worcester, Massachusetts, and dated this fifteenth day of February, 1924."

Clause G of the policy reads as follows:

"The weekly indemnities provided by this policy, collectively, shall not cover periods of disability exceeding sixty (60) weeks in the aggregate. Thereafter the insured may, at his option, continue the policy for its death and dismemberment benefits at one-third the then premium paid for any unexpired period hereunder. The term 'total disability,' whenever used in this policy, shall mean inability to engage in any gainful occupation."

The continuous benefit rider called for an additional premium of $15 per year. It was admitted that all the premiums were paid or tendered. Insured had several

small claims prior to 1931, all of which were paid by the appellant association. His health began to fail that year, and he had numerous complaints, all of which were covered by the policy, and prior to August 1, 1932, he had a claim against appellant on account of his physical condition, which appellant refused to pay. Appellee was compelled to go into court and file suit for his weekly indemnity, and, upon a settlement of that suit, appellee was paid 47 days' more indemnity than sixty weeks.

It was admitted in the complaint, and during the course of the trial, that the sixty weeks' period covered by the policy expired on the 4th day of August, 1932. On November 7, 1932, more than 3 months after the expiration of the sixty weeks' period, the association was informed by plaintiff's attorney that Mr. Jurney at that time seemed to be in very excellent health, and on December 17, 1932, more than 4 months after the expiration of the sixty weeks' period, the company was informed by said attorney that the insured had been sick since December 11, 1932.

Said clause G of the policy provides that the weekly indemnities shall not cover disability exceeding sixty weeks in the aggregate, and that, after the expiration of said sixty weeks' period, insured may, at his option, continue the policy for death and dismemberment benefits at one-third of the then premium, or cancel and receive from the association the premium paid for any expired period thereunder. It was admitted by all the parties that the sixty weeks for which the plaintiff was entitled to recover under the policy proper had expired on August 4, 1932.

The undisputed proof showed further that, after the expiration of the sixty weeks' period, the plaintiff was employed at Little Rock for approximately ninety days in the office of the Missouri Pacific Railroad Company as a file clerk, and performed the duties in connection with the position during all of said time, and thereafter attended one of the government C. C. C. camps near Little Rock.

Prior to the bringing of this suit, the appellee never claimed that the disability complained of therein com-

menced within the sixty weeks' period and continued beyond that period, or that any disability prevented him from engaging in a gainful occupation until his letter of December 17, 1932, in which he claimed he had become disabled as a result of influenza. This disability did not commence until more than 4 months after the expiration of the 60 weeks' period, and the association advised him that, under the terms of the policy, he was not entitled to any more disability payments, and that after the expiration of that time the policy, under its terms, only continued in effect for death and dismemberment benefits.

The appellee insisted that the policy entitled him to indemnity payments for disability commencing after the expiration of the sixty weeks, notwithstanding its provisions to the contrary, tendered the association the full premium that thereafter became due. This the association declined, for the reason that, under the terms of the policy, after the expiration of the sixty weeks' period, only one-third of the old premium was due, should the insured elect to continue the policy for death and dismemberment benefits. The appellee regarded this contention of the association as a repudiation of the policy, and brought this suit for damages for the alleged repudiation.

The appellant demurred to the complaint, which was amended, and answered, denying all the allegations thereof without waiving its demurrer; and alleged that it at all times had performed said contract of insurance and had urged the plaintiff to do so, but that he refused to continue said policy according to its terms.

The court instructed the jury, giving appellant's requested instruction No. 5, to which appellee did not object, and refusing appellant's request for an instructed verdict. Both parties apparently relied upon the contract throughout the entire time, and there was only a dispute as to whether or not the policy covered the disability claimed by the plaintiff. Notwithstanding the undisputed proof outlined, the court submitted the case to the jury, which returned a verdict for appellee, and, from the judgment thereon, this appeal comes.

