

COURT OF APPEALS
DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

JAMES M. KENY, EXECUTOR,
ESTATE OF GALIA KENY, ET AL.

Plaintiffs-Appellants

-vs-

ANTHEM LIFE INSURANCE
COMPANY

Defendant-Appellee

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JUDGES:

Hon. W. Scott Gwin, P.J.

Hon. Sheila G. Farmer, J.

Hon. Patricia A. Delaney, J.

Case No. 15 CAE 04 0035

OPINION

CHARACTER OF PROCEEDING:

Appeal from the Court of Common
Pleas, Case No. 12 CVH 12 1004

JUDGMENT:

Affirmed

DATE OF JUDGMENT:

July 21, 2015

APPEARANCES:

For Plaintiffs-Appellants

SUSAN N. HAYES
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Worthington, OH 43085

For Defendant-Appellee

JOSEPH C. KLEIN
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Farmer, J.

{¶1} The decedent, Galia Keny, died on October 19, 2011. At the time of her death, she was employed by The Ohio State University Medical Center (hereinafter "OSU"). As an employee, she was covered under a group term life insurance policy issued by appellee, Anthem Life Insurance Company. Upon the decedent's death, appellee paid the proceeds of the policy to her surviving spouse, William Brown, Jr.

{¶2} On December 4, 2013, appellants, James M. Keny, Executor of the Estate of Galia Keny, and her surviving children, Tara, Mason, Cory, and Audrey Keny, filed a complaint against appellee and Mr. Brown claiming breach of contract and negligence. Appellants claimed the proceeds of the life insurance policy should have been paid to the decedent's estate, not Mr. Brown. On June 30, 2014, the trial court dismissed the negligence claim and the claims against Mr. Brown. The only matter left pending was the breach of contract claim against appellee.

{¶3} On September 8, 2014, appellee filed a motion for summary judgment. By judgment entry filed March 24, 2015, the trial court granted the motion and closed the case.

{¶4} Appellants filed an appeal and this matter is now before this court for consideration. Assignment of error is as follows:

I

{¶5} THE COURT OF COMMON PLEAS JUDGE ERRED AS A MATTER OF LAW IN GRANTING APPELLEE ANTHEM LIFE INSURANCE COMPANY'S MOTION FOR SUMMARY JUDGMENT ON BREACH OF CONTRACT CLAIM WHERE ISSUES OF FACT REMAINED."

I

{¶6} Appellants claim the trial court erred in granting summary judgment to appellee on their breach of contract claim as there are issues of fact yet to be determined. We disagree.

{¶7} Summary Judgment motions are to be resolved in light of the dictates of Civ.R. 56. Said rule was reaffirmed by the Supreme Court of Ohio in *State ex rel. Zimmerman v. Tompkins*, 75 Ohio St.3d 447, 448, 1996-Ohio-211:

Civ.R. 56(C) provides that before summary judgment may be granted, it must be determined that (1) no genuine issue as to any material fact remains to be litigated, (2) the moving party is entitled to judgment as a matter of law, and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the party against whom the motion for summary judgment is made. *State ex. rel. Parsons v. Fleming* (1994), 68 Ohio St.3d 509, 511, 628 N.E.2d 1377, 1379, citing *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327, 4 O.O3d 466, 472, 364 N.E.2d 267, 274.

{¶8} As an appellate court reviewing summary judgment motions, we must stand in the shoes of the trial court and review summary judgments on the same standard and evidence as the trial court. *Smiddy v. The Wedding Party, Inc.*, 30 Ohio St.3d 35 (1987).

{¶9} Appellants argue appellee breached its insurance contract by acting in bad faith by electing to pay the insurance proceeds to Mr. Brown rather than the estate. Appellants also argue appellee acted on the instructions of OSU, the payor of the insurance policy.

{¶10} "In order to recover on a claim of breach of contract, the plaintiff must prove (1) the existence of a contract, (2) performance by the plaintiff, (3) breach by the defendant, and (4) damage or loss to the plaintiff." *Price v. Dillon*, 7th Dist. Mahoning Nos. 07-MA-75, 07-MA-76, 2008-Ohio-1178, ¶ 44.

{¶11} Appellee's September 8, 2014 motion for summary judgment was supported by various affidavits and exhibits. The group term life insurance policy Certificate of Coverage (attached to the summary judgment motion as Exhibit B) provided the following in pertinent part:

BENEFIT

In the event of your death while you are insured under this certificate, we will pay the group term life insurance amount stated in the schedule of benefits to your beneficiary.

PAYMENT OF BENEFIT

We will pay your group term life insurance benefit after we receive notice and proof of your death.

All life insurance benefits will be paid in one lump sum:

- ◆ directly to the Beneficiary; or
- ◆ by making a deposit in an interest bearing account established by Us for the Beneficiary.

Other settlement options may be available upon request.

