DIVISION ONE
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RUTH A. WILLINGHAM, CLERK
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

JOAN IRENE ABNEY, an unmarried woman, Plaintiff/Appellant, v. LIBERTY MUTUAL INSURANCE COMPANY, a Massachusetts corporation; LIBERTY MUTUAL GROUP, INC., a Massachusetts corporation; LIBERTY MUTUAL INSURANCE CORPORATION, an insurance company, Defendants/Appellees.	No. 1 CA-CV 11-0112 DEPARTMENT C **MEMORANDUM DECISION** (Not for Publication - Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. CV2010-094915

The Honorable Larry Grant, Judge

AFFIRMED

Arnett & Arnett By Mark W. Arnett Wayne C. Arnett Attorneys for Plaintiff/Appellant	Chandler
Cavanagh Law Firm By Scott A. Salmon Cassandra V. Meyer Taylor C. Young Attorneys for Defendants/Appellees	Phoenix

D O W N I E, Judge

¶1 Joan Irene Abney appeals the dismissal of her lawsuit against Liberty Mutual Insurance Company ("Liberty Mutual") on statute of limitations grounds. For the reasons that follow, we affirm.

FACTS AND PROCEDURAL HISTORY[1]

¶2 In August 1995, Abney applied for automobile insurance with Liberty Mutual for her 1984 Oldsmobile. She submitted a $162 premium payment via money order and received a receipt. Liberty Mutual issued an insurance card reflecting coverage for the Oldsmobile effective August 22, 1995, and listing policy number AO7-261-735751-015 ("AO7261 policy").

¶3 On September 20, 1995, an engine fire destroyed the Oldsmobile. Abney submitted a claim to Liberty Mutual. In October, Liberty Mutual reimbursed Abney for towing costs. Abney advised Liberty Mutual she "would be without a residence in the near future." According to Abney, the claims representative responded that if Abney had no residence, Liberty Mutual would not pay benefits to her. Abney became homeless,

[1] "When considering a ruling granting a motion to dismiss, we accept the allegations of the complaint as true." *Republic Nat'l Bank of N.Y. v. Pima County*, 200 Ariz. 199, 205, ¶ 22, 25 P.3d 1, 7 (App. 2001) (citation omitted).

and Liberty Mutual reportedly advised "that her claim would be paid once she again had a residence."

¶4 Abney remained homeless "for many years." She eventually established a residence, and, in 2009, contacted Liberty Mutual about her claim. She also filed a complaint with the Attorney General's office that was referred to the Arizona Department of Insurance ("DOI"). Abney's complaint alleged she had not received compensation for a collision loss involving a truck in March 1993 or for the Oldsmobile destroyed in the September 1995 fire.

¶5 Liberty Mutual responded to the DOI complaint, explaining that the AO7261 policy was effective August 22 through November 29, 1995, but that a "declaration page was never generated . . . because no premium payments were ever made." Although Liberty Mutual had a record of its towing reimbursement payment, it could not locate any other records regarding the September 1995 loss. It did find records coded as commercial automobile claims reflecting a March 1993 date of loss, but those numbers did not correspond to the AL647 file number assigned to the September 1995 loss.[2] Liberty Mutual offered to further review the matter if Abney provided additional information.

[2] The DOI determined Abney had settled the March 1993 claim with another insurer for $11,000.

¶6 In May 2010, Abney sent additional information to Liberty Mutual.[3] In June, the insurer wrote to Abney, explaining it could not find records relating to her claim, that "[a]ny claim payments that were not cashed would have been turned over to the State of Arizona as abandoned property," and that it had "exhausted all efforts in trying to find claims" based on the information Abney provided.

¶7 In July 2010, Abney sued Liberty Mutual, alleging breach of the covenant of good faith and fair dealing and breach of contract.[4] Liberty Mutual moved to dismiss, arguing Abney's claims were timed-barred because the applicable limitations periods (two years for bad faith and six years for breach of contract) began to run in 1995, when the insurer allegedly refused to pay based on Abney's lack of a residence. In response, Abney contended the limitations periods were not triggered until she received a "final unequivocal denial" of her claim, which did not occur until 2010. She also stated that her bad faith claim was based in part on "false statements" Liberty Mutual made to DOI in 2009, and argued the doctrine of equitable tolling applied to her claims. After briefing and oral

[3] Abney asked about an "old Liberty Mutual policy" number corresponding to a policy she and her brother held.

