

WILLIAMS v. BUFFALO GERMAN INS. Co.

(Circuit Court, D. Kentucky. February 19, 1883.)

1. FIRE INSURANCE—SOLE OWNERSHIP OF PROPERTY—OUTSTANDING INTEREST—BOND FOR CONVEYANCE.

A policy of fire insurance described the property insured as "his two-story dwelling-house," etc., and it appeared that he had purchased the fee and taken a bond for a conveyance, but that the vendor had only a life estate in the property, with a remainder in six-sevenths thereof; that a suit had been instituted to perfect the title, to which the insured was a party; and that there was an outstanding purchase note, which he owned at the time of the insurance and the loss. *Held*, that the outstanding note, and the fact that the insured only held under a title bond, was not material to the risk, and that the fact of the outstanding seventh interest or remainder did not prevent him from being "the sole and unconditional owner," within the meaning of the policy.

2. SAME—MATERIALITY OF DEFECT IN TITLE—QUESTION FOR JURY.

In such a case the question whether the defect in the title or interest of the insured was material to the risk should have been submitted to the jury, and the peremptory instruction to the jury to find for him was error.

At Law. Motion for new trial.

Yeiser & Moss, for plaintiff.

Gilbert & Reed, for defendant.

BARR, J. I gave the instructions for plaintiff on the trial of this case, and I am glad a motion for a new trial has been entered, as it gives an opportunity for the examination of the authorities, and a more mature consideration of the questions upon which the case turned. The material facts are not in controversy, and, if I remember them, they are briefly these: No previous written application for insurance was made by plaintiff, and at the time he insured he was in the possession of the property insured, claiming the absolute ownership thereof. He had purchased a fee-simple title, and held a title bond for a conveyance with covenant of warranty. There was an outstanding purchase note, which he owed at the time of the insurance and at the time of the loss. At this time there was a defect in the title of the vendor, Mrs. Perkins. She had a life estate in the property, and had obtained from her children their interest, except one of them, who held an undivided one-seventh in the remainder after the death of Mrs. Perkins. There was pending in the McCracken circuit court a chancery suit at the time this insurance was obtained. Williams was a party to this litigation, and its object was to perfect Mrs. Perkins' title so that he (Williams) might obtain from her a perfect title. The policy describes the property insured as plaintiff's: "His two-story frame dwelling-house and ell." There was no other statement as to title and ownership; and as the policy provides that the assured, by the acceptance of this policy, warrants that he, among other things, has not "omitted to state to the company any information material to the risk," the learned counsel insists that the omission to state to the company the outstanding vendor's note, and that he only held

under a title bond, was and is fatal to his contract of insurance. The outstanding note, and the fact that plaintiff's title was evidenced by a title bond instead of a deed, were not material to the risk, since the loss to the assured would have been equally as great as if his title had been a legal instead of an equitable one, and the note had been paid instead of being unpaid. It will be observed that the assured was not asked as to the evidence of his title, nor did he warrant against incumbrances. The defect of title, the outstanding one-seventh interest in the remainder, which the assured had notice of, I will consider under the next defense. There is a provision of the policy which provides that it shall become void unless consent in writing is indorsed by the company in each of the following instances, viz.:

"If the assured is not the sole and unconditional owner of the property; * * * or if any change takes place in the title, interest, location, or possession of the property, * * * whether by sale, transfer, or conveyance, in whole or in part, or by legal process, or by judicial decree; or if the title or possession be now, or shall hereafter become, involved in litigation."

This is rather awkwardly expressed, but I presume the meaning is that if the assured is not sole and unconditional owner of the property insured, or if the title or possession of it is involved, or shall thereafter become involved, in litigation, it must be consented to, and consent indorsed in writing by the company. I am inclined to the opinion that this does not require the assured to guaranty his title, but only requires that he hold, *claiming* a sole and unconditional ownership. If this is not the correct construction, then every one accepting such a policy thereby warrants his title to be *perfect*.

