COURT OF APPEALS
DECISION
DATED AND FILED

September 22, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2009AP2061 **Cir. Ct. No. 2008CV2425**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

ROSEMARY OAKS,

PLAINTIFF-RESPONDENT,

V.

SETTLERS LIFE INSURANCE COMPANY,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Waukesha County: MICHAEL O. BOHREN, Judge. *Reversed and cause remanded with directions and for further proceedings.*

Before Brown, C.J., Neubauer, P.J., and Anderson, J.

¶1 PER CURIAM. Settlers Life Insurance Company appeals from summary judgment in favor of Rosemary Oaks for life insurance benefits on cancelled policies insuring the life of her husband, Ken Oaks. We reverse the

judgment and remand for entry of an order granting Settlers' motion to dismiss the complaint and for such further proceedings necessary to determine how to return the parties to the status quo on policies void ab initio.

¶2 Ken Oaks was an insurance agent for Settlers' business predecessor until April 13, 2001. In January 1984, he applied for a $285,000 life insurance policy on his life with Rosemary as the owner of the policy. He signed her name to the application. He signed his name as the agent. The policy was converted to three separate policies between 1987 and 1989 with Ken signing Rosemary's name to the required authorizations. Rosemary knew about the application for the policy and the conversions, although she did not know her signature was required. Unknown to Rosemary, loans were taken against the policies at various dates and the policies were surrendered. One policy was surrendered on February 15, 2002 (hereafter referred to as the 2002 policy). The other two policies were surrendered on June 27, 2007 (hereafter referred to as the 2007 policies). Ken signed Rosemary's name to the forms requesting surrender. The proceeds of surrender, $9,941.73 in total when loans against the policies were offset, were sent by checks addressed to Rosemary and deposited in Ken and Rosemary's joint checking account with Rosemary's endorsement on each check.

¶3 On March 14, 2008, Ken died. Rosemary requested that life insurance benefits be paid to her under the policies. She was informed that the policies had been surrendered. This action was commenced and both parties moved for summary judgment. The circuit court ruled that because Rosemary knew about and consented to the application and conversions those actions were valid. The court found that Ken's communication with Settlers relative to that paperwork was as Settlers' agent. Regarding the loans and surrenders, things Rosemary did not know about and undertaken at times when Ken was no longer

Settlers' agent, the court ruled that Ken did not act with apparent or actual authority for Rosemary and Settlers had no basis to continue to rely on Ken as a conduit for information. It concluded that the loans against and surrender of the policies were invalid. Judgment was entered for $263,565.51, plus interest and double costs.[1]

¶4 When called upon to review a circuit court's grant of summary judgment, we follow the same methodology as the circuit court under WIS. STAT. § 802.08(2) (2007-08).[2] ***Apple Valley Gardens Ass'n, Inc. v. MacHutta***, 2007 WI App 270, ¶10, 306 Wis. 2d 780, 743 N.W.2d 483, *aff'd*, 2009 WI 28, 316 Wis. 2d 85, 763 N.W.2d 126.

> Where, as here, the parties file cross-motions for summary judgment and neither argues that factual disputes bar the other's motion, the facts are deemed stipulated, leaving us to determine issues of law. Any stipulation, however, remains subject to the rule that summary judgment may be granted only if no material issue of fact is presented by the parties' respective evidentiary facts.

Id. (citation omitted). Where the material facts are not disputed, the court is presented solely with a question of law subject to de novo review. ***Smaxwell v. Bayard***, 2004 WI 101, ¶12, 274 Wis. 2d 278, 682 N.W.2d 923.

¶5 Rosemary's complaint, filed July 11, 2008, asserted a breach of contract claim and sought a declaration that the policy surrenders were invalid.

[1] The circuit court rejected Settlers' statute of limitation defense as to the 2002 policy and concluded that Rosemary did not have to pay the loans against the policies occasioned by Ken's tort. Past due premiums were offset against death benefits in determining the judgment amount.

[2] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

Under WIS. STAT. § 893.43, an action for breach of contract must be commenced within six years after the cause of action accrues or be barred. A cause of action accrues when there is a claim capable of present enforcement. ***Effert v. Heritage Mut. Ins. Co.***, 160 Wis. 2d 520, 524, 466 N.W.2d 660 (Ct. App. 1990). "[A] contract claim arises when the contract is breached." ***Id.*** at 525.

