IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-10704
(Summary Calendar)

HARRY SCALING,

Plaintiff-Appellant-
Cross Appellee,

versus

OLD REPUBLIC LIFE INSURANCE
COMPANY,

Defendant-Appellee-
Cross Appellant,

MARTIN SILVER,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Texas
(4:94-CV-006-A)

March 13, 1995

Before DUHÉ, WIENER and STEWART, Circuit Judges.

PER CURIAM:[*]

In 1976, Harry Scaling, Appellant herein, was the principal of BP Industries, Inc. ("BPI"), which was in the process of liquidating its assets. One of those assets was the right to publish certain community directories similar to the Yellow Pages. In 1976, an agreement was entered into between BPI and Jack Blake of Blake Publishing, giving him the right to publish the

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

directories. Under the terms of the agreement, Blake Publishing would pay BPI royalties of 10% of the cash received from the sale of the directories for a period of approximately ten (10) years. Because Blake was just getting his publishing company underway, Scaling had some concerns as to what would happen in the event of Blake's death during the contract period. It was agreed that a life insurance policy would be purchased on Blake's life, payable to BPI.

The insurance policy was a $500,000 ten (10) year term policy purchased through Old Republic Life Insurance Company. Such policy was issued as a result of conversations with insurance agent Martin Silver. Silver completed the application and forwarded it to Scaling for execution, indicating thereon that it was a key-man policy payable to Silver upon the death of Blake. Blake, the insured, signed the application.

In 1977, Scaling personally purchased the telephone directories contract from BPI. Scaling wrote to Silver and requested a change of beneficiary designation, which Old Republic and Silver effectuated. Blake did not sign the request for the change. As discussed fully *infra*, Texas law requires that any change of beneficiary be made by the insured in writing in order for a statutory insurable interest to be maintained on the life of another person. Otherwise, in order to recover under a policy insuring the life of another person, a designated beneficiary may recover policy proceeds only in limited circumstances recognized by the common law.

In 1984, Blake withdrew from the business of Blake Publishing due to illness. In July 1985, Blake died. Scaling applied for and received the proceeds of the insurance policy from Old Republic.

In 1986, Scaling sued Blake Publishing in Texas state court for breach of the publishing contracts. Blake Publishing claimed it was entitled to an offset for any sums Scaling received from the life insurance policy. Blake's widow intervened in the suit, claiming that Scaling had no insurable interest in the insurance policy at the time of Blake's death; thus, she asserted entitlement to the policy's proceeds. The state trial court held that Scaling was entitled to recover from Blake Publishing on two of his contract claims, but that Blake Publishing was entitled to a credit or offset for the insurance proceeds paid to Scaling. The trial court also held that the excess insurance proceeds belonged to Scaling.

The Texas appellate court affirmed in part and reversed and rendered in part. The court determined that at the time the insurance policy was issued, Scaling and Blake had a key-man relationship; however, at the time of Blake's death, Blake was no longer a key man because Blake had withdrawn from the business in Fall 1984, a fact that was uncontradicted at trial. The appellate court further held that Scaling retained a common-law insurable interest in Blake's life because Scaling was a creditor of Blake's, but that his right to the policy proceeds was limited to the extent of the debt owed to him by Blake Publishing. The remainder of the

proceeds were deemed to be held by Scaling as constructive trustee for the benefit of the estate of Blake.

After the state court litigation was concluded, Scaling instituted this action in federal court against Old Republic and Silver, alleging fraudulent misrepresentation, or alternatively, negligent misrepresentations as to the nature of the policy which had been issued. Old Republic and Silver filed motions for summary judgment, asserting that Scaling's claims were meritless and were also time-barred. The district court rejected the argument that Scaling's suit was untimely but granted summary judgment in favor of Old Republic and Silver on the merits of Scaling's case. Scaling appeals.

Standard of Review

We review a district court's grant of summary judgment de novo. Topalian v. Ehrman, 954 F.2d 1125 (5th Cir. 1992). Summary judgment is proper if the pleadings, depositions, answers to interrogatories, and admissions on file together with the affidavits filed in support of the motion, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986).

The moving party has the initial burden of showing that there is no genuine issue of material fact. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986). The movant may discharge this burden by showing an absence of evidence to support the non-moving

party's case. Celotex, 477 U.S. at 325. Once the moving party has carried its burden under Rule 56(c), the non-moving party must do more than merely show that there is some metaphysical doubt as to the material facts. Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). The party opposing the motion may not rest on mere allegations or denials of pleading, but must set forth specific facts showing a genuine issue for trial. Anderson, 477 U.S. at 248, 256. An issue is material only if its resolution could affect the outcome of the action. Id. at 248. Unsupported allegations, conclusory in nature, are insufficient to defeat a proper motion for summary judgment. Simmons v. Lyons, 746 F.2d 265, 269 (5th Cir. 1984).

