FILED
DEC 28 1977
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

CHARLES A. CANNON, III,

Appellee,

v.

LIFE INVESTORS INSURANCE CO. OF AMERICA,

Appellant.

Filed December 28, 1977

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2-59520

Appeal from Woodbury District Court - Donald M. Pendleton, Judge.

Action by insured to recover cash surrender value of life insurance policy with defendant insurance company. Defendant appeals trial court's order granting judgment notwithstanding the verdict for plaintiff after verdict for defendant. Affirmed.

P. L. Nymann, of Jacobs, Gaul, Nymann & Green, of Sioux City, for appellee.

Wiley Mayne, of Goldberg, Mayne, Probasco, Berenstein & Yeager, of Sioux City, for appellant.

Heard by Allbee, C.J., and Donielson, Snell, Oxberger and Carter, JJ.

PER CURIAM

This is an action by plaintiff, whose life had been insured under a policy with defendant insurance company, to recover the cash surrender value of his policy. Defendant contended that plaintiff had acquiesced in keeping the policy in force for an additional 11 months after the date the policy was surrendered to defendant and that the cash surrender value should be reduced by the amount of the premium for this period, after giving plaintiff credit for increased cash values and dividend accumulations for the same period. Defendant paid plaintiff the cash surrender value as thus computed. Plaintiff brought this action to recover the difference between this sum and the cash surrender value on the date he surrendered the policy, plus interest for delay in payment.

The action in the trial court was tried to a jury. At the conclusion of all of the evidence plaintiff moved for a directed verdict. The trial court overruled this motion and submitted the case to the jury on the single issue of estoppel. The trial court peremptorily instructed the jury that on March 19, 1974, plaintiff mailed his policy to the defendant company, requesting cancellation of the policy and payment to plaintiff of the guaranteed cash value and dividend accumulations to that date, and performed the necessary mechanical functions to achieve said result. The jury was further peremptorily instructed that based upon these facts the plaintiff was "entitled to recover from the defendant unless the defendant has proved by the greater weight or preponderance of the evidence that plaintiff is estopped [as defined in other instructions]." The jury returned a verdict for defendant insurance company. In ruling on plaintiff's post-trial motion for judgment notwithstanding the verdict, the trial court determined that there was insufficient evidence upon which to have submitted the defense of estoppel. It accordingly granted the motion and entered judgment for the plaintiff.

Before considering whether the record supports submission of the defense of estoppel to the jury, we determine whether the trial court correctly perceived this to be the only issue in the case in ruling on the motion for judgment notwithstanding the verdict. We are satisfied that it was the only issue and remains such for purposes of this appeal. The defendant did not object to the peremptory instructions of the trial

court to which we have referred.[1] Nor did it object to the court's instruction that, if the plaintiff was entitled to recover, the amount of recovery should be the sum of $1,717.78. Accordingly, defendant has preserved no issues which would defeat plaintiff's right to a directed verdict for the amount of the judgment other than the issues which we now consider.

I. Initially, plaintiff contends that estoppel was improperly submitted because it was not pleaded by defendant. In Holi-Rest, Inc. v. Treloar, 217 N.W.2d 517, 523 (Iowa 1974), the court observed that to plead estoppel it is only necessary to plead the facts relied upon to support the theory and precise words are not essential. In colloquy between the trial court and counsel before instructing the jury, defendant's counsel advised the court that defendant contended the allegations of paragraph five of its answer raised the issue of estoppel and the court evidently agreed. Plaintiff's counsel did not object, in the trial court, to the instruction submitting the defense of estoppel to the jury.[2] Nor were plaintiff's motions for directed verdict and judgment notwithstanding the verdict based upon the contention that estoppel had not been pleaded. Accordingly, we do not believe that plaintiff may raise this issue on appeal.

[1] Defendant did object to the form of the instruction on estoppel but because we conclude that plaintiff was entitled to a directed verdict this is not an issue. Defendant also objected to the failure of the trial court to instruct on an alternative defense based upon subjective good faith. We consider this claim under division II of this opinion.

