

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 92-1150
Summary Calendar

EDWARD J. PETRUS,

Plaintiff-Appellant,

VERSUS

UNIONMUTUAL STOCK LIFE INSURANCE COMPANY OF AMERICA,

Defendant-Appellee.

Appeal from the United States District Court
For the Northern District of Texas

CA4 87 061 K

(April 30, 1993)

Before REYNALDO G. GARZA, DUHE' and EMILIO M. GARZA, Circuit
Judges.

PER CURIAM:*

Appellant, Edward J. Petrus, appeals the accuracy of the
district court's findings and its determination that he take
nothing against the appellee, UNUM Stock Life Insurance Company of

*Local Rule 47.5 provides: "The publication of opinions
that have no precedential value and merely decide particular
cases on the basis of well-settled principles of law imposes
needless expense on the public and burdens on the legal
profession." Pursuant to that Rule, the Court has determined
that this opinion should not be published.

America ("UNUM").

Appellee's motion to dismiss appeal for lack of jurisdiction is denied and we reach the merits.

Upon careful review of the district court's findings of fact and conclusions of law, we find that they are proper and that the appellant's claims are without merit. We therefore affirm.

FACTS

The appellant was a licensed ophthalmologist and conducted surgery in Austin, Texas since 1972. In 1979, Petrus received a one year probated sentence for Medicare and Medicaid fraud in the 147th Judicial District Court of Travis County. Medicare/Medicaid suspended Petrus for one year in 1982 due to this conviction. After negotiations, the suspension was reduced to six months that commenced in May of 1983.

Petrus took out a disability policy with UNUM on October 25, 1982, insuring his specialty, eye surgery. The policy would pay \$5,000 monthly if he was to become unable to perform ophthalmic surgery even though he might be able to continue non-surgical aspects of his practice. The policy also required that the insured provide periodic proofs of loss and that he remain under the regular care and attendance of a physician. On October 25, 1983, Petrus took out another policy for an additional \$1000 a month coverage.

In October, 1984, a federal grand jury indicted the appellant in the Western District of Texas on multiple counts of Medicare/Medicaid fraud and a count of obstruction of justice.

Petrus pled guilty to two counts of fraudulently submitting claims under the name of another physician when in fact he had rendered the services while under suspension. He also pled guilty to the count of obstruction of justice which consisted of his attempt in persuading a witness, Dr. Baer, to give false testimony to the grand jury. On June 13, 1985, Petrus was sentenced to nine years in prison and fined \$55,000.

On June 10, 1985, the appellant had submitted a claim of disability under his two policies. Petrus stated that he had fallen from a ladder six feet onto his back on April 27, 1985, and that he had sustained lower back injuries that prevented him from conducting eye surgery. The appellant was incarcerated on July 15, 1985 and remained so until March, 1988.

UNUM started to pay \$6,000 a month in benefits to the appellant. In September, the appellee questioned the financial information provided by Petrus regarding the second policy. UNUM sent back all of his premiums and offered to terminate the policy. Petrus did not accept the paid premiums and the policy continued in force. Eventually more financial information was provided to UNUM's satisfaction and the payments on the second policy were resumed. There were several lapses in the monthly payments due to Petrus not providing clear or, often, any proofs of loss supporting his continued claim of inability to perform surgery.

UNUM paid a total of \$270,647.23 for benefits up to July 1, 1989, to Petrus while he was in prison. Petrus brought suit in federal court complaining of the delays in payments, the continual

requirement of doctor's reports substantiating the disability and the termination of all payments in July, 1989. The district court found that Petrus had caused the delays in payments because of his perennial refusal to send in timely and accurate physicians reports. The court also found that the required proofs of loss did not sufficiently prove that Petrus could not perform surgery after July 1, 1989, and therefore the appellee was not liable for payments. The two policies had lapsed during the litigation due to the appellant not keeping up with the premiums. The court's judgement that Petrus take nothing was entered on October 15, 1991. On October 24, the appellant filed a motion to extend time to file a motion for a new trial and amended findings of fact and conclusions of law. The appellee has filed a motion to dismiss due to a lack of jurisdiction because he alleges that the time extensions given to the appellant were improper and therefore did not toll the time period to file an appeal, which was filed on February 18, 1992.

ANALYSIS

The appellees motion to dismiss is denied and we reach the merits of this dispute. On October 28, 1991, the court specifically granted an extension to November 12, due the showing of good cause by the appellant. The good cause was that the appellant's attorney was working on a capital murder trial. The court should not have granted the extension in accordance with Federal Rules of Civil Procedure 52(b), 59(b) and 6(b); but because it specifically did so and the appellant relied on this permission,

we allow it under the "unique circumstances" doctrine. Harris Truck Lines v. Cherry Meat Packers, 371 U.S. 215, 215-17, 9 L.Ed.2d 261, 262-63, 83 S.Ct. 283 (1962); Thompson v. Immigration Service, 375 U.S. 384, 384-88, 11 L.Ed.2d 404, 405-7, 84 S.Ct. 397 (1964). The doctrine provides for the exception if a party commits an improper act in specific reliance on the court's direction. The late filing was improper but was mistakenly sanctioned by the court. The appellant was under the impression that he was acting properly due to the court's specific permission. Under these "unique circumstances" we allow the late filing which in turn tolls the time period for filing of appeal. The appeal was therefore timely filed and we have proper jurisdiction.

We have carefully reviewed the findings of fact and conclusions of law, and we find that they were proper in all respects. The appellant argues that UNUM repudiated the contract and therefore he was not bound by the policies requirements. He goes on to argue that he did not have to keep proving his continual disability once it was established. The district court correctly found that the policies were never repudiated by the appellant. UNUM merely questioned the supporting financial information for the second policy and gave the insured the choice of accepting the reimbursements of past premiums or provide new information to correct UNUM's assessment of the policy. Petrus decided not to accept the premiums and instead provided the necessary explanations regarding his financial information. He accepted the monthly benefits paid by insurer and was still bound by the policies'

parameters. He was responsible for providing continual proofs of loss that specifically supported his claim that he could not perform surgery. Simply put, the various proofs of loss provided after July 1, 1989, were extremely late, contradictory and did not prove that he could not perform eye surgery. Petrus performed only eight to ten hours of surgery a week before his injury. The late physicians' reports could not specifically rule out the possibility that he could still perform some surgical procedures. The claims of deceptive practice and bad faith on the part of the appellee are simply unfounded. The late payments of some of Petrus' benefits were due solely to his noncompliance to the policies' requirements. The policies lapsed because the appellant refused to pay the premiums after repeated warnings by UNUM. We can question a court's finding of fact only if we find clear error. Southern Pacific Transp. Co. v. Chabert, 973 F.2d 441, 444 (5th Cir. 1992), cert denied, (1993). We find no errors here.

CONCLUSION

Petrus received disability benefits while he was in prison and for over one year afterwards. His payments were completely paid through July 1, 1989, and totaled over \$270,000. He was properly denied payments after July 1, 1989, because he did not timely comply with the required proofs of loss and the reports finally submitted did not sufficiently prove, by a preponderance of the evidence, his continued inability to perform any eye surgery. The appellant's claims are meritless and we therefore AFFIRM.