IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

BONITA BLACK, Plaintiff, v. REYBOLD VENTURE GROUP VII, LLC, Defendant.	)	C.A. No. N18C-02-177 WCC

Submitted: April 25, 2018
Decided: September 6, 2018

Defendant's Motion to Dismiss- GRANTED IN PART, DENIED IN PART

MEMORANDUM OPINION

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CARPENTER, J.

I. FACTUAL BACKGROUND

This negligence action arises from a slip and fall accident. Bonita Black ("Plaintiff") alleges that she sustained personal injuries after she slipped and fell in the parking lot of St. Andrews Apartments ("St. Andrews") in Bear, Delaware.[1] St. Andrews was operated by Reybold Venture Group VII, LLC ("Reybold" or "Defendant"),[2] who pursuant to Superior Court Rule of Civil Procedure 12(b)(6), moves to dismiss Plaintiff's Complaint. The Court held oral arguments on the Motion on April 25, 2018.

The crux of this case is whether the statute of limitations has been tolled.[3] *Specifically*, the parties dispute whether 18 *Del. C.* § 3914 requires Reybold, who is not an insurance company or self-insured, to provide notice to the Plaintiff of the applicable statute of limitations.[4]

The facts of the case are relatively straightforward and undisputed. On February 16, 2016, Plaintiff, a business invitee, went to St. Andrews to perform physical, therapeutic education for a client in connection with her employment at Community Systems, Inc.[5] Plaintiff claims after arriving at St. Andrews she was

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[1] Compl. ¶¶ 5–7.
[2] *Id.* at ¶ 2.
[3] Def.'s Mot to Dismiss ¶¶ 7–9.
[4] *See* Def.'s Reply to Pl.'s Resp. to Def.'s Mot to Dismiss at 3.
[5] Compl. ¶ 5. There is no dispute that Plaintiff was in the scope of her employment when the injury occurred.

injured when she exited her car and immediately slipped and fell on ice, falling and striking her left side (the "Accident").[6]

Because the injuries occurred during the scope of her employment, there is a workers' compensation claim. In fact, "[h]er claim for workers' compensation benefits was acknowledged via employer's carrier Liberty Mutual, and that matter was to be set for mediation on May 1, 2018, with a view toward a global commutation of those benefits."[7] Additionally, Plaintiff states that she was contacted in March 2016, by the Defendant's liability carrier through an adjuster named Eric Lesperance ("Lesperance") for Harleysville Preferred Insurance Co. ("Harleysville").[8] Lesperance communicated to the undersigned that he was assigned the future handling of the claim,[9] and the undersigned allegedly told Lesperance on or about November 2, 2017, there were prospects of settling the third-party claim.[10] "This correspondence reveals Harleysville knew of the pendency of Plaintiff's claim as early as March of 2016."[11] Despite Harleysville's knowledge, it did not place Plaintiff on notice of the statute of limitations as 18 *Del. C.* § 3914 requires, thus tolling the statute of limitations.

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[6] *Id.* at ¶¶ 6–7.
[7] Pl.'s Resp. to Def.'s Mot to Dismiss ¶ 10.
[8] *Id.* at ¶ 3.
[9] *Id.* at ¶ 4.
[10] There is no documented verbal or written communication between Eric Lesperance and the undersigned's office following the November 2, 2017 communication. *Id.* at ¶ 5.
[11] *Id.* at ¶ 10.

On February 26, 2018, Plaintiff filed suit against Defendant, alleging that the Defendant was negligent when it failed to provide a safe parking area and the Accident caused injuries to her neck, lower back, left shoulder and right wrist.[12] Plaintiff seeks a judgment that Defendant was negligent and seeks damages including prejudgment interest and statutory and reasonable fees and costs in such amounts that may be awarded by the Court.[13] Defendant filed the instant motion asserting that the Plaintiff's claims are barred by the statute of limitations.

II. STANDARD OF REVIEW

"A motion to dismiss for failure to state a claim upon which relief can be granted made pursuant to Superior Court Rule 12(b)(6) will not be granted if the plaintiff may recover under any reasonably conceivable set of circumstances susceptible of proof under the complaint."[14] All well-pled allegations in the complaint must be accepted as true,[15] and every reasonable factual inference will be drawn in favor of the plaintiff.[16] If the claimant may recover under that standard of review, the court must deny the motion to dismiss.[17]

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[12] Compl. ¶ 7.
[13] Compl. ¶¶ A–B.
[14] *Martin v. Widener Univ. Sch. of Law*, 1992 WL 153540, at *2 (Del. Super. Ct. June 4, 1992) (citing *Spence v. Funk*, 396 A.2d 967, 968 (Del.1978)).
[15] *Id.*
[16] *Master Mechanical Inc. v. Shoal Construction, Inc.*, 2009 WL 1515591, at *1 (Del. Super. Ct. May 29, 2009).
[17] *See Spence v. Funk*, 396 A.2d 967, 968 (Del.1978).

