

2012 IL App (2d) 111271-U
No. 2-11-1271
Order filed July 10, 2012

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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

MARTIN CARTAGE AND EXPRESS, INC.)	Appeal from the Circuit Court
)	of Du Page County.
Plaintiff-Appellant,)	
)	
v.)	No. 08-L-605
)	
ARTHUR J. GALLAGHER AND COMPANY,)	Honorable
)	Hollis L. Webster,
Defendant-Appellee.)	Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justices Burke and Hudson concurred in the judgment.

ORDER

Held: The trial court properly dismissed plaintiff's complaint as barred by the two-year limitations period for actions against insurance producers, as plaintiff's breach of contract claim concerned defendant's procurement of two insurance policies; cause of action accrued when breach occurred, and discovery rule did not postpone running of statute of limitations; equitable estoppel did not apply.

¶ 1 Plaintiff, Martin Cartage & Express, Inc., sued defendant, Arthur J. Gallagher & Co., for breach of contract arising out of defendant's purported failure to return unearned premiums upon the expiration of two commercial trucking insurance policies. The trial court dismissed plaintiff's amended complaint pursuant to section 2-619(a)(5) of the Code of Civil Procedure (Code) (735 ILCS

5/2-619(a)(5) (West 2008)) on the basis that plaintiff filed its complaint outside of the two-year limitations period provided for by section 13-214.4 of the Code (735 ILCS 5/13-214.4 (West 2008)).

For the following reasons, we affirm.

¶ 2

BACKGROUND

¶ 3 This is the second time this case has been here on appeal. In the first appeal, we reversed the trial court's dismissal of plaintiff's original complaint. *Martin Cartage & Express, Inc. v. Arthur J. Gallagher & Co.*, Nos. 2-10-0258 & 2-10-0273 cons. (2011) (unpublished order under Supreme Court Rule 23). We reasoned that plaintiff's claim was framed by its complaint, which alleged that plaintiff had purchased two insurance policies from defendant and that defendant had breached a term of those policies when it failed to return unearned premiums upon the expiration of the policies. We concluded that plaintiff's claim did not concern the "sale" of the insurance policies, but an alleged breach of a term of the policies, thus taking it out of the ambit of section 13-214.4's limitations period. See 735 ILCS 5/13-214.4 (West 2008) (providing that its two-year limitations period applies to claims "concerning the sale, placement, procurement, renewal, cancellation of, or failure to procure any policy of insurance").

¶ 4 On remand, defendant filed another section 2-619 motion to dismiss plaintiff's original complaint. Defendant argued that, although plaintiff alleged in its complaint that defendant had breached a term of the insurance policies by failing to return unearned premiums, plaintiff's claim must fail because defendant was not a party to the insurance policies, but was merely the insurance broker who procured the policies for plaintiff. Defendant pointed out that Lincoln General Insurance Company (Lincoln) was the insurance carrier for the policies, not defendant. The trial court granted defendant's motion and dismissed plaintiff's complaint without prejudice.

¶ 5 Plaintiff timely filed an amended complaint. Plaintiff alleged that it negotiated with defendant “for the procurement of insurance” and that defendant promised “to provide insurance *** according to certain terms.” Regarding the first insurance policy, which was effective from February 2004 to February 2005, plaintiff alleged that defendant had offered the policy in exchange for a premium of \$119,824 based upon estimated annual mileage of 720,000 miles at a rate of \$16.64 per 100 miles driven. Plaintiff further alleged that, in consideration of plaintiff’s payment of the premium, defendant promised to return unearned premiums at the expiration of the policy at a rate of \$16.64 per 100 miles not driven. Plaintiff made identical allegations regarding the second insurance policy, which was effective from February 2005 to February 2006, except that the premium was \$168,114 based upon estimated annual mileage of 980,000 miles at a rate of \$12.60 per 100 miles driven.¹ Plaintiff alleged that, during the term of the first policy, it drove only 560,380 miles, and, during the term of the second policy, it drove only 792,880 miles. Plaintiff alleged it was due return premiums totaling \$26,560.77 for policy one and \$21,804.12² for policy two.

