

UNITED STATES COURT OF APPEALS

For the Fifth Circuit

No. 92-7645
Summary Calendar

JENNY LYNN SMITH,

Plaintiff-Appellant,

VERSUS

KENTUCKY HOME MUTUAL
LIFE INSURANCE COMPANY and
GWIN D. WYATT,

Defendants-Appellees.

Appeal from the United States District Court
For the Southern District of Mississippi

(July 9, 1993)

Before Higginbotham, Smith, and DeMoss, Circuit Judges.

DeMoss, Circuit Judge:*

I. FACTS AND PROCEDURAL HISTORY

William Smith met with insurance agent Gwin Wyatt on July 20, 1987 to obtain a life insurance policy on his life. On August 25, 1987, with the assistance of Wyatt, Mr. Smith

*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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

purchased a policy with \$125,000 in coverage (the policy) from Kentucky Home Mutual Life Insurance Company (Kentucky Home Mutual) and named his wife, Jenny Smith, as the beneficiary. On February 1, 1989 Mr. Smith committed suicide by shooting himself in the chest. On November 29, 1989 Mrs. Smith filed a claim with Kentucky Home Mutual for benefits on the policy. After it reviewed her claim, Kentucky Home Mutual told Mrs. Smith that it would not pay her benefits because of the exclusion provision for death by suicide. The exclusion provision states:

Suicide - If the insured dies by suicide, while sane or insane, within two years from the policy date, the amount payable will be limited to the amount of premiums paid, less any outstanding policy loans with interest to the date of death.

After Kentucky Home Mutual denied her claim, Mrs. Smith sued Kentucky Home Mutual and Wyatt, individually and as an agent for Kentucky Home Mutual, in Mississippi state court on May 7, 1991. The defendants then removed the case to the United States District Court for the Southern District of Mississippi asserting diversity jurisdiction. The defendants contended, and the district court agreed, that Mrs. Smith had fraudulently joined Wyatt, a Mississippi resident, to defeat federal court jurisdiction.

In her suit, Mrs. Smith contends that Wyatt fraudulently induced Mr. Smith into purchasing life insurance, while knowing of his suicidal tendencies and knowing that if he committed suicide, Kentucky Home Mutual would not pay benefits under the policy. Additionally, Mrs. Smith contends that Wyatt negligently

completed the application form and negligently chose Kentucky Home Mutual as the company from which to purchase the policy. Finally, Smith contends that Wyatt's actions were willful, intentional, and grossly negligent.

As for Kentucky Home Mutual, Mrs. Smith asserts that it tortiously breached the policy by denying her benefits, and it fraudulently induced her to purchase the policy when it did not intend to honor the terms of the policy. Mrs. Smith also contends that Kentucky Home Mutual's actions were willful, intentional, and grossly negligent. As a result, Smith contends that she is entitled to damages against Wyatt and Kentucky Home Mutual for the full amount of the policy, \$150,000.00 for mental anguish, and an unspecified amount of punitive damages.

After it reviewed the case, the district court granted a summary judgment to Wyatt¹, and in a separate memorandum opinion and order, granted a summary judgment to Kentucky Home Mutual. Mrs. Smith appeals to this court contending that the district court erred in holding that she had fraudulently joined Wyatt, and in granting Wyatt and Kentucky Home Mutual a summary judgment.

II. DISCUSSION

This court reviews a grant of summary judgment de novo, using the same criteria that the district court used in the first

¹ Wyatt's motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) was converted to a motion for summary judgment when the district court considered evidence outside the pleadings.

instance. Hanks v. Transcontinental Gas Pipe Line Corp., 953 F.2d 996, 997 (5th Cir. 1992). Summary judgment is appropriate if the record reveals "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

1. Did Mrs. Smith Fraudulently Join Wyatt?

Mrs. Smith contends that we must remand the present case to Mississippi state court because the district court erred in holding that she had fraudulently joined Wyatt. The diversity jurisdiction statute, 28 U.S.C. § 1332, states that "[t]he district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$50,000 . . . and is between--(1) citizens of different States. . . ." The courts have interpreted the diversity jurisdiction statute to require that diversity be complete--that is, none of the plaintiffs may be a resident of the same state of any of the defendants. Quaker State Dyeing & Finishing Co., v. ITT Terryphone Corp., 461 F.2d 1140, 1142 (3rd Cir. 1972). It is undisputed that Mrs. Smith and Wyatt are both residents of Mississippi, and, therefore, unless Mrs. Smith fraudulently joined Wyatt, the district court did not have jurisdiction to hear the case in the first instance and we do not now have jurisdiction.

