Buffalo Law Review

Volume 12 | Number 1 Article 46

10-1-1962

Insurance—Jury Trial Waived by Life Insurance Beneficiary through Dilatory Tactics

Richard S. Mayberry

possible that the Court has adopted only part of the rule of *Rea v. Rea* and will permit non-disclosure of any independent investigation only when there has been express stipulation. It appears that no certain explanation can be given.

A. D.

INSURANCE

JURY TRIAL WAIVED BY LIFE INSURANCE BENEFICIARY THROUGH DILATORY TACTICS

The insured died approximately nine months after he took out a life policy in October 1959. The policy contained a clause making it incontestable by the insurer two years after the date of issue. The insurer notified the beneficiaries by letter in September 1960, some thirteen months prior to the expiration of the period of contestability, of its intent to rescind the policy due to alleged fraud and misrepresentation by the insured in his application for insurance. Subsequently the insurer began a suit for rescission with service of complaint, after a month of attempting service, on April 25, 1961, seven months after the notice. The beneficiaries submitted in answer a general denial and a counterclaim demanding that the policy be declared valid and the insurer be declared liable to them for the face value of the policy. They later moved for a separate trial of the factual issues raised by the counterclaim and for a stay of the equity action pending the outcome of the jury trial. The Court of Appeals held that the Appellate Division[1] had not abused its discretion in reversing the Supreme Court, Special Term order granting the motion. It stated that the beneficiaries had waived a jury by dilatory tactics in not initiating a suit at law during the seven months between notice by the insurer and commencement of the suit in equity. *Phoenix Mutual Life Insurance Company v. Conway*, 11 N.Y.2d 367, 183 N.E.2d 754, 229 N.Y.S.2d 740 (1962).

The Appellate Division generally has the same discretionary powers as does the lower branch of the Supreme Court; it may reverse on review any discretionary decision of that court even where no abuse of its powers is found.[2] However, a reversal without a finding of abuse is rare.[3] The background of the entire area of litigation between an insurer and the beneficiaries of the insured under a life policy containing an incontestability clause[4] must be viewed in light of the basic apprehensive view of juries taken towards insurance carriers. A number of similar New York cases indicate the common practice of a carrier of bringing a suit for rescission in equity quickly, or without adequate notice

1. 15 A.D.2d 924, 225 N.Y.S.2d 532 (2d Dep't 1962).
2. O'Connor v. Papertsian, 309 N.Y. 465, 131 N.E.2d 883 (1956); Hogan v. Franken, 221 App. Div. 164, 223 N.Y. Supp. 1 (3d Dep't 1927); 9 Carmody-Wait 573 and cases footnoted.
3. Hogan v. Franken, supra note 2.
4. See N.Y. Ins. Law § 155(1)(b) for statutory discussion of incontestability clauses.

to the insured, in order to have the issues litigated by a court without a jury.[5] On the other hand, beneficiaries under such policies often delay action on their claims, taking advantage of the six-year contract statute of limitations, in the hope that the insurer will not contest the policy within the stipulated period of contestability, in order to avoid defenses of fraud or misrepresentation.[6] In every suit where the beneficiaries have delayed, the question arises as to whether the delay is innocent or is evidence of maneuvering of this nature.

The beneficiaries are entitled to a trial by jury of the issues of fact involved,[7] though this right may be waived.[8] The jury trial may be obtained by bringing a suit at law on the policy. However, as mentioned above, the insurer is at the disadvantage if he must await a legal action by the beneficiaries since he is pressed by the impending expiration of the time allowed him to contest the policy upon any ground other than the failure of the insured to pay premiums. The only recourse is an equitable action for rescission, prior to which he is required to provide the beneficiaries, by notice, sufficient time to institute an action at law. This notice does not suspend the running of the contestability period, as only the commencement of a court action is considered a contest.[9] The beneficiaries may further attempt to obtain a jury trial upon any factual issues presented by their counterclaim in the suit for rescission by motion, as in the instant case. The granting of this motion is a matter within the discretion of the court where the counterclaim arises under the same transaction.[10] It is here that the actions of both parties must be carefully weighed, and discretion exercised in favor of the innocent, or less culpable, party. Also discretionary with the court is the order of trial of the actions, should the motion be granted. Subdivisions (2) and (3) of section 443 of the Civil Practice Act provide that the Court, in its discretion, may order a separate trial between the plaintiff and one or more defendants of any issue of fact prior to other issues in the case.

The Appellate Division stated two bases for its reversal of the Special Term order in the instant case: first, that the beneficiaries, in failing to commence an action at law within the seven-month period between notice and service, had waived a jury trial; and second, that the rescission action having been begun first, should be tried first. The Court of Appeals discussed only the first point in affirming. The *Haney* case, cited by the Appellate Division in

5. See generally Mutual Life Ins. Co. v. Kessler, 160 Misc. 543, 290 N.Y. Supp. 891 (Sup. Ct. 1936); Mutual Life Ins. Co. v. Marzec, 146 Misc. 26, 262 N.Y. Supp. 558 (Sup. Ct. 1932).