Those who insure against fire and other losses are interested in knowing who is in possession of the property insured, and upon whom the loss would primarily fall if there were no insurance, and hence are interested in knowing whether the assured is holding as a sole and unconditional owner. The *character* of his possession and holding is the matter of interest to the insurer, and not his paper title.

We should give a reasonable construction to the language of this contract, and, in ascertaining what is a reasonable construction, the purpose and object of the contract should be considered.

The plaintiff had purchased a sole and unconditional ownership, and was in possession under that purchase. The fact that his vendor, although claiming a fee-simple title, had in law only a life estate and six-sevenths of the remainder, does not, I think, prevent plaintiff from being the sole and unconditional owner of the property, within the meaning of this provision of the policy. If the assured are expected not only to state the extent of their interest in the property sought to be insured, but to guaranty a *perfect* title, under penalty of losing the benefit of their insurance, the language should be clear and explicit, so that the assured may understand it.

The authorities are in some conflict upon this subject.

The supreme court, in *Ins. Co. v. Haven*, 95 U. S. 245, held that an outstanding lease for 10 years was not a violation of an agreement that the assured had the "entire, unconditional, and sole ownership of the property."

In *Hough v. City Fire Co.* 29 Conn. 10, the court held that the word "absolute" in such a provision in the policy was synonymous with "vested." In that case the policy provided that "if the interest in the property to be insured be a leasehold interest, or other interest not *absolute*, it must be so represented to the company, and expressed in the policy in writing, otherwise the insurance shall be void;" and the facts were that the assured was in possession under a parol agreement to purchase. The assured recovered for his loss. In *Wineland v. Security Ins. Co.* 53 Md. 276, the policy provided that if the assured was not "the sole and absolute owner of the land on which the building should stand by a title in fee-simple," the same should be stated and indorsed in writing, else the policy would be void. The assured had entered under a parol gift from his uncle, who was the fee-simple owner, and had made improvements on the land, and the court held he could not recover. Much stress was laid upon the words "by a title in fee-simple."

In *American Basket Co. v. Farmville Ins. Co.* 3 Hughes, 251, the assured had only an equitable fee, and it had been stated in the application that the title was in the assured; still a recovery was had, although the policy, like the one at bar, required the assured to be the "entire, unqualified, and sole owner."

In *Washington Mills M. Co. v. Commercial Fire Ins. Co.* 13 FED. REP. 646, the policy provided that "if the interest of the assured in the property be any other than the entire, unconditional, and sole ownership of the property for the use and benefit of the assured, or if the buildings insured stand on leased ground, it must be so represented to the company, or so expressed in the written part of the policy, otherwise the policy shall be void."

The land had been sold by the assured before obtaining the policy, but in the conveyance the assured had reserved the right to remove the buildings within a certain time, and if not removed within that time they were to be the purchaser's. Those buildings were insured and destroyed during the time within which assured could remove them. Held, he could recover for the loss of the buildings.

In *Waller v. Northern Assurance Co.* 10 FED. REP. 233, the policy provided as in *Washington Mills, etc., v. Ins. Co., supra*, and the finding of the jury was that the assured was simply a mortgagee with a debt of \$5,000, and that the property assured was worth \$8,000 or \$9,000. The assured held by an absolute, unconditional title, although in fact he was only a mortgagee. The court held that there could be no recovery, because the assured's true interest was material to the risk, and should have been communicated to the insurer.

In *Rumsey v. Phoenix Ins. Co.* 1 FED. REP. 396, the provisions of the policy were like those in the policy sued on, and the court uses this very pertinent language to the case at bar:

"A party in possession of insured premises under a valid subsisting contract of purchase is equitable owner, and has an insurable interest, although he has not paid the whole consideration money. He is not guilty of a misrepresentation if he represents the house as *his* when he applies for insurance, and there is no breach of warranty if the house is described as his dwelling-house in the policy. The statement and the state of facts are consistent with each other; there is no misrepresentation, because an intent to deceive cannot be inferred; there is no breach of warranty, because *the representation is true in substance.*"

It is insisted that the plaintiff's title was, at the time of the insurance, "involved in litigation," and therefore he should not recover.