[4] From the inception of this litigation, both parties have referred to Abney's breach of the covenant of good faith and fair dealing claim as an insurance bad faith claim. We thus treat it in the same manner.

argument, the superior court granted Liberty Mutual's motion to dismiss. Abney timely appealed. We have jurisdiction pursuant to Arizona Revised Statute ("A.R.S.") section 12-2101(B).

DISCUSSION

¶8 The parties agree that we review *de novo* whether Abney's claims are barred by the applicable statutes of limitations. We will uphold the superior court's dismissal "only if the plaintiff would not be entitled to relief under any interpretation of the facts susceptible of proof," after resolving "all reasonable inferences in favor of the plaintiff." *Hogan v. Wash. Mut. Bank*, 227 Ariz. 561, 564, ¶ 12, 261 P.3d 445, 448 (App. 2011) (citations omitted).

¶9 Liberty Mutual attached two documents to its motion to dismiss: its December 2009 letter to DOI, referenced in the complaint, and the January 2010 letter from DOI to Abney, explaining it had completed review of her complaint. Abney attached several documents to her response to the motion to dismiss, including an affidavit detailing conversations she reportedly had with Liberty Mutual employees in 2010. It does not appear that the superior court treated the motion to dismiss as one for summary judgment. *See* Ariz. R. Civ. P. 12(b); *Pritchard v. State*, 163 Ariz. 427, 432-33, 788 P.2d 1178, 1183-84 ("The proper method for raising a defense of limitation is a motion to dismiss under Rule 12(b)(6) . . . . [W]hen

matters outside the pleadings are presented to and not excluded by the court, the motion is to be treated as one for summary judgment . . . ."). However, neither party contended below or on appeal that the court should have done so.[5] *See Schabel v. Deer Valley Unified Sch. Dist. No. 97*, 186 Ariz. 161, 167, 920 P.2d 41, 47 (App. 1996) (issues not raised in appellate briefs are waived); *MT Builders, L.L.C. v. Fisher Roofing, Inc.,* 219 Ariz. 297, 304 n.7, ¶ 19, 197 P.3d 758, 765 n.7 (App. 2008) (arguments not developed on appeal are waived).

¶10 A statute of limitations defense may be raised in a motion to dismiss "if it appears on the face of the complaint that the claim is barred." *Republic Nat'l*, 200 Ariz. at 204, ¶ 20, 25 P.3d at 6 (citation omitted). "The plaintiff then must show the statute has not expired." *Id.* (citations omitted). Abney argues the limitations periods did not begin running on her claims until June 3, 2010, "when Liberty Mutual made its first and only final unequivocal denial of Ms. Abney's claim." We conclude otherwise.

¶11 "[A]n insurance company commits bad faith when it (1) intentionally (2) denies, fails to process, or fails to pay a claim (3) without a reasonable basis for such action. The cause of action arises only when all three elements are present. A

[5] Abney did not file a transcript of the oral argument on the motion to dismiss, which might have shed light on how the court treated the documents outside the pleadings.

limitations period starts when the cause of action arises." *Ness v. W. Sec. Life Ins. Co.*, 174 Ariz. 497, 500, 851 P.2d 122, 125 (App. 1992) (citations omitted).

¶12 Abney's complaint alleged that Liberty Mutual refused to pay benefits because she lacked a residence, even though the insurance policy contained "no provision . . . that states an insured must have a residence in order to be paid benefits." According to Abney's own allegations, Liberty Mutual intentionally failed to pay her claim without a reasonable basis in 1995. The tort of bad faith encompasses not merely the denial of claims, but also the failure to process or pay claims without a reasonable basis. *See Ness*, 174 Ariz. at 500, 851 P.2d at 125.

¶13 Abney's reliance on *Ness* and *Blutreich v. Liberty Mutual Insurance Company*, 170 Ariz. 541, 826 P.2d 1167 (App. 1991), is unavailing. In *Ness*, we reversed the grant of summary judgment because there was a question of fact regarding when the insurer denied disability benefits. We based our decision on correspondence from the insurer indicating it may have "treated its failure to pay benefits as non-final" because the letters seemed to spark hope that "additional benefits might be paid." *Ness*, 174 Ariz. at 500-01, 851 P.2d at 125-26. For example, the insurance company advised it could not make a final determination regarding the claim "until an evaluation of

Mr. Ness's ability or inability to perform work is made," and it sought an update regarding his medical treatment "to keep his entire claim file current." *Id.* at 499, 851 P.2d at 124.