¶ 6 Once again, defendant filed a motion to dismiss under section 2-619(a)(5) arguing that plaintiff’s claim was time-barred under section 13-214.4 of the Code. Defendant argued that plaintiff’s amended complaint made it clear that plaintiff’s claim concerned the procurement of

¹ We note that these numbers do not add up. A premium based upon 980,000 miles at a rate of \$12.60 per 100 miles would total only \$123,480, not \$168,114.

² This number reflects \$1,773 that Lincoln credited plaintiff following the expiration of policy two. A return premium for 187,120 miles not driven (980,000-792,880) at a rate of \$12.60 per 100 miles would equal \$23,577.12. Subtract the \$1,773 that Lincoln credited plaintiff to get \$21,804.12.

insurance policies, and, thus, fell within the ambit of section 13-214.4. The trial court granted defendant's motion and dismissed plaintiff's amended complaint with prejudice. Plaintiff timely appealed.

¶ 7 ANALYSIS

¶ 8 On appeal, plaintiff raises four arguments: (1) the trial court's dismissal of plaintiff's amended complaint was improper under the law-of-the-case doctrine; (2) section 13-214.4 does not apply to plaintiff's breach of contract action; (3) even if section 13-214.4 does apply, the discovery rule postponed the running of the statute of limitations; and (4) defendant should be equitably estopped from raising a statute of limitations defense. We address each argument in turn.

¶ 9 Law-of-the-Case Doctrine

¶ 10 "Generally, the law-of-the-case doctrine bars relitigation of an issue previously decided in the same case." *Bjork v. Draper*, 404 Ill. App. 3d 493, 501 (2010). It encompasses questions of law decided in a previous appeal, which are binding on the trial court on remand, as well as on the appellate court in subsequent appeals. *Bjork*, 404 Ill. App. 3d at 501. The doctrine applies "as long as the facts remain the same" (*People v. Patterson*, 154 Ill. 2d 414, 468 (1992)), or as long as the facts presented do not "require a different interpretation" (*Bradley v. Howard Hembrough Volkswagen, Inc.*, 89 Ill. App. 3d 121, 124 (1980)). Issues not previously decided do not become law of the case. *Aguilar v. Safeway Insurance Co.*, 221 Ill. App. 3d 1095, 1101 (1991).

¶ 11 The law-of-the-case doctrine did not preclude the trial court from determining whether plaintiff's claim as presented in its amended complaint was time-barred under section 13-214.4 of the Code, and, likewise, it does not preclude this court from reviewing the trial court's dismissal of plaintiff's amended complaint on that basis. We determined in the prior appeal that plaintiff's cause

dismissal of a complaint under section 2-619(a)(5) of the Code. *Alvarez v. Pappas*, 229 Ill. 2d 217, 220 (2008).

¶ 14 Relevant to this case, section 13-214.4 of the Code provides:

“All causes of action brought by any person or entity under any statute or any legal or equitable theory against an insurance producer, registered firm, or limited insurance representative concerning the sale, placement, procurement, renewal, cancellation of, or failure to procure any policy of insurance shall be brought within 2 years of the date the cause of action accrues.” 735 ILCS 5/13-214.4 (West 2008).

To the extent that we are required to interpret section 13-214.4 of the Code, our review also is *de novo*. *Alvarez*, 229 Ill. 2d at 220.

¶ 15 Plaintiff argues that this is a “simple breach of contract action” that is “unconnected” with the sale of the two insurance policies and otherwise not “encompassed by the plain language” of section 13-214.4 of the Code. We disagree.