Discussion

On appeal, Scaling seems to have abandoned his claim of fraudulent misrepresentation, as he alleges in brief only that he has set forth the elements to support a claim for negligent misrepresentation. He does not brief the merits of his fraudulent misrepresentation claim; thus, we will not consider the merits of this claim. *See* Murphy v. Collins, 26 F.3d 541, 542-543 n. 11 (5th Cir. 1994) (Any claim not renewed in brief on appeal is deemed abandoned.)

The elements of a cause of action for negligent misrepresentation have been set out by the Texas Supreme Court in Federal Land Bank Ass'n of Tyler v. Sloane, 825 S.W.2d 439, 442 (Tex. 1991). A plaintiff alleging such a cause of action must prove that: (1) there was a representation made by a defendant in

the course of his business or in a transaction in which he has a pecuniary interest, (2) the defendant supplied "false information" for the guidance of others in their business, (3) the defendant did not exercise reasonable care or competence in obtaining or communicating the information, and (4) the plaintiff suffers pecuniary loss by justifiably relying on the representation.

Scaling complains that misrepresentations were made to him in 1976 that the insurance policy would be a "key-man" policy, and that these misrepresentations form the basis for his claim. He points to summary judgment evidence in the form of his own affidavit, which states that Silver testified in a deposition taken during discovery in the state court litigation that he did not subjectively believe the policy to be a key-man policy at the time it was issued; instead, he believed it to be a credit life policy to ensure repayment of debt owed by Blake Publishing to Scaling in conjunction with office equipment Blake Publishing purchased from Scaling. The affidavit states that Silver testified that he placed the notation "key man" on the policy application merely to simplify the approval process. Thus, Silver apparently testified, perhaps implicitly, at deposition in the state court proceedings that he did not feel Blake qualified as a key man because of the lack of employer-employee relationship between Blake and BPI, nor did he consider the policy to be a key man policy.

Scaling complains that Silver represented to him at the time of the purchase of the policy that the policy was a key-man policy to benefit Scaling for potential loss of revenue in the event of

Blake's death. Silver and Old Republic point out that Scaling has nothing about which to complain because the state appellate court, as well as the federal district court, determined that the policy as originally issued was in fact a valid key man policy that would have provided policy benefits to BP Industries for the loss of revenue caused by Blake's death. Thus, what Silver believed about the policy at the time of its issuance is inapposite. Silver's "key man" designation on the policy application thus was an accurate characterization, even though Silver did not believe Blake was actually a "key man" because of the lack of employer-employee relationship between Blake and BPI. Thus, there was no "misrepresentation" made by Silver about the nature of the policy, because the state court rulings were entirely consistent with these alleged representations. Moreover, Silver's belief that the policy was a credit life policy issued only to secure debt owed by Blake Publishing to Scaling is likewise of no consequence, because the state appellate court and the federal district court concluded that the policy was a key-man policy.

Having concluded that the policy as originally issued was a valid key-man policy designed to protect BPI against the loss of revenue that might result from Blake's death, the state appellate court and the federal district court followed with an analysis of the legal effect of the change of beneficiary made without the written consent of the Blake, the insured, and the legal effect of Blake's subsequent withdrawal from the business.

Under Texas law, in order for a person to collect the proceeds of a life insurance policy, he must have an insurable interest in the life of the individual insured at the time of the insured's death. Bell v. Phillips, 152 F.2d 188, 190-91 (5th Cir. 1945). A person can obtain an insurable interest in Texas in either of two ways: (1) by a written designation by the insured, as provided by Tex. Ins. Code Ann. art. 3.49-1 § 2 (Vernon 1981) or (2) by virtue of the common law. Empire Life Ins. Co. of Am. v. Moody, 584 S.W.2d 855, 859-860 (Tex. 1979).

Although Blake initially approved in writing the issuance of the policy to BPI, he did not approve the change of ownership and beneficiary to Scaling. Because Scaling, as owner of the policy but not the insured life, requested a change of beneficiary from BPI to himself without Blake's consent, the statutory insurable interest (under (1) above) ceased; thereafter, Scaling's interest in the proceeds, if any, could only be based on a common-law insurable interest.

The common law recognizes three categories of persons having an insurable interest in the life of another: (1) one so closely related by affinity or blood that he or she wishes the other to continue to live, irrespective of monetary considerations; (b) a creditor; and (c) one who has a reasonable expectation of pecuniary advantage or benefit from the continued life of another. Ibid.

The state appellate court found that, when the policy was first issued, Scaling had two types of common-law insurable interests in Blake's life: (1) he was a creditor of Blake's, and

(2) he had a reasonable expectation of pecuniary advantage or benefit from Blake's continued life, i.e., Blake was a key man. However, because it was uncontroverted at trial that Blake was no longer active in the business at the time of his death, the court held that Scaling no longer had a key-man relationship with Blake when he died. As a result, at the time of Blake's death, Scaling's insurable interest in Blake's life was limited to that of a creditor.

A person whose insurable interest is that of a creditor is entitled to the insurance proceeds only to the extent of the debt owed. The remainder is held as a trustee for the estate of the insured. Because Scaling had already collected the full $500,000 insurance proceeds, the state court offset the debt owed to Scaling against the proceeds and ordered that Blake's estate was entitled to the remaining funds.

