Andreasen v. Progressive Express Ins. Co.

United States District Court for the Southern District of Florida

August 25, 2017, Decided; August 25, 2017, Entered on Docket

CASE NO. 17-20190-CIV-LENARD/GOODMAN

Reporter
2017 U.S. Dist. LEXIS 142456 *

JOHN ***ANDREASEN***, Plaintiff, v. PROGRESSIVE EXPRESS INSURANCE COMPANY, Defendants.

Core Terms

Progressive, statute of limitations, coverage, accrued, cause of action, allegations, fraudulent concealment, non-stacked, stacking, motion to dismiss, Statutes, concealment, declaratory relief, policy limit, reformation, uninsured, motorist, vehicles, declaratory judgment, limitations period, four-year, coercive, insured, argues, notice, flatbed truck, four year, limitations, five-year, applies

Counsel: [*1] For JOHN ***ANDREASEN***, Plaintiff: David Allen Hagen, LEAD ATTORNEY, Law Office of David A. Hagen, P.A., Miami, FL; Roy D. Wasson, LEAD ATTORNEY, Miami, FL.

For Progressive Express Insurance Company, a foreign corporation, Defendant, Cross Defendant: Stuart Jeffrey Freeman, Brasfield, Freeman, Goldis & Cash, P.A., St. Petersburg, FL.

For Fulton Company, Inc., Defendant, Cross Claimant: Martin David Berg, LEAD ATTORNEY, Miami, FL.

Judges: JOAN A. LENARD, UNITED STATES DISTRICT JUDGE.

Opinion by: JOAN A. LENARD

Opinion

ORDER GRANTING DEFENDANT PROGRESSIVE AMERICAN INSURANCE COMPANY'S AMENDED MOTION TO DISMISS AMENDED COMPLAINT (D.E. 23) AND DISMISSING THE AMENDED COMPLAINT WITHOUT PREJUDICE

THIS CAUSE is before the Court upon Defendant Progressive Express Insurance Company's ("Progressive") Amended Motion to Dismiss Plaintiff John ***Andreasen***'s Amended Complaint for Failure to State a Claim Upon Which Relief Can be Granted and/or for Filing an Action After the Expiration of the Statutes of Limitations, ("Motion," D.E. 23), filed February 15, 2017. Plaintiff filed a Response on March 7, 2017, ("Response," D.E. 41), to which Progressive filed a Reply on March 14, 2017, ("Reply," D.E. 42).

I. Background[1]

In 2008, Plaintiff was employed **[*2]** by Fulton Company, Inc, ("Fulton"), a small business that provided lawn spraying and vegetation management services. (Am. Compl. ¶ 5.) Fulton had a small fleet of three commercial vehicles and four drivers. (Id. ¶ 7.) Defendant Progressive provided automobile insurance coverage to Fulton's operation pursuant to Commercial Auto Liability Insurance Policy Number 01716746-5. (Id. ¶ 6.) The subject policy specifically named Plaintiff as a

[1] The following facts are gleaned from Plaintiff's Amended Complaint (D.E. 13) and are deemed to be true for purposes of ruling on Defendant's Motion.

covered driver and listed each of Fulton's commercial vehicles as follows:

2001 Isuzu Flatbed Truck VIN: 4KLC4B1R11J803972
2001 Isuzu Flatbed Truck VIN: 4KLC4B1R31J804475
2003 Isuzu Flatbed Truck VIN: 4KLC4B1R43J801393

(Id. ¶ 7; see also D.E. 13-1 at 3.) Fulton paid a full, separate premium on each of its commercial vehicles on the Policy. (Id. ¶ 9.)

On January 30, 2008, Plaintiff was involved in a serious motor vehicle accident while operating Fulton's insured 2003 Isuzu Flatbed Truck. (Id. ¶ 11.) Plaintiff was traveling northbound on an undivided, two-lane highway when an uninsured motorist, Carlos Hernandez, who was travelling southbound on the highway crossed the centerline and collided with Plaintiff's truck. (Id. ¶ 12.) Hernandez died at the scene; Plaintiff **[*3]** was airlifted and rendered permanently and totally disabled as a result of the accident. (Id. ¶ 13.) Plaintiff's economic damages exceed $1.2 million. (Id.)