¶ 16 Plaintiff alleged in its amended complaint that it negotiated with defendant “for the procurement of insurance.” The only reasonable inference we can draw from plaintiff’s allegation is that defendant acted as an insurance broker for purposes of the subject transactions. An insurance broker “is an individual who procures insurance and acts as a middleman between the insured and the insurer, who *** having secured an order, places the insurance with the company selected by the insured, or in the absence of any selection by the insured, with a company he selects himself.” *Krause v. Pekin Life Insurance Co.*, 194 Ill. App. 3d 798, 804-05 (1990). Our inference finds support in the exhibits attached to plaintiff’s amended complaint, which included copies of insurance proposals in which defendant identified Lincoln as the insurance carrier for the two policies

defendant procured. Although section 13-214.4 of the Code does not define “insurance producer,” section 500-10 of the Insurance Code (215 ILCS 5/500-10 (West 2010)) defines “insurance producer” as “a person required to be licensed under the laws of this State to sell, solicit, or negotiate insurance.” Also, Black’s Law Dictionary notes that the term insurance “broker” is interchangeable with the term insurance “producer.” Black’s Law Dictionary, 206 (8th ed. 2004). Therefore, we construe plaintiff’s complaint as one against an “insurance producer” as that term is used in section 13-214.4 of the Code.

¶ 17 Next, plaintiff alleged that defendant promised “to provide insurance *** according to certain terms.” Given plaintiff’s allegation, discussed above, that it negotiated with defendant “for the procurement of insurance,” we must construe this allegation to mean that defendant promised to “procure” insurance according to certain terms, not “provide” it in the sense of acting as the insurance carrier. Although section 13-214.4 does not define “procurement,” Black’s Law Dictionary defines it as “[t]he act of getting or obtaining something.” Black’s Law Dictionary, 1244 (8th ed. 2004); see also *Alvarez*, 229 Ill. 2d at 225 (it is appropriate for a court to turn to the dictionary to determine the plain and ordinary meaning of undefined terms in a statute). Therefore, we construe plaintiff’s complaint as involving defendant’s “procurement” of insurance as that term is used in section 13-214.4 of the Code.

¶ 18 Although plaintiff alleged in its amended complaint that defendant was an insurance broker who procured insurance policies for plaintiff, plaintiff nevertheless argues that its cause of action is an ordinary breach of contract action, not covered by section 13-214.4 of the Code. Plaintiff relies on the allegation in its amended complaint that, in addition to promising to procure insurance

policies according to certain terms, defendant also promised to return unearned premiums to plaintiff upon the expiration of the policies, a promise that plaintiff alleges defendant breached.

¶ 19 Plaintiff's argument urges us to view in isolation facts that cannot reasonably be separated. While we must accept as true plaintiff's allegation that defendant promised to return unearned premiums to plaintiff upon the expiration of the two insurance policies, given that defendant was not the insurance carrier but the insurance broker who procured the policies, we agree with the trial court that plaintiff's breach of contract claim cannot be viewed in isolation from defendant's procurement of the insurance policies. Therefore, section 13-214.4 of the Code applies. Notably, the insurance policies³ that defendant procured from Lincoln contained minimum earned premium provisions. Accordingly, even accepting as true plaintiff's allegation that defendant promised to return unearned premiums to plaintiff upon the expiration of the two insurance policies, defendant procured policies that did not permit it to fulfil its promise. Although plaintiff urges us to conclude that this is a "simple breach of contract action" that is "unconnected" with the procurement of the two insurance policies, we decline to dissect the facts in this manner. Defendant's promise to procure the two insurance policies, and its purported promise to return unearned premiums upon the expiration of those policies, are entirely connected and it would be unreasonable to consider them in isolation.

³ We can consider the policies because attached as an exhibit to defendant's second section 2-619(a)(5) motion to dismiss was a copy of plaintiff's original complaint, which stated that the two insurance policies were "incorporated herein as though fully set forth." See *Missner v. Clifford*, 393 Ill. App. 3d 751, 759 (2009) (a court deciding a section 2-619 motion to dismiss can consider documents offered in support of and in opposition to the motion).

