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IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-631

No. COA20-417

Filed 16 November 2021

Madison County, No. 18-CVS-60

JBL COMMUNICATIONS, INC. and JACKIE BROOK LUNSFORD, Plaintiffs,

v.

AMCO INSURANCE COMPANY, BANKERS INSURANCE AGENCY, INC., d/b/a/ BANKERS INSURANCE AGENCY OF VIRGINIA, INC., BANKERS INSURANCE, LLC, and TONY NEWSOME, Defendants.

Appeal by plaintiffs from order entered 20 November 2019 by Judge R. Gregory Horne in Superior Court, Madison County. Heard in the Court of Appeals 9 March 2021.

Law Offices of Jamie A. Stokes, PLLC, by Jamie A. Stokes, for plaintiff-appellants.

Manning, Fulton Skinner, P.A., by Michael T. Medford and Brianne M. Glass, for defendant-appellees Bankers Insurance Agency, Inc. d/b/a Bankers Insurance Agency of Virginia, Inc., Bankers Insurance, LLC, and Tony Newsome.

STROUD, Chief Judge.

¶ 1 Plaintiffs appeal a summary judgment order dismissing their action. Because plaintiffs' claims were barred by the applicable statutes of limitations, we affirm.

I. Background

¶ 2 On 23 February 2018, JBL Communications, Inc. ("JBL") and Jackie Lunsford ("Lunsford"), alleged president and majority shareholder of JBL, filed a complaint against defendants AMCO Insurance Company ("AMCO"); Bankers Insurance Agency, Inc. d/b/a Bankers Insurance Agency of Virginia, Inc. ("Bankers Virginia"); Bankers Insurance, LLC ("Bankers LLC"); and Tony Newsome ("Newsome") (defendant Bankers Virginia, defendant Bankers LLC, and defendant Newsome are herein referred to collectively as "the Agency defendants"). This case arises from plaintiffs' claims that defendant AMCO was required to provide excess liability insurance coverage for damages resulting from an automobile collision on 13 September 2012 ("2012 collision"), either based upon the actual business policies issued to plaintiff JBL or, if those polices did not apply to the 2012 collision, based upon a negligent failure by the Agency defendants to procure insurance.

¶ 3 As this appeal addresses only the summary judgment order based upon the statutes of limitations, we will include only the basic facts, regarding the automobile accident and the resulting civil liability claims, needed to address the parties' arguments regarding the issue on appeal. Plaintiffs' complaint alleges that on 13 September 2012, plaintiff Lunsford "was the registered owner and operator of a 2012 Ford Mustang[,]" when it was involved in a vehicle collision, the 2012 collision. Ms. Kathleen Lewis was a passenger in plaintiff Lunsford's vehicle, and she was seriously

injured in the 2012 collision. Ms. Martha Collins, who was in the other vehicle involved in the 2012 collision, died from her injuries.

¶ 4 In 2014, plaintiff Lunsford was criminally charged for the death of Ms. Collins, and ultimately, he was convicted of and incarcerated for involuntary manslaughter. Both Ms. Lewis and the estate of Ms. Collins asserted civil claims for damages. Plaintiff Lunsford settled the claim with Ms. Lewis with his personal Travelers Insurance policy, apparently for the policy limits. Plaintiff Lunsford explained in his deposition that he settled the civil wrongful death claim by Ms. Collins estate for $650,000.00.

¶ 5 The record before this Court includes many documents, communications, and depositions; we will highlight only a few as relevant to the issue on appeal. During plaintiff Lunsford's settlement negotiations with Ms. Lewis, her attorney sought to confirm that Lunsford's Travelers Insurance policy was the only insurance coverage applicable to the claim. In response, in March 2013, plaintiff Lunsford signed an affidavit stating that the only insurance coverage for the vehicle he was driving at the time of the collision was his Travelers Insurance policy.

¶ 6 After the estate of Ms. Collins filed its claim against plaintiffs, by letter dated 17 May 2016, Nationwide Insurance, on behalf of AMCO, sent a letter to plaintiff Lunsford. The 17 May 2016 letter noted that "[r]ecently an issue has been raised as to whether the [business policies issued to JBL] provide coverage to [Lunsford]

individually for this accident." Based upon an "investigation" the "2012 Ford Mustang that [plaintiff Lunsford was] driving at the time of the accident . . . was listed on a policy [he] individually had with Travelers Insurance. . . . [T]his vehicle is not listed on the policy JBL Communications has with AMCO."

