[Cite as *Am. Family Ins. Co. v. Johnson*, 2007-Ohio-7271.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 88023

AMERICAN FAMILY INSURANCE COMPANY

PLAINTIFF-APPELLANT

vs.

PATRICIA JOHNSON, ET AL.

DEFENDANTS-APPELLEES

JUDGMENT:
DISMISSED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-545123

BEFORE: Gallagher, P. J., Stewart, J., and Dyke, J.

RELEASED: February 8, 2007

JOURNALIZED:

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SEAN C. GALLAGHER, P. J.:

{¶1} Appellant, American Family Insurance Company ("American Family"), appeals from the judgment in the Cuyahoga County Court of Common Pleas that granted a motion for directed verdict in favor of appellees, Patricia Johnson and Thomas Johnson. For the reasons stated herein, we dismiss the appeal for a lack of a final appealable order.

{¶2} In order to understand the trial court's ruling and to evaluate it as a final

appealable order, we believe some explanation of the case and review of the ruling is necessary. In doing so, we make no determination as to the merits of this action.

Declaratory Judgment Action and Policy of Insurance

{¶3} American Family filed this declaratory judgment action against the Johnsons on October 12, 2004. The action was filed following the submission of a claim by the Johnsons under their homeowner's policy for fire damage of approximately $118,000 to their house. The fire occurred in September 2003.

{¶4} In its complaint, American Family alleges that the Johnsons provided misrepresentations or omissions in their application for insurance and that a controversy has arisen as to whether these actions were material to the application and rendered the policy of insurance void. American Family also alleges that a controversy has arisen as to whether the Johnsons caused an intentional loss to the insured premises and engaged in fraud. American Family requested that the court declare the respective rights and obligations of the parties under the policy. A copy of the policy was attached to the complaint.

{¶5} The matter proceeded to a bench trial where American Family called several witnesses to testify. At the conclusion of American Family's case, defense counsel moved for a directed verdict, claiming American Family had failed to establish the elements of its case. The trial court granted the motion, concluding, "I don't find that there's sufficient information by a preponderance of the evidence that [the Johnsons] were involved in [the] starting of the fire, nor

do I find that the application process for which the answers were omitted or deleted or not answered sufficient to warrant rendering this contract void."

{¶6} Subsequently, the trial court issued the following findings of fact and conclusions of law:

> **"The defendants regularly paid premiums to the plaintiff for home casualty insurance for over a year. Defendants produced checks to establish this fact. That during the interim, plaintiff, despite having knowledge that its own agent, originally responsible for writing the policy was released and having had a second agent re-write the policy, never raised any issue about the truthfulness of any of the statements made by defendants to set the policy into effect. Nearly a full year passed without plaintiff questioning the authenticity of any of the answers that Patricia Johnson provided. The presence of a blank application in the plaintiff's file with Ms. Johnson's signature affixed thereon, raised serious credibility issues which questions the [plaintiff's] business practices.**
>
> **"Plaintiff had ample opportunity to determine the veracity of these statements. Furthermore, plaintiff did have knowledge defendants had filed for bankruptcy before issuing the policy. The plaintiff went to inspect the home of defendants for fire or other pre-existing damage and found nothing to prevent it from issuing a policy to defendants. Rather, plaintiff continued to accept premiums until a claim for fire damage losses was made. In light of the foregoing, the claim that material misrepresentations were made has not been proved. Defendants satisfied the material conditions of the insurance contract. And in any event under the facts here, they were waived. *City of North Olmsted v. Eliza Jennings* (1993), Ohio App.3d 173. Plaintiff failed to prove by the preponderance of the evidence that the fire was not accidental. Therefore defendants' motion for a directed verdict was properly granted."**

{¶7} American Family appealed from the trial court's ruling, raising three

assignments of error for review, each challenging the court's granting of a directed verdict. As discussed below, we must dismiss the appeal for a lack of a final appealable order.

Nature of the Trial Court's Ruling

{¶8} Initially, we recognize that a motion for a directed verdict does not lie in a bench trial as Civ.R. 50 applies only to a jury trial. Where a bench trial is held, a motion for a directed verdict is deemed to be a motion for involuntary dismissal pursuant to Civ.R. 41(B)(2).[1] *Connolly Constr. Co. v. Yoder*, Union App. No. 14-04-39, 2005-Ohio-4624; *Junkins v. Spinnaker Bay Condo. Assoc.*, Ottowa App. No. OT-01-007, OT-01-006, 2002-Ohio-872; *Hirus v. Balraj* (Jan. 6, 1994), Cuyahoga App. No. 64488. Civ.R. 41(B)(2) authorizes a trial court, in its discretion, to dismiss the action if the plaintiff has failed to prove its case by a preponderance of the evidence or the otherwise applicable burden of proof. The rule requires that "[i]f the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Civ.R. 52 if requested to do so by any party." Civ.R. 41(B)(2).

