IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

DAVID R. and BARBARA T. SMITH,	:	
	:	C.A. No. 09C-10-043 WLW
Plaintiffs,	:	
	:	
v.	:	
	:	
GOODVILLE MUTUAL CASUALTY INSURANCE COMPANY, a Pennsylvania corporation,	:	
	:	
	:	
Defendant.	:	

Submitted: August 20, 2010
Decided: October 21, 2010

ORDER

Upon Defendant's Motion for Summary Judgment.
Granted.

Kathryn J. Garrison, Esquire of Schmittinger & Rodriguez, P.A., Dover, Delaware; attorneys for the Plaintiffs.

Jeffrey A. Young, Esquire of Young & McNelis, Dover, Delaware; attorneys for the Defendant.

WITHAM, R.J.

FACTS

The Smiths bought a homeowner's insurance policy from Goodville Mutual Casualty Insurance Company to insure a home to be built by a contractor, Chapel Homes. The policy covered "theft from a dwelling unit under construction" and "theft of building materials." It expressly did not cover "earth" or "losses that occur from design, construction, workmanship, or installation of the property." The policy contained a limitation of suit clause, providing that suits against Goodville over disputed claims must be initiated no later than two years after the date of loss.

Unfortunately, Chapel Homes ran into financial difficulty and halted construction. The contractor's agents allegedly appropriated lumber and backfill (earth) before abandoning the work-site in June 2006. The Smiths filed insurance claims to cover their losses from the alleged theft.

In a letter dated January 2, 2007, Goodville rejected the Smith's claims. The letter explains that Goodville considered the stolen backfill to be "earth," and the appropriated materials to be losses resulting from the contractor's "workmanship." As a result, neither claim would be covered. Nonetheless, Goodwill provided that it was prepared to consider a "potential claim" for stolen lumber if the Smiths could substantiate it. The parties exchanged a series of letters regarding the claims. In a letter dated June 19, 2007, Goodville agreed to reconsider the backfill as well as the lumber claims – subject to the submission of an adequate proof of loss. The company conceded that the impending criminal conviction of the contractor would be powerful evidence that the contractor had committed "theft."

The record does not indicate why the reconsideration process was not completed during 2007. In a subsequent letter, dated May 19, 2008, Goodville directed the Smiths to submit recipts and invoices to substantiate their claims within 60 days. Note that the time for filing suit under the policy's limiation of suit provision lapsed during that 60-day period--on June 6, 2008. The Smiths submitted their proof of loss on August 14, 2008. Goodville rejected the submission because it consisted of sworn affidavits and estimates rather than invoices and receipts. Goodville also granted additional time for the Smiths to resubmit a more acceptable proof of loss.

The Smiths re-submitted their proof of loss on December 5, 2008. However, Goodville finally rejected the claims on December 19, 2008–six months after the expiration of time for filing suit under the policy's limitation of suit provision.

PROCEDURAL HISTORY

The Smiths filed a breach of contract claim against Goodville on October 27, 2009. Goodwill moved for summary judgment, arguing that the Court should grant summary judgment because: (1) the lawsuit is precluded by the suit limitation provision; (2) the lawsuit is precluded by the state statute of limitations for contract claims; and (3) as a matter of law, the policy does not cover the claims for backfill and lumber.

Standard of Review

Summary Judgment should be granted only if the record shows that there is no genuine issue as to any material fact and the moving party is entitled to judgment as

a matter of law.[1] The facts must be viewed in the light most favorable to the non-moving party.[2] Summary Judgment may not be granted if the record indicates that a material fact is in dispute, or if it seems desirable to inquire more thoroughly into the facts in order to clarify the application of the law to the circumstances.[3] However, when the facts permit a reasonable person to draw but one inference, the question becomes one for decision as a matter of law.[4]

DISCUSSION

A. Contractual Limitation of Suit Provision

The first issue is whether to dismiss the case because the Smiths failed to comply with the policy's limitation of suit provision. In relevant part, the provision provides:

> 11. Suit Against Us -- No suit may be brought against "us" unless all the "terms" of this policy have been complied with and:
> (a) Property Coverages -- The Suit is brought within two years after the loss.

Contracts are generally enforced according to their terms–as long as those terms are valid and not otherwise precluded by an applicable legal defense. Suit

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[1] Super. Ct. Civ. R. 56(c).