6. See Prudential Ins. Co. of America v. Haney, 163 Misc. 179, 296 N.Y. Supp. 576 (Sup. Ct. 1937).

7. Mutual Life Ins. Co. v. Kessler, supra note 5; N.Y. Ins. Law, supra note 4.

8. See N.Y. Civ. Prac. Act, § 426; Prudential Ins. Co. of America v. Haney, supra note 6.

9. Killian v. Metropolitan Life Ins. Co., 251 N.Y. 44, 166 N.E. 798 (1929).

10. Manhattan Life Ins. Co. v. Hammerstein Opera Co., 184 App. Div. 440, 171 N.Y. Supp. 678 (1st Dep't 1918); see Di Menna v. Cooper and Evans Co., 220 N.Y. 391, 115 N.E. 993 (1917).

support of its first point, is quite similar factually. The court stated: "Having by her own maneuvering forced the company to resort to an action in equity, the beneficiary should not now complain if she has lost her right to a jury trial, and she has lost it."[11] The Appellate Division was convinced that the failure to act, although the brevity of the majority opinion leaves scant room for close analysis, indicates such maneuvering. The Court of Appeals arrived at the same conclusion in the instant case in holding that the denial of a jury trial was not an abuse of discretion. It was stated that the company's notice was adequate warning to the beneficiaries to begin an action if a jury trial were desired, and that a failure to do so could justifiably be taken as indicative of an intent to outmaneuver the insurance company. The instant case is a rare example of the denial of trial by jury to a beneficiary where there has been no express waiver of that right. Waiver normally depends not upon the failure to act, other than failure to assert this right at the pleading stage, but upon the intention of the party. It is an intentional abandonment and should not be found in acts evidencing negligence or oversight rather than intent.[12] Here it is held that a party may waive trial by jury even prior to the pleading stage, that is, by failing to bring a legal action, a new theory as expounded by the Court of Appeals. Section 426 of the Civil Practice Act establishes no such ground for finding a waiver, nor does it list any manner of waiver before the suit is initiated. It would seem incumbent upon the courts to find an intentional act only where a party has had an opportunity to manifest the intent in a manner prescribed by law or in some other definite form. The instant decision is further weakened by the reversal by the Appellate Division of the Supreme Court, indicating, without stating, an abuse of that court's discretion in granting the motion. Were the decision based upon a reversal of an exercise of sound discretion, as it seems to have been viewed by the Court of Appeals, it would have been more unfortunate. In any case, the Appellate Division spells out no abuse, and the Court of Appeals states that no such expression is necessary.

That the plaintiff insurer is not here an anticipatory defendant cannot be doubted when the events are viewed in the light of the time limit imposed upon it and its own delay in bringing suit. The same result might have been obtained, however, in a more expeditious and less harmful manner by affirming only the Appellate Division's decision as to the order of trial. No waiver need have been found, and only the integrity of the Special Term, in its exercise of discretion, would have been offended. *Res judicata* on the issues decided in the equity suit would have, for all practical purposes, disposed of the issues to be tried in the jury action. That action would probably never have reached trial. But, the right of the beneficiaries to a jury trial would not have been

11. Prudential Ins. Co. of America v. Haney, supra note 6, at 182, 296 N.Y. Supp. at 579.

12. Alsens American Portland Cement Works v. Degnon Const. Co., 222 N.Y. 34, 118 N.E. 210 (1917).

impugned by the finding of an entirely new breed of waiver. Usually the courts are intent upon the protection of the beneficiary from the "maneuverings" of the insurance companies in their attempts to avoid a jury trial. Viewing the sequence of events, especially the difficulty of effecting service upon the beneficiaries as emphasized by the Court of Appeals, it is not difficult to conclude that an element of "maneuvering" may have guided the beneficiaries. Both courts on appeal groped for precedent, finding it in a 1937 New York Supreme Court decision[13] and a United States Supreme Court case, *American Life Insurance Co. v. Stewart*,[14] in which the parties had waived a jury by stipulation. A further federal case, *Beacon Theatres Inc. v. Westover*,[15] is mentioned by the Court of Appeals. This case is quite explicit in its view that, in federal courts, a jury trial, where one is required, should be preserved wherever possible by exercising the discretion of the court in deciding the sequence of trial of legal and equitable claims in a narrow and restricted manner. In fact, neither of the federal opinions cited by the Court of Appeals immediately following the discovery of a waiver in the instant case, involves a waiver but discusses sequence of trial of legal and equitable claims. But this is New York; the case is not in a federal court, there is no seventh amendment, and the right to a jury trial is not nearly as well protected if this case is to be a guide. The holding should find wide application in the numerous suits of this nature which arise, and must be viewed by insurance carriers as advantageous in avoiding the pitfalls of jury verdicts. To the beneficiary and his attorney, the rule places a higher premium upon prompt action in the face of impending litigation at the instance of an insurer.

R. S. M.

LABOR LAW

Dissolution of Federally Authorized Welfare Fund by State Superintendent of Insurance Upheld

A welfare fund for the benefit of union members was established pursuant to a collective bargaining agreement, entailing contributions by the employer to the fund, and which was to be administered by a committee. Subsequent to a labor dispute and a resultant work stoppage, the employer ceased business operations. One year later the trustees of the fund notified the State Insurance Department of their intention to continue to benefit the members of the union until the assets of the fund were expended. The Director of Insurance asserted that since the trustees were themselves commencing a voluntary liquidation, he had an obligation to take possession and proceed with the liquidation. He applied for an order authorizing this action which was granted by the Supreme

13. Prudential Ins. Co. of America v. Haney, supra note 6.
14. 300 U.S. 203 (1937).
15. 359 U.S. 500 (1959).