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[1] Civ.R. 41(B)(2) states the following: "Dismissal; non-jury action. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Civ.R. 52 if requested to do so by any party."

{¶9} In this case, the trial court granted the motion and rendered a judgment on the merits against the plaintiff. However, in doing so, the trial court failed to adequately declare the rights and obligations of the parties under the insurance contract. In fact, the trial court did not even mention the insurance contract, let alone construe the policy at issue.

Lack of a Final Appealable Order

{¶10}It is well settled that "when a trial court enters a judgment in a declaratory judgment action, the order must declare all of the parties' rights and obligations in order to constitute a final, appealable order." *Stiggers v. Erie Ins. Group*, Cuyahoga App. No. 85418, 2005-Ohio-3434, citing *Accent Group, Inc. v. Village of N. Randall*, Cuyahoga App. No. 83274, 2004-Ohio-1455. Further, "[a]s a general rule, a trial court does not fulfill its function in a declaratory judgment action when it fails to construe the documents at issue." *Highlands Bus. Park, LLC v. Grubb & Ellis Co.*, Cuyahoga App. No. 85225, 2005-Ohio-3139.

{¶11}Because a judgment in a declaratory judgment action requires a declaration of the rights and obligations of the parties, this court has previously recognized that "[a]n action which seeks the declaration of rights and obligations is not the type of action ideally suited to disposition by summary judgment." *Stiggers*, supra, quoting *Nickschinski v. Sentry Ins. Co.* (1993), 88 Ohio App.3d 185, 189. The same holds true with respect to the judgment of dismissal in this matter.

{¶12}A review of the trial court's ruling in this matter reflects that the court failed to fulfill its function in this declaratory judgment action when it disposed of the matter without addressing the declaratory relief requested and without adequately advising the parties of their rights and obligations under the insurance policy. Indeed, "[t]he failure of the trial court to fulfull its function vis-a-vis a declaratory judgment action when it disposed of the claims in issue * * * without setting forth the construction of the [contract] or the law under consideration, and declaring the rights of the parties with reasons for doing so, prevents the order appealed from being a final order capable of appellate review." *Sitton v. Alamo Rent-A-Car LLC*, Cuyahoga App. No. 80801, 2002-Ohio-4168, citing *Bella Vista Group, Inc. v. City of Strongsville* (Sept. 6, 2001), Cuyahoga App. No. 78836; *Haapala v. Nationwide Property & Casualty Ins. Co.* (Nov. 9, 2000), Cuyahoga App. No. 77597.

{¶13}We acknowledge that the trial court attempted to set forth some reasoning for its grant of the Johnsons' motion. The trial court raised much concern over the blank application with Patricia Johnson's signature and American Family's business practices. However, there was testimony that the information on the subsequent application, which was utilized by American Family, was provided by Patricia Johnson and that this application was verified and signed by her. The trial court failed to consider whether the statements made by Patricia Johnson in the insurance application were incorporated into

the insurance policy as warranties or representations and whether any misstatement of fact would render the policy void ab initio or voidable, in the absence of waiver being established.[2] See *Allstate Ins. Co. v. Boggs* (1971), 27 Ohio St.2d 216, 218; *Insurance Co. v. Pyle* (1886), 44 Ohio St. 19, paragraph two of the syllabus.

{¶14}The trial court also concluded that American Family had failed to prove by a preponderance of the evidence that the fire was not accidental. In making this finding, the trial court did not declare the rights and obligations of the parties for accidental and intentional losses or for fraudulent conduct under the homeowner's policy.

Conclusion

{¶15}We find that the trial court's judgment does not qualify as a final appealable order. The trial court, having been presented with a complaint for declaratory relief, must make a declaration of the parties' rights and obligations under the policy of insurance. Accordingly, this appeal is dismissed for a lack of a final appealable order.

It is ordered that appellees recover from appellant costs herein taxed.

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[2] We recognize that the trial court found the doctrine of waiver should be applied. This was done without first construing the policy. Further, the testimony presented reflected that American Family was not aware of the purported misrepresentations until it investigated the fire. "Waiver" has been defined as "a voluntary relinquishment of a known right." *State ex rel. Wallace v. State Med. Bd.*, 89 Ohio St.3d 431, 435, 2000-Ohio-213. The burden of establishing the defense of waiver was upon the Johnsons.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

SEAN C. GALLAGHER, PRESIDING JUDGE

MELODY J. STEWART, J., and
ANN DYKE, J., CONCUR