Progressive received proper notice of Plaintiff's claim under the Policy. (Id. ¶ 16.) On February 5, 2008, Plaintiff's attorney requested Fulton's insurance information from Progressive pursuant to *Section 627.4137, Florida Statutes.* (Id. ¶ 17.) The next day, February 6, 2008, Progressive delivered to Plaintiff's attorney a written response indicating that the limit of liability coverage was "$500,000 combined single limit for uninsured motorist non-stacked." (See id. ¶ 18; see also D.E. 13-1 at 26.)

On or about February 26, 2008, Plaintiff's attorney verbally inquired about stacking[2] Uninsured/Underinsured Motorist ("UM/UIM") coverage because Fulton's three commercial vehicles were individually-listed on the Commercial Auto Coverage Summary—Declarations Page, each carrying its own premium for UM/UIM coverage. (Id. ¶ 19.) Progressive advised that it was non-stacking, and on February 26, 2008, Plaintiff's attorney demanded the non-stacked UM/UIM policy limits, which Progressive represented to be $500,000. (Id.) On March 3, 2008, Progressive tendered the requested $500,000 **[*4]** UM/UIM policy limits. (Id. ¶ 20.) On March 4, 2008, Plaintiff executed a Release and Trust Agreement in which he released any and all legal claims against Progressive in consideration for the $500,000 payment. (D.E. 13-1 at 30.)

Over four years later, on August 15, 2012, Plaintiff's attorney requested from Progressive, in writing, a signed selection/rejection form for stacking UM coverage completed by a representative of Fulton, as required by *Section 627.727, Florida Statutes.* (Am. Compl. ¶ 23; see also D.E. 13-1 at 34.) On September 7, 2012, Progressive wrote back that it had "been unable to locate the UM selection form under policy number 01716746-5." (Id. ¶ 24; see also D.E. 13-1 at 36.)

Over three years later, on January 6, 2016, Plaintiff's attorney made a new, money-stacking policy limit demand on the remaining two 2001 Isuzu flatbed trucks. (Id. ¶ 26; see also D.E. 13-1 at 40-41.) Counsel's letter demanded $1 million—the $500,000 policy limit for each of the remaining two Isuzus. (See id.) On January 21, 2016, Progressive denied the stacking policy limit demand on the basis that the statute of limitations had expired. (Id. ¶ 27; see also D.E. 13-1 at 43.) On January 22, 2016, Plaintiff's attorney filed a Civil **[*5]** Remedy Notice with the Florida Department of Financial Services. (Id. ¶ 29.)

[2] "Stacking is a judicial creation, based on the common sense notion that an insured should be entitled to get what is paid for. Thus, if the insured pays separate premiums for uninsured motorist protection on separate vehicles, the insured should get the benefit of coverage for each individual premium paid." *United Servs. Auto. Ass'n v. Roth, 744 So. 2d 1227, 1229 (Fla. Dist. Ct. App. 1999)*. Under Florida insurance law, an anti-stacking provision in an auto insurance policy is valid only if it satisfies the statutory requirements of "notice to the insured, knowing acceptance by the insured, and filing of revised premium rates[.]" *Rando v. GEICO, 556 F.3d 1173, 1180 (11th Cir. 2009)*.

On December 20, 2016, Plaintiff filed a five-count complaint in state court. (See D.E. 1-1 at 5-21.) On January 17, 2017, Progressive removed the case to this Court. (D.E. 1.) On January 31, 2017, Plaintiff filed the operative Amended Complaint for: (1) Count I: Breach of Insured Motorist Coverage Contract as to Progressive; (2) Count II: Declaratory Judgment Action—Policy Construction; (3) Count III: Reformation of Policy; (4) Count IV: Bad Faith Handling of an Insurance Claim; and (5) Coverage by Estoppel. (D.E. 13.)

On February 15, 2017, Defendant moved to dismiss the Amended Complaint for failure to state a claim and/or as barred by the statute of limitations. (D.E. 23.)