¶ 20 We also decline to address plaintiff’s statutory interpretation arguments that go beyond the plain language of section 13-214.4 of the Code. Plaintiff urges us to consider the legislative history of the Code section, but, when statutory language is clear, we must give it effect without resort to other aids of construction. *Wisnasky-Bettorf v. Pierce*, 2012 IL 111253, ¶ 16. As we determined above, because plaintiff’s breach of contract action concerns an insurance broker’s procurement of insurance policies, plaintiff’s action falls within the plain, unambiguous language of section 13-214.4 of the Code, and we need not resort to further aids of statutory construction to determine that the statute applies to the facts before us.

¶ 21 Application of Discovery Rule

¶ 22 Plaintiff next argues that its cause of action “did not accrue more than two years before it filed its complaint.” In substance, however, plaintiff makes little argument concerning the date its cause of action accrued but, rather, argues that the discovery rule delayed the commencement of the limitations period until May 7, 2007. Therefore, plaintiff argues that its original complaint, filed on May 29, 2008, fell within the two-year limitations period.

¶ 23 Generally, a contract action accrues at the time of the breach of contract, not when a party sustains damages. *State Farm Fire & Casualty Co. v. John J. Rickhoff Sheet Metal Co.*, 394 Ill. App. 3d 548, 565 (2009). “That damages are not immediately ascertainable does not postpone the accrual of a claim.” *Indiana Insurance Co. v. Machon & Machon, Inc.*, 324 Ill. App. 3d 300, 304 (2001). Under some circumstances, the discovery rule may delay the commencement of the limitations period. *State Farm Fire & Casualty*, 394 Ill. App. 3d at 566. Where applicable, the discovery rule postpones the running of the statute of limitations until a person knows or reasonably should know of his injury and that it was wrongfully caused. *Knox College v. Celotex Corp.*, 88 Ill. 2d 407, 415.

The statute of limitations begins to run once “the injured person becomes possessed of sufficient information concerning his injury and its cause to put a reasonable person on inquiry to determine whether actionable conduct is involved.” *Knox College*, 88 Ill. 2d at 416. “When a plaintiff uses the discovery rule to delay commencement of the statute of limitations, the plaintiff has the burden of proving the date of discovery.” *Hermitage Corp. v. Contractors Adjustment Co.*, 166 Ill. 2d 72, 85 (1995).

¶ 24 In the context of claims against an insurance agent or broker for procurement of insurance policies with defects in coverage, courts applying section 13-214.4 have held that a cause of action accrues on the date coverage under a policy was denied. *State Farm Fire & Casualty*, 394 Ill. App. 3d at 566 (citing *Broadnax v. Morrow*, 326 Ill. App. 3d 1074, 1081(2002); *Indiana Insurance*, 324 Ill. App. 3d at 304). Applying the discovery rule in this context, courts also have held that the limitations period may not commence running until a plaintiff learns of the denial of coverage. *State Farm Fire & Casualty*, 394 Ill. App. 3d at 566 (citing *Indiana Insurance*, 324 Ill. App. 3d at 304). Relevant to the present case, in *Indiana Insurance*, the court held that the plaintiff did not meet its burden under the discovery rule of proving the date it discovered the defendant’s breach, where the plaintiff did not specify in its complaint the date it discovered the breach. *Indiana Insurance*, 324 Ill. App. 3d at 304.

¶ 25 Here, plaintiff’s cause of action related to the first insurance policy accrued at the latest on September 15, 2005. The record reflects that, on that date, Lincoln completed its final audit of the policy and determined that plaintiff was not due a return premium, but in fact owed Lincoln an additional premium of \$3,363. Lincoln determined that plaintiff owed this additional premium because it had not driven sufficient miles to satisfy the minimum earned premium of \$82,697 under

the policy. Lincoln's determination that plaintiff was not due a return premium under the policy was analogous to an insurer's denial of coverage in the context of a cause of action against an insurance broker for procuring a policy with defects in coverage. Just as a cause of action against the insurance broker accrues on the date the insurer denies coverage (*State Farm Fire & Casualty*, 394 Ill. App. 3d at 566), plaintiff's cause of action against defendant accrued on the date Lincoln denied return of an unearned premium.