III. DISCUSSION

The parties agree that the applicable statute of limitations for this action is two years,[18] and that Plaintiff's action was filed more than two years after the Accident.[19] It is equally undisputed that neither Defendant or Harleysville ever gave Plaintiff notice of the applicable statute of limitations pursuant to 18 *Del. C.* § 3914 ("Claim Notice Statute"). The Claim Notice Statute requires: "[a]n insurer shall be required during the pendency of any claim received pursuant to a casualty insurance policy to give prompt and timely written notice to claimant informing claimant of the applicable state statute of limitations regarding action for his or her damages."[20] The parties, however, dispute whether the Claim Notice Statute applies to Reybold. The Defendant is neither a self-insured nor an insurance company, and if the Court rules the statute applies to the Defendant, it would extend the obligation of the insurer to the tortfeasor defendant to notify a plaintiff of the applicable statute of limitations.

Generally, the Court would engage in a detailed analysis to interpret the Claim Notice Statute, but for the purposes of this Motion the Court need not do so. This Court's decisions in *LaFayette v. Christian* and in *Lambert v. 24.7 Fitness Studio,*

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[18] *See* 10 *Del. C.* §8119.
[19] Plaintiff filed the Complaint on February 26, 2018, only a few weeks after the statute of limitations expired.
[20] 18 *Del. C.* § 3914.

LLC and DGYMS, LLC, have found the Claim Notice Statute is unambiguous and only an insurer is required to notify a plaintiff of the statute of limitations.[21] Although the Claim Notice Statute does not define insurer nor does it distinguish between a self-insured, the Delaware Supreme Court discussed insurance and insurers in *Stop & Shop Cos. v. Gonzalez*. The Court stated:

> [i]nsurance, in its basic operation, involves the setting aside of money to establish a fund sufficient to respond to claims arising from predictable risks. Whether the funding be through contract with an independent insurer, or self-funding, or a combination of the two through partial self-insurance in the form of deductibles, the result is the same. A fund is created to protect against risk of bodily harm or property damage.[22]

In the instant case, Reybold is not an insurer nor is it in the business of selling insurance contracts. As such, Defendant is not barred from relying on the statute of limitations under Section 3914. To impose Section 3914's notice requirement on Reybold, who bears no affiliation with the insurance industry, would be inconsistent with the purpose underlying Section 3914 and the Delaware precedent case law which dealt with this very issue. In fact, this Court has previously held in *LaFayette v. Christian*:

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[21] *See LaFayette v. Christian*, 2012 WL 3608690, at *2 (Del. Super. Ct. Aug. 21, 2012) (citing *Taylor v. Bender*, 1991 WL 89882, at *2 (Del. Super. Ct. May 28, 1991); *see also Lambert v. 24.7 Fitness Studio, LLC and DGYMS, LLC*, 2018 WL 2418385, at *4 (Del. Super. Ct. May 29, 2018).

[22] *LaFayette v. Christian*, 2012 WL 3608690, at *2 (Del. Super. Ct. Aug. 21, 2012) (citing *Stop & Shop Companies, Inc. v. Gonzales*, 619 A.2d 896, 898 (Del. 1993)).

> [t]he requirements of [Section] 3914 are designed to provide claimants with notice of the applicable statute of limitations. The burden placed on insurers is not an onerous one and conforms to a readily discernible rational social policy considering the relative knowledge and position of the parties. Insurance companies are likely to be aware of laws and regulations applicable to their business. A claimant, on the other hand, is not. Concern over the possibility of a sophisticated insurance industry overreaching a less sophisticated claimant is legitimate and reasonable.[23]

This Court continues to agree that Section 3914 was intended to "protect unsophisticated claimants from more sophisticated *insurance companies.*"[24] The failure of the insurer to provide notice pursuant to Section 3914 cannot affect the tortfeasor's entitlement to assert the statute of limitations as a defense.

The Court agrees with the Defendant that Reybold is not an "insurer" defined by the statute. Reybold is a commercial entity in the business of leasing residential dwelling units to customers. Reybold is neither in the business of entering contracts for insurance, nor do they receive premiums in exchange for promises to indemnify or set-aside funds for claims. Because of the plain language of the Claim Notice Statute and a lack of legislative intent to suggest otherwise, the Court cannot extend