¶ 7 Plaintiffs filed the complaint on 23 February 2018, alleging they had excess insurance coverage for the 2012 collision under business policies issued to plaintiff JBL and defendant AMCO wrongfully failed to pay under the policies, or in the alternative, if the policies did not apply to the 2012 collision, the Agency defendants are at fault for not procuring the excess insurance with AMCO. The complaint includes claims for (1) a declaratory judgment against defendant AMCO regarding excess liability coverage for the 2012 collision; (2) breach of contract by defendant AMCO due to its failure to provide the excess coverage; (3) in the alternative, failure to procure the excess insurance by the Agency defendants; (4) in the alternative, negligent misrepresentation by the Agency defendants in conveying that the excess liability insurance had been procured; (5) Chapter 75 claim for unfair and deceptive trade practices against all defendants; and (6) bad faith on behalf of all defendants. Plaintiffs made claims for relief in excess of $25,000 and also requested treble damages, punitive damages, and attorney fees.

¶ 8 The Agency defendants answered plaintiffs' complaint and among other defenses pled statutes of limitations for plaintiffs' claims. On 11 February 2019,

defendant AMCO was voluntarily dismissed from the action, leaving only the Agency defendants.[1] On 11 September 2019, the Agency defendants filed a motion for summary judgment arguing plaintiffs' action should be dismissed as it was barred by the statutes of limitations.

¶ 9 On 19 November 2019, the trial court entered an order allowing the Agency defendants' motion for summary judgment and dismissing the claims against them as plaintiffs' claims were "barred by the applicable statutes of limitation." As the claims against defendant AMCO were previously dismissed, the order dismissing the claims against the Agency defendants is a final order dismissing plaintiffs' entire action. Plaintiffs timely filed notice of appeal.

II. Statutes of Limitations

¶ 10 Plaintiffs contend the trial court erred by granting summary judgment because there is a genuine issue of material fact as to whether their claims were barred by the statutes of limitations. While plaintiffs do not contest the date of the 2012 collision, the date of the filing of their complaint, or the applicable statutes of limitations for each claim, they do contend the statutes of limitation were tolled as

[1] This dismissal effectively eliminated the first two claims for a declaratory judgment against defendant AMCO regarding excess liability coverage for the 2012 collision and for breach of contract by defendant AMCO due to its failure to provide the excess coverage. The only claims remaining arise from the Agency defendants' alleged failure to procure excess insurance coverage.

plaintiffs did not discover the lack of excess liability insurance coverage until 2016 when they received a formal letter of denial from AMCO. Plaintiffs also contend there is a genuine issue of material fact as to whether their failure to discover the lack of excess liability insurance coverage until approximately four years after the 2012 collision was reasonable.

A. Standard of Review

> When the affirmative defense of the statute of limitations has been pled, the burden is on the plaintiff to show that his cause of action accrued within the limitations period. On appeal from an order granting summary judgment, our standard of review is *de novo*, and we view the evidence in the light most favorable to the non-movant.
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> Generally, whether a cause of action is barred by the statute of limitations is a mixed question of law and fact. However, where the statute of limitations is properly pled and the facts are not in conflict, the issue becomes a matter of law, and summary judgment is appropriate.

Scott & Jones, Inc. v. Carlton Ins. Agency, Inc., 196 N.C. App. 290, 293, 677 S.E.2d 848, 850 (2009) (citations omitted).

B. Tolling of Statutes of Limitations

¶ 11 Plaintiffs waited approximately five and a half years after the 2012 collision to file their complaint. Plaintiffs begin the argument section of their brief by acknowledging the applicable statutes of limitations but contend that "[t]he 17 May 2016 denial letter establishes the date of reasonable discovery as a matter of law." (Capitalization altered.) Citing North Carolina General Statute § 1-52(9), plaintiffs

note claims for "fraud or mistake . . . shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake[,]" and thus 17 May 2016, the day plaintiffs received the letter denying their claim, was the first date of reasonable discovery.

