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Insurance--Life Insurance--Materiality of Misrepresentations in Application in Non-Medical Policy (Tolar v. Metropolitan Life Ins. Co., 297 N.Y. 441 (1948))

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tended. This viewpoint has been specifically approved in other jurisdictions.¹³

In New York the matter seems to have been settled once and for all by statute.¹⁴ The language is quite clear and leaves little room for doubt. If the insured dies inside the United States his death must be a result of his being a member of such service.¹⁵ In the event the insured dies outside such states, his military status alone is sufficient to avoid liability.¹⁶

L. J. L.

INSURANCE — LIFE INSURANCE — MATERIALITY OF MISREPRESENTATIONS IN APPLICATION IN NON-MEDICAL POLICY.—This is an action on a non-medical policy of life insurance. The insured died of a rheumatic heart condition about one year after the policy was issued. The defense is that the insured's negative answers to questions in the application, as to whether she ever had any illness or prior medical consultation within five years, were material misrepresentations and that had the defendant known the true facts it would not have issued the policy. The family physician had examined the insured on several occasions prior to the issuance of the policy and had discovered a chronic endocarditis condition. The insurer also proved that in its practice, it uniformly rejected applications revealing a heart condition. The trial court submitted to the jury the question of the insured's knowledge of her heart condition and the jury rendered a verdict for the plaintiff. *Held*, judgment reversed. The question of knowledge on the part of the insured concerning the condition of her health has no part in the determination of liability in this case. Section 149 of the New York Insurance Law provides that misrepresentations as to consultations are deemed to be mis-

feiture of the policy, but merely for an exemption from liability under certain circumstances and conditions. It holds out no inducements to the assured to refrain from enlistment in his country's service, and does not constitute, in any sense, an agreement not to enlist or to evade the draft law." *Id.* at 5, the court here adopts a quotation from *Miller v. Illinois Bankers' Life Ass'n*, 138 Ark. 442, 212 S. W. 310, 311 (1919).

¹³ *Railey v. United Life & Accident Ins. Co.*, 26 Ga. App. 269, 106 S. E. 203 (1921); *Bradshaw v. Farmers' & Bankers' Life Ins. Co.*, 107 Kan. 681, 193 Pac. 332 (1920); *Marks v. Supreme Tribe of Ben Hur*, 191 Ky. 385, 230 S. W. 540 (1921).

¹⁴ N. Y. INS. LAW § 155.

¹⁵ "No policy of life insurance . . . shall contain any provision which excludes or restricts liability for death caused in a certain specified manner or occurring while the insured has a specified status, except the following provisions . . ."

(1) Inside the forty-eight states of the United States, the District of Columbia or the Dominion of Canada as a result of service in (a) the military, naval or air forces of any country at war, . . ." *Ibid.*

¹⁶ (2) "Outside such state, district, and dominion while in such forces or units." *Ibid.*

representations of the existence of the disease so far as the determination of materiality thereof is concerned. *Tolar v. Metropolitan Life Ins. Co.*, 297 N. Y. 441, 80 N. E. 2d 53 (1948).

It is established law in New York that a misrepresentation in an application for a policy of life insurance will avoid the policy if it is material to the risk.¹ Prior to 1936 the "might" test was used in determining materiality.² However, Mr. Justice Lehman, in *Geer v. Union Mut. Life Ins. Co.*,³ attempted to clarify the existing law on the test of materiality when he held the test to be not whether the insurer *might* have decided to issue the policy even if it had been apprised of the truth, but whether the failure to state the truth where there was a duty to speak prevented the insurer from exercising its choice of accepting or rejecting the risk. Following the *Geer* decision, the Insurance Law was revised and a new test of materiality established. Under Section 149, subdivision 2,⁴ the individual insurer test is established; and under subdivision 3, evidence of the insurer's practice as to acceptance or rejection of similar risks is admissible. Thus, it is no longer what the reasonable insurer *might have done*, but what the particular insurer *would have done* if the true facts had been known. This "would" test is established by a preponderance of authority in other jurisdictions.⁵ In the instant case, the court also considered the plaintiff's contention that the insurer must prove the existence of the ailment. This contention was rejected as opposed to the legislative intent in enacting subdivision 4 of Section 149. This subdivision "does not unconditionally make the existence of the ailment 'the fact misrepresented'; it makes it such only 'for the purpose of determining its materiality'; that is, the materiality of the misrepresentation."⁶

¹ *Ketchum & Co. v. State Mut. Life Assur. Co.*, 162 F. 2d 977 (C. C. A. 2d 1947); *Giuliani v. Metropolitan Life Ins. Co.*, 269 App. Div. 376, 56 N. Y. S. 2d 475 (4th Dep't 1945).

² *Travelers' Ins. Co. v. Pomerantz*, 246 N. Y. 63, 68, 158 N. E. 21, 23 (1927).

³ 273 N. Y. 261, 272, 7 N. E. 2d 125, 128 (1937). The effect of this decision is that, where an insurer asks a direct question in the application and an untruthful answer is given, such a misrepresentation is material as a matter of law. Attention to the unfairness of this situation, *i.e.*, the making of every question, even those in regard to trivial ailments, material was drawn by the dissent of Mr. Justice Finch when he said that by this rule ". . . they [insurers] could change in effect the replies which the statute states shall be deemed representations into warranties."

⁴ N. Y. INS. LAW § 149.

⁵ *New York Life Ins. Co. v. Levin*, 102 F. 2d 403 (C. C. A. 8th 1939); *Steigler v. Eureka Life Ins. Co.*, 146 Md. 629, 127 Atl. 397 (1925); *Pacific Mut. Life Ins. Co. v. Rosenthal*, 122 N. J. Eq. 155, 192 Atl. 742 (1937).

⁶ *Ketchum & Co. v. State Mut. Life Assur. Co.*, 162 F. 2d 977, 979 (C. C. A. 2d 1947). See Insurance Law Revision of State of New York, Tentative Draft, 1937, Art. VII, § 63, pp. 143, 144; *Jenkins v. John Hancock Mut. Life Ins. Co.*, 257 N. Y. 289, 178 N. E. 9 (1931).

Where the concealment of the consultation is for an ailment of a serious nature, its materiality may be decided as a matter of law.⁷ Thus, as in the instant case, concealment of consultation for an ailment which subsequently was the cause of death would be of such a serious nature.⁸ This decision indicates the trend in insurance law to strike a happy medium between the harsh doctrine of warranty and that doctrine which left the decision of materiality to a jury which had a tendency to lean toward the insured.

J. F. M.

MORTGAGES—ASSIGNMENT OF RENTS—PRIORITY OF ASSIGNEES.

—The defendant mortgaged an apartment house to the plaintiff bank, which mortgage contained an assignment of rent clause and provided for the appointment of a receiver upon default.¹ The mortgagor, before default, had leased the entire premises to another corporation with the right to collect rent from the existing tenants. The lessee corporation, Sunnybrook Associates, was joined in the foreclosure action, as a defendant, and it moved² to modify the order obtained by the plaintiff which appointed a receiver to collect all the rents, profits and issues of the mortgaged premises. The court held that in the absence of bad faith, fraud or collusion, the receiver might not disregard Sunnybrook's lease and was confined to such rents as Sunnybrook was obligated to pay under its lease to the Improved Real Estate Corporation, the mortgagor-lessor. Both the plaintiff mortgagee and the receiver appealed from the order as modified. *Held*, unanimously reversed. As a matter of law, a receiver is entitled to rents in preference to an assignee of rents under an assignment made by a mortgagor after the execution of a mortgage. The lessee, Sunnybrook, is in the position of an assignee of rents. *Dollar Savings Bank v. Sunnybrook Associates*, 272 App. Div. 734, 74 N. Y. S. 2d 759 (1st Dep't 1947).³

If we regard the lessee in this case as a mere assignee, such an assignee, who has taken his assignment with knowledge of the existence of a prior assignment, cannot cut off the rights of the prior

⁷ See *Geer v. Union Mutual Life Ins. Co.*, *supra* note 3 at 272, 7 N. E. 2d at 130; *Giuliani v. Metropolitan Life Ins. Co.*, 269 App. Div. 376, 382, 56 N. Y. S. 2d 475, 479 (4th Dep't 1945).

⁸ *Sun Life Assur. Co. of Canada v. Maloney*, 132 F. 2d 388 (C. C. A. 5th 1942).

¹ See Statutory Form M, N. Y. REAL PROP. LAW § 258; N. Y. REAL PROP. LAW § 254(10).

² "By the settled practice of chancery a stranger may intervene and will be heard *pro interesse suo* when his interests in the subject matter of a receivership are affected to his prejudice by acts of the receiver." *Klasko Finance Corp. v. Belleaire Hotel Corp.*, 257 N. Y. 1, 4, 177 N. E. 289 (1931).

³ *Motion for leave to appeal on certified questions denied*, 273 App. Div. 808, 76 N. Y. S. 2d 269 (1st Dep't 1948), *motion to dismiss appeal granted*, 297 N. Y. 949, 80 N. E. 2d 346 (1948).