BENEFICIARY

The primary beneficiary is the person you name to receive life insurance benefits on your enrollment card. You may name more than one beneficiary and may change the beneficiary at any time by completing a "Change of Name/Beneficiary Card." You must provide the name of the new beneficiary and the date that the change is to be effective on the change card. A change will be effective on the date you state on the change card. If you do not include a date for the change to become effective, the change will be effective on the date the policyholder receives the change card. If your death occurs before the policyholder receives a change card, we will not change any payment we made before the card was received. In the event of your primary beneficiary's death, payment will be made to the contingent beneficiary. The contingent beneficiary is the person you name on the enrollment card or change card to receive life insurance benefits if payment cannot be made to your primary beneficiary or beneficiaries.

If you name two or more beneficiaries and you do not state their respective share of the benefits, the benefits will be divided equally. If any beneficiary dies before you die, that beneficiary's share will pass to the surviving beneficiaries equally.

If you failed to name a beneficiary or if no beneficiary survives you, we will pay your life insurance benefit to your estate or, at our option, to:

- ◆ your surviving spouse; otherwise
- ◆ your surviving children equally; otherwise
- ◆ your surviving parent(s) equally; otherwise
- ◆ any person who verifies to us that they have incurred funeral or other expenses related to your last illness or death. However, our payment to this person will not exceed \$1,000.

{¶12} Jody Gilkerson, the Benefits Program Manager for OSU, filed an affidavit (attached to the summary judgment motion as Exhibit A) and averred the following in pertinent part:

5. I am aware that OSU was notified about Ms. Keny's death and her spouse initiated the process to obtain available life insurance benefits. However, as of the time of her death, OSU had no record whatsoever of any beneficiary designations made by Ms. Keny. Therefore, as is customary, OSU sent no notifications to anyone regarding the benefits to which they may or may not have been entitled.

7. At the time of Mr. Brown's claim and now, there is no record in Ms. Keny's files that she ever designated anyone as a beneficiary for her policy. Therefore, to the best of my knowledge, the forms submitted to ALIC regarding Ms. Keny's lack of designated beneficiaries are correct.

8. Between the date of Ms. Keny's death and June 2012, no individual other than Mr. Brown notified OSU of any competing claims to the life insurance benefits. Neither did OSU represent to any other individual that it would process any claims on the policy to anyone other than Mr. Brown.

{¶13} Jamie Dupler, Short Term Disability/Life Coordinator for OSU, filed an affidavit (attached to the summary judgment motion as Exhibit C), and averred the following in pertinent part:

3. Gaila Keny was an eligible employee and was enrolled in OSU's group term life insurance policy on October 17, 2004 to the time of her death in October 2011. As such, she had the option to designate beneficiaries under the terms of the COC. In 2011, OSU kept paper records of an employee's beneficiary designations in his or her insurance policy files. At the time of Ms. Keny's death, OSU had no record of any beneficiary designation made by Ms. Keny in her insurance policy files.

4. On November 3, 2011, William Brown submitted a Preference Beneficiary Affidavit to OSU indicating that he was the sole claimant on, and beneficiary of, Ms. Keny's life insurance policy. A true and accurate copy of the Preference Beneficiary Affidavit is attached here as Exhibit 1. Using the information in Mr. Brown's affidavit, I completed the Employer Statement of Death Form, a true and accurate copy of which is attached here as Exhibit 2. I then sent these documents to ALIC for processing of the life insurance benefits.

6. Between the date of Ms. Keny's death and June 2012, I am not aware of any individual other than Mr. Brown who notified OSU of any competing claims to the life insurance benefits.

{¶14} In response, appellants filed a memorandum in opposition on September 29, 2014. The executor, James Keny, filed an affidavit (attached to the memorandum as Exhibit A) and averred the following in pertinent part:

3. Any paperwork of Galia's would have been in the house with Mr. Brown. We did not even know about the policy eligibility until sometime in March 2012.

4. I contacted OSU on March 21, 2012, and then met with Katie Shockley, the benefits coordinator at OSU on 3/27/2012. She provided me the forms that would need to be filled out by the children and the amount of the policy to be paid out. Not once did she mention that Mr. Brown had made application and that the proceeds were already paid out. It was also odd to me that she had trouble finding the job history record for Galia since she had worked for OSU over 20 years. Mrs. Shockley also forwarded my information onto Jamie Dupler, the life insurance coordinator at OSU, On March 21, 2012, so Jamie Dupler's affidavit that he had no information on other claims prior to June 2012 is false as well as the affidavits of the other representatives which should have shown the communications in their records. See attached e-mail communication.

5. All of Galia's other benefits had been changed to reflect the children as the primary beneficiaries including her PERS which was changed just 2 months prior to her death.

{¶15} Jill Warner, the decedent's friend and co-worker, filed an affidavit (attached to the memorandum as Exhibit B), and averred the following in pertinent part:

2. I am making this statement on my own personal knowledge and information.

3. Galia Keny told me approximately 2 months before she died that she had met with Kristie Henneman to change her beneficiary designations.