¶ 26 Similarly, plaintiff's cause of action related to the second policy accrued at the latest on April 11, 2006. The record reflects that, on that date, Lincoln completed its audit of the second policy and credited plaintiff only \$1,773 as its return premium. Lincoln credited plaintiff this amount after determining that it had billed plaintiff \$113,364 for liability coverage, while the premium earned based on miles driven was only \$106,880. However, because the minimum earned premium under the policy was \$111,591, Lincoln determined that plaintiff was due a return premium of only \$1,773. Again, plaintiff's cause of action in connection with the second policy accrued on the date Lincoln denied return of an unearned premium in the amount plaintiff claims it was due. See *State Farm Fire & Casualty*, 394 Ill. App. 3d at 566 (stating the rule that a cause of action against an insurance broker arising out of procurement of a policy with defects in coverage accrues on the date the insurer denies coverage).

¶ 27 We reject plaintiff's argument that we cannot identify the date of the breaches because the insurance policies did not establish the time within which audits were to be completed, and because plaintiff "did not know when it could reasonably expect a refund." Plaintiff's argument ignores that Lincoln completed its audit and denied plaintiff a return premium under the first policy on September 15, 2005, and under the second policy on April 11, 2006. After those dates, plaintiff may

have remained hopeful that defendant would remedy the breaches and return unearned premiums despite the results of Lincoln's audits, but this does not somehow transform the denial of return premiums into a non-breach. Hoping a party will remedy a breach does not delay accrual of the breach of contract action.

¶ 28 Nevertheless, plaintiff argues that the discovery rule postponed the commencement of the running of the statute of limitations, such that its amended complaint, which related back to the date of filing of its original complaint, was not time-barred. We disagree. Like the plaintiff in *Indiana Insurance*, plaintiff here did not allege in its amended complaint the date it discovered that Lincoln had denied return of unearned premiums under the policies. See *Indiana Insurance*, 324 Ill. App. 3d at 304. It is plaintiff's burden under the discovery rule to prove the date of discovery (*Hermitage*, 166 Ill. 2d at 85), and plaintiff pleaded no such date.

¶ 29 Furthermore, we reject plaintiff's argument that the discovery rule postponed the running of the statute of limitations until May 7, 2007, which is the date plaintiff received an e-mail from a Lincoln employee stating that plaintiff was not owed any return premiums. Plaintiff contends that this e-mail was the "first statement by any party" that plaintiff was not owed return premiums. However, plaintiff's own admissions in the record belie its argument. See *Fahey*, 200 Ill. App. 3d at 440 (a court reviewing a section 2-619 dismissal may consider admissions contained in the record). Attached as an exhibit to defendant's reply brief submitted in support of its section 2-615(a)(5) motion to dismiss plaintiff's amended complaint is a copy of plaintiff's interrogatory answers. The exhibit contains the following question and answer:

"4. State when [p]laintiff first learned that the 2004-2005 policy at issue contained a provision for a minimum premium and how [p]laintiff learned of this provision.

Answer: On or about January 10, 2006, Glen Hall [of Martin Cartage] was advised by Matt Reese of Arthur J. Gallagher in response to numerous requests by Mr. Hall for the return of excess premiums paid.