The state court's analysis and determinations regarding the above issues have already been litigated. We will not revisit the merits of that case. In determining whether Silver and Old Republic made negligent misrepresentations to Scaling which resulted in injury to Scaling, we have compared the reasoning of the state court on why Scaling lost his right to the proceeds with the allegations made against Silver and Old Republic, to determine if those allegations, assuming their veracity *arguendo*, affected the merits of the state court proceedings. We have concluded that Scaling's claims have no merit.

Scaling focuses in brief almost solely upon the testimony given by Silver at his deposition regarding his subjective belief about the policy's characterization. Scaling argues that the only source of any claim that the proceeds were to be used as payment for a debt came from the testimony of Silver. Thus, Scaling seems to believe that Silver's testimony is what caused him to lose in the state court proceedings; however, as explained above, the state court did not rely on Silver's representations. Instead, the court concluded that the policy was a key man policy, but that the statutory insurable interest was lost when the beneficiary was changed without Blake's signature; later, the common law key-man relationship was destroyed when Blake ceased running Blake Publishing. Accordingly, the only remaining way under which Scaling could possibly recover any of the proceeds was as a creditor. Thus, by process of elimination when reviewing the common law on insurable interest, the state court concluded that Scaling did have a common law insurable interest covering only the debt owed by Blake Publishing to Scaling. The state court did not come to this conclusion because of Silver's testimony at deposition, but because of its review of the relevant law.

Scaling asserts in his reply brief that there is a genuine issue of material fact relating to whether Blake had in fact withdrawn from the business. However, this issue was settled in the state proceedings: the state appellate court observed that the fact of Blake's withdrawal was uncontested at trial. We will not permit this issue to be re-litigated, as it is inapposite to the

issues before us. Had Blake not withdrawn from the company, Scaling would have had a recognizable insurable interest covering the revenue and would have won in the state court litigation. In that event, Scaling would not have an action against Silver and Old Republic. Scaling argues that the issue creates a fact issue as regards to whether Scaling maintained a reasonable expectation of pecuniary benefits from Blake's services, but he overlooks the fact that this is not one of the elements, nor even an issue, of his negligent misrepresentation claim against Silver and Old Republic.

The only conceivable way in which Scaling might have a right of recovery against Silver and Old Republic might possibly come from representations made to Scaling about the legal effect of the change of beneficiary from BPI to Scaling. For example, if Silver had assured Scaling that the statutory insurable interest was not lost despite the lack of Blake's signature, Scaling might be able to claim negligent misrepresentation. However, Scaling does not allege such a scenario, nor has he briefed the issue of whether an insurance company and its agents have a duty to make sure proper signatures are obtained in a situation like this. However, we note that even after the change of beneficiary was made, Scaling still had a key-man relationship with Blake under the common law. Thus, no real injury had occurred at that point even though the statutory insurable interest was not maintained. Had Blake died at that point, Scaling still would have been entitled to the insurance proceeds by virtue of the common law key man relationship that existed in fact between Scaling and Blake. The real injury did not

occur until Blake withdrew from his position as head of Blake Publishing, some seven years later. At that point, Blake ceased being a "key man" under the common law. Scaling does not contend that Silver and Old Republic misrepresented to Scaling the effect of Blake's withdrawal from the company; in fact, there is no allegation that Silver or Old Republic even knew that Blake had withdrawn.[1]

Scaling's claims, as briefed, have no merit. Moreover, other possible arguments that Scaling may have made are deemed waived because they have not been briefed, e.g., that Silver had a duty to fully inform Scaling about the effect of the change of beneficiary made without the signature of the insured and about the effect of a possible future withdrawal of the key man from the operation.[2]

Because we affirm based on our review of the merits of Scaling's claims, we do not reach the issues raised in Old Republic's cross-appeal, urging affirmance on the basis that his

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[1] In assessing whether there is any possible allegation of a misrepresentation regarding the effect of Blake's withdrawal from the company, we cannot help but observe that Scaling was in an optimal position to know that Blake had withdrawn from running the company months before his death; he should have considered changing the named insured in his "key-man policy" from Blake to the new "key man." If Scaling had done so, he could have recovered for lost revenue under his common law "key-man" insurable interest.

[2] We do note, however, that we probably would have rejected such claims anyway, because imposing such a duty upon an insurance agent would probably be excessive: it would require that insurance agents know every detail of the law on insurable interest and advise all clients accordingly. We feel that such legal questions are best directed to an attorney.

claims are time-barred, despite the district court's conclusion to the contrary.[3]

Conclusion

For the foregoing reasons, we AFFIRM.

[3]We point out in passing that it was not necessary for Old Republic to have filed a cross-appeal, as it was merely offering an alternative argument for affirming the district court, not seeking to obtain any greater rights under the judgment. We can affirm on any basis that supports the judgment, even without the filing of a cross-appeal.