Vander Veer v. Continental Casualty Co.

Court of Appeals of New York

March 25, 1974, Argued ; May 9, 1974, Decided

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Reporter
34 N.Y.2d 50 *; 312 N.E.2d 156 **; 356 N.Y.S.2d 13 ***; 1974 N.Y. LEXIS 1588 ****

Albert Vander Veer, II, Respondent, v. Continental Casualty Company, Appellant

Prior History: [**1]** *Vander Veer* v. *Continental Cas. Co.*, 42 A D 2d 311, reversed.

Appeal from an order of the Appellate Division of the Supreme Court in the Third Judicial Department, entered August 7, 1973, which, by a divided court, affirmed (1) a judgment of the Supreme Court in favor of plaintiff, entered in Albany County upon a verdict rendered at a Trial Term (Harold J. Hughes, J.), and (2) an order of said Supreme Court, denying a motion by defendant to set aside said verdict.

Disposition: Order reversed, with costs, and complaint dismissed.

Counsel: *John A. Murray*, **[****3]** *Arthur E. McCormick* and *Earl S. Jones, Jr.* for appellant. I. The trial court was in error in submitting to the jury, as a question of fact, whether plaintiff misrepresented the condition of his health and the medical treatment he had had. II. The trial court was in error in denying defendant's motion for a dismissal of the complaint and for a directed verdict in favor of defendant. III. Plaintiff's failure to disclose his condition was a material misrepresentation as a matter of law. (*Anderson* v. *Aetna Life Ins. Co.*, 265 N. Y. 376; *Kirschner* v. *Equitable Life Assur. Soc. of U. S.*, 157 Misc. 635; *Wageman* v. *Metropolitan Life Ins. Co.*, 24 A D 2d 67; *Geer* v. *Union Mut. Life Ins. Co.*, 273 N. Y. 261; *Greene* v. *United Mut. Life Ins. Co.*, 38 Misc 2d 728; *New York Life Ins. Co.* v. *Miller*, 17 Misc 2d 532.)

Harry S. Christenson for respondent. I. The question whether plaintiff misrepresented the condition of his health was properly submitted to the jury. (*Sommer* v. *Guardian Life Ins. Co. of Amer.*, 281 N. Y. 508; *Geer* v. *Union Mut. Life Ins. Co.*, 273 N. Y. 261; *Cushman* v. *United States Life Ins. Co.*, 70 **[****4]** N. Y. 72.) II. The trial court was correct in denying defendant's motions for a dismissal of the complaint and for a directed verdict. III. Plaintiff's failure to disclose the incident of January 19, 1962 was not a misrepresentation as a matter of law.

Judges: Chief Judge Breitel and Judges Jasen, Jones, Wachtler, Rabin and Stevens concur in *Per Curiam* opinion; Judge Gabrielli taking no part.

Opinion by: PER CURIAM

Opinion

[*51] [156] [***13]** In his application for group accident and health insurance, made on January 27, 1963, plaintiff stated that to the best of his knowledge, he **[***14]** was in good health and free from any physical impairment or disorder. In response to a question whether he had had any medical advice or treatment for certain specified disorders or conditions, including any disorder of the cardiovascular system, plaintiff listed five separate occasions **[**157]** on which he had received treatment for various disorders referred to in the question.

[*52] Plaintiff neglected to set forth that approximately one year earlier, on January 19, 1962, he had visited his personal physician at which time there was a diagnosis of paroxysmal atrial fibrillation **[****5]** for which he was directed to take quinidine, a medication which corrects and controls this condition, and for which he had been taking same for approximately 21 months.

On February 15, 1963, plaintiff was issued a certificate of accident and health insurance by the defendant pursuant to a master policy of the American Medical Association, of which the plaintiff was a member. Under the master policy, individual applicants were offered a choice of three plans. Plan A, which the plaintiff chose, provided monthly indemnity of $ 1,000, Plan B, $ 750 and Plan C, $ 500, monthly. The choice lay with the applicant. The policy

provided, however, that the company reserved the right to limit to the lowest amount of monthly indemnity, that is $ 500, the insurance of any member who did not furnish evidence of insurability satisfactory to the company.

In 1964, plaintiff became disabled as a result of an accident involving a golf cart and certain conditions which developed subsequently. Thereafter, when his claim was rejected, he brought action on the certificate of accident and health insurance. Payment of $ 500 per month under Plan C is already being made and involved herein is the action **[****6]** for the additional $ 500 under Plan A, which provides for the $ 1,000 per month indemnity.

Two questions are presented: Whether plaintiff misrepresented his health as a matter of law and whether the misrepresentation was material as a matter of law. The answer to both must be in the affirmative. The record reveals and it is not open to dispute, that the plaintiff did misrepresent the condition of his health by failing to disclose his heart condition and the medical treatment he received. At trial, plaintiff admitted that the diagnosis and the treatment were not included in the application. The condition was a cardiac abnormality and, as a physician, plaintiff must have been aware of its significance. As an insurer, the defendant is free to select its risks and it makes inquiry of matters which it deems material to the risk. Failure to disclose is as much a misrepresentation as a false affirmative statement. (*Geer* v. *Union Mut. Life Ins. Co.*, 273 N. Y. 261.) Plaintiff failed to disclose, as the statement **[*53]** of his physician indicated, that he had a history of having had episodes of paroxysmal atrial **[***15]** fibrillation since adolescence. Obviously, this **[****7]** was not a temporary condition or a matter so trivial that it might not have affected the disposition of the application. We hold, as a matter of law, that at the time of making application, plaintiff did misrepresent his health and we hold further, as a matter of law, that such a misrepresentation was material (Insurance Law, § 149; *Wageman* v. *Metropolitan Life Ins. Co.*, 24 A D 2d 67, affd. 18 N Y 2d 777). By his failure to disclose his heart condition, plaintiff deprived the defendant of freedom of choice in determining whether to accept or reject the risk. On the record, there is little doubt that the defendant would have rejected the risk or certainly would have rejected it under Plan A.

Accordingly, the order appealed from should be reversed, the judgment vacated, and the complaint dismissed with costs to defendant-appellant.

Order reversed, with costs, and complaint dismissed.