Given this admission, the latest the discovery rule could have postponed the running of the statute of limitations on the breach concerning policy one was January 10, 2006. Even assuming that plaintiff previously had been unaware of the results of Lincoln's audit on September 15, 2005, on January 10, 2006, plaintiff knew that defendant had procured a policy containing a minimum earned premium that prohibited defendant from returning an unearned premium at the rate it allegedly had promised. Regardless of whether plaintiff knew the full extent of its purported damages at this point, plaintiff was apprised of sufficient information to put it on inquiry notice to determine whether actionable conduct was involved.⁴ Therefore, at the latest, the two-year statute of limitations on the breach concerning policy one expired on January 10, 2008, more than four months before plaintiff filed its original complaint.

¶ 30 The exhibit attached to defendant's reply brief also contains the following question and answer concerning policy two:

5. State when [p]laintiff first learned that the 2005-2006 policy at issue contained a provision for a minimum premium and how [p]laintiff learned of this provision.

⁴ Indeed, the record reflects that plaintiff was actively inquiring into the matter by this point. The record contains an e-mail dated February 21, 2006, in which plaintiff acknowledged a dispute over the return premium under policy one and then concluded: "Based on the 2 expired policies, I am due a total return of \$40,212.00. This is no small amount, and I hope that you can bring both of these policies to a close no later than 03-31-06."

Answer: See answer to interrogatory number four above.”

Given this admission, there is no reason to apply the discovery rule to postpone the running of the statute of limitations on the breach concerning policy two. On January 10, 2006, plaintiff admittedly knew that policy two contained a minimum earned premium provision that would prohibit defendant from returning an unearned premium at the rate it allegedly had promised. Therefore, when Lincoln denied plaintiff a return premium on April 11, 2006, plaintiff’s cause of action accrued on that date and the statute of limitations began to run immediately. Therefore, at the latest, the two-year statute of limitations on the breach concerning policy two expired on April 11, 2008, more than one month before plaintiff filed its original complaint.

¶ 31 Equitable Estoppel

¶ 32 Plaintiff’s final argument is that defendant should be equitably estopped from asserting a statute of limitations defense. Plaintiff’s argument is without merit.

¶ 33 Generally, to invoke equitable estoppel against a statute of limitations defense, “ ‘the plaintiff must have relied on acts or representations of the defendant which caused the plaintiff to refrain from filing suit within the applicable statute of limitations.’ ” *Kheirkhavash v. Baniassadi*, 407 Ill. App. 3d 171, 182 (2011) (quoting *Leffler v. Engler, Zoghlin, & Mann, Ltd.*, 157 Ill. App. 3d 718, 722-23 (1987)). However, equitable estoppel applies only if a plaintiff had no knowledge or means of knowing the true facts giving rise to a cause of action within the applicable limitations period. *Wheaton v. Steward*, 353 Ill. App. 3d 67, 71 (2004). Moreover, “equitable estoppel does not give a plaintiff the entire limitations period measured from the date the defendant discontinues the conduct that lulled the plaintiff into inaction.” *Butler v. Mayer, Brown and Platt*, 301 Ill. App. 3d

919, 925 (1998). If the defendant's conduct ended with ample time remaining under the statute of limitations, equitable estoppel will not extend the limitations period. *Butler*, 301 Ill. App. 3d at 925.

¶ 34 Here, plaintiff admits in the section of its brief pertaining to the discovery rule that it received an e-mail on May 7, 2007, in which a Lincoln employee asserted that plaintiff was not due any return premiums under the two insurance policies. Plaintiff asserts that May 7, 2007, was the first date on which it knew that it "needed to pick up its weapons." Because plaintiff admittedly had knowledge of the facts giving rise to its cause of action in May 2007, plaintiff cannot invoke equitable estoppel to delay the expiration of the statute of limitations, which expired at the latest on April 11, 2008. Even assuming *arguendo* that defendant did affirmatively mislead plaintiff concerning the facts until plaintiff received the e-mail from Lincoln on May 7, 2007, because there was still ample time remaining under the statute of limitations on that date, equitable estoppel will not extend the limitations period.

¶ 35

CONCLUSION

¶ 36 For the following reasons, we affirm the judgment of the circuit court of Du Page County.

¶ 37 Affirmed.