II. Legal Standard

Under *Federal Rule of Civil Procedure 12(b)(6)*, a court may dismiss a claim for "failure to state a claim upon which relief can be granted." "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (quoting *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007))*. Conclusory statements, assertions or labels will not survive a *12(b)(6)* motion to dismiss. Id. "A claim has facial plausibility when the plaintiff **[*6]** pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id.; see also *Edwards v. Prime, Inc., 602 F.3d 1276, 1291 (11th Cir. 2010)* (setting forth the plausibility standard). "Factual allegations must be enough to raise a right to relief above the speculative level[.]" *Twombly, 550 U.S. at 555* (citation omitted). Additionally:

> Although it must accept well-pled facts as true, the court is not required to accept a plaintiff's legal conclusions. *Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009)* (noting "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions"). In evaluating the sufficiency of a plaintiff's pleadings, we make reasonable inferences in Plaintiff's favor, "but we are not required to draw plaintiff's inference." *Aldana v. Del Monte Fresh Produce, N.A., Inc., 416 F.3d 1242, 1248 (11th Cir. 2005)*. Similarly, "unwarranted deductions of fact" in a complaint are not admitted as true for the purpose of testing the sufficiency of plaintiff's allegations. Id.; see also *Iqbal, 129 S. Ct. at 1951* (stating conclusory allegations are "not entitled to be assumed true").

Sinaltrainal v. Coca-Cola, 578 F.3d 1252, 1260 (11th Cir. 2009), abrogated on other grounds by *Mohamad v. Palestinian Auth., 566 U.S. 449, 132 S. Ct. 1702, 1706 n.2, 182 L. Ed. 2d 720 (2012)*. The Eleventh Circuit has endorsed "a 'two-pronged approach' in applying these principles: 1) eliminate any allegations in the complaint that are merely legal conclusions; and **[*7]** 2) where there are well-pleaded factual allegations, 'assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.'" *American Dental Ass'n v. Cigna Corp., 605 F.3d 1283, 1290 (11th Cir. 2010)* (quoting *Iqbal, 556 U.S. at 679*).

"When considering a motion to dismiss, all facts set forth in the plaintiff's complaint 'are to be accepted as true and the court limits its consideration to the pleadings and exhibits attached thereto.'" *Grossman v. Nationsbank, N.A., 225 F.3d 1228, 1231 (11th Cir. 2000)* (quoting *GSW, Inc. v. Long Cty., 999 F.2d 1508, 1510 (11th Cir. 1993))*; see also *Fed. R. Civ. P. 10(c)* ("A copy of a written instrument that is an exhibit to a pleading is a part of the pleading for all purposes.").[3]

III. Discussion

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[3] All of the relevant documents are attached as Exhibits to Plaintiff's Amended Complaint in a single attachment. (See D.E. 13-1.) When citing to an Exhibit, the Court will cite to the page number in Docket Entry 13-1 on which the referenced document appears.

Progressive argues that Plaintiff's claims should be dismissed for failure to state a claim and/or because they are barred by the statute of limitations. (Mot. at 8-17.) Because the statute of limitations bars Plaintiff's claims as alleged, the Court will limit its discussion to that issue.

Plaintiff argues that "it is premature to address the statute of limitations issue" at this motion to dismiss stage, but that once the statute of limitations defense is pled in Progressive's Answer, "the matter will be ripe for adjudication of the fraudulent concealment avoidance to that defense." (Resp. at 9-10.)

"Generally, whether a claim is barred by the statute of limitations **[*8]** should be raised as an affirmative defense in the answer rather than in a motion to dismiss." *Spadaro, 855 F Supp. 2d at 1328* (citing *Cabral v. City of Miami Beach, 76 So. 3d 324, 326 (Fla. Dist. Ct. App. 2011)*). "However, if facts on the face of the pleadings show that the statute of limitations bars the action, the defense can be raised by motion to dismiss." Id. (citing *Tello v. Dean Witter Reynolds, Inc., 410 F.3d 1275, 1288 (11th Cir. 2005)*).

"The doctrine of fraudulent concealment will operate to toll the statute of limitations 'when it can be shown that fraud has been perpetrated on the injured party sufficient to place him in ignorance of his right to a cause of action or to prevent him from discovering his injury.'" *Am. Home Assurance Co. v. Weaver Aggregate Transport, Inc., 990 F. Supp. 2d 1254, 1272 (M.D. Fla. 2013)* (quoting *Nardone v. Reynolds, 333 So. 2d 25, 39 (Fla. 1976)*, modified on other grounds by *Tanner v. Hartog, 618 So. 2d 177 (Fla. 1993)*). "To establish fraudulent concealment, a claimant must allege and establish: '(1) successful concealment of the cause of action, (2) fraudulent means to achieve that concealment, and (3) plaintiff exercised reasonable care and diligence in seeking to discover the facts that form the basis of his claim." Id. (quoting *Burr v. Philip Morris USA Inc., No. 8:07-CV-01429-MSS—EAJ, 2012 U.S. Dist. LEXIS 159084, 2012 WL 5290164, at *3 (M.D. Fla. Sept. 28, 2012)* (citing *Berisford v. Jack Eckerd Corp., 667 So. 2d 809, 812 (Fla. Dist. Ct. App. 1995)*).[4]