Fraudulent joinder occurs when the facts asserted by the plaintiff as the basis of liability for the resident defendant could not possibly create such liability under the law of the state in which the plaintiff brings suit or that there has been outright

fraud in the plaintiff's pleading of jurisdictional facts. Parks v. New York Times Co., 308 F.2d 474, 477 (5th Cir. 1962), cert. denied, 376 U.S. 949 (1964). Here, we are concerned with the former. In assessing a claim of fraudulent joinder, the court uses a proceeding similar to that used for ruling on a motion for summary judgment. B., Inc. v. Miller Brewing Co., 663 F.2d 545, 548-49 (5th Cir. 1981); Carriere v. Sears, Roebuck and Co., 893 F.2d 98, 100 (5th Cir.), cert. denied, ___ U.S. ___, 111 S.Ct. 60, 112 L.Ed.2d 35 (1990). To show fraudulent joinder, a defendant may submit affidavits and deposition transcripts, and a plaintiff may submit affidavits and deposition transcripts along with factual allegations contained in the verified complaint. B. Inc., at 548-49. The district court must resolve all factual allegations in the light most favorable to the plaintiff. It must also resolve all uncertainties as to state substantive law in favor of the plaintiff. Id. After having done so, if the district court finds there is no possibility of a valid cause of action against the resident defendant, the defendant has been fraudulently joined. In making this determination, however, a court is not bound by the allegations of the plaintiff's complaint, but may "pierce a plaintiff's pleadings to determine whether there exists, in fact, a basis for imposing liability against the resident defendant." Bolivar v. R & H Oil and Gas Co., Inc., 789 F. Supp. 1374, 1377 (S.D. Miss. 1991).

In the present case, we hold there is no possibility of Mrs. Smith establishing liability against Wyatt. The affidavit of Wyatt

reflects that she was a disclosed agent of Kentucky Home Mutual. Under Mississippi law, a disclosed agent is not liable for a breach of duty or contract committed by its disclosed principal and a third party. Williams v. Lafayette Ins. Co., 640 F. Supp. 686, 692 (N.D. Miss. 1986). Although, a disclosed agent may be liable if she commits a tort separate and independent from the contract, there is no credible evidence that Wyatt has committed such a tort in this case.² See Gray v. United States Fidelity & Guaranty, 646 F. Supp. 27 (S.D. Miss. 1986); Williams v. Lafayette Ins. Co., 640 F. Supp. 686, 692 (N.D. Miss 1986). Therefore, the district court properly held that Mrs. Smith had fraudulently joined Wyatt, and, consequently, properly exercised its jurisdiction.

2. Was Mr. Smith's Death a Suicide?

Mrs. Smith contends that Mr. Smith's death was not a "suicide" within the meaning of the policy. Rather, she contends that the direct and proximate cause of Mr. Smith's death was an automobile accident, which occurred over two years before his death and led to his depression and later to him shooting himself. To support her contention, Smith relies on Norbeck v. Mutual of Omaha Ins., 476 P.2d 546 (Wash. App. 1970), rev. denied, 79 Wash.2d 1001 (1971), in which the court allowed a beneficiary to recover death benefits, because it held that the insured's death was directly and proximately caused, not by the insured's self-inflicted gunshot

² Although Mrs. Smith contends that Wyatt fraudulently induced her to purchase the policy, for reasons discussed later in the opinion, we hold that the district court properly granted summary judgment to Wyatt on that claim.

wound, but by a head injury that occurred eighty-two days before his death. In Norbeck, the court held the insured's prior accident, which caused his head injury, "was the direct and proximate cause of death" and "the self-infliction of the mortal wound was the result of an uncontrollable impulse resulting from the brain damage" caused by the accident. Id. at 547.

