

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
WOOD COUNTY

Gregory G. Johnson

Court of Appeals No. WD-12-029

Appellant

Trial Court No. 2011CV0343

v.

Ohio National Life Assurance Co.

DECISION AND JUDGMENT

Appellee

Decided: January 17, 2014

* * * * *

Barry T. Doyle and John R. Gaughen, for appellant.

Martin T. Galvin, Andrew J. Dorman and Chetan S. Patil,
for appellee.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} This is an appeal from a judgment of the Wood County Court of Common Pleas that granted the summary judgment motion of defendant-appellee, Ohio National Life Assurance Corporation (“Ohio National”), denied the summary judgment motion of

plaintiff-appellant, Gregory G. Johnson, and dismissed the case. Appellant now challenges that judgment through a sole assignment of error:

The trial court erred in denying plaintiff-appellant Johnson's motion for summary judgment and granting defendant-appellee Ohio National's motion for summary judgment.

{¶ 2} The undisputed facts of this case are as follows. Appellant is a medical doctor who became board certified in obstetrics and gynecology in 1985. On December 1, 1987, Ohio National issued to Johnson Disability Income Policy No. H6095631 ("Policy 631"), which was to provide benefits to Johnson for covered losses during periods of total disability due to injury or sickness. On August 1, 1991, Ohio National issued to Johnson Disability Income Policy No. H6126045 ("Policy 045"), which also was to provide benefits to Johnson for covered losses during periods of total disability due to injury or sickness.

{¶ 3} From August 1983 until May 2007, Johnson was employed by various medical providers as an OB/GYN. From May to October 2007, Johnson took time off from work, and although he was pursuing employment as an OB/GYN, he was not able to find a position in that field. From October 2007 through March 2008, he worked on a temporary basis as an OB/GYN at the Defiance Clinic, filling in for other doctors when needed. Throughout that time period, he worked approximately 24 days at the Defiance Clinic. In addition, from November 2007 through December 2008, Johnson worked part-time as a physician at Great Lakes Urgent Care. That position did not include any work

as an OB/GYN. Rather, as an urgent care physician, Johnson performed physicals, examined patients suffering from colds, flu and allergies, and performed limited suturing of minor wounds.

{¶ 4} On June 26, 2008, Johnson visited Dr. Robert Axonovitz, a specialist in internal medicine for a physical. Among Johnson's concerns was joint pain, swelling and stiffness in his hands and a rash. Dr. Axonovitz did not make a diagnosis at this first visit, but noted that it appeared Johnson had an inflammatory condition of his hands and skin. Because lab tests revealed significant inflammation of the hands, Dr. Axonovitz referred Johnson to Dr. William Treuhaft, a rheumatologist. Johnson first saw Dr. Treuhaft on November 14, 2008. After further testing, Dr. Treuhaft diagnosed Johnson as having psoriatic arthritis. That condition prevented him from continuing to operate as a surgeon and therefore prevented him from practicing as an OB/GYN.

{¶ 5} On December 26, 2008, Johnson submitted a claim for disability income benefits pursuant to his policies with Ohio National. On November 30, 2010, Ohio National denied the claim on the basis that as of the claimed date of disability, June 26, 2008, Johnson was working as an urgent care physician and had not worked as an OB/GYN since March 2008. Ohio National concluded that Johnson did not meet the definition of "Total Disability or Totally Disabled" as defined by the policies at issue, because as of June 26, 2008, he could still perform the substantial and material tasks of his job as an urgent care doctor.

{¶ 6} On April 21, 2011, Johnson filed a complaint in the court below against Ohio National. Johnson alleged that he was entitled to disability income benefits under the two policies and that Ohio National's refusal to pay such benefits was a breach of contract and was made in bad faith. Both parties filed motions for summary judgment in the court below. On May 29, 2012, the court issued a judgment entry granting Ohio National's motion for summary judgment, denying Johnson's motion, and dismissing the case. It is from that judgment that Johnson appeals.

{¶ 7} In his sole assignment of error, Johnson asserts that the lower court erred in granting Ohio National summary judgment and denying his own motion for summary judgment. Johnson does not articulate the basis for his argument in his brief but, rather, incorporates the legal arguments and supporting legal authorities he presented to the trial court as grounds for reversal. Because our review of a ruling on a summary judgment motion is de novo, Johnson's failure to further articulate his arguments before this court is not fatal to his appeal.

{¶ 8} Again, appellate review of a trial court's ruling on a summary judgment motion is de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). Accordingly, we review the trial court's grant of summary judgment independently and without deference to the trial court's determination. *Brown v. Scioto Cty. Bd. of Commrs.*, 87 Ohio App.3d 704, 711, 622 N.E.2d 1153 (4th Dist.1993). Summary judgment will be granted only when there remains no genuine issue of material fact and, when construing the evidence most strongly in favor of the nonmoving party,

reasonable minds can only conclude that the moving party is entitled to judgment as a matter of law. *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 66, 375 N.E.2d 46 (1978).

