

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOAN P. BRODSKY : CIVIL ACTION
 :
 v. :
 :
 THE EQUITABLE LIFE ASSURANCE :
 SOCIETY OF THE U.S. : NO. 99-1218

MEMORANDUM

Ludwig, J.

August 19, 1999

In this action to recover the proceeds of a life insurance policy, defendant The Equitable Life Assurance Society of the United States moves to dismiss the complaint under Fed. R. Civ. P. 12(b)(6). Because the parties rely on affidavits of fact, the motion will be treated under Rule 56.¹ Id. Jurisdiction is diversity. 28 U.S.C. § 1332. Pennsylvania law governs substantive issues. Summary judgment for defendant will be granted.

In 1998, Bruce L. Brodsky submitted an application to Equitable for a \$1 million life insurance policy naming his wife, Joan P. Brodsky, beneficiary. Compl. ¶¶ 7, 8. All of his dealings with Equitable were through an insurance agent, Andrew J. Rubin, with whom his wife, Joan Brodsky, had placed insurance

¹“Summary judgment should be granted if, after drawing all reasonable inferences from the underlying facts in the light most favorable to the nonmoving party, the court concludes that there is no genuine issue of material fact to be resolved at trial and the moving party is entitled to judgment as a matter of law.” In re Baby Food Antitrust Litig., 166 F.3d 112, 124 (3d Cir. 1999) (quoting Petruzzi’s IGA v. Darling-Delaware, 998 F.2d 1224, 1230 (3d Cir. 1993)).

as far back as 1984.² At Equitable's request, Mr. Brodsky underwent a physical examination, which he passed. Id. ¶¶ 8, 9. On September 8, 1998 Equitable issued the policy and mailed it to Rubin. Id. ¶¶ 5, 10. On September 14, 1998 Mr. Brodsky died. Id. ¶ 14. The following day, Rubin (no doubt unaware of his death) mailed the policy to Brodsky with a bill from Equitable for the first annual premium – which plaintiff thereupon paid. Id. ¶¶ 16, 17.

On summary judgment the overall question is whether, under the law and the facts, a contract of life insurance could have existed between the parties. Page A05479 of the policy application states: “Each signer of this application agrees that . . . no insurance shall take effect on this application: (a) until a policy is delivered and the full initial premium for it is paid, or an approved payment authorization is signed, while the person(s) proposed for insurance is (are) living.” Expressed in the negative, plaintiff does not dispute that under those terms, as worded, a contract of insurance could not have been formed unless prior to the insured's death (1) the policy had been delivered and (2) the premium paid. See Couch on Insurance 3d §§ 14:1, 72:8 (Supp. 1999) (terms of insurance policy determine whether delivery of the policy and payment of initial premium are

²Rubin, who represented Equitable and its subsidiaries, had sold Joan Brodsky as many as three previous Equitable policies involving disability as well as life insurance. Pl. aff. ¶¶ 2, 3; Rubin verification ¶ 3. An insurance agent acts for a specific insurance company; a broker acts independently and purchases insurance for customers. See 40 Pa. Cons. Stat. Ann. §§ 231, 251 (1998). On this occasion, Joan Brodsky again contacted Rubin's office and asked that a life insurance application be sent to her husband.

conditions precedent to insurer's obligations). Defendant controverts that either of these two conditions was satisfied.

Plaintiff, however, maintains that delivery occurred upon Rubin's receipt of the policy from Equitable and that under the evidence the premium prepayment condition was waived. Given the circumstances of this case, the time of the alleged waiver is critical. Since the facts demonstrate that it could not have taken place while the insured was alive, the creation of an insurance contract was impossible as a matter of law.³ For this reason, summary judgment must be granted.

Here is an analysis of the premium prepayment issue. Plaintiff asserts that Rubin, acting on behalf of Equitable, waived the prepayment requirement via a history of dealings with the Brodskys dating back perhaps fifteen years. It is unclear whether in this instance the premium payment was to be sent to Rubin or directly to Equitable, but Equitable agrees that in regard to payment Rubin was its agent. "A waiver in law is the act of intentionally relinquishing or abandoning some known right, claim, or privilege." Brown v. City of Pittsburgh, 409 Pa. 357, 359, 186 A.2d 399, 401 (1962). "It is well established

³Rubin's affidavit, which is uncontradicted on this point, states that he "never in any way indicated to Joan Brodsky that the policy in question in this case would become effective without payment of the first premium." Rubin verification ¶ 4. The indirect evidence of waiver on which plaintiff relies consists of Rubin's past extensions of credit as to payments of initial premiums and his mailing to the insured of both the policy and premium bill on September 15, 1998. In this sense, the effective date of such a waiver would necessarily have been the date of the mailing.

that a provision in a life insurance policy stating that the policy is ineffective until payment of the initial premium is for the insurer's benefit and may be waived by the insurer." Blouch v. Zinn, 350 Pa. Super. 327, 504 A.2d 862, 865 (1986) (citing Susquehanna Mut. Fire Ins. Co. v. Elkins, 124 Pa. 484, 17 A. 24 (1889)). Under this general rule, Rubin, acting for Equitable, conceivably could have waived the premium prepayment condition.