"Because the doctrine of equitable tolling derives from the practice of federal courts of equity, federal courts have predictably **[*9]** adopted the same pleading requirements those courts traditionally imposed upon plaintiffs seeking equitable relief from a statute of limitations." *Pedraza v. United Guar. Corp., 114 F. Supp. 2d 1347, 1356 (S.D. Ga. 2000)* (citing *Charlotte Telecasters, Inc. v. Jefferson-Pilot Corp., 546 F.2d 570, 574 (4th Cir. 1976)*). "Therefore, a plaintiff must satisfy *Federal*

[4] The courts are not uniform in their articulation of the elements of a claim for fraudulent concealment under Florida law. Compare *Am. Home Assurance Co., 990 F. Supp. 2d at 1272* ("To establish fraudulent concealment, a claimant must allege and establish: '(1) successful concealment of the cause of action, (2) fraudulent means to achieve that concealment, and (3) plaintiff exercised reasonable care and diligence in seeking to discover the facts that form the basis of his claim.") (quoting *Burr v. Philip Morris USA Inc., No. 8:07-CV-01429-MSS-EAJ, 2012 U.S. Dist. LEXIS 159084, 2012 WL 5290164, at *3 (M.D. Fla. Sept. 28, 2012)* (citing *Berisford v. Jack Eckerd Corp., 667 So. 2d 809, 812 (Fla. Dist. Ct. App. 1995))*, with *Aprigliano v. Am. Honda Motor Co., Inc., 979 F. Supp. 2d 1331, 1342 (S.D. Fla. 2013)* ("To prevail on a claim for fraudulent concealment under Florida law: [p]laintiffs ha[ve] to prove [1] the [defendant] concealed or failed to disclose a material fact; [2] the [defendant] knew or should have known the material fact should be disclosed; [3] the [defendant] knew [its] concealment of or failure to disclose the material fact would induce the plaintiffs to act; [4] the [defendants] had a duty to disclose the material fact; and [5] the plaintiffs detrimentally relied on the misinformation.") (quoting *Philip Morris USA, Inc. v. Hess, 95 So. 3d 254, 259 (Fla. Dist. Ct. App. 2012)* (quoting *R.J. Reynolds Tobacco Co. v. Martin, 53 So. 3d 1060 (Fla. Dist. Ct. App. 2010))*, and *Jones v. Gen. Motors Corp., 24 F. Supp. 2d 1335, 1339 (M.D. Fla. 1998)* ("In order to assert a cause of action under Florida law based upon fraudulent concealment, plaintiffs must establish: (1) a misrepresentation of material fact or suppression of the truth; (2) [a] knowledge of the representor of the misrepresentation, or [b] representations made by the representor without knowledge as to either the truth or falsity, or [c] representations made under circumstances in which the representor ought to have known, if he did not know, of the falsity thereof; (3) an intention that the representor induce another to act on it; and (4) resulting injury to the party acting in justifiable reliance on the representation.") (quoting *Pulte Home Corp. Inc. v. Ply Gem Indus., Inc., 804 F. Supp. 1471, 1483 (M.D. Fla. 1992)*). The form the Court invokes here is the one attributed to *Berisford, 667 So. 2d at 811-12*, which is a case the Eleventh Circuit cited with approval in *Raie v. Cheminova, Inc., 336 F.3d 1278, 1282 n.1 (11th Cir. 2003)*.