{¶ 9} An insurance policy is a contract between the insurer and the insured. *Nationwide Mut. Ins. Co. v. Marsh*, 15 Ohio St.3d 107, 109, 472 N.E.2d 1061 (1984). “The words and phrases contained in an insurance policy must be given their plain and ordinary meaning unless there is something in the contract that would indicate a contrary intention.” *McKeehan v. Am. Family Life Assur. Co. of Columbus*, 156 Ohio App.3d 254, 2004-Ohio-764, 805 N.E.2d 183, ¶ 4 (1st Dist.), citing *Olmstead v. Lumbermens Mut. Ins. Co.*, 22 Ohio St.2d 212, 259 N.E.2d 123 (1970). A court may not alter the clear and unambiguous language of an insurance policy in order to reach a result not intended by the parties to the contract. *Gomolka v. State Auto. Mut. Ins. Co.*, 70 Ohio St.2d 166, 168, 436 N.E.2d 1347 (1982). Nevertheless, when contract provisions are reasonably susceptible of more than one interpretation, they must be construed strictly against the insurer and liberally in favor of the insured. *King v. Nationwide Ins. Co.*, 35 Ohio St.3d 208, 519 N.E.2d 1380 (1988), syllabus.

{¶ 10} Two substantially similar disability income insurance policies are at issue in this case. Both policies provide that Ohio National will pay Johnson income while he is “totally disabled.” Policy 631, which was issued on December 1, 1987, provides under the definitions section:

You are Totally Disabled or have a Total Disability if: (a) you are not able to do the substantial and material tasks of your own job due to injury or Sickness; and (b) you are under a Physician's care. You do not need to be under a Physician's care on a regular basis if you can show that further recovery is not expected of you. You are not Totally Disabled if you are working at your own job and are earning more than 25% of your Monthly Earnings Before Disability.

{¶ 11} Policy 045, which was issued on August 1, 1991, included a "Regular Occupation Rider" which added the following definitions to that policy:

Total Disability or Totally Disabled

Means that, as a result of Sickness or Injury, you are not able to perform all or the substantial and material duties of your regular occupation at the start of your Total Disability.

Your Regular Occupation

Means the occupation (or occupations if more than one) in which you are regularly engaged at the time you become Totally Disabled. If your regular occupation is limited to a Board Certified Specialty within the scope of your degree or license, we will deem that Specialty to be your occupation.

{¶ 12} It is undisputed that Johnson has psoriatic arthritis and is unable to perform the substantial and material duties of an OB/GYN due to that disability. The parties

further agree that June 26, 2008, is the date of disability for purposes of Johnson's claim. Johnson asserts that his claim for disability benefits should have been allowed because, as of that date, he was still an OB/GYN and his disability prevented him from continuing to practice medicine in that field. Ohio National counters, however, that as of that date, Johnson was working as an urgent care physician and was able to perform the substantial and material duties of that job and occupation, despite his psoriatic arthritis. Accordingly, Ohio National asserts Johnson was not totally disabled as that term is defined by both policies.

{¶ 13} In viewing the plain language of both policies, it is clear that Ohio National properly denied Johnson's claim for disability benefits. Policy 631 allows a claim for disability benefits where a claimant is not able to do the substantial and material tasks of his own job due to injury or sickness. The policy does not define the term "job." A common definition of "job" is "a regular remunerative position." *Merriam-Webster's Collegiate Dictionary* 630 (10th Ed.1996). At the onset of Johnson's disability, the regular remunerative position in which he was engaged was as an urgent care doctor.

{¶ 14} Similarly, Policy 045 allows a claim for disability benefits where a claimant is not able to perform all or the substantial and material duties of his regular occupation at the start of the disability. This policy uses the phrase "regular occupation," rather than "job," but then defines that phrase using the words "occupation" and "regular." A common definition of "occupation" is "the principal business of one's life." *Merriam-Webster's Collegiate Dictionary* at 804. The policy, however, further narrows

the definition of “regular occupation.” Although Johnson was a board certified OB/GYN, at the time of the onset of his disability his regular occupation was not limited to that specialty. The principal business of his life at that time was as an urgent care doctor. He had not regularly practiced as an OB/GYN since May 2007, and had last treated patients as an OB/GYN in March 2008. Moreover, the record demonstrates that appellant stopped working full-time as an OB/GYN in May 2007, for reasons not related to any disability.

{¶ 15} In conclusion, although Johnson may have still considered himself to be an OB/GYN as of June 26, 2008, it was neither his job nor his regular occupation at that time. Because psoriatic arthritis did not prevent him from performing the substantial and material tasks of an urgent care physician, Johnson was not totally disabled as that phrase is used in both policies at issue.

{¶ 16} Accordingly, the lower court did not err in granting Ohio National’s motion for summary judgment and in denying Johnson’s motion for summary judgment. The sole assignment of error is not well-taken.

{¶ 17} On consideration whereof, we find that substantial justice has been done the party complaining and the judgment of the Wood County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J.

JUDGE

Arlene Singer, J.

JUDGE

Thomas J. Osowik, J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
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