¶ 12 But plaintiffs' argument is not borne out by the record, even viewed in the light most favorable to plaintiffs. *See Scott & Jones, Inc.,* 196 N.C. App. at 293, 677 S.E.2d at 850. Plaintiffs argue their trust in the Agency defendants, developed during a business and personal relationship over years prior to 2012, and the events after the 2012 collision led to plaintiffs' delay in discovering the lack of excess insurance coverage. Plaintiffs contend plaintiff Lunsford failed to realize the lack of excess insurance coverage under the business policies issued to plaintiff JBL based upon the time plaintiff Lunsford spent preparing for his criminal and civil litigation, along with his period of incarceration. For purposes of summary judgment, we accept plaintiffs' contentions regarding their long relationship with the Agency defendants as true, and certainly there is no factual dispute regarding plaintiff Lunsford's criminal conviction and imprisonment or the timing of the civil claims asserted by Ms. Lewis and the estate of Ms. Collins. But these circumstances do not support plaintiffs' argument that the Agency defendants somehow delayed the denial of plaintiffs' claim for excess coverage; misrepresented or hid the lack of insurance coverage from plaintiffs; prevented plaintiffs from discovering the lack of insurance coverage; or

prevented plaintiffs from filing their claims in this case sooner.

¶ 13 The business insurance policies issued to plaintiff JBL as described in plaintiffs' own complaint were issued in 2011 and were available to plaintiffs at all times. *See generally State Farm Mut. Auto. Ins. Co. v. Gaylor*, 190 N.C. App. 448, 452, 660 S.E.2d 104, 107 (2008) ("Persons entering contracts of insurance, like other contracts, have a duty to read them and ordinarily are charged with knowledge of their contents. Where a party has reasonable opportunity to read the instrument in question, and the language of the instrument is clear, unambiguous and easily understood, failure to read the instrument bars that party from asserting its belief that the policy contained provisions which it does not." (citation omitted)). The events, communications, and documents in the record should only have alerted plaintiffs of the need to investigate their potential insurance coverage and make certain of any applicable insurance policies as soon as possible, as it was obvious very soon after the 2012 collision that plaintiffs would be subject to substantial civil claims from both Ms. Lewis and the estate of Ms. Collins.

¶ 14 Plaintiffs emphasize the date of the letter from AMCO, 17 May 2016, supports their argument that they had no reason to believe the JBL business policies would not provide individual coverage for plaintiff Lunsford until that date. But plaintiffs take portions of this letter out of context and ignore the clear provisions of the JBL insurance policies which were always available to plaintiffs. The letter notes that

AMCO was providing a defense to JBL "[i]n response to a complaint filed against" plaintiffs Lunsford and JBL regarding Ms. Collins's death. The letter states that "[*r*]*ecently* an issue has been raised as to whether the polices provide coverage for you individually for this accident." (Emphasis added.) Based upon the insurance policies, the Collins complaint, and "the sequence of events on the evening in question," the letter advised that the JBL business policies did not provide any individual coverage. Plaintiffs do not dispute the provisions of the JBL business policies or the facts revealed in the investigation as noted in the AMCO letter, which in summary, indicate that plaintiff Lunsford's actions that evening were "at least twice removed from any action that could be considered to be on behalf of JBL Communications."

¶ 15 In addition, Attorney Larry Leake began representing plaintiff Lunsford shortly after the 2012 collision. In his deposition, Mr. Leake testified that he did not "prior to June of 2016 . . . make any demand to Tony Newsome or Bankers Insurance[2] on behalf of . . . Lunsford" because "it was very clear to the world those issues[, regarding excess coverage,] were being raised. How those came to be raised, I don't specifically recall . . . ." Mr. Leake was further asked, "And so insofar as you are aware, prior to 2016, nobody had approached Tony Newsome or Bankers and said,

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[2] Mr. Leake was referring to Bankers Virginia, Bankers LLC, and Mr. Newsome, the Agency defendants, whom plaintiffs contend wrongfully failed to procure excess liability coverage.

'We think you may have messed up this insurance'?" to which Leake responded, "If anybody did, it was . . . Lunsford. And I don't know whether he did or not."

¶ 16 Ultimately, plaintiffs have forecast no evidence that the Agency defendants may be at fault for any delay in plaintiffs' discovery of the lack of excess insurance coverage. Overall, the record indicates any delay in discovery was attributable to plaintiffs. We accept as true plaintiff Lunsford's allegations he was distressed and distracted by having to deal with the criminal and civil claims filed against him, but these circumstances are not the fault of defendants. Plaintiffs claim that at least the timing regarding "when reasonable discovery occurred[,]" is an issue of fact which should be resolved by the trial court, but nothing in the record indicates a genuine issue of material fact as to whether defendants somehow misrepresented or concealed any information regarding the actual coverage provided by the business insurance policies issued to plaintiff JBL. The record indicates only plaintiffs' own failure to be familiar with the terms of the business insurance policies issued to plaintiff JBL and to take action to address any potential question regarding applicability of the excess insurance coverage until after several years had passed. Thus, we need not analyze any special rules or exceptions which might apply to extend plaintiffs' time to bring these claims, and all statutes of limitations apply.