Rule of Civil Procedure 9(b)'s requirement to plead with particularity in her complaint the facts giving rise to a claim of fraudulent concealment before a federal court will toll the statute of limitations." Id. (citing *J. Geils Band Emp. Benefit Plan v. Smith Barney Shearson, Inc., 76 F.3d 1245, 1255, 1259 (1st Cir. 1996)*; *Larson v. Northrop Corp., 21 F.3d 1164, 1173, 305 U.S. App. D.C. 416 (D.C. Cir. 1994)*; *Volk v. D.A. Davidson & Co., 816 F.2d 1406, 1415 (9th Cir. 1987)*). "A plaintiff's generalized and conclusory allegations of fraudulent concealment do not satisfy the requirements of *Rule 9(b)*." Id. (citing *Armstrong v. McAlpin, 699 F.2d 79, 88 (2d Cir. 1983)*). Rather, "a plaintiff seeking to avoid the statute of limitations by alleging 'fraudulent concealment' must make 'distinct averments as to the time when the fraud, mistake, concealment or misrepresentation was discovered, and what the discovery is, so that the court may clearly see, whether by the exercise of ordinary diligence, the discovery might not have been before made.'" *Hall v. Burger King Corp., 912 F. Supp. 1509, 1536 (S.D. Fla. 1995)* (quoting *Moviecolor Ltd. v. Eastman Kodak Co., 288 F.2d 80, 88 (2d Cir. 1961)* (quoting *Stearns v. Page, 48 U.S. (7 How.) 819, 12 L. Ed. 928 (1849)*)).

The Amended Complaint alleges that on February 6, 2008, in response to Plaintiff's request, Progressive provided statutory disclosure to Plaintiff of Fulton's Policy. (Am. Compl. ¶ 18; D.E. 13-1 at 26.) The disclosure indicates that Fulton's UM coverage was non-stacked. (D.E. **[*10]** 13-1 at 26.)

The Amended Complaint further alleges that on February 26, 2008, Plaintiff's attorney verbally asked Progressive about stacking UM/UIM coverage. (Am. Compl. ¶ 19.) Progressive advised that it was a non-stacking Policy and, on February 26, 2008, Plaintiff's attorney demanded the non-stacked UM/UIM policy limits, "represented by [Progressive] as being $500,000." (Id.) On April 22, 2008, Progressive tendered the $500,000. (Id. ¶ 21.)

Over four years later, on August 15, 2012, Plaintiff's attorney wrote to Progressive and requested a signed selection/rejection form for stacking UM coverage completed by a Fulton representative, as required by *Section 627.727, Florida Statutes.* (Id. ¶ 23.) On September 7, 2012, Progressive wrote back indicating that it had "been unable to locate the UM selection form under policy number 01716746-5." (Id. ¶ 24.) The same day, Progressive sent a Disclosure Statement pursuant to *Section 627.4137, Florida Statutes*, providing information regarding the subject Policy. (Id. ¶ 25.)

Then, apparently nothing happened until more than three years later when, on January 6, 2016, Plaintiff's attorney made a new demand for stacked coverage on the Policy in the amount of $1,000,000 (i.e., the $500,000 UM policy limits on the other **[*11]** two Isuzu flatbed trucks on the Policy). (Id. ¶ 26.) On January 21, 2016, Progressive denied the demand. (Id. ¶ 27.)

The Court finds that these allegations are insufficient to toll the statute of limitations under the fraudulent concealment doctrine. Specifically, even assuming arguendo that the Amended Complaint adequately alleges with the requisite specificity that Progressive successfully concealed Plaintiff's causes of action, and that it used fraudulent means to achieve that concealment, it wholly fails to allege that "Plaintiff exercised reasonable care and diligence in seeking to discover the facts that form the basis of his claim." *Am. Home Assurance Co., 990 F. Supp. 2d at 1272*. As such, the Amended Complaint fails to plead the allegations necessary to toll the statute of limitations for fraudulent concealment of Plaintiff's claims.

However, the Court still must determine the date on which the claims accrued and the applicable limitations period to be applied.

a. Count I

Progressive argues that Count I (breach of contract)

is subject to a five-year statute of limitations accruing on the date of the accident, January 30, 2008. (Mot. at 13 (citing *Brewer, 940 So. 2d at 1286 n.3* (citing *Woodall, 699 So. 2d 1361*; *Kilbreath, 419 So. 2d 632*; *Fla. Stat. § 95.11(2)(b)*). In Kilbreath, the Supreme Court of Florida held that a "cause **[*12]** of action for an uninsured/underinsured motorist claim" arises on the date of the accident "since the right of action stems from the plaintiff's right of action against the tortfeasor." *419 So. 2d at 633*. In Woodall, the Supreme Court of Florida held that a five-year statute of limitations applied to uninsured/underinsured motorist claims under *Section 95.11(2)(b)*. *699 So. 2d at 1362 n.2*; see also *Brewer, 940 So. 2d at 1286 n.3* ("To obtain a determination regarding liability and the extent of damages owed on the insurance contract, Brewer would need to bring an action on the contract, which would likely be precluded by the statute of limitations, i.e., five years from the date of the accident.").

