UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

James R. Baker v. The Penn Mutual Life Insurance Company

788 F.2d 650 (10th Cir. 1986) · No. No. 84-1412 · Decided April 2, 1986

SUMMARY

The Tenth Circuit affirmed summary judgment for Penn Mutual in a former general agent's action concerning termination, deferred commissions or vestings, reimbursement of agency expenses, rescission, and alleged tortious conversion. Applying Kansas law, the court held that the written agency contract permitted termination on 60 days' notice, did not entitle the plaintiff to vestings on successor insurance products, and did not support rescission or additional contractual duties on the facts presented.

CASE DETAILS

COURT	United States Court of Appeals for the Tenth Circuit
WRITING FOR THE COURT	Anderson, Circuit Judge; Barrett, Circuit Judge; Cook, District Judge, sitting by designation
JURISDICTION	Federal
DECIDED	April 2, 1986
DOCKET	No. 84-1412
DISPOSITION	affirmed
PROCEDURAL POSTURE	Plaintiff appealed from the district court's grant of summary judgment for Penn Mutual on twelve of thirteen causes of action and denial of his motion to alter or amend the judgment. He pursued only five causes of action and related theories on appeal.
STANDARD OF REVIEW	Summary judgment is reviewed in the same manner as by the district court: the record is viewed in the light most favorable to the nonmoving party, and the court determines whether a genuine issue of material fact exists and, if not, whether the substantive law was correctly applied.
PRECEDENTIAL VALUE	Published federal appellate opinion; precedential within the Tenth Circuit subject to later authority.
PARTIES	James R. Baker v. The Penn Mutual Life Insurance Company

TOPICS

insurance contracts wrongful termination contract interpretation appellate procedure

PRACTICE AREAS

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QUESTIONS PRESENTED

1. Whether Baker raised a genuine issue of material fact that the written termination provisions of the 1975 General Agency Contract had been orally modified or restricted by public policy, equity, estoppel, implied amendment, or good-faith principles.
2. Whether Baker's termination notice was ineffective because it was coerced or because Penn Mutual did not itself provide written notice.
3. Whether Baker was entitled to renewal commissions or vestings on Independence Builder universal-life policies or based on an alleged duty by Penn Mutual to preserve policies and vestings after termination.
4. Whether Baker could obtain rescission of the 1975 contract based on mutual mistake or misrepresentation concerning expected future income.
5. Whether Baker could pursue a tortious-conversion theory concerning premium-finance instruments when that theory was raised for the first time on appeal.

HOLDINGS

1. The vague statements that Baker would be paid for his sales production and that the company would take care of him did not create an enforceable oral modification of the written termination provisions because they identified no new consideration, lacked a meeting of the minds, and did not specify the provisions or terms allegedly modified.
2. Penn Mutual was entitled to terminate the general agency relationship under the contract's sixty-day termination provision, and Baker's alleged coercion did not establish a legally cognizable injury because Penn Mutual could have terminated the relationship directly and the notice provision was effectively satisfied by Baker's written notice.
3. Baker was not entitled to vestings on Independence Builder policies because his contract limited post-termination commissions to premiums paid on policies placed in force during his tenure, and the Independence Builder policies were not replacements for those policies within the meaning of the contract.
4. Penn Mutual's contractual duty to Baker did not require it to preserve policies or vestings against ordinary competitive business decisions, although the implied covenant of good faith could prohibit arbitrary action intended to defeat the agent's contractual right to renewal premiums.
5. Baker could not rescind the 1975 contract based on statements that it was designed to produce greater income because those statements concerned uncertain future results rather than an existing fact, did not establish mutuality of mistake, and were followed by conduct affirming the contract and accepting its benefits.

6. The court would not consider Baker's tortious-conversion theory concerning premium-finance instruments because he pursued the claim below as a breach-of-contract claim and raised the conversion theory for the first time on appeal.