We do not find the court's decision in Norbeck persuasive. More important, in this diversity case we are Erie bound to follow Mississippi substantive law, which does not follow the result reached by the court in Norbeck. Mississippi law does not allow a beneficiary to avoid the effects of a suicide exclusion provision and recover death benefits for an insured's suicide even if other factors contributed to the suicide. Randle v. Continental Casualty Co., 458 F. Supp. 7, 12 (N.D. Miss.), affirmed, 584 F.2d 117 (5th Cir. 1978); Rives v. Franklin Life Ins. Co., 664 F. Supp 1025, 1026 (N.D. Miss. 1987). Kentucky Home Mutual contends, and we agree, that the law of Mississippi regarding suicide exclusion provisions is clearly and accurately stated in Rives v. Franklin Life Ins. Co., 664 F.Supp. 1025 (N.D. Miss. 1987).

In Rives, the insured was found dead with a bullet wound to the head and a revolver in his right hand. At the time of his death, the insured was under the influence of alcohol and drugs. The beneficiaries sued contending that they were entitled to collect on the policy even if the insured committed suicide because the insured was incapable of forming the intent to commit suicide as a result of the effect of the alcohol and drugs. The court in

Rives rejected that contention holding that "in order for the insurer to avoid liability under an exclusion of coverage of death from suicide, sane or insane, it need not be shown that the insured had the mental capacity to realize the physical nature or consequences of his act or to form a conscious purpose to kill himself." Id. at 1026 (quoting Randle v. Continental Casualty Co., 458 F.Supp. 7, 12 (N.D. Miss.), aff'd, 584 F.2d 117 (5th Cir. 1978)).

Consequently, assuming the evidence was sufficient for a jury to find that Mr. Smith suffered from mental distress related to his prior automobile accident that caused him to commit suicide, Mrs. Smith still would not be allowed to escape the plain language of the suicide exclusion and recover on the policy.³

As an alternative argument, Mrs. Smith contends that Kentucky Home waived the suicide exclusion provision and therefore is estopped from relying on it as a defense to payment. In Pongetti v. First Continental Life and Accident Co., 688 F. Supp. 245 (N.D.

³ In Norbeck, the court found that "the self-infliction of the mortal wound was the result of an uncontrollable impulse resulting from the brain damage," and it allowed recovery because it held "the accident was the direct and proximate cause of death." Id. at 547. If we assumed Norbeck was the law in Mississippi, the medical evidence falls short of showing that Mr. Smith's automobile accident on September 5, 1986 was the direct and proximate cause of his death. The only evidence Mrs. Smith submitted showing a causal connection between the accident and the suicide was an affidavit from Mr. Smith's psychiatrist, Dr. Ritter. In the affidavit, Ritter stated that Mr. Smith's "depressive symptomatology was apparently associated, at least in part, with the . . . motor vehicle accident of September 5, 1986," and the "accident was a contributing factor to his subsequent depressions and suicide." That testimony falls far short of creating a fact issue whether the accident was a direct and proximate cause of death.

Miss. 1988), an insured claimed that the insurance agent's knowledge of her pre-existing medical condition constituted a waiver of the policy provision excluding claims arising from pre-existing conditions. The court rejected this argument noting that the established rule of law in Mississippi is that waiver and estoppel may not operate to create coverage or expand existing coverage to expressly excluded risk. Id. at 248. The court stated "[w]aiver or estoppel cannot operate so as to bring within the coverage of the policy property, or a loss, or a risk, which by the terms of the policy is expressly excepted or otherwise excluded." Id. The policy in the present case expressly excludes from coverage death by suicide, and therefore waiver and estoppel are equally inapplicable to it. Also, waiver requires the "voluntary and intentional relinquishment of a known right." Van den Broeke v. Bellanca Aircraft Corp., 576 F.2d 582, 584 (5th Cir. 1978). Mrs. Smith has produced no evidence that Wyatt or Kentucky Home Mutual voluntarily and intentionally relinquished their right to rely on the suicide exclusion provision, the application of which depended on the insured's future conduct in shooting himself.