[2] This failure to object to the instruction does not prevent plaintiff from urging that the estoppel defense should not have been submitted at all. This claim was clearly preserved in plaintiff's motion for directed verdict and renewed in his motion for judgment notwithstanding the verdict. Plaintiff was not required to thereafter object to the estoppel instruction in order to preserve error. He may have been satisfied with the instruction if the jury was to decide the issue. See, in this regard, Heavilin v. Wendell, 214 Iowa 844, 241 N.W. 654, 658 (1932).

We next consider whether the evidence was sufficient to justify submission of the estoppel defense to the jury. We conclude that the trial court properly determined that it was not. Plaintiff's act in requesting cancellation of his policy and payment of the cash surrender value was clear and unequivocal. He completed all of the necessary forms provided by defendant company to accomplish such result. Rather than accept this decision, the record shows that various representatives of the defendant, including the president of its parent company, undertook a concerted campaign to cause plaintiff to change his mind. While this was going on defendant, at the initiative of its own executive officers, continued to charge the regular premium for the policy against its accumulated cash value as "premium loans." We find no evidence of any communication by plaintiff to defendant while this was going on that he agreed to or acquiesced in this practice or that he was retracting his previous cancellation request. Defendant seeks to predicate its claim of estoppel on plaintiff's failure to protest against these unilaterial efforts to keep the policy in force. We find that none of the authorities relied upon by defendant concerning the concept of estoppel by silence are factually in point. As observed in 28 Am. Jur. 2d Estoppel § 53 at 667-68;

> [T]o give rise to an estoppel by silence or inaction, there must be a right and an opportunity to speak and, in addition, **an obligation or duty to do so.** (emphasis added)

This statement of the law is in accord with that made by our supreme court in Anfenson v. Banks, 180 Iowa 1066, 1095-96, 163 N.W. 608 (1917).

Considering the respective positions of the parties in the instant conflict we believe that after plaintiff had once spoken with respect to his intentions he was under no duty to speak again. Defendant proceeded at its peril in seeking to maintain the policy in force. Reasonable conduct on its part required it to await some positive affirmation by plaintiff that he had changed his position. The facts do not support an estoppel based upon plaintiff's conduct.

We also conclude that the conduct of defendant, as shown by the evidence, is inadequate to support a claim of estoppel. A party claiming an estoppel must have acted upon the declaration or conduct of the person sought to be estopped, and not on its own initiative. 28 Am. Jur. 2d Estoppel § 76 at 711-12; Id. at 719 ("one may not properly base a claim of estoppel. . . on acts or omissions induced by his own conduct");

Stookesberry v. Burgher, 220 Iowa 916, 921-22, 262 N.W. 820, 823 (1936). Here defendant acted on its own initiative to maintain plaintiff's policy in force, contrary to plaintiff's direction. Such actions took place prior to any failure of plaintiff to respond to defendant's communications pertaining to the premium loan and additional dividends earned. Such oral conversations as plaintiff had with defendant's representatives prior to this time had in no way solicited this action by defendant. Under such circumstances we believe that the law should not withdraw its remedies as a result of plaintiff's failure to protest. The trial court correctly concluded that the defense of estoppel was without support in the evidence.

II. In the trial court defendant proposed that the court instruct the jury on an alternative theory of defense based upon its subjective good faith. The trial court declined to submit such defense to the jury. On appeal defendant argues in the alternative that if the evidence does not support its claim of estoppel it should have a new trial at which it can present its "good faith" defense. Defendant has cited no authority, on the present facts, which we find to be supportive of its claimed defense. We have been unable to locate any such authority upon our independent research. We are not persuaded that the proposed legal theory has merit. Accordingly, we conclude that the trial court acted properly in failing to instruct on such theory.

We have considered all issues presented and find no basis for reversal.

AFFIRMED.