UNITED STATES LIFE INS. CO. v. SMITH.

(Circuit Court of Appeals, Sixth Circuit. March 7, 1899.)

No. 605.

1. LIFE INSURANCE—MISREPRESENTATIONS IN APPLICATION—WAIVER—AUTHORITY OF AGENT.

An application for life insurance, which was made part of the contract, and the representations in which were part consideration for the issuance of the policy, consisted of two parts, one of which (to be filled and signed in the presence of the medical examiner) contained a provision that "no information or statement, unless contained in this application, made, given, received, or required by any person at any time, shall be binding on the company." Such application contained the following question: "Has any application ever been made for insurance on this life, on which a policy was not issued for the full amount and of the same kind as applied for, and at ordinary rates?" This question was answered, "No." In an action on the policy it was shown without dispute that the insured had previously made three applications for insurance to different companies, all of which had been absolutely rejected. *Held*, that the fact that the local agent of the company, who had no duty in connection with such application, had been told of such rejections, and advised the answer made, did not bind the company, or change the effect of the answer as a fraudulent misrepresentation on a material matter, which rendered the policy void, the question not being ambiguous.

2. SAME—DEFENSE TO ACTION ON POLICY—TENDER OF PREMIUMS PAID.

A life insurance company is not required to tender back the premiums paid on a policy, to enable it to defend against an action thereon on the ground of fraudulent misrepresentations made in the application, where by the terms of the policy such defense is permitted, and the premiums paid are forfeited, in case the fraud is discovered, and notice thereof given the insured, within two years from the date of its issuance, and such provision has been complied with, and no premiums thereafter received. In such case, where the fraud is established, the forfeiture may be enforced.

In Error to the Circuit Court of the United States for the Eastern District of Tennessee.

This is an action upon a policy of life insurance issued by the United States Life Insurance Company of New York upon the life of Joseph Smith; the beneficiary being Minnie J. Smith, wife of the assured. The policy was for $5,000, issued April 1, 1895. The assured died September 25, 1895. All liability was denied by the company, and suit was brought in the circuit court for the county of Hamilton, state of Tennessee, and removed therefrom by the company upon the ground of diversity of citizenship. The plea was, in effect, the general issue, with notice, according to Tennessee practice, that the defendant on the trial would rely, among other defenses, upon the fact that the person insured, in his application, had made untrue statements in respect to former applications for insurance which had been rejected, and had also made untrue statements in respect to certain diseases to which he had been subject,—among others, jaundice, palpitation of the heart, disease of the genital or urinary organs, diabetes, etc.,—and that the falsity of his statements had been discovered, and communicated to the insured and assured, within two years from the date of the policy. The policy, among other things, provided (1) that it was issued "in consideration of the statements and agreements in the application" for the same, "which are made a part of this contract," and the further consideration of the payment of an annual premium, "and upon the conditions and agreements upon the back thereof." Among these conditions and agreements referred to were the following: "(3) In case of understatement of age, the amount payable shall be the insurance that the actual premium paid would have purchased at the

true age of the insured. Any other breach of warranty or untrue or incomplete statement made in the application for this policy will render this contract void, provided that discovery of the same must be made and communicated to the insured or assured within two years from the date hereof." "(7) After two years from the date hereof, if the premiums on this policy are duly paid as herein stipulated, the liability of the company under this policy shall not be disputed." Among the questions and answers embodied in the application made part of the contract were the following: (1) "Has any application ever been made for insurance on this life, on which a policy was not issued for the full amount and of the same kind as applied for, and at ordinary rates?" "If so, by what company, and when?" This was answered, "No," without other comment or explanation. There was uncontradicted evidence that, at the time this application was made and signed, three separate applications had been made in as many different companies for insurance upon the life of this applicant, all of which had been rejected. (2) Among the questions and answers touching diseases to which the applicant might have been subject, were these: "Has the person ever been subject to or had jaundice? Difficulty in urinating? Neuralgia, or any disease of the genital or urinary organs?" Each of these questions were answered, "No." There was also a more general question in these words: "Has the person ever had any illness, local disease, or personal injury, or been subject to any surgical operation? If so, state nature, date, duration, and severity thereof?" The answer to this was: "No. Not in bed by illness for years, except a cold last fall, disabling him two weeks." There was evidence of most conclusive character tending to show that the insured had for years been the subject of a most serious disease, called "diabetes," and there was also evidence tending to show that he had had each of the other diseases inquired of. There was a disagreement between medical experts as to whether diabetes was a disease of the genital or urinary organs, and consequently an issue for the jury to say whether this was or was not one of the diseases specifically inquired about. The medical examination made at the time of the application was by a physician unacquainted with the previous medical history of the insured, and failed to disclose any present evidences of diabetes. The insured was asked to give the names and residences of physicians "who have attended the person or have been consulted by him," and to state "when and for what they were consulted." To this he answered by giving the name of Dr. Satterlee, and by saying that he had consulted him for the cold he had referred to in a former answer. There was evidence tending to show that the insured had been treated by or consulted with several other physicians. This application, after being filled out by the insured, was signed by him, and witnessed by the medical examiner. At the conclusion of all the evidence the plaintiff in error asked that the jury be instructed to find for the defendant. This was denied, and the cause submitted to the jury, who found for the defendant in error.