[2] *Guy v. Judicial Nominating Comm'n*, 659 A.2d 777, 780 (Del. Super. Ct. 1995).

[3] *Ebersole v. Lowengrub*, 180 A.2d 467, 468-69 (Del. 1962).

[4] *Wootten v. Kiger*, 226 A.2d 238, 239 (Del. 1967).

limitation provisions in insurance contracts are valid under Delaware Law.[5] In fact, the Delaware Supreme Court has upheld provisions that are substantially identical to the provision at issue in this case.[6] Therefore, the provision will bar this lawsuit unless the Smiths can establish a valid defense to enforcement.

Estoppel

The Smiths argue that Goodwill should be estopped from asserting the provision the parties' mutual cooperation throughout the two-year reconsideration process lulled them into believing the provision would not be asserted if negotiations ultimately failed.

Delaware courts invoke the doctrine of equitable estoppel to prevent a party from unjustly asserting an otherwise valid legal defense when his words or conduct have induced his counter-party to reasonably believe that the defense would not be asserted.[7] In the insurance context, a party seeking to estop an insurer from asserting a limitation of suit provision must: "(1) misleading conduct of the company, and (2) reliance thereon by him to his injury."[8] The party asserting estoppel must establish

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[5] *Woodward v. Farm Family Cas. Ins. Co.*, 796 A.2d 638, 642 (Del. 2002).

[6] In fact, the provision in *Woodward* required the insured to file suit against his insurer within *one year* of the occurrence of the loss giving rise to the disputed claim. *Id.*

[7] *First Fed. Sav. & Loan Ass'n of New Castle County v. Nationwide Mut. Fire Ins. Co.*, 460 A.2d 543, 545 (Del. 1983).

[8] *Gribble v. Royal Ins. Co.,* 165 A.2d 443, 446 (1960).

it by clear and convincing evidence.[9]

The Smiths have a difficult case. In *Woodward v. Farm Family*, the Delaware Supreme Court held that an insurer generally has no duty–even during settlement negotiations–to inform an insured that it will invoke its rights under a limitation of suit provision.[10] In that case, the parties had engaged in extended settlement negotiations that broke down five months before the end of the time for filing suit. The plaintiffs did finally file suit once it was too late, and the insurer invoked the limitations provision.

The plaintiffs argued, *inter alia*, that the insurer should be estopped from asserting the provision because the fact of the negotiations led them to believe it would not be asserted. The Court disagreed: (1) finding that the insurer did not have a duty to notify the insured that it would assert the provision, and (2) affirming this Court's determination that it was unreasonable for the plaintiffs to rely on the prospect of settlement when negotiations had broken down a full five months before the last day to file suit.[11]

This case is somewhat different from *Woodward* because the parties continued to actively negotiate up to and after the expiration of limitation on suit provision. Unlike the plaintiffs in *Woodward*, the Smiths had a reasonable prospect of settlement

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[9] *Mut. Ben. Life Ins. Co. of Newark, N. J. v. Bailey*, 190 A.2d 757, 759 (1963).

[10] *Woodward*, 2001 WL 879914 (Del. Super. Ct. July 10, 2001).

[11] 796 A.2d at 642.

at the contractual deadline for filing suit. There was never a time before the end of the limitation period when it was clear that negotiations would fail and that a lawsuit would be necessary.

Yet, "some reasonable prospect of settlement" is still an insufficient basis for estoppel. The Smiths must show that Goodville's conduct was *misleading* and induced them to postpone filing suit until it was too late. The record simply does not show that Goodville engaged in misleading conduct. The initial decision to reject the claims was based on the plausible rationale that the claims were for uncovered losses to "earth" and defects due to "workmanship." There was also nothing misleading about Goodville's later decision to reconsider "potential claims" upon the submission of an acceptable proof of loss. To the contrary, Goodville's letters clearly assert that the company reserved all of its rights under the contract. Of course, that reservation of rights would include the limitation provision.

The Smiths apparently believed that Goodville's decision to reconsider the claims implied that the limitation provision would not apply. It is understandable how ordinary homeowners–untrained in the strict formalities of contract law–would believe it both counterproductive and bizarre to sue the insurer before it had even finished considering their claims. It is less understandable why the Smith's then-attorney (who has since been replaced) permitted them to make that mistake.