KEY QUOTATIONS

> *"When the employment is not for a definite term and there is no contractual or statutory restriction upon the right of discharge, an employer may lawfully discharge an employee whenever and for whatever cause he chooses, without incurring liability...."* (¶ 26)

> *"Absent a specific contract provision, the agent has no voice in the settlement of policy claims. He is not a third party beneficiary under the policy nor in direct privity through the insuring contract. He must recover on his own contract, if at all, and the implied promise of good faith dealing on that contract does not preclude the insurer from contracting with third parties according to its judgment of business interests."* (¶ 38)

> *"Rescission is an equitable remedy designed to afford relief from contracts entered into through mistake, fraud, or duress."* (¶ 54)

FACTUAL BACKGROUND

Baker served as Penn Mutual's soliciting agent and then general agent for more than twenty-one years under written agency contracts, including a 1975 General Agency Contract. The contract permitted either party to terminate on sixty days' written notice and permitted Penn Mutual to terminate immediately for cause, with forfeiture of vestings in a cause termination. In 1979, after Baker used approximately $50,000 in agency funds toward construction of his residence based on his understanding that Penn Mutual's president had authorized the use, Penn Mutual gave him the choice of voluntary sixty-day termination or immediate termination for cause; Baker submitted notice effective December 31, 1979. After termination, Baker challenged the loss of renewal commissions, asserted that Penn Mutual should have preserved or transferred vestings when policyholders moved to a universal-life product, sought rescission based on alleged expectations of greater income under the 1975 contract, and claimed damages concerning premium-finance agreements.

PROCEDURAL HISTORY

Baker filed a diversity action against Penn Mutual and certain officers alleging wrongful termination, deprivation of deferred commissions or vestings, failure to reimburse expenditures, and related claims. The individual defendants were dismissed. After discovery, the District Court for the District of Kansas granted Penn Mutual summary judgment on all causes of action except the eighth cause of action, left Penn Mutual's counterclaim intact, and later denied Baker's motion to alter or amend the judgment. The Tenth Circuit affirmed.

DISPOSITION

affirmed

CASES CITED

- Gomez v. American Electric Power Service Corp., 726 F.2d 649, 651 (10th Cir. 1984)

- Western Casualty & Surety Co. v. National Union Fire Insurance Co., 677 F.2d 789, 791 & n.1 (10th Cir. 1982)
- Lindley v. Amoco Production Co., 639 F.2d 671, 672 (10th Cir. 1981)
- Otteson v. United States, 622 F.2d 516, 519 (10th Cir. 1980)
- Leaseamerican Corp. v. Eckel, 710 F.2d 1470, 1473 (10th Cir. 1983)
- Singleton v. Wulff, 428 U.S. 106, 121 (1976)
- Augusta Medical Complex, Inc. v. Blue Cross of Kansas, Inc., 227 Kan. 469, 608 P.2d 890 (1980)
- Frogge v. Belford, 168 Kan. 74, 211 P.2d 49 (1949)
- Johnson v. National Beef Packing Co., 220 Kan. 52, 551 P.2d 779 (1976)
- Lorson v. Falcon Coach, Inc., 214 Kan. 670, 522 P.2d 449, 457 (1974)
- Roush v. National Old Line Insurance Co., 453 F. Supp. 247, 252 (W.D. Okla. 1978)
- Sterling Colorado Agency, Inc. v. Sterling Insurance Co., 266 F.2d 472, 474-77 (10th Cir. 1959)
- United States v. Garland, 122 F.2d 118, 122 (4th Cir. 1941)
- Shear v. National Rifle Association, 606 F.2d 1251 (D.C. Cir. 1979)
- Sidwell Oil & Gas Co. v. Loyd, 230 Kan. 77, 630 P.2d 1107, 1110 (1981)
- Cleaves v. Thompson, 122 Kan. 43, 251 P. 429, 430 (1926)
- International Union of Operating Engineers, Local 953 v. Central National Life Insurance Co., 501 F.2d 902, 907 (10th Cir. 1974)