Here, Count I accrued on January 30, 2008—the date of the accident. (Am. Comp. ¶ 11.) Plaintiff did not file his original Complaint in this case until December 20, 2016, which is more than five years from the date the claim asserted in Count I accrued. (D.E. 1-1 at 21.) Accordingly, Count I must be dismissed as time-barred. See *Kilbreath, 419 So. 2d at 633*.

b. Count II

Progressive argues that Count II (declaratory judgment—policy construction) is subject to a five-year statute of limitations under *Section 95.11(2)(b), Florida Statutes*, accruing on February 6, 2008 when progressive provided written disclosure advising Plaintiff that it was providing **[*13]** non-stacked coverage on a policy that listed three vehicles, or, alternatively, on March 4, 2008, when Plaintiff executed the Release Agreement. (Id. at 14.)

Because Count II is "[a] legal or equitable action on a contract, obligation, or liability founded on a written instrument[,]" a five year statute of limitations applies. *Fla. Stat. § 95.11(2)(b)*. "A cause of action accrues when the last element constituting the cause of action occurs." *Fla. Stat. § 95.031(1)*.

The Court has found little authority addressing when a declaratory judgment claim accrues under facts similar to the ones at bar. Generally, in the insurance context, "a specific refusal to pay a claim is the breach which triggers the cause of action and begins the statute of limitations running." *Donovan v. State Farm Fire and Cas. Co., 574 So. 2d 285, 286 (Fla. Dist. Ct. App. 1991)*. However, as Maryland's Court of Special Appeals has observed, "[a]n action for declaratory judgment . . . may be brought even before a breach occurs." *Commercial Union Ins. Co. v. Porter Hayden Co., 116 Md. App. 605, 698 A.2d 1167, 1192 (Md. Ct. Spec. App. 1997)*. Thus, courts apply a special rule in circumstances such as the one the Court is presented with:

> The better rule, toward which the cases seem to be moving, is that the right to declaratory relief continues until the right to coercive relief, as between the parties, has itself been extinguished. . . . [R]egardless of the time when a right to declaratory **[*14]** relief accrues, the statute should begin to run when a coercive cause of action arises, and the statutory period should expire on the coercive and the declaratory causes of action simultaneously. This result would not contravene the statute's policy of preventing unfair surprise and presentation of stale claims. The possibility of declaratory relief cannot be said to subject the party to undue uncertainty so long as coercive relief is or will be available; the evidence of a right cannot be deemed stale so long as that right may yet be transgressed in such a way as to entitle either party to coercive relief. And indeed if the uncertainty is burdensome, the aggrieved party may himself seek a declaration and eliminate his doubt.

Id. (quoting Comment, Developments in the Law: Declaratory Judgments, 62 Harv. L. Rev. 787, 831-32 (1949)). The Supreme Court of California adopted and applied this rule Maguire v. Hibernia Savings & Loan Soc.:

> We are of the opinion that the period of limitations applicable to ordinary actions at law and suits in equity should be applied in like manner to actions for declaratory relief. Thus, if declaratory relief is sought with reference to an obligation which has been breached and the right to **[*15]** commence an action for "coercive" relief upon the cause of action arising therefrom is barred by the statute, the right to declaratory relief is likewise barred. On the other hand, if declaratory relief is sought "before there has been any breach of the obligation in respect to which said declaration is sought," or within the statutory period after the breach, the right to such relief is not barred by lapse of time. There is no anomaly in the fact that a party may have a right to sue for declaratory relief without setting in motion the statute of limitations.

23 Cal. 2d 719, 146 P.2d 673, 681 (1944). This rule reflects the sound principle that "if coercive relief for the violation of a right has been barred, a claimant may not circumvent the statute by obtaining a declaratory judgment." Comment, Developments in the Law: Declaratory Judgments, 62 Harv. L. Rev. at 830.

