STATE OF MICHIGAN

COURT OF APPEALS

WILLIAM CAMMIN AND JOANNE CAMMIN,

Plaintiffs,

v

WALKER AGENCY, INC, a Michigan corporation,

Defendant-Appellant,

and

PIONEER STATE MUTUAL INSURANCE COMPANY, a Michigan insurance corporation,

Defendant-Appellee.

UNPUBLISHED
July 26, 1996

No. 176196
LC No. 92-4155-CZ

Before: Doctoroff, C.J., and Michael J. Kelly and Markey, JJ.

PER CURIAM.

The trial court issued a judgment ordering defendant-appellant Walker [hereinafter Walker] to pay $35,000 to defendant-appellee Pioneer [hereinafter Pioneer] to account for Walker's liability to plaintiffs. Walker appeals as of right. We affirm.

In 1981, plaintiffs purchased a house to use as rental property. Plaintiffs contacted Walker, an independent insurance agent. Walker purchased rental coverage for plaintiffs through Citizens Insurance. In 1990, plaintiff sold the home by land contract to the Wanners. The Wanners purchased homeowner's coverage on the property from Pioneer. In 1991, the Wanners filed for bankruptcy and

plaintiffs recovered the property. As a result of the transfer of property, the Wanners' homeowners insurance was canceled.

In June 1991, plaintiff Joanne Cammin testified that she spoke with Sheree Wiltse, an agent at Walker. Plaintiff stated that she wanted to renew the homeowner's policy. Plaintiff testified that, when Wiltse asked her if she needed glass and contents coverage, she said she would not need that type of coverage. Plaintiff assumed that Wiltse knew this since plaintiffs would not own the contents of the rental home. Although Wiltse admits asking plaintiff if she wanted glass and contents coverage, she denies asking if the home was going to be used as a rental home. Wiltse obtained insurance for plaintiffs through Pioneer. The policy became effective on June 26, 1991. Wiltse stated that, if she had known that plaintiffs desired rental coverage for the property, she would have insured the home through Citizens Insurance.

On September 1, 1991, plaintiffs found a third party to rent the property. On November 9, 1991, the home was destroyed by a fire. Pioneer refused to pay damages because the homeowner's policy did not cover rental property. Plaintiffs filed suit, alleging that Walker had a duty to provide coverage for plaintiffs' home because Walker knew it was a rental home. Plaintiffs also alleged that Walker was negligent when it failed to provide coverage and that Pioneer was liable for the representations made by an agent with whom it had contracted to provide insurance.

The parties stipulated to a partial settlement. Plaintiffs accepted $70,000 in satisfaction of all claims against Walker and Pioneer. Walker and Pioneer agreed to split this $70,000 cost before trial, and have the trial court, sitting in a bench trial, decide the issue of liability for the settlement payment.

The trial court determined that Walker should pay for the loss. The trial court stated that Walker did not acquire the necessary information from plaintiffs. The court determined that Pioneer did nothing wrong.

First, Walker argues that the trial court erred when it did not order reformation of the insurance policy since both plaintiffs and Walker intended the house to be insured against the possibility of fire. We disagree.

In order to decree the reformation of a written instrument on the grounds of mistake, the mistake must be mutual and common to both parties to the instrument. *Dingeman v Reffit*, 152 Mich App 350, 358; 393 NW2d 632 (1986). In the cases cited by Walker, reformation occurred because both parties made the same faulty assumption about the terms of the contract. *Wilson v Livingston Co Mutual Fire Ins Co*, 259 Mich 25, 29; 242 NW 827 (1932); *Hammel v U S Fidelity & Guaranty Co*, 246 Mich 251, 254; 224 NW 337 (1929); *Ovavez v Patron's Mutual Fire Ins Co*, 233 Mich 305, 310; 206 NW 503 (1925).

In this case, on the other hand, Wiltse and plaintiff Joanne Cammin did not agree on the intended subject matter of the contract. Plaintiff testified that she assumed that she would obtain the same policy she had prior to the purchase of the home by the Wanners. Wiltse understood that

plaintiffs wanted the same policy as the Wanners without the glass and contents coverage. Wiltse drafted the policy that she thought plaintiffs wanted. Because the contract did not reflect the same mistake on the part of both parties, no mutual mistake occurred. *See Brenner Co v Brooker Engineering Co*, 301 Mich 719, 725; 4 NW2d 71 (1942).

Next, Walker argues that the trial court erred when it ruled that Pioneer had met its burden of proving Walker liable for the $70,000 loss. The settlement agreement between Walker, Pioneer and plaintiffs provided that Walker and Pioneer each had the burden of proving that the stipulated loss should fall on the other party.

The trial court stated that Pioneer met its burden while Walker did not. An insurance agent is subject to tort liability for failing to procure insurance which would have provided a source of recovery. *Khalaf v Bankers & Shippers Ins*, 404 Mich 134, 142-143; 273 NW2d 811 (1978). We agree with the trial court's determination that Pioneer met its burden by showing that Walker breached its duty when it failed to acquire the appropriate insurance for plaintiffs.

Walker also maintains that the trial court failed to consider comparative fault on the part of plaintiffs. In the settlement agreement between the parties, Walker agreed that plaintiffs were entitled to $70,000 in damages and that a court would determine whether Walker or Pioneer was liable for those damages. Settlement agreements are binding until rescinded for cause. *Stefanac v Cranbrook Ed Comm*, 435 Mich 155, 163; 458 NW2d 56 (1990). Because the settlement agreement stated that Walker and Pioneer would litigate the issue of responsibility for the $70,000 damages, plaintiffs' comparative negligence was properly excluded from consideration.

Because no mutual mistake existed, we decline to grant Walker's request for reformation of the contract. The trial court did not err in determining that Pioneer met its burden of proof that Walker caused the loss. Because the settlement agreement disposed of any comparative negligence claims against plaintiffs, the trial court properly excluded that issue from its determination.

Affirmed.

/s/ Martin M. Doctoroff
/s/ Michael J. Kelly
/s/ Jane E. Markey