2016 IL App (2d) 160043-U
No. 2-16-0043
Order filed December 7, 2016

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

JANIS STRAUSS, Individually and as Special Administrator for DAVID STRAUSS, her Husband and Decedent, Plaintiff-Appellant, v. ALEXANDER PANKOW, Defendant-Appellee.	)	Appeal from the Circuit Court of McHenry County. No. 15-LA-50 Honorable Michael T. Caldwell, Judge, Presiding.

JUSTICE SPENCE delivered the judgment of the court.
Justices Burke and Birkett concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly granted defendant's motion to dismiss plaintiff's complaint as time-barred, because the statute of limitations began to run when plaintiff's insurance claim was denied. The trial court also did not err in denying plaintiff's request to amend her complaint, as she made the request after her complaint had been dismissed with prejudice. Therefore, we affirmed.

¶ 2 Plaintiff, Janis Strauss, individually and as special administrator for David Strauss (Strauss), her husband and decedent, sought damages from defendant, insurance agent Alexander Pankow, based on her removal as a co-beneficiary on Strauss's life insurance policy. The trial court granted defendant's motion to dismiss the complaint as time-barred pursuant to section 2-

619(a)(5) of the Code of Civil Procedure (Code) (735 ILCS 5/2-619(a)(5) (West 2014)). On appeal, plaintiff argues that the trial court erred in not properly applying the discovery rule to toll the statute of limitations, or alternatively in not leaving the question for the jury to decide. She also argues that the trial court erred in refusing to allow her to file an amended complaint. We affirm.

¶ 3 I. BACKGROUND

¶ 4 Plaintiff filed a three-count complaint against defendant on February 23, 2015, alleging as follows. Strauss owned a construction business with Michael Vertanen. In December 2004, Strauss and Vertanen were contemplating entering into a "buy-sell" agreement. The proposed agreement, which was never finalized, required them to each acquire a $500,000 life insurance policy insuring their respective lives. The men agreed that Vertanen would own Strauss's policy, and Vertanen and plaintiff would be equal beneficiaries of that policy. Correspondingly, Strauss would own Vertanen's policy, and Strauss and Vertanen's wife would be equal beneficiaries of that policy.

¶ 5 Defendant was a licensed insurance provider and was a " 'captured agent' " of Primerica Life Insurance Company. Strauss and Vertanen sought defendant's advice and assistance regarding the life insurance policies. Defendant represented that the two contemplated life insurance policies could be obtained through Primerica. Based on defendant's representations, both Strauss and plaintiff believed and understood that Strauss's life insurance policy named Vertanen and plaintiff as equal beneficiaries, and they were never told that the original selection of beneficiaries had been changed.

¶ 6 Strauss died on January 10, 2007, and plaintiff subsequently filed a claim seeking her $250,000 share of the death benefit. However, defendant and Primerica informed her that she

was not the designated beneficiary of Strauss's life insurance policy.[1] Plaintiff then made countless inquiries to defendant and Primerica as to how and why she was not one of the beneficiaries. She finally received an answer on April 5, 2013, in the form of a letter from the law firm representing Primerica.

¶ 7 Plaintiff attached the letter as an exhibit to her complaint, and we summarize the information provided in the letter. The letter stated that on December 20, 2004, Strauss signed an application naming plaintiff and Vertanen each 50% co-beneficiaries. However, Primerica rejected the application six days later.[2] On December 29, 2004, Primerica reviewed a revised application, initialed by Strauss, that struck plaintiff as a beneficiary and changed Vertanen to the sole beneficiary. Primerica accepted the revised application, and the policy was issued effective February 3, 2005. Vertanen was the policy's owner and paid its premiums.

¶ 8 Plaintiff alleged that she reviewed copies of documents included with the letter and determined that the purported signature and/or initials of Strauss on the revised form had been forged.

¶ 9 Count I of plaintiff's complaint alleged that defendant breached his oral agreement with Strauss to obtain a life insurance policy naming plaintiff as a 50%-beneficiary. Count II alleged fraud, in that defendant misrepresented to Strauss and plaintiff that plaintiff would be a 50%-beneficiary of the policy, and that defendant forged or caused, permitted, allowed, or induced the

[1] In plaintiff's statement of facts, she states that she was told this information "on or about January 2007."

[2] Plaintiff alleged that Primerica rejected the application on the basis that the policy was sought in conjunction with a "buy-sell" agreement, and it was not permissible for that type of policy to have a family member and a business partner as co-beneficiaries.

forgery of Strauss's signature and initials to change the policy's named beneficiaries. Count III alleged that defendant breached his fiduciary duty to Strauss and plaintiff through these actions.