3. Was Mr. Smith Fraudulently Induced to Purchase the Policy?

Mrs. Smith contends that Wyatt and Kentucky Home Mutual fraudulently induced Mr. Smith to purchase the policy and to pay premiums on the policy when Wyatt, acting as an agent for Kentucky Home Mutual, knew that Kentucky Home Mutual did not intend to pay

benefits on the policy upon Mr. Smith's death.⁴ To prove fraud under Mississippi law, a party must show by clear and convincing evidence: (1) a representation (2) its falsity (3) its materiality (4) the speaker's knowledge of its falsity or ignorance of its truth; (5) the speaker's intent that the person to whom the representation was made acts on the representation and in the manner reasonably contemplated manner; (6) the hearer's ignorance of the falsity of the representation; (7) his reliance on its truth; (8) his right to rely on it; and (9) consequent and proximate injury arising from the representation. Franklin v. Lovitt Equipment Co., 420 So.2d 1370, 1373 (Miss. 1982).

The evidence submitted by Mrs. Smith is insufficient to show that Wyatt made a material, false, representation, which was relied upon by her. Mrs. Smith does not contend that Wyatt or Kentucky Home Mutual represented that Kentucky Home Mutual would pay on the policy if the insured committed suicide within two years. Mrs. Smith simply states in her affidavit that Wyatt told her and her husband that the policy "would take care of the children and me in the event of Bill's [Mr. Smith's] death." This was just a statement as to the benefits of life insurance policies generally, and one upon which the Smiths could not reasonably rely See Davidson v. State Farm Fire & Casualty Co., 641 F. Supp. 503, 514 (N.D. Miss. 1986).

⁴ Mrs. Smith's contention that Kentucky Home Mutual would somehow benefit by fraudulently inducing Mrs. Smith to purchase the policy is belied by the fact that Kentucky Home Mutual was required under the policy to return the previously paid premiums plus interest, which it did.

Additionally, Mrs. Smith contends Wyatt committed fraud by failing to inform Mr. Smith and her of the exclusion provision. However, because the Smiths had the policy in their possession for over a year before Mr. Smith's death, we can conclusively presume under Mississippi law that they knew the contents of the policy. Cherry v. Anthony, Gibbs, Sage, 501 So.2d 416, 419 (Miss. 1987). Therefore, Wyatt had no affirmative duty to bring the exclusion provision to the attention of the Smiths, as it is assumed that they knew of it. Consequently, Mrs. Smith could not reasonably have expected to be entitled to recover policy benefits after her husband committed suicide.⁵ Considering this, we hold that the Smiths were not fraudulently induced to purchase the policy.

Since the defendants are not liable on the policy and they did not fraudulently induce the Smith to purchase the policy, we also deny Mrs. Smith's claim for punitive damages.⁶ In sum, Mrs. Smith

⁵ Mrs. Smith has failed to produce any evidence that Wyatt concealed the existence of the suicide exclusion provision.

⁶ Mrs. Smith contends that Wyatt negligently completed the insurance application form and negligently selected Kentucky Home Mutual as the company from which to purchase the policy. However, other than her conclusory allegations, Mrs. Smith has not argued in her brief how Wyatt's completion of the application form or her selection of Kentucky Home Mutual was negligent, and therefore she has waived this issue. Moreover, even if Mrs. Smith had not waived this issue, the district court properly granted summary judgment on it. Mrs. Smith does not contend that she requested a policy without a suicide exclusion or even that there was such a policy available on the market. Further, Mrs. Smith's only allegation as to Wyatt's knowledge is that "Gwin Wyatt knew that William D. Smith was under the treatment of his psychiatrist, Dr. Robert Ritter," and that she knew he "had experienced suicidal thoughts and tendencies." That allegation is insufficient evidence to create a material issue of fact whether Wyatt specifically knew when she helped Mr. Smith obtain the policy that Mr. Smith planned to commit suicide within the

received what was owed her on the policy.

III. CONCLUSION

The district court had jurisdiction in the present case because there was no factual or legal basis for imposing liability against Wyatt. Wyatt and Kentucky Home did not fraudulently induce the Smiths to purchase the policy. Mr. Smith's suicide and the suicide exclusion provision relieved Kentucky Home Mutual from its obligation to pay on the policy.

For the foregoing reasons, we AFFIRM the judgment of the district court.

two year exclusion period.