There was a litigation in which plaintiff was endeavoring to perfect his title, but the outstanding one-seventh interest could not have been recovered from him, as that interest did not accrue until the death of the mother, who was plaintiff's vendor. The chief purpose of the chancery suit was to have the property which plaintiff exchanged for the property insured take the place of that property. "Involved in litigation" means, in this connection, a litigation in which there could be a recovery of the assured's title in part or in whole. I do not mean that the litigation should show that there *would* be a recovery against the assured, but only that the litigation should be of such a *character* that there might be some recovery against him. Thus, to illustrate, suppose a party held by title bond, and was entitled to a deed, and was suing to get the legal title out of heirs or others, and the suit was of such a character that in *no* event could there be a recovery against such a party, this would not be a litigation *involving* the title of such party within the meaning of this policy. In this case the daughter of Mrs. Perkins could in *no* event have recovered of Williams anything, because her interest was that of a remainder-man, subject to a prior life estate, which was owned by Williams.

The views indicated on the trial, after a careful consideration, are still adhered to; but I am inclined to think error was committed by a peremptory instruction to the jury to find for plaintiff.

It may be that the jury would have found that this defect in the title and interest of plaintiff was a fact material to the risk, and as plaintiff knew of it, he should have communicated it to the defendant. This question should have been left to the jury.

I shall, therefore, grant defendant a new trial, and it is so ordered. The costs will follow the final result.

MILLER v. UNION PACIFIC RY. CO.¹

(Circuit Court, D. Colorado. June, 1883.)

1. RAILROAD COMPANY—NEGLIGENCE.

Negligence is the failure to use ordinary care,—that is to say, such care as a person of common prudence would exercise under the circumstances; and where the complaint is that the plaintiff has been injured by the negligence of a railroad company, the question for the jury is, did the railroad company fail to discharge any duty it owed to the plaintiff?

2. NEGLIGENCE—PUSH CARS.

Where push cars are furnished by a railroad company to be used in transporting materials, and to be propelled by pushing, it is not negligence in the company to fail to supply them with brakes or other means of controlling their movement.

3. MASTER AND SERVANT—RESPONSIBILITY OF MASTER FOR ACTS OF VICE-PRINCIPAL.

If the master, or another servant standing towards the servant injured in the relation of superior or vice-principal, orders the latter into a situation of greater danger than in the ordinary course of his duty he would have incurred, and he obeys and is thereby injured, the master is liable, unless the danger is so apparent that to obey would be an act of recklessness.

4. SAME—WHO IS A VICE-PRINCIPAL.

Where a master employs one servant and requires him to work under the orders of another, and gives the latter power to dismiss the former at his pleasure, the latter is a superior servant or vice-principal, and stands in the place of the master when acting in the scope of his powers.

5. RAILROAD COMPANY—USAGE OR CUSTOM—USE OF PUSH CARS TO CARRY EMPLOYEES.

Although push cars are originally furnished to be used only to carry materials, yet if the company permits their use to transport workmen from place to place for such a time and so generally as to become a custom of the road, it may be held to have authorized such use.

McCrory, J., (*charging jury*.) The plaintiff in his complaint avers that he has suffered personal injury by reason of the negligence of the Kansas Pacific Railroad Company, and that the defendant is liable therefor. That the plaintiff was injured while in the employ of said Kansas Pacific Railroad Company, substantially as alleged, is not disputed; but the defendant interposes three separate defenses, which it is your duty to consider. These are—*First*, that the Kansas Pacific Railroad Company was not guilty of negligence as charged; *second*, that the plaintiff was guilty of negligence which contributed to his injury; *third*, that if there was any negligence other than that of the plaintiff, it was the negligence of his fellow-servants engaged in the same common service with him, for which the company is not liable.

If you find from the evidence that either of these defenses has been sustained, you will find for the defendant. If you find that neither of them has been sustained, and that plaintiff has suffered injury without negligence on his part, and by reason of the negligence of

¹ From the Colorado Law Reporter.