¶ 10 On April 16, 2015, defendant filed a motion to strike or dismiss the complaint pursuant to section 2-615 of the Code (735 ILCS 5/2-615 (West 2014)). He argued that plaintiff did not have standing to bring a direct claim against him for failing to procure the life insurance policy, because she was not a party to the policy application or to the policy. Defendant further argued that certain statutes of limitations applied. He argued the complaint was barred by the two-year statute of limitations of section 13-214.4 of the Code (735 ILCS 5/13-214.4 (West 2014)) for actions against an insurance producer for procuring or failing to procure an insurance policy. He also argued that it was barred under the five-year statutes of limitations under sections 13-205 (735 ILCS 5/13-205 (West 2014)) and 13-215 (735 ILCS 5/13-215 (West 2014)) of the Code because plaintiff knew in January 2007 that her claim for death benefits had been denied based on her not being a co-beneficiary under the policy. Last, defendant argued that all counts of the complaint failed to state a cause of action.

¶ 11 Plaintiff filed a response to the motion on July 22, 2016. She argued that she did not know and reasonably could not have known of the injury to herself and Strauss until she received the April 5, 2013, law firm correspondence. She argued that it was not until that time that she learned of the events leading up to her removal as a beneficiary, the change to Vertanen as the sole beneficiary, and the evidence of forgery on the revised application.

¶ 12 In defendant's reply memorandum, he referenced section 2-619 of the Code (735 ILCS 5/2-619 (West 2014)) in addition to section 2-615 of the Code. He argued that Strauss received the policy shortly after December 2004, and Strauss was deemed to know the terms of coverage

upon the policy's receipt. Defendant argued that the discovery rule did not save plaintiff's claims because she admitted that she knew in 2007 that she was not listed as a beneficiary.

¶ 13 The trial court granted the motion to dismiss, with prejudice, on August 10, 2015. It stated that the statute of limitations had run on plaintiff's case and that she was "on notice well before she filed suit in this case."

¶ 14 Plaintiff filed a motion to reconsider on September 4, 2015, and an amended motion to reconsider on October 23, 2015. The trial court denied the amended motion to reconsider on December 15, 2015, clarifying that the dismissal of the complaint was pursuant to section 2-619. Plaintiff moved to amend the complaint to add Primerica and Vertanen as defendants. Defendant objected, and the trial court denied the motion to amend as being untimely and not "in conformance with the rules."

¶ 15 Plaintiff timely appealed.

¶ 16 II. ANALYSIS

¶ 17 On appeal, plaintiff argues that the trial court erred in granting defendant's motion to dismiss her complaint under section 2-619. A section 2-619 motion admits the legal sufficiency of a complaint but asserts an affirmative matter that defeats the claim. *Bjork v. O'Meara*, 2013 IL 114044, ¶ 21. Section 2-619(a)(5), in particular, allows for the involuntary dismissal of an action that "was not commenced within the time limited by law." 735 ILCS 5/2-619(a)(5) (West 2014). A section 2-619 motion admits as true all well-pleaded facts and reasonable inferences therefrom, and all pleadings and supporting documents must be viewed in the light most favorable to the nonmoving party. *Bjork*, 2013 IL 114044, ¶ 21. We review *de novo* a dismissal under section 2-619(a)(5). *O'Toole v. Chicago Zoological Society*, 2015 IL 118254, ¶ 16.

¶ 18 In the trial court, defendant argued that plaintiff's complaint was time-barred under various sections of the Code. However, on appeal he relies on section 13-214.4 of the Code, which states:

> "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 2014).

Section 13-214.4 encompasses an insured's claims against an insurance agent or broker. *Scottsdale Insurance Co. v. Lakeside Community Committee*, 2016 IL App (1st) 141845, ¶ 20. Plaintiff does not dispute that section 13-214.4 applies to this case, though she disagrees with defendant regarding when the two-year limitations period began to run.