¶6 Here if Settlers breached the contract it was when it terminated the contract and paid out the value of the policies. *See* ***Draper v. Frontier Ins. Co.***, 638 N.E.2d 1176, 1179 (Ill. App. Ct. 1994) ("plaintiff's suit is not merely one to recover on the policy, but also one for the wrongful cancellation of the policy. The former claim is wholly and necessarily dependent on the latter."). Rosemary was the owner of the policy and not just a beneficiary. Her cause of action accrued when ownership was terminated. It does not matter when Rosemary discovered the potentially wrongful termination of the contract. *See* ***Atkinson v. Everbrite, Inc.***, 224 Wis. 2d 724, 733, 592 N.W.2d 299 (Ct. App. 1999). That she was denied the death benefit years later only served to change the amount of her damages and did not give rise to a separate actionable claim. We conclude that the statute of limitations bars recovery on the 2002 policy because this action was not commenced within six years of the termination of the policy.[3]

¶7 Settlers advances multiple reasons why Rosemary is bound by the loans against and surrender of the 2007 policies: estoppel, actual or apparent agency by Ken to act for Rosemary on all matters concerning the policies and the couple's financial affairs, the good-faith defense available to life insurers under

[3] As Settlers points out, the statute of limitation also bars any challenge to the loans made against the policies, the last loan being made on May 28, 2002, more than six years from the commencement of this suit.

WIS. STAT. § 766.61(2)(b)1., and that the policies were void ab initio because of material misrepresentations in the policy application and conversions. We conclude the dispositive argument is that the policies were void ab initio because of Ken's forgery on the application and conversions. It is the only argument we need to consider. *See* ***Sweet v. Berge***, 113 Wis. 2d 61, 67, 334 N.W.2d 559 (Ct. App. 1983) (holding that a Wisconsin appellate court need not decide an issue if the resolution of another issue is dispositive).

¶8 Rosemary's complaint alleges that the documentation cancelling the policies included the forgery of her name. Rosemary stated in her affidavit that she did not know she was supposed to sign any documentation relating to the application for life insurance. Thus, she did not give Ken permission to sign her name on the application. Rosemary cannot simply negate her signature on the surrender documents as forgeries (because without her knowledge and permission) but adopt her signature on the application and conversion documents, also forgeries. She cannot have it both ways.[4] Thus, her signature on the application was a forgery.

¶9 It is undisputed that Ken signed Rosemary's name to the application. He also signed his own name to the application as Settlers' agent. However, the

[4] We recognize that this is akin to the argument that Rosemary cannot delegate authority to Ken to acquire and manage the policies and parties' financial affairs and then, in hindsight, disavow his acts that do not benefit her. *See* ***Slavin v. Comm'r of Internal Revenue***, 932 F.2d 598, 601 (7th Cir. 1991) (a principal disappointed with the results of her agent's acts *ex post* cannot withdraw his authority *ex ante*); ***Ocrant v. Dean Witter & Co***, 502 F.2d 854, 858 (10th Cir. 1974) ("Mrs. Ocrant has stressed her complete reliance on her husband's skill and expertise to excuse her own inattentiveness and inaction. She cannot now reject that reliance for purposes of disaffirming his activities.").

penmanship of the signatures is different and reflects that Ken was trying to differentiate the signatures to make it appear that Rosemary had personally signed.

¶10 By its very unlawful nature, the forging of an applicant's signature is an act outside the authority of an insurance agent. Ken submitted the application and conversion documents with knowledge that Rosemary's signature was forged. However, Ken wore multiple hats when submitting the application for insurance. Ken was also the insured under the policy. His knowledge of the forgery is not imputed to Settlers because Ken acted in collusion with himself, as both the insurance agent and insured, to deceive Settlers that Rosemary had signed the application. *See* WIS. STAT. § 631.09(4) (subsections imputing an agent's knowledge to the insurer do not apply "if the agent and the policyholder or insured acted in collusion to deceive or defraud the insurer, or if the policyholder or insured knew the agent was acting beyond the scope of the agent's authority"). *See also* WIS. STAT. § 628.40 (insurer bound only by acts of its agent within the scope of the agent's apparent authority).

¶11 Forgery renders a contract void ab initio. ***Laborers' Pension Fund v. A & C Envtl., Inc.***, 301 F.3d 768, 779-80 (7th Cir. 2002) (*citing* ***Crocker v. Bellangee***, 6 Wis. 645 (1858)). Thus, the life insurance policy was never in force. ***Id.*** The 2007 policies were not in force for two years so as to trigger the incontestability clause in the policies or the incontestability statute, WIS. STAT. § 632.46. *See* ***Obartuch v. Security Mut. Life Ins. Co.***, 114 F.2d 873, 878 (7th Cir. 1940).

¶12 Rosemary cannot recover on life insurance policies that were void ab initio. Consequently, we reverse the judgment and remand with directions for entry of an order granting Settlers' motion for summary judgment dismissing the

complaint. Pursuant to a motion to reconsider our initial opinion in this case, and the response to that motion, the parties agree that upon rescission of the 2007 policies, the parties should be returned to the status quo with respect to those policies. We remand for further proceedings necessary to determine the appropriate relief.

By the Court.—Judgment reversed and cause remanded with directions and for further proceedings.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.