Applying this rule to this case, the Court finds that Count II is barred by the statute of limitations because the claim for the underlying breach is barred by the statute of limitations. See supra Section III(a)(1); *Fla. Stat § 95.11(2)(b)*. Stated differently, even if the Court decided Count II on the merits in Plaintiff's favor and declared that the subject Policy provided stacked UM/UIM coverage, Plaintiff's **[*16]** claim for breach of contract would be (and is) barred by the five-year statute of limitations. See supra Section III(a)(1); *Fla. Stat § 95.11(2)(b)*. Accordingly, the Court finds that Plaintiff's request for a declaratory judgment in Count II is likewise barred by the statute of limitations. See *Commercial Union, 698 A.2d at 1192-93*; *Maguire, 146 P.2d at 681*.

b. Count III

Progressive argues that Count III (reformation of policy) is subject to a five-year statute of limitations under *Fla. Stat. § 95.11(2)(b)*, accruing on February 6, 2008 when progressive provided written disclosure advising Plaintiff that it was providing non-stacked coverage on a policy that listed three vehicles, or, alternatively, on March 4, 2008, when Plaintiff executed the Release Agreement. (Id. at 14.)

"[A]n equitable action seeking reformation of a written contract . . . is subject to a five-year limitations period." *Simony v. Fifth Third Mortg. Co., No. 2:14-cv-387-FtM-29DNF, 2014 U.S. Dist. LEXIS 150366, 2014 WL 5420796, at *3 (M.D. Fla. Oct. 22, 2014)* (citing *Fla. Stat. § 95.11(2)*). "[A] statute of limitations begins to run when there has been notice of an invasion of legal rights or a person has been put on notice of his right to a cause of action." *Reisman v. Gen. Motors Corp., 845 F.2d 289, 291 (11th Cir. 1988)* (quoting *Kelley v. Sch. Bd, If Seminole Cty., 435 So. 2d 804, 806 (Fla. 1983))*. The limitations period beings to run when the party seeking reformation "knew or should have known of the mistake." Id.

The issue here is when Plaintiff should have **[*17]** known of the mistake. See *Davis v. Monahan, 832 So. 2d 708 (Fla. 2002)* (holding that the "delayed discovery rule" delays accrual of a cause of action only "in cases of fraud, products liability, professional and medical malpractice, and intentional torts based on abuse"). Because the Amended Complaint does not allege fraud or fraudulent concealment, the Court finds that Count III accrued on February 6, 2008, when Progressive disclosed to Plaintiff that it was providing non-stacked coverage on a policy listing three vehicles. See *Bowes v. Travelers Ins. Co., 173 F. Supp. 2d 342, 346 (E.D. Pa. 2001)* ("[T]he written policies

that were issued in 1988 are the controlling documents in this case. If the policies did not reflect what the Fizzanos thought they were agreeing to, a suit for reformation should have been initiated many years ago. The current demand for reformation is barred by Pennsylvania's four-year statute of limitations for contract claims."). Alternatively, at the latest Plaintiff should have known of the mistake on March 3, 2008—the date Progressive tendered the non-stacked policy limit of $500,000. See *Nelson v. State Farm Mut. Auto. Ins. Co., 419 F.3d 1117, 1121 (10th Cir. 2005)* (holding, under Colorado law, that reformation claim accrued when the plaintiff "knew or should have known that State Farm had not offered him extended PIP benefits" which was, at the latest, **[*18]** on the last date he was paid under a basic, limited PIP policy); see also *Murry v. GuideOne Specialty Mut. Ins. Co., 194 P.3d 489, 494 (Colo. App. 2008)*. On either of those dates, Plaintiff should have known that there was a mistake in the Policy and, therefore, was on notice of his right to a cause of action for reformation.

Because Count III was filed more than five years after either of the accrual dates identified above, it must be dismissed as time-barred.

d. Count IV

In Count IV, Plaintiff alleges statutory bad faith under *Section 624.155, Florida Statutes.* (Am. Compl. ¶ 66.)