4. My experience with OSU is that every time a position change or classification change occurred, you are required to update all of your benefit information. As Galia had recently had a position change there would be no reason there would not have been an updated beneficiary form that had to be completed as a part of that process.

{¶16} Susan Crawford, a long term friend of the decedent, filed an affidavit (attached to the memorandum as Exhibit C), and averred the following in pertinent part:

3. My husband and I usually attended Passover meal with Galia's family, and did so the year of her death.

4. It was on that occasion that Galia confided to me that her husband, Bill, was having an affair. When I asked her what she was doing about it, she told me that she intended to put forth every effort to save the

marriage. She also told me she was in the process of changing the beneficiary designations of her financial assets from her husband to her children. She was clear about her intent to minimize any risk to her children while attempting to repair her marriage, as she understood the likelihood of such repair was minimal.

{¶17} The parties to a contract are bound by the specific language of the contract. It is undisputed that a beneficiary card completed by the decedent does not exist. The evidence presented by the affidavits of Jill Warner and Susan Crawford are hearsay at best, and are unreliable and conclusory vis-à-vis the facts established by the affidavits submitted by Jody Gilkerson and Jamie Dupler. Appellants admit a claim was not made or presented to appellee until after payment was made to Mr. Brown. Appellants presented a claim on March 21, 2012, some four and one-half months after the claim filed by Mr. Brown. Benefits were paid out on February 13, 2012, after receipt of a Certificate of Death confirming the cause of death as suicide.

{¶18} Catherine Pruitt, Manager, Clinical Quality for appellee, filed an affidavit (attached to the summary judgment motion as Exhibit D), and averred the following in pertinent part:

5. On November 30, 2011, before making payments to Mr. Brown, ALIC sent an email to OSU to re-confirm that Ms. Keny had not designated a beneficiary. OSU confirmed to ALIC in an email that it had no record of beneficiaries listed for Ms. Keny, and instructed ALIC to use

Mr. Brown's Preference Beneficiary Affidavit to process the payment of proceeds to him. A true and accurate copy of the November 30, 2011 email correspondence between OSU and AKIC is attached here as Exhibit 2.

6. Because the initial death certificate listed the cause of death as "Pending Investigation," ALIC held benefits until it received an update certificate confirming the cause of death as suicide. A true and accurate copy of that case note is attached hereto as Exhibit 3.

7. By check dated February 13, 2012, ALIC paid the benefits of Ms. Keny's life insurance policy to Mr. Brown in the amount of \$183,506.34. The check issued to Mr. Brown was cashed on February 24, 2012.

{¶19} In *Butcher v. Pollard*, 32 Ohio App 2d 1, 7 (8th Dist.1972), our brethren from the Eighth District reviewed a "substitute beneficiary clause" in the absence of a designated beneficiary form and stated the following:

In examining the substitute beneficiary clause, we find that it is a rather ubiquitous creature. It serves as a succeeding directive where the insured has simply failed to exercise his contractual right to name a beneficiary, or where the named beneficiary predeceases the insured; it has even been invoked where the named beneficiary survives the insured, but is statutorily barred from receiving the proceeds. In these instances, if it were not for the back-up provisions, the proceeds would more than likely

be paid to the insured's estate. Functionally the payment of insurance benefits under the substitute beneficiary clause is quite similar to inheritance under R.C. 2105.06, Ohio's descent and distribution statute. Both the decedent's property and his insurance are distributed upon his death. Both the contract provision and the succession laws become operative in the absence of the decedent's expressed intentions as to how the proceeds and his property are to be allocated. And, both provide that distribution is to be made first to the spouse and children, if possible. (Footnotes omitted.)

{¶20} In *Saker, Administrator of the Estate of Phillips v. Madry*, 10th Dist. Franklin No. 86AP-742, 1997 WL 6075, *1 (Feb. 5, 1987), our brethren from the Tenth District explained the following:

Life insurance benefits are not considered assets of the estate unless the policy is payable to the executor or administrator of such estate, or the insured recovered the proceeds of the policy prior to his or her death. When a facility of payment clause is involved, insurance proceeds do not become part of the assets of the estate unless the insurance company declines to designate a beneficiary under such a clause.

{¶21} In its judgment entry filed March 24, 2015, the trial court concluded, "the Court finds that Anthem fulfilled the contract terms and that Plaintiffs have not provided any evidence to show that Anthem failed to act honestly and reasonably in doing so."

{¶22} We concur with the trial court's analysis that undisputedly, a change of beneficiary designation card was not in existence and the terms of the insurance policy specifically provided for payment to others i.e., the surviving spouse, as a default beneficiary. Although the executor and the surviving children presented a "wish she could have, should have" argument, there is no showing that appellee breached its duty of good faith or acted negligently in following the specific provisions of the insurance contract.

{¶23} The sole assignment of error is denied.

{¶24} The judgment of the Court of Common Pleas of Delaware County, Ohio is hereby affirmed.

By Farmer, J.

Gwin, P.J. and

Delaney, J. concur.

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