1. Failure to Procure Insurance

¶ 17 This Court noted in *Scott & Jones, Inc.*, that it would treat a claim for

procurement of insurance as a contractual claim without deciding if in fact such a claim was valid, and therefore – as a contractual claim – it was subject to a three-year statute of limitations under North Carolina General Statute § 1-52(1). *Scott & Jones, Inc.*, 196 N.C. App. at 296-98, 677 S.E.2d at 852-53. ("[T]he absence of completed products coverage should have been apparent to plaintiff on the date plaintiff received the policy, or at the latest, it should have been apparent to plaintiff immediately upon Mr. McMillan's injury. . . . . Plaintiff also alleges, Defendants breached their contractual obligation (1) by failing to reasonably counsel the Plaintiff and (2) by failing to include completed products coverage in the insurance policies the Defendants sold to the Plaintiff. However, plaintiff's argument again ignores the fact that even if defendants had properly advised plaintiff and procured completed products coverage after Mr. McMillan's fall, it would have no effect on the current action involving the injury of Mr. McMillan. Limitations of actions for breach of contract are governed by G.S. § 1–52(1), the three-year statute of limitations, which applies to actions upon a contract, obligation or liability arising out of a contract, express or implied, with exceptions not pertinent to this case. The statute begins to run when the claim accrues; for a breach of contract action, the claim accrues upon breach. Mr. McMillan fell on 3 February 2003. Plaintiff's complaint was not filed until 31 October 2006, approximately three years and nine months after the latest possible date defendants could have breached their contract. Thus, plaintiff's claim

for breach of contract is barred by the statute of limitations." (citations, quotation marks, brackets, and footnote omitted)). Thus here, plaintiffs' claim for failure to procure insurance is subject to a three-year statute of limitations. *See generally id.* Any potential failure to procure insurance would have occurred prior to the 2012 collision, and the claim would accrue at the latest on the date of the 2012 collision, so the statute of limitations expired, at the latest, in 2015.

2. Negligent Misrepresentation

> The statute of limitations for negligent misrepresentation is three years pursuant to N.C. Gen. Stat. § 1–52. Unlike a claim for fraud, a claim for negligent misrepresentation, where it exists, accrues and the statute of limitations begins to run as soon as the right to institute and maintain a suit arises.

Carlisle v. Keith, 169 N.C. App. 674, 684, 614 S.E.2d 542, 549 (2005) (citations and quotation marks omitted). Plaintiffs' claim accrued, at the latest, as of the date of the 2012 collision, and the statute of limitations expired in 2015. *See id.*

3. Chapter 75 Unfair and Deceptive Trade Practices

¶ 18 "The statute of limitations for an unfair and deceptive trade practices claim is four years. *See* N.C. Gen. Stat. § 75–16.2 (2011)." *Trantham v. Michael L. Martin, Inc.*, 228 N.C. App. 118, 126, 745 S.E.2d 327, 334 (2013). Whether this claim accrued when the insurance policy was issued in 2011 or upon the later date of the 2012 collision, this statute of limitations expired, at the latest, in 2016. *See id.*

4. Bad Faith

¶ 19 Bad faith, in this case, is also barred by a three-year statute of limitations under North Carolina General Statute § 1-52. *See Page v. Lexington Ins. Co.*, 177 N.C. App. 246, 251, 628 S.E.2d 427, 430 (2006) ("In the present case, plaintiffs' claims for breach of contract, breach of fiduciary duty, *and bad faith* arose on 21 February 2001, and plaintiffs did not file their complaint until 28 July 2004. Plaintiffs' claims for these causes of action were thus barred by the three-year statute of limitations applicable to these claims. *See* N.C. Gen. Stat. § 1–52(12) (2005) (providing that a claim for loss covered by an insurance policy is subject to a three-year statute of limitations)." (emphasis added)).

C. Summary

¶ 20 There is no genuine issue of material fact as to the relevant dates or events, and all of plaintiffs' claims are barred by the applicable statutes of limitations. The trial court did not err in allowing summary judgment on behalf of the Agency defendants.

III. Conclusion

¶ 21 We affirm the trial court's summary judgment order dismissing plaintiff's claims against defendants.

AFFIRMED.

Judges DIETZ and CARPENTER concur.

Report per Rule 30(e).