> A *Fl. Stat. § 624.155* bad faith claim is "[a]n action founded on a statutory liability" and is therefore governed by the four year statute of limitations. See *Fl. Stat. § 95.11(3)(f)*; *Coachmen Indus., Inc. v. Royal Surplus Lines Ins. Co., No. 3:06-cv-959-J—HTS, 2007 U.S. Dist. LEXIS 46134, 2007 WL 1837842, at *13 (M.D. Fla. 2007)* (four year statute of limitations applicable to statutory claims applied to statutory bad faith claim under *Fl. Stat. § 624.155*). A statute of limitations begins to run "from the time the cause of action accrues." See *Fl. Stat. § 95.031*. "A cause of action accrues when the last element constituting the cause of action occurs." See *Fl. Stat. § 95.031(1)*. An action under *Fl. Stat. § 624.155* for failure to settle an uninsured motorist claim accrues when there has been "a determination of the existence of liability on the part of the uninsured tortfeasor **[*19]** and the extent of the plaintiff's damages." See *Blanchard v. State Farm Mut. Auto. Ins. Co., 575 So. 2d 1289, 1291 (Fla. 1991)*; *Vest v. Travelers Ins. Co., 753 So. 2d 1270, 1276 (Fla. 2000)* ("We continue to hold in accord with Blanchard that bringing a cause of action in court for violation of *section 624.155(1)(b)(1)* is premature until there is a determination of liability and extent of damages owed on the first-party insurance contract.").

Lopez v. Geico Cas. Co., 968 F. Supp. 2d 1202, 1206 (S.D. Fla. 2013). Here, Plaintiff himself argues that the claim accrued on September 7, 2012, when Progressive notified Plaintiff's attorney that it was unable to locate a signed waiver of stacking coverage for the subject Policy. (Am. Compl. ¶ 67; Resp. at 10.) Plaintiff did not file his original Complaint until more than four years later on December 20, 2016. (D.E. 1-1 at 21.) Accordingly, Count IV must be dismissed as time-barred.

e. Count V

As to Count V, Plaintiff alleges coverage by estoppel. (Am. Compl. ¶¶ 76-81.) Progressive argues that a four-year statute of limitations applies under *Section 95.11(3)(k)* or *(p)*, Florida Statutes. (Mot. at 15.) Under *Section 95.11(3)(k)* a four-year limitations period applies to "[a] legal or equitable action on a contract, obligation, or liability not founded on a written instrument . . . ." *Fla. Stat. § 95.11(3)(k)*. *Section 95.11(3)(p)* is a catchall provision under which a four-year limitations period applies to "[a]ny action not specifically provided for in these statutes." **[*20]** *Fla. Stat. § 95.11(3)(p)*. Plaintiff does not contest that a four-

year statute of limitations applies.

According to Plaintiff's Response brief, the written instrument at-issue in this case, i.e., the Policy, purported to provide non-stacked coverage, (Resp. at 10), and according to the plain language of Count V, the coverage by estoppel claim is based upon Progressive's "actions that were inconsistent with the non-existence of stacking coverage[,]" (Compl. ¶ 79 (emphasis added)). Therefore, the Court finds that a four-year statute of limitations applies to Count V under *Section 95.11(3)(k), Florida Statutes*, because Count V asserts a claim for liability of stacked coverage based on principles of equity not founded on a written instrument. See *Servicios de Almacen Fiscal Zona Franca y Mandatos S.A. v. Ryder Int'l, Inc., 264 F. App'x 878, 881 (11th Cir. 2008)* (finding that the plaintiff's promissory estoppel claim was subject to a four-year limitations period under *Fla. Stat. § 95.11(3)(k)*).

Count V likely accrued sometime between February 6, 2008 and April 22, 2008 when the "actions" alleged to have created the coverage by estoppel occurred. (Am. Compl. ¶ 78.) At the latest, the claim asserted in Count V accrued on September 7, 2012 when Progressive gave actual notice to Plaintiff that it could not locate Fulton's UM selection form. (Am. Compl. ¶ 67; Resp. at 10.) Plaintiff did not **[*21]** file his original Complaint until more than four years later on December 20, 2016. (D.E. 1-1 at 21.) Accordingly, Count V must be dismissed as time-barred.

III. Conclusion

Accordingly, it is **ORDERED AND ADJUDGED** that:

1. Defendant Progressive Express Insurance Company's Amended Motion to Dismiss Amended Complaint (D.E. 23) is **GRANTED**;

2. Plaintiff's Amended Complaint (D.E. 13) is **DISMISSED without prejudice** as time-barred; and

3. Plaintiff shall have fourteen days from the date of this Order within which to file a Second Amended Complaint or **SHOW CAUSE** why this case should not be permanently closed.

DONE AND ORDERED in Chambers at Miami, Florida this 25th day of August, 2017.

/s/ Joan A. Lenard

JOAN A. LENARD

UNITED STATES DISTRICT JUDGE

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