Frank L. Harrington and *Cravens, Cravens & Friedman*, for appellant.

Robert Bailey, for appellee.

KIRBY, J., (after stating the facts). It is insisted that the court erred in refusing to instruct a verdict for appellant, and this contention must be sustained. Under the undisputed testimony there was no repudiation of the contract of insurance by the association, nor any breach of it. Had the association repudiated the contract even, it would still have been entitled to a directed verdict in its favor for the reason that the plaintiff, with full knowledge of its repudiation, elected to stand on the contract. The suit was not one to recover installments under an insurance policy, but was brought on the theory that plaintiff was entitled to recover the present value of future installments under the contract on account of an alleged repudiation of it by the appellant company. A careful examination of all the evidence in the case shows by the undisputed proof that the association at no time either repudiated the contract or breached any of its terms, but always relied upon it. The only controversy between appellant and appellee was as to the meaning of the contract and the coverage afforded by its provisions.

Under the terms of the rider, which was correctly construed by the court below, appellee was only entitled to the indemnity benefits thereunder beyond the sixty weeks provided in the policy itself in the event that a disability occurred within the said period and continued thereafter, totally disabling him and of such a nature as necessarily confined him to the house under the care of a physician, etc. No such contingency was shown here, but rather the contrary. It was agreed by the parties hereto that the sixty weeks provided in the policy for payment of indemnity expired on August 4, 1932, and that a settlement was made with appellee by the association whereby he was paid indemnity under the policy up to and including September 22, 1932. The undisputed proof shows that no disability which existed within the sixty-week period continued thereafter, or continuously disabled the insured or confined him to the house, or disabled him from

following a gainful occupation. As already said, he came to Little Rock after the expiration of the sixty-week period, and secured employment with the Missouri Pacific Railroad Company, where he worked for approximately three months, drawing pay at the rate of $3.56 per day; and he made no claim of any disability after August 4, 1932, until December 17, 1932, when he claimed to have had an attack of influenza which confined him to his home from December 11th. A field representative of the association was informed by plaintiff's attorney on November 7, 1932, three months after the expiration of the 60-week period, that appellee was in the best of health, and not objectionable as an insurance risk. Appellee himself testified that he was in good health during this time.

In *Mutual Life Ins. Co.* v. *Marsh,* 186 Ark. 861, 56 S. W. (2d) 433, it was held that there could be no recovery for damages for an alleged repudiation of payment of indemnity under an insurance contract when it appeared that there was no repudiation, the insured's remedy being to sue for the installments as they matured. In the instant case, there was no refusal to carry out the contract or renunciation of the agreement, but, as shown by the correspondence between the parties, when default was claimed to have been made, the association only contended that, under the existing facts, the insured was no longer entitled to the weekly indemnity, having been paid all that was due him under the terms of the contract. See 13 C. J., §§ 725-27, page 651.

Moreover, it was said in *Mutual Life Ins. Co.* v. *Marsh, supra,* that, if the insured, with knowledge of the facts, elects to continue with the contract, he cannot subsequently make a second and inconsistent election to treat it as abrogated. See also *McNamara* v. *Cerf,* 4 Fed. (2d) 997.

Said instruction No. 5, given by the court without objection from appellee, correctly declared the law, and, in addition, the court instructed the jury that plaintiff, to be entitled to recover, must show by a preponderance of the evidence that the defendant insurance company

breached the contract or repudiated the provisions thereof. The undisputed testimony, as already shown, discloses that no disability arose during the sixty weeks' period and continued thereafter as was necessary to entitle appellee to recover; and that the insurance company had performed its contract in the payment of the sixty weeks' indemnity thereunder, and could not be held to further liability.

Under the circumstances of this case, the court erred in not directing a verdict for the appellant company and in submitting the cause to the jury, since there was no sufficient evidence to warrant its being done. The judgment is accordingly reversed, and the cause, appearing to have been fully developed, is dismissed.