¶ 19 Courts have applied the "discovery rule" to actions which would otherwise be time-barred by section 13-214.4. *Id.* ¶ 27. The discovery rule postpones the commencement of the limitations period until the plaintiff knows or reasonably should know of his or her injury and that the injury was wrongfully caused. *Citimortgage, Inc. v. Parille*, 2016 IL App (2d) 150286, ¶ 41. " 'Wrongfully caused' does not mean knowledge of a specific defendant's negligent conduct or knowledge that an actionable wrong was committed." *Scottsdale Insurance Co.*, 2016 IL App (1st) 141845, ¶ 24. Instead, it means that the plaintiff has sufficient information about the injury and its cause to put a reasonable person on notice to make additional inquiries. *Id.* At that point, the plaintiff has the burden to investigate whether a legal remedy exists. *Id.* ¶ 25. When a party should be charged with knowledge of his or her injury and that it was wrongfully caused is

generally a question of fact, though judgment may be entered as a matter of law when the undisputed facts lead to only one conclusion. *Id.* ¶ 26.

¶ 20 Plaintiff argues that she was harmed, but not injured, in January 2007, when she learned that she was not a co-beneficiary of her husband's death benefits. She cites section 7 of the Restatement (Second) of Torts, which states that it uses the word "injury" to mean the invasion of a legally protected interest and "harm" to mean the loss or detriment to a person from any cause. Restatement (Second) of Torts § 7 (1965). Plaintiff maintains that there is nothing in the record to indicate that in January 2007, she should have reasonably known that not being a co-beneficiary was the result of some wrongdoing by a third party. Plaintiff argues that her removal as a co-beneficiary could have stemmed from a non-tortious act, such as a clerical or administrative error. Plaintiff cites *Nolan v. Johns-Manville Asbestos*, 85 Ill. 2d 161, 171 (1981), where the court stated that in applying the standard that a party must know both that an injury has occurred and that it was wrongfully caused, a person is not held to a standard of knowing the inherently unknowable. According to plaintiff, the first indicia which should have, and did, reasonably prompt a suspicion of wrongdoing was the April 2013 letter. Plaintiff contends that it was only after reviewing the revised application that she concluded that the document was forged, in that the initials were not in her husband's handwriting and contained only two letters, whereas Strauss always used all three of his initials. Plaintiff argues that she timely filed her suit within two years of receiving that letter.

¶ 21 Plaintiff cites *Rasgaitis v. Waterstone Financial Group*, 2013 IL App (2d) 111112. There, the plaintiffs alleged as follows. The defendants, who were financial advisors, advised them to mortgage the equity in their home and purchase life insurance policies and annuities. *Id.* ¶ 1. The plaintiffs went through with the recommended transactions near the end of 2006 and the

beginning of 2007. *Id.* ¶¶ 13-14. In January 2008 and August 2008, the defendants continued to represent that the investment plan was working. *Id.* ¶ 17. It was not until February 2009, when the plaintiffs left multiple messages for defendants but received no response, that they sought other professional investment advice and learned that defendants' representations were false. *Id.* ¶ 18. The investment plan was actually unsuitable for them and resulted in a significant financial loss to the plaintiffs, while it generated large commissions for the defendants. *Id.* ¶¶ 15-16.

¶ 22 The plaintiffs filed suit in April 2010. *Id.* ¶ 3. The defendants moved to dismiss the suit as time-barred by the two-year statute of limitations for insurance and the three-year statute of limitations for annuities. *Id.* ¶ 21. The trial court granted the motion, but we reversed as to the majority of claims. *Id.* ¶ 59. We stated that the plaintiffs could not have reasonably known of their injury or that it was wrongfully caused until February 2009, when the defendants did not return their phone calls. *Id.* ¶ 31.

¶ 23 Plaintiff argues that just as the plaintiffs' inquiries in *Rasgaitis* were found to toll the statute of limitations, her numerous inquiries as to how and why she was not a policy beneficiary should have likewise tolled the running of the limitations clock. Plaintiff maintains that it was not until her receipt of the April 2013 letter that she knew or reasonably should have known that her elimination as a beneficiary was caused by wrongdoing. Plaintiff argues that although the plaintiffs' unreturned calls in *Rasgaitis* were sufficient to trigger the statute of limitations, defendant's lack of response to her inquiries did not provide her reasonable notice of injury because she did not have a history of dialogue with defendant, so she would not have necessarily expected him to respond. She maintains that her only contact with defendant was in January 2007, when he told her that she was not a beneficiary. Plaintiff argues that, at a minimum,

whether she should have been on notice in January 2007 was a fact question that should have been left for the jury to decide.

¶ 24 Defendant points out that plaintiff fails to distinguish between her cause of action as the administrator of Strauss's estate and her individual cause of action as the co-beneficiary of the original life insurance application. Defendant cites *Indiana Insurance Co. v. Machon & Machon, Inc.*, 324 Ill. App. 3d 300, 304 (2001), where the court stated that in cases of torts arising out of a contractual relationship, the statute of limitations begins to run when the duty is breached, not when the damages are sustained. As to the claim for Strauss's estate, defendant argues that the limitations period began to run no later than the date Strauss received the policy, on April 7, 2005. See *Hoover v. Country Mutual Insurance Co.*, 2012 IL App (1st) 110939, ¶¶ 59-61 (the insureds had the burden of knowing the terms and liability limits of their insurance policies, and of bringing any discrepancies to the insurance company's attention).

¶ 25 We acknowledge that defendant's position is supported by recent caselaw. In *Babiarz v. Stearns*, 2016 IL App (1st) 150988, ¶ 43, the court stated that insureds have the burden of knowing the contents of their insurance policies and have an affirmative duty to review the terms of new policies. It stated that courts will not excuse this burden absent allegations that a policy was ambiguous. *Id.* Here, the insurance policy was issued years before Strauss passed away, and he arguably could have easily ascertained the named beneficiaries. Accepting such an analysis, the statute of limitations on an action by or on behalf of Strauss would have begun running in 2005, long before plaintiff filed the 2013 action.

¶ 26 At the same time, in *General Casualty Co. v. Carroll Tiling Service, Inc.*, 342 Ill. App. 3d 883, 899-900 (2003), the court stated that where the relationship between the plaintiff and the insurance agent was fiduciary, the discovery rule applied. Here, plaintiff alleged that defendant

owed a fiduciary duty to Strauss and to her, so we must consider the application of the discovery rule. We examine the discovery rule as it applies to plaintiff's claims both individually and on Strauss's behalf.

¶ 27 Defendant argues that, at the latest, plaintiff's claims accrued in January 2007, making her 2015 complaint untimely. We agree. A claim against an insurance producer accrues at the moment coverage is denied, and the discovery rule delays the commencement of the limitations period until the plaintiff learned of the denial of coverage. *State Farm Fire & Casualty Co. v. John J. Rickhoff Sheet Metal Co.*, 394 Ill. App. 3d 548, 566 (2009). Here, plaintiff alleged that she believed and understood that she was a co-beneficiary on Strauss's life insurance policy from the policy's inception. However, she admittedly knew in January 2007 that she was denied coverage based on her not being listed as a co-beneficiary on the policy. Plaintiff's argument that she knew that she was "harmed" at that time but not "injured" is not persuasive, as the distinction she cites is explicitly for use within the cited Restatement section (Restatement (Second) of Torts § 7 (1965)), as opposed to Illinois's application of the discovery rule. To the contrary, in *Broadnax v. Morrow*, 326 Ill. App. 3d 1074, 1081 (2002), the court directly stated that the plaintiff should have known of his "injury," and that it was wrongfully caused, when the insurance company first denied his claim. Plaintiff's position that a clerical or administrative error could have caused the discrepancy in beneficiaries does not change the result, for an action does not have to be intentionally malicious to constitute a tort. Tellingly, plaintiff does not attempt to address *John J. Rickhoff Sheet Metal Co.*, *Broadnax*, or similar cases that pinpoint the time a plaintiff learns that coverage has been denied as the start of the running of the limitations period.

¶ 28 Because plaintiff believed that she was a policy beneficiary years before Strauss died but was told by defendant that she was not a listed beneficiary in January 2007, at that point she should have reasonably known that she was injured and that the injury was wrongfully caused, triggering the running of the statute of limitations. Again, "wrongfully caused" does not mean knowledge of specific negligent conduct or an actionable wrong, but rather that the plaintiff has enough information about the injury and its cause such that a reasonable person would be on notice to inquire further. *Scottsdale Insurance Co.*, 2016 IL App (1st) 141845, ¶ 24. Indeed, under the discovery rule, a statute of limitations may begin to run even if the plaintiff lacks actual knowledge that there was negligent conduct. *Janousek v. Katten Muchin Rosenman LLP*, 2015 IL App (1st) 142989, ¶ 13. Plaintiff is correct that when a party should have known of the injury and that it was wrongfully caused is generally a question of fact, but in this case the undisputed facts lead to only one conclusion, that being that the limitations period began to run in January 2007. As such, the trial court properly entered judgment a matter of law. See *id.* ¶ 26.

¶ 29 *Rasgaitis* does not aid plaintiff, as there the defendants continued to represent that the investment plan was working, and it was not until they stopped returning phone calls that the plaintiffs could have reasonably known of their injury or that it was wrongfully caused. *Rasgaitis*, 2013 IL App (2d) 111112, ¶ 31. Here, plaintiff was directly told in January 2007 that she was not a beneficiary on the policy, and she never alleged that defendant made any contrary representations. To the extent that defendant failed to communicate further would only add to a reasonable person's notice that he or she needed to take additional action. See *Hancock v. Village of Itasca*, 2016 IL App (2d) 150677, ¶ 12 (when a plaintiff has facts about the harm done

to him, he can protect himself against the running of the statute of limitations by seeking legal advice about possible causes).

¶ 30 As the two-year statute of limitations began running in January 2007 and plaintiff's complaint was not filed until February 2015, the trial court correctly granted defendant's motion to dismiss the complaint as time-barred. Based on our resolution of this issue, we do not address defendant's alternative arguments that dismissal was also proper because plaintiff lacked standing and because she failed to adequately plead proximate cause.

¶ 31 Plaintiff additionally argues that the trial court erred in not permitting her to amend her complaint. Plaintiff argues that it is plausible that she could prove a set of facts that would allow her to recover from Primerica and/or Vertanen. Defendant takes the position that plaintiff has forfeited her argument by failing to adequately develop it and cite case law. See Ill. S. Ct. R. 341(h)(7) (eff. Jan. 1, 2016) ("Argument *** shall contain the contentions of the appellant and the reasons therefor, with citation of the authorities and the pages of the record relied on."); *Diaz v. Legat Architects, Inc.*, 397 Ill. App. 3d 13, 40 (2009) (the failure to comply with supreme court rules is grounds for disregarding the argument on appeal). However, we believe that plaintiff has adequately presented her argument to allow for review.

¶ 32 Whether to grant a motion to amend pleadings is within the trial court's discretion, and we will not reverse its decision absent an abuse of discretion. *Terra Foundation for American Art v. DLA Piper LLP (US)*, 2016 IL App (1st) 153285, ¶ 56. In reviewing a trial court's denial of a motion to amend, we usually look to whether: (1) the proposed amendment would cure the defective pleading; (2) whether the proposed amendment would surprise or prejudice the other party; (3) whether the proposed amendment was timely filed; and (4) whether there were previous opportunities to amend. *Id.* ¶ 57.

¶ 33 Plaintiff cites section 2-616(c) of the Code, which states: "A pleading may be amended at any time, before or after judgment, to conform the pleadings to the proofs, upon terms as to costs and continuance that may be just." 735 ILCS 5/2-616(c) (West 2014). However, plaintiff was not attempting to conform the pleadings to the proofs here, but rather desired to add additional defendants and unspecified allegations against them. Such actions are covered by section 2-616(a) of the Code (735 ILCS 5/2-616(a) (West 2014)), which states:

> "*At any time before final judgment* amendments may be allowed on just and reasonable terms, introducing any party who ought to have been joined as plaintiff or defendant, dismissing any party, changing the cause of action or defense or adding new causes of action or defenses, and in any matter, either of form or substance, in any process, pleading, bill of particulars or proceedings, which may enable the plaintiff to sustain the claim for which it was intended to be brought or the defendant to make a defense or assert a cross claim." (Emphasis added.) *Id.*

Plaintiff did not seek to amend her complaint until after the trial court had already dismissed it with prejudice. An involuntary dismissal without leave to amend is a final order. *Hachem v. Chicago Title Insurance Co.*, 2015 IL App (1st) 143188, ¶ 18. After a final judgment, a party does not have a statutory right to amend a pleading under section 2-616(a), but rather may only amend the pleading to conform it to the proofs. *Terra Foundation for American Art*, 2016 IL App (1st) 153285, ¶ 57. Thus, the trial court did not err in denying plaintiff's request to amend her complaint. See *id.* Even otherwise, we would hold that the trial court acted within its discretion in denying plaintiff's motion to amend as: plaintiff did not seek to amend until after her complaint had been dismissed with prejudice; she did not provide a copy of the proposed amendments; and she did not explain how the claims against the additional defendants,

particularly Primerica, would also not be time-barred. *Cf. Hachem*, 2015 IL App (1st) 143188, ¶ 19 (the trial court did not abuse its discretion in denying the plaintiffs' oral motion for leave to file an amended complaint where they made the request after their complaint was dismissed with prejudice, and the plaintiffs did not explain how they would cure the defective pleading or why they did not previously seek leave to amend).

¶ 34 III. CONCLUSION

¶ 35 For the foregoing reasons, we affirm the judgment of the McHenry County circuit court.

¶ 36 Affirmed.