FILED
NOV 24 1981
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

ROBERT A. PUTT,

Plaintiff-Appellant,

vs.

FORD LIFE INSURANCE COMPANY,

Defendant-Appellee.

Filed November 24, 1981

1-270
2-64571

Appeal from Polk District Court - A. B. Crouch, Judge.

Plaintiff appeals from a judgment for defendant in this suit alleging fraud in the issuance of a credit disability insurance policy. AFFIRMED.

Virgil Moore, Des Moines, for plaintiff-appellant.

Michael J. Cunningham and Kenneth A. Johnson of Bertroche Law Firm, Des Moines, for defendant-appellee.

Heard by Oxberger, C.J., and Donielson, Carter, and Johnson, JJ. Snell, J., takes no part.

DONIELSON, J.

Plaintiff appeals from a judgment for defendant in this suit alleging fraud in the issuance of a credit disability insurance policy. On appeal, plaintiff asserts that: (1) it was an abuse of discretion to deny his motion to amend to conform to proof; (2) the policy should have been reformed; (3) the policy exclusion for pre-existing health conditions was not applicable on the facts of this case; (4) defendant's conduct was fraudulent as a matter of law. We affirm.

Our scope of review in this matter is limited to correction of errors at law. Iowa R. App. P. 4.

I.

Toward the end of June, 1978, plaintiff and his wife, Marilyn Putt, purchased a 1978 Ford Thunderbird from Metro Ford. On June 29, 1978, Marilyn Putt went to Metro Ford for the purpose of finalizing the paperwork associated with the purchase. During the course of filling out the financial papers, Mr. Todd Gfeller, an employee of Metro Ford, asked Marilyn whether she wanted credit life, accident and health insurance on the loan. Marilyn responded, "Yes, at least on Bob, because you know how his health has been." Mr. Gfeller replied "Yes," and filled out the papers. There was no discussion of policy exclusions at that time. There is some evidence that Mr. Gfeller had limited knowledge that plaintiff was in poor health.

Prior to purchase of the auto and the credit life, accident and health insurance, plaintiff had a heart condition which was serious enough to require monthly medical check-ups. Plaintiff was aged 43 and employed as a maintenance supervisor at Armstrong. His last actual work day at Armstrong was July 31, 1978, but he received pay in the form of fringe benefits until February 1, 1979. He has had no employment since July 31, 1978.

Plaintiff filed a claim for payment under the credit life policy in August, 1978. The claim was denied under the pre-existing condition exclusion set out below.

> EXCLUSIONS - No insurance is provided here under . . .if disability results from (d) pre-existing conditions which manifested themselves to you by requiring medical diagnosis or treatment or would have caused a reasonably prudent person to have sought medical diagnosis or treatment within six months preceding the effective date or insurance and which causes a loss within six months following the effective date of coverage; provided however, the disability commencing thereafter resulting from such condition shall be covered.

Plaintiff filed suit alleging fraud in the sale of the insurance policy. Defendant answered and relied upon the above exclusion as an affirmative defense. The case was tried on October 10, 1979. At the close of evidence plaintiff moved to amend his petition to ask the court "to enforce the oral contract of disability insurance . . . without the restrictions that are shown in the insurance certificate." The court denied the motion, reasoning that to rule otherwise would substantially change the issues.

On October 30, 1979, the court filed its Findings of Fact, Conclusions of Law, and Order which held that there was "no evidence [defendant's agent-Gfeller] was aware of the exclusion clause," and that plaintiff had failed to prove fraud. Plaintiff's motion for a new trial was denied and this appeal was subsequently instituted.

II.

Plaintiff argues that the trial court erred by failing to permit plaintiff to amend his petition to conform to proof. This motion was made after both parties had presented their evidence. The trial court denied the motion on the grounds that it presented "a whole new cause of action based on a whole new theory."

Under Iowa R. Civ. P. 88, "Leave to amend, including leave to conform to the proof, shall be freely given when justice so requires." In reviewing the trial court's denial of plaintiff's motion we must determine whether there was an abuse of discretion. Johnston v. Percy Construction, Inc., 258 N.W.2d 366 (Iowa 1977). "We are especially unlikely to find an abuse of discretion when reviewing denial of an amendment proposed on the eve of trial or during trial." Id. at 371. In this case plaintiff alleged fraud in his pleadings and presented evidence on fraud at trial. Defendant answered and asserted an affirmative defense in response to plaintiff's allegations of fraud. We find that the trial court did not abuse its discretion by denying plaintiff's motion to conform to proof at the close of the evidence when the entire record of the case to that point was based only upon allegations of fraud. We affirm the trial court's ruling on this motion.

III.

Plaintiff contends that there was an adequate basis for reformation of the insurance contract. We disagree. Iowa R. Civ. P. 69(a) requires that a claimant set forth "a demand for judgment for the relief to which he deems himself entitled." Plaintiff never requested reformation of the contract in his pleadings, nor did this issue

arise at trial, unless plaintiff's motion to amend to form to proof can be considered a request for reformation of the contract. Even if we view the motion to amend as a request for reformation, plaintiff cannot prevail because there is not "clear, satisfactory and convincing evidence of fraud, deceit, duress or mutual mistake," as required by Iowa R. App. P. 14(f)(11).

IV.

Plaintiff next questions whether there is sufficient evidence to support the trial court's finding that the exclusion in the policy relieved defendant of liability and plaintiff also alleges that defendant's conduct in sale of the insurance was fraudulent. The court found that there were no representations that the policy would cover a pre-existing condition and that reoccurrence of a pre-existing condition resulted in denial of plaintiff's claim. Our review indicates that the court correctly applied the law to the facts of this case. Plaintiff clearly failed to establish all the elements of fraud by a preponderance of clear, satisfactory, and convincing evidence. See Grefe v. Ross, 231 N.W.2d 863, 864 (Iowa 1975). Specifically, there was very little evidence that any representation had been made to plaintiff at the time of the sale, and no evidence of a false representation or intent to deceive the plaintiff.

AFFIRMED.