Regardless, estoppel does not apply in the absence of misleading conduct. Conduct is not misleading merely because someone misunderstands it. As previously noted, the Delaware Supreme Court has held that an insurer generally has no

duty–even during settlement negotiations–to notify the insured that it will assert a limitation of suit provision once time expires. The Smiths are presumed to have read the limitation of suit provision in their policy. They should also have noted–in the very letter in which Goodville agreed to reconsider their claims–that Goodville expressly reserved all of its rights under the contract. The Smiths were on notice. There is no contrary evidence from which it might be inferred that Goodville was negotiating in bad faith or was otherwise engaged in misleading conduct. Therefore, the Smiths have failed to establish the defense of equitable estoppel.

Waiver

Similarly, the Smiths argue that Goodville waived the limitation of suit provision. Waiver is the intentional relinquishment of a known right.[12] A party asserting waiver must prove it by clear and convincing evidence.[13]

The Smiths fail to meet their burden of proof for two reasons. First, mere silence does not effect a waiver unless there is a duty to speak.[14] As noted in the preceding discussion, Goodville did not have a duty to inform the Smiths that it would assert the provision.

Second, the evidence simply does not show that Goodville ever intended to

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[12] *Woodward*, 2001 WL 879914 (Del. Super. Ct. July 10, 2001).

[13] *Vechery v. Hartford Acc. & Indem. Ins. Co.,* 121 A.2d 681, 685 (1956)(citing *Aronson v. Frankfort Accident & Plate Glass Ins. Co.*, 99 P. 537 (1908)(requiring waiver to be proven by clear and convincing evidence).

[14] *Faill v. Faill*, 303 A.2d 679 (1973).

waive its rights under the policy. In fact, Goodville's letters expressly indicate that the company reserved all rights under the contract. The Smiths argue that Goodville impliedly waived the provision by permitting them to resubmit their proof of loss after the time for filing suit expired. However, that fact only demonstrates that Goodville was still willing to consider the claim. If Goodville's indulgence of the Smiths' late submission of their proof of loss waived anything, it would have waived the discretion to reject that submission for being untimely. It would not demonstrate that Goodville intended to waive its *right not to be sued*.

The Smiths have not met their burden of proof. Therefore, there is no basis for finding that Goodville waived the limitation of suit provision.

1. Statute of Limitations - 10 Del. C. § 8106

Delaware has a three year statute of limitations for contract claims.[15] The statute begins to run upon the accrual of a cause of action.[16] Naturally, a cause of action for breach of contract accrues on the date the contract is breached.[17] In *Allstate v. Spinelli*, the Delaware Supreme Court held that a breach of contract claim on an insurance policy did not begin to run until the claim was finally denied.

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[15] 10 Del. C. § 8106

[16] *Allstate Ins. Co. v. Spinelli*, 443 A.2d 1286, 1292 (Del. 1982).

[17] *Id. (*Citing *Worrel v. Farmers Bank of Dela., Del.Supr.*, 430 A.2d 469 (1981); *Pioneer Nat. Title Ins. Co. v. Child Inc.*, Del.Supr., 401 A.2d 68 (1979); *Artesian Water Co. v. Lynch*, Del.Ch., 283 A.2d 690 (1971); *Pioneer Nat. Title Ins. Co. v. Sabo*, Del.Super., 382 A.2d 265 (1978); *Rudginski v. Pullella*, Del.Super., 378 A.2d 646 (1977); 51 Am.Jur.2d., Limitation of Actions s 126 (1970).

Under *Spinelli*, the Smiths' cause of action for breach of contract only accrued when Goodville finally rejected their claims on December 19, 2008. The Smiths were still well within the specified three year period when they filed suit in October of 2009. Therefore, the statute of limitations would not bar this action.

2. Does the policy cover the claims?

This suit is precluded by the limitation of suit provision. Therefore, it is unnecessary to decide the underlying, substantive issues at this time.

CONCLUSION

Because the Smiths failed to file suit within the period specified by the contractual limitation of suit provision, Goodville's motion for summary judgment is **granted**.

IT IS SO ORDERED.

/s/ William L. Witham, Jr.
Resident Judge

WLW/dmh
oc: Prothonotary
xc: Counsel