Henry A. Chambers and O. P. Buel, for plaintiff in error.

Wm. T. Murray, for defendant in error.

Before TAFT and LURTON, Circuit Judges, and SEVERENS, District Judge.

LURTON, Circuit Judge, after making the foregoing statement, delivered the opinion of the court.

The controlling question in the case is as to the effect upon the contract of insurance of the untrue answer of the insured to the question in respect to former applications for insurance. That question was in these words:

"Has an application ever been made for an insurance on this life, on which a policy was not issued for the full amount and of the same kind as applied for, and at ordinary rates?"

This the insured answered, "No."

The fact was not disputed that the insured had had three separate applications for life insurance rejected, and yet he answered this question in such way as to withhold this most material information from the company to whom he was then making a new proposal for insurance. That the answer was both material and a warranty has not been, and cannot be, disputed. For the defendant in error it is said that the insured stated the facts touching his former applications to one D. J. Duffey, then the local agent of the insurance company, and that Duffey advised him that the correct answer upon the facts stated would be, "No." The facts thus stated to Duffey were simply that three former applications to three different companies had been absolutely rejected. The learned trial judge refused to instruct the jury to find for the defendant, but left it to them to say whether the insured in good faith had acted upon the advice of the company's agent after stating the facts touching his former rejected applications, and that, if they should find this to be the case, the company would be estopped to rely upon the untruthfulness of the answer. This view of the trial court seems to have been due to some doubt entertained as to the entire clearness of the question. This question occurs in the printed form used by the company's medical examiner. One part of the application is to be filled out and signed in the presence of the soliciting agent, and witnessed by him. This is called "Form A." But the remainder of the application is to be filled out and signed in the presence of the company's medical examiner, and is called "Form B." The agent has nothing to do with this medical examination, and no control over it; and Duffey, though present in this instance, states that many companies require that the agents shall not be present. This form B, when filled out and signed, including the medical officer's personal examination and report, is forwarded by the latter to the company's chief medical officer, and does not pass through the hands of the local agent. Duffey was therefore in the discharge of no duty when present during the medical officer's examination, nor when advising the applicant as to how he should answer questions then propounded. Just preceding the signature of the applicant upon form B there is found the following declaration and agreement:

"(1) That all the statements and answers in this application are hereby warranted to be true, full, and complete, and that this application and declaration shall, with the policy herein applied for, alone constitute the contract between me and the United States Life Insurance Company of New York; *and no information or statement, unless contained in this application, made, given, received, or required by any person at any time, shall be binding on the company.* * * * (5) *That this application, its statements, representations, and agreements,* together with all the conditions and stipulations contained in the policy hereby applied for, *shall be binding on me* and on any future holder of this policy."

This is signed by the insured, Joseph P. Smith, and witnessed by E. A. Cobleigh, the medical examiner of the company. We have italicized the material parts of this declaration and agreement. The stipulation most material to the question in hand is that "*no information or statement, unless contained in this application, made,* given, received, or required by any person at any time, *shall be binding on the company.*" The contention now is that the "information"