The first question is whether Rubin, as Equitable's agent, had express or implied authority to waive the prepayment requirement.⁴ "Express authority [is] directly granted by the principal to bind that principal as to certain matters, [while] implied authority . . . bind[s] the principal to those acts of the agent that are necessary, proper and usual in the exercise of the agent's express authority" Volunteer Fire Co. v. Hilltop Oil Co., 412 Pa. Super. 140, 149, 602 A.2d 1348, 1353 (1992). Speaking directly to this point, page A05479 of the application, which was signed by Mr. Brodsky, states: "No agent or medical examiner has authority to modify this agreement or the temporary insurance agreement, nor to waive any of Equitable's rights or requirements" Based on this provision, Rubin appears to have had no express or implied authority to waive

⁴Early caselaw suggests that a non-waiver provision may itself be waived. See Gough v. Halperin, 306 Pa. 230, 234, 159 A. 447, 448 (1932); McFarland v. Kittanning Ins. Co., 134 Pa. 590, 599-602, 19 A. 796, 796-97 (1890); Imperial Fire Ins. Co. of London v. Dunham, 117 Pa. 460, 12 A. 668 (1888). Here, there is no evidence that Rubin was authorized to waive the non-waiver provision or that he did so.

prepayment of premium, despite any circumstances, such as the combined mailing of the policy and the premium bill, that may be argued to the contrary.

Rubin also lacked apparent authority. There is no proof that Equitable held out Rubin as empowered to waive or relax the explicit terms of the insurance application. See Volunteer Fire, 412 Pa. Super. at 149, 602 A.2d at 1353 (“Apparent authority exists where a principal, by words or conduct, leads people with whom the alleged agent deals to believe that the principal has granted the agent the authority he or she purports to exercise.”). Mr. Brodsky’s signature on page A05479 of the application must be deemed to show that he had notice of Rubin’s lack of authority. In this regard, see Fierst v. Commonwealth Land Title Ins. Co., 499 Pa. 68, 74, 451 A.2d 674, 677 (1982) (“A person with notice of a limitation of an agent’s authority cannot subject the principal to liability upon a transaction with the agent if he should know that the agent is acting improperly.” (quoting Restatement (Second) of Agency § 166 (1958))).

Moreover, even if Rubin had been authorized by Equitable to waive prepayment of premium, there is no persuasive indication that he did so.⁵ The Pennsylvania Supreme Court has outlined the requirements for such a waiver:

To constitute a waiver of legal right, there must be a clear, unequivocal and decisive act of the party with knowledge of such right and an evident purpose to

⁵From an evidentiary standpoint, as previously noted, a waiver by Rubin could have occurred only upon the mailing of the policy and premium bill to Brodsky, which post-dated Brodsky’s death. Accordingly, no waiver would have been effectual, since the insured at that time was deceased, and it could not have been a knowing waiver on Rubin’s part.

surrender it. Waiver is essentially a matter of intention. It may be expressed or implied. In the absence of an express agreement a waiver will not be presumed or implied contrary to the intention of the party whose rights would be injuriously affected thereby, unless by his conduct the opposite party has been misled, to his prejudice, into the honest belief that such waiver was intended or consented to. In short, the doctrine of implied waiver applies only to situations equivalent to an estoppel, and the person claiming the waiver to prevail must show that he was misled and prejudiced thereby.

Brown, 409 Pa. at 359, 186 A.2d at 401 (quotations and citations omitted); Zivari v. Willis, 416 Pa. Super. 432, 436, 611 A.2d 293, 295 (1992).

According to plaintiff's affidavit, she purchased several insurance policies from Rubin without paying the premium in advance – the premiums were always paid shortly thereafter.⁶ Pl. aff. ¶ 3. These policies, however, are not alleged to have required prepayment of premium. Plaintiff's affidavit, which is credited on this motion, does not maintain that Equitable misled her or her husband as to the prepayment requirement or non-waiver clause. Rubin – and Equitable – did nothing to induce the Brodskys to believe the policy was in force prior to payment, and here, significantly, prior to Bruce Brodsky's death. Given his death before Rubin mailed the policy and the premium bill, there is no basis on which plaintiff or her husband could have changed position as a consequence of the alleged waiver. Cf. Schifalacqua v. CNA Ins. & Continental Cas. Co., 567 F.2d 1255, 1258 (3d Cir. 1977) (no implied waiver where insurer did nothing to

⁶Rubin's affidavit says that this occurred only once — for a term-life policy sold to plaintiff in 1996. Rubin verification ¶ 3.

induce insured's belief that policy was in force at time of accident, which occurred prior to insurer's acceptance of late policy payment); 2101 Allegheny Assocs. v. Cox Home Video, Inc., Civ. A. No. 91-2743, 1991 WL 225008, at *9 (E.D. Pa. Oct. 29, 1991) (summary judgment granted where no evidence that plaintiff changed its position as a result of the alleged waiver).

Another approach taken by plaintiff is that the insurance policy was in effect because the insured had a reasonable expectation of coverage. In Collister v. Nationwide Life Ins. Co., 479 Pa. 579, 594, 388 A.2d 1346, 1353 (1978), interim insurance coverage was held to exist where "the insurer accepted payment of the first premium at the time it took the application" unless the insurer establishes "that the consumer had no reasonable basis for believing that he or she was purchasing immediate insurance coverage."

Here, the facts do not present a triable issue as to temporary insurance coverage. The insurance premium was not submitted with the application, and the policy itself expressly negated the possibility of immediate insurance coverage.⁷

Edmund V. Ludwig, J.

⁷In view of the conclusions reached as to non-waiver of prepayment of premium, the issue of delivery of the policy is not discussed or decided.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOAN P. BRODSKY : CIVIL ACTION
 :
v. :
 :
THE EQUITABLE LIFE ASSURANCE :
SOCIETY OF THE U.S. : NO. 99-1218

ORDER

AND NOW, this 19th day of August, 1999, the following is ordered:

1. The motion of defendant The Equitable Life Assurance Society of the U.S. for summary judgment is granted.
2. Judgment is entered for defendant The Equitable Life Assurance Society of the U.S. and against plaintiff Joan P. Brodsky.

Edmund V. Ludwig, J.