SECOND DIVISION
December 19, 2017

No. 1-17-1054

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

TONY THANOUKOS and ANN THANAKOUS,	)	
	)	Appeal from the
Plaintiffs-Appellants,	)	Circuit Court of
	)	Cook County
v.	)	
	)	No. 2016 L 008964
RON KITA, NICK THEODOSOPOULOS and THEO	)	
INSURANCE AGENCY,	)	Honorable
	)	James E. Snyder
Defendants-Appellees.	)	Judge Presiding.

JUSTICE MASON delivered the judgment of the court.
Justices Pucinski and Hyman concurred in the judgment.

ORDER

¶ 1 *Held*: Dismissal of plaintiffs' complaint against insurance brokers based on the two-year statute of limitations reversed as the discovery rule precluded a finding that the complaint was untimely as a matter of law.

¶ 2 Plaintiffs Tony and Ann Thanakous purchased homeowners insurance through defendants-brokers Ron Kita, Nick Theodosopoulos and Theo Insurance Agency. Defendants placed the insurance with Allstate Insurance Company, which issued a "Deluxe Plus Homeowners Policy." The policy was originally issued on November 1, 2012, and renewed on November 1, 2013, each for a one-year term. On September 10, 2014, plaintiffs sustained water back-up damage in their home as a result of sump pump failure due to an electrical outage. Allstate denied plaintiffs' claim under the policy based

on exclusions for damage due to (i) floods and (ii) back up water due to sump pump failure.

¶ 3 On September 9, 2016, plaintiffs sued defendants alleging a variety of claims arising out of Allstate's denial of coverage. Plaintiffs included counts for negligent misrepresentation, negligent procurement of insurance, breach of oral contract and breach of fiduciary duty. Central to all of plaintiffs' claims was their allegation that they requested defendants "to procure insurance that fully covered their [r]esidence for damages to their personal property and the building including a loss as a result of water." Plaintiffs claimed that the individual defendants assured Ann Thanoukos that the residence was "fully covered" from the policy's inception, that "everything" was covered, and that the policy would provide "full coverage" for damage, including a loss as a result of water. As a result of the failure of the sump pump on September 10, 2014, plaintiffs alleged that they suffered damages in excess of $63,000 comprised of damage to both their residence and personal property.

¶ 4 Defendants filed a combined motion to dismiss the complaint pursuant to section 2-619.1. 735 ILCS 5/2-619.1 (West 2014). Defendants first argued that, pursuant to section 2-619(a)(5) (735 ILCS 5/2-619(a)(5) (West 2014)), plaintiffs' complaint was time-barred in its entirety because it was not filed within two years of the date plaintiffs received their homeowners policy. Pursuant to section 2-615 (735 ILCS 5/2-615 (West 2014)), defendants also argued that each count of plaintiffs' complaint failed to state a claim upon which relief could be granted. The trial court determined that the complaint was untimely and granted defendants' 2-619 motion. Plaintiffs timely appealed.

¶ 5 A section 2-619 motion "admits the legal sufficiency of the complaint but asserts an affirmative defense or other matter that avoids or defeats the plaintiff's claim." *Relf v. Shatayeva*, 2013 IL 114925, ¶ 20; *DeLuna v. Burciaga*, 223 Ill. 2d 49, 59 (2006). "Áffirmative matter" includes any defense apart from one that negates an essential allegation of plaintiff's cause of action. *Kedzie and 103rd Currency Exchange, Inc. v. Hodge*, 156 Ill. 2d 112, 115 (1993). Section 2-619(a)(5) permits a court to dismiss an action on the ground that it was not "commenced within the time limited by law." 735 ILCS 5-2/619(a)(5) (West 2014). We review the trial court's ruling on a section 2-619 motion *de novo*. *Moon v. Rhode*, 2016 IL 119572, ¶ 15; *DeLuna*, 223 Ill. 2d at 59.

¶ 6 Section 13-214.4 of the Illinois Code of Civil Procedure provides for a two-year statute of limitations for actions against, among others, insurance producers:

> "All causes of action brought by any person or entity under any statute or legal or equitable theory against an insurance producer *** 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).

Defendants claim that plaintiffs' cause of action for their failure to procure insurance covering water damage accrued on November 1, 2012, the date plaintiffs' Allstate policy became effective and that their suit, filed on September 9, 2016, more than two years later, was time-barred.

¶ 7 Defendants first argue that plaintiffs have waived certain arguments they advance on appeal because they were not raised until plaintiffs' motion for reconsideration of the order granting the motion to dismiss. In particular, defendants contend that although

plaintiffs raised the discovery rule in opposition to defendants' statute of limitations argument, they failed to argue that (i) their claim against defendants did not accrue until Allstate denied their claim for coverage under the policy, and (ii) defendants' role as fiduciaries tolled the running of the limitations period. But in their response to defendants' statute of limitations argument, plaintiffs cited *Perelman v. Fisher,* 298 Ill. App. 3d 1007, 1011-13 (1998), which recognized both an insurance broker's status as a fiduciary and that an insured's failure to read the policy when issued is not contributory negligence as a matter of law so that the trial court's dismissal of plaintiff's complaint as untimely was improper. The premise of defendants' motion here was that plaintiffs' failure to read their policy when issued to determine whether it provided the requested coverage for water damage meant that their complaint filed more than two years later was untimely as a matter of law. And although plaintiffs' response to defendants' motion could have set out the arguments more clearly, we will not, under the circumstances, find plaintiffs' arguments waived. See *Cambridge Engineering v. Mercury Partners 90 BI, Inc.,* 378 Ill. App. 3d 437, 453 (2007) (waiver is an admonition to the parties, and not a limitation on the court's jurisdiction; if the record is sufficient, the court can decide the issues).

¶ 8 On the merits, we find that the trial court improperly dismissed plaintiffs' complaint as untimely. As numerous cases have discussed, Illinois recognizes a distinction between an insured's claim against (i) an insurance company when a policy of insurance does not provide the coverage requested and (ii) an insurance broker for failing to obtain the type of coverage requested by the insured. See, *e.g., American Family Insurance Co. v. Krop,* 2017 IL App (1st) 161071, ¶ 34 (2017) (pet. for leave to appeal

allowed No. 122556 (Sept. 27, 2017); *Economy Fire & Casualty Co. v. Bassett*, 170 Ill. App. 3d 765, 774-75 (1988). In the former case, the insured, having entered into a contract with the insurer, cannot claim that the contract did not conform to the coverage requested, at least in the absence of any ambiguity in the policy. *Perelman*, 298 Ill. App. 3d at 1011 (citing *Foster v. Crum & Forster Insurance Cos.*, 36 Ill. App. 3d 595, 598 (1976) ("Illinois courts have repeatedly held that when an insured sues his or her insurer after failing to note a discrepancy between the policy issued and received and the policy requested or expected, the insured will be bound by the contract terms because he or she is under a duty to read the policy and inform the insurer of any discrepancy….")). On the other hand, a broker who, as noted, is an agent and, therefore, a fiduciary of the insured, is under an obligation to "exercise competence and skill when he or she renders the service of procuring insurance coverage" and may be liable for damage caused "when the policy obtained is materially defective through the agent's fault." *Perelman*, 298 Ill. App. 3d at 1011-12. When an insured sues a broker for failing to obtain the type of coverage desired by the insured, the cause of action may accrue when the policy is issued, but the discovery rule tolls the statute of limitations until the insured knew or should have known that the policy did not provide the desired coverage, which is typically when the insurance company denies a claim. *Krop*, 2017 IL App (1st) 161071, ¶ 35 ("This court has consistently held that in the case of an insured's claim against its agent, the plaintiff knows or reasonably should know of the injury at the moment when coverage is denied. [Citations]."). While we do not adopt a categorical rule that insureds can never be charged with knowledge that their policy does not conform to the coverage requested from their broker before denial of a claim—as, for example, when they do examine the

policy and discover the absence of coverage—such cases involve questions of fact inappropriate for resolution on a motion to dismiss. There is certainly nothing in the record here to support a finding that plaintiffs knew of the lack of coverage for water damage before the date Allstate denied their claim under the policy.

¶ 9 There is no dispute that defendants acted as insurance brokers for plaintiffs. Taking the allegations of the complaint as true, plaintiffs claim that they informed defendants of their desire to obtain coverage for damage to their home and property as a result of water infiltration and that the policy defendants obtained from Allstate excludes such coverage. It matters not, as defendants argue, that the policy plainly excludes coverage for water damage as a result of a flood or sewer back-up due to sump pump failure. Because plaintiffs allege that they specifically requested coverage for water damage and that the policy defendants obtained did not provide such coverage, defendants' reliance on the unambiguous policy terms is misplaced. And while defendants are not precluded from pursuing any affirmative defenses based on plaintiffs' failure to examine the policy to determine if it provided the coverage they sought, defendants were not entitled to dismissal of the complaint as untimely as a matter of law.

¶ 10 Defendants also argue that plaintiffs have suffered no damages as Allstate, despite the lack of coverage, has paid plaintiffs the maximum benefit payable under the policy for sewer back-up due to sump pump failure. Apart from the fact that there is no record support for defendants' claim, plaintiffs allege that they sustained more than $63,000 in damages to their residence and personal property. And if, as plaintiffs allege, they requested that defendants obtain a policy that provided "full coverage" for water damage

due to flooding or sump pump failure, Allstate's payment of a portion of that amount would mitigate, but not eliminate damages.

¶ 11 Finally, defendants ask us to consider the alternative bases they argued under section 2-615 for dismissal of the various counts of the complaint for failure to state a claim. But since the trial court did not consider these alternative arguments, we believe the better course is to remand so that the trial court can resolve these issues.

¶ 12 Reversed and remanded.