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Article 7

Insurance: Delay in Passing Upon Application

Clayton Crooks

The Tax commission was backed and moved by virtue of the statutes 71.10 which provided for a ten day notice to the corporation before proceeding with the reassessment, and section 71.155 which provides for a hearing of the plaintiff corporation before the tax commission in the Circuit Court of Dane County, and sub-division 5 of the same section provides for an appeal on the judgment within 20 days of its recording before the Supreme Court of Wisconsin.

And, although the case was reversed in part as to other contentions, it is a good illustration of the futility of attacking the methods of a taxing body, because in its practice it seems to be violating the due process clauses of the state and federal constitutions, if such body moves by authority of a statute which provides in some way for a notice to the assessed party, a hearing before the assessing body, and some method for appealing the assessment to a court for final adjudication.

FRANCIS ACKERMAN

Insurance.

Behnke v. *Standard Acc. Inc. Co. of Detroit,* 41 Fed. 696, is an appeal by the plaintiff from the judgment of the District Court of the United States for the Eastern District of Wisconsin. The action is based upon a complaint purporting to state two causes of action, the first upon an alleged express contract by the appellee to insure appellants against liability under the Wisconsin Workmens Compensation Act, and the second upon an alleged tort, in that appellee negligently failed to enter into, or to notify the appellants within a reasonable time that it refused to enter into the contract of insurance.

The facts are as follows: the appellants, engaged in operating a portable sawmill and logging in Forest County, Wisconsin, whose compensation insurance had been handled by Ross Richardson prior to October, 1925, were advised by him in September, 1925, that their present policy procured by him with the London Guaranty and Accident Company would expire October 1, 1925. They were also advised that they would have to seek insurance elsewhere because that company refused to renew the policy. Richardson, who was an agent of the Fidelity Deposit Company of Maryland, thereupon wrote Wolff, the general manager of the Milwaukee district for the same company stating that he had the application for the insurance, outlining it as best he could, and asking whether Wolff could secure the compensation insurance from some company. Neither Wolff nor Richardson was an agent of the appellee company nor of the George H. Russell Company, its Milwaukee agent.

Wolff answered on stationery bearing the letterhead of the Fidelity and Deposit Company, saying that he believed that he could procure the policy and asking for the details regarding the risk. This letter

was forwarded to the appellants and they in response supplied the necessary details, also stating that they would like to have the insurance in 10 days so that they would be completely covered when they commenced operations. Wolff immeditely, on October 3, 1925, returned an application blank to be checked and signed by the appellants who received it from Richardson on October 8th, and returned it to Richardson, who forwarded it to Wolff. The appellees received it from Wolff on October 13th, and on October 18th wired Wolff their refusal to execute the policy, and on the same day Wolff wrote the notice of refusal to Richardson, also steating that he knew of no company that would accept the risk. Richardson and Wolff were to split on the commissions if any were received.

On October 21st appellants' employee was killed. When Richardson was notified of this fact the next morning he informed the appellants that he had just received notice of the refusal from the Milwaukee agency.

Sparks, Circuit Judge:—It is settled Wisconsin law that there may be a valid oral contract of insurance, 182 Wis. 171. It is equally well settled that an insurance company may be liable for its delay in passing upon an application for insurance. 58 Wis. 508; 160 Iowa 19.

Richardson could not be held to be an agent of the appellee within the meaning of section 209.05, Wisconsin Statutes, 1927, because he did not solicit the insurance, nor did he transmit an application to appellee or to its agent, and he received no compensation for what he did. On the contrary the facts show that he was the agent of the appellants. The fact that he expected to receive a compensation was not sufficient to constitute him an agent, especially since the fact was never brought home to the company nor its agent.

Neither was Wolff an agent of the company despite the fact that he transmitted the application to the agent of the appellee. He was acting under Richardson's directions to "scout around and get this policy for me," was under no contract with the appellee, and no compensation was paid him.

However, even though these two were appellees' agents, no cause of action is made out. Certainly the company has some discretion in acting on an application and may refuse it if it chooses. The agent is not the final arbiter. There was no contract here and surely there was no negligence exercised by the appellants in receiving the application on the 13th of October and rejecting it on the 17th, making know its refusal to Wolff immediately.

Notwithstanding all allegations, contentions, admissions, and denials, the appellants failed to establish a ground for recovery of damages for negligence. Before there can be a recovery in such case

damages must be proved. If the appellants were unable to secure insurance from any other company they were not damaged by appellees' negligence or refusal, even if such were present. The only evidence on the point is Wolff's communication that "we know of absolutely no company who will take on this risk." This was uncontradicted, and the burden was on the appellants to discredit it if they could; otherwise there could be no damages and it was useless to send the case to the jury.

Judgment affirmed.

CLAYTON CROOKS.

Corporations; Fire and Police Commissioners; Removal—Appointments.

The mayor of Watertown sent written notice to three members of the fire and police commission dismissing each of them from office. No further procedure ensued. The mayor immediately filed notice with the secretary of the fire and police commission, appointing two new members to replace those removed, and called a meeting of his appointees, now commissioners, and with them fixed a date for the trial of the charges filed by the mayor against the discharged commissioners. An action was begun which resulted in the writ of prohibition now questioned. 230 N. W. 43, *State ex rel. Piertz* v. *Hartwig, et al.*

The prime consideration here relates to the question of whether or not a mayor has the power to dismiss an appointed officer wihtout cause and whether such dismissals created vacancies to be filled by new appointees.

The Wisconsin statutes to be considered here are: 62:13 which vests the mayor with the power to appoint five citizens as members of a fire and police commission, each member to be appointed by him, annually for the term of five years, and that such appointment be filed in writing with the secretary of the board of fire and police commission; 62.09 (3) (c) provides that appointments by the mayor of a city shall be subject to confirmation by the council unless otherwise provided by law, and section 17.12 (1) (c) of the statutes requires that officers appointed by the mayor without confirmation of the council may be removed by such officer for cause when he deems it for the best interests of the city.

62.13 restricts the term of office of such appointee and requires a written notice of such appointment to be filed with the secretary of the board while 62.09 requires the confirmation of the mayor's appointment by the council. These last two statutes dispense with 17.12 (1) (c) which applies in cases where the mayor's appointments are not subject to the confirmation of the council.