¶14 The facts of this case are readily distinguishable. Liberty Mutual's alleged refusal to pay was, according to Abney, based on her homelessness, not the need for additional information or negotiations over the amount owed. Additionally, after the alleged refusal to pay in 1995, Abney engaged in no negotiations and failed to communicate with the insurer for 14 years. According to *Ness*, termination of settlement negotiations gives rise to a bad faith claim. *See* 174 Ariz. at 501, 851 P.2d at 126 ("[T]he better reasoned rule is that the cause of action [for insurance bad faith] accrues at the time all settlement negotiations end and not at the time of the original casualty.") (citation omitted). Negotiations in this case ended in 1995, triggering the statute of limitations on Abney's claims. *See also Blutreich*, 170 Ariz. at 545, 826 P.2d at 1171 (limitations period for suit to recover underinsured motorist benefits "begins to run against the insured only upon an event in the nature of a breach of contract by the insurer").

¶15 We also disagree with the suggestion that Abney's bad faith claim somehow remained viable or was resurrected because Liberty Mutual made "false statements" to the DOI in 2009. Abney argues:

> Lying to the Department of Insurance in an effort to dissuade it from helping [her] get her claim paid is certainly a breach of the duty of good faith and fair dealing and is actionable in tort.

¶16 The statute of limitations expired on Abney's bad faith claim roughly 13 years before Liberty Mutual made the allegedly false statements to the DOI. The tort of bad faith occurs when one party "damage[s] the rights of the other party to receive the benefits flowing from the underlying contractual relationship." *Taylor v. State Farm Mut. Auto. Ins. Co.*, 185 Ariz. 174, 176, 913 P.2d 1092, 1094 (1996). Abney's right to "receive the benefits flowing from the underlying contractual relationship" had long since expired. As a matter of law, the allegedly false statements in 2009 were not actionable as part of Abney's lapsed bad faith claim.

¶17 Finally, we are unpersuaded by Abney's equitable tolling argument. Her opening brief merely states: "If the facts of the Complaint are true, as this court must accept them to be, Liberty Mutual certainly induced Ms. Abney to believe that her claim would be paid without the need to bring suit." Abney does not elaborate on this claim and does not identify the allegations in the complaint upon which she relies. *Cf. McCloud v. Ariz. Dep't of Pub. Safety*, 217 Ariz. 82, 85, ¶ 8, 170 P.3d 691, 694 (App. 2007) ("The party opposing a motion to dismiss

based on a statute of limitations defense 'bears the burden of proving the statute has been tolled.'") (citations omitted).

¶18 A defendant may be estopped from asserting a statute of limitations defense if it "induces the plaintiff to forego litigation by leading plaintiff to believe a settlement or adjustment of the claim will be effected without the necessity of bringing suit." *Roer v. Buckeye Irr. Co.*, 167 Ariz. 545, 547, 809 P.2d 970, 972 (App. 1990). At times, Abney appears to rely on conversations she reportedly had with Liberty Mutual employees in 2010 to support her equitable tolling claim. Such communications, though, occurred well after the limitations period had expired on her claims and therefore could not have led to any detrimental reliance. To the extent Abney claims a 1995 promise to pay benefits once she obtained a residence justifies equitable tolling, we disagree. Certain cases may present questions of fact about whether a plaintiff has reasonably relied on a defendant's promise to settle or adjust a claim. But even in situations where estoppel could apply, a party must bring suit within a "reasonable time." *Brewer v. Food Giant Supermarkets, Inc.*, 121 Ariz. 216, 217, 589 P.2d 459, 460 (App. 1978) (finding 16-month delay "unreasonable"). We have no difficulty concluding here that waiting 14 years after the alleged inducement is unreasonable as a matter of law.

CONCLUSION

¶19 We affirm the judgment of the superior court. Both parties request attorneys' fees incurred on appeal pursuant to A.R.S. § 12-341.01. Abney is not the successful party on appeal and is therefore not entitled to a fee award. In the exercise our discretion, we deny Liberty Mutual's request. However, as the successful party on appeal, Liberty Mutual is entitled to an award of costs upon compliance with ARCAP 21.

/s/
MARGARET H. DOWNIE, Judge

CONCURRING:

/s/
PATRICIA K. NORRIS, Presiding Judge

/s/
PHILIP HALL, Judge