Court of Appeals, State of Michigan

ORDER

Pecola Taylor v Affirmative Insurance Company of Michigan

Docket No. 311869

LC No. 11-003911-NF

Karen M. Fort Hood
Presiding Judge

Michael J. Talbot

Kirsten Frank Kelly
Judges

In lieu of granting the application, the Court orders, pursuant to MCR 7.205(D)(2), that the May 16, 2012, order of the Wayne Circuit Court denying summary disposition to defendant hereby is REVERSED. The record before this Court demonstrates that plaintiff, the owner of the vehicle at issue, was present when Charles Sullivan, the father of two of her children, applied for the insurance ultimately issued by defendant. Plaintiff was not a licensed driver, never having obtained a driver's license. Sullivan's license had been revoked after numerous suspensions. Plaintiff testified in deposition that she was aware that neither she nor Sullivan held a valid driver's license. In deposition, plaintiff admitted that it was true that she should not have had a reasonable expectation of driving or insuring the car under the circumstances, but attempted to blame the insurance agent for failing to ask pertinent questions. As the owner of the vehicle, and as a person applying for insurance, plaintiff had a duty to ascertain that truthful information appeared on the application. Our Supreme Court has ruled that, when a duty of disclosure exists, "[a] fraud arising from the suppression of the truth is as prejudicial as that which springs from the assertion of a falsehood, and courts have not hesitated to sustain recoveries where the truth has been suppressed with the intent to defraud." *Titan Ins Co v Hyten*, 491 Mich 547, 557; 817 NW2d 562 (2012) (citation omitted).

Further, plaintiff testified that she signed Sullivan's name to the insurance application, which neither identified her as the owner of the vehicle, nor listed her as a resident of the same household as Sullivan, facts that defendant contended would have precluded the issuance of the insurance. Note that the circuit court previously ruled in a related declaratory action that plaintiff and Sullivan made material misrepresentations in procuring the policy. Rescission is an appropriate remedy where the contract would not have been made. See *Rosenthal v Triangle Development Co*, 261 Mich 462, 463; 246 NW 182 (1933). Indeed, in the declaratory action, the circuit court declared the policy to be void *ab initio*. Therefore, the policy under which plaintiff seeks benefits is void.

Although an insurer may not rescind a policy where an innocent third party has been injured, *Sisk-Rathburn v Farm Bureau General Ins Co of MI,* 279 Mich App 425, 430; 760 NW2d 878 (2008), rescission may occur if the party claiming benefits actively defrauded the insurer and was not an innocent third party, *Hammoud v Metro Prop & Cas Ins Co*, 222 Mich App 485, 488-489; 563 NW2d 716 (1997). Here, the circuit court expressly found in the declaratory action that plaintiff was not an innocent third party. The facts in the instant action support that finding; therefore, the circuit court erred in its ruling in this case that plaintiff created a genuine issue of material fact on this point.

Even considering the totality of the circumstances in a light most favorable to plaintiff, she cannot prevail here. The circuit court thus improperly denied defendant's motion for summary disposition. The case is REMANDED to the circuit court for further proceedings consistent with this order.

This order is to have immediate effect, MCR 7.215(F)(2).

The Court retains no further jurisdiction.

A true copy entered and certified by Larry S. Royster, Chief Clerk, on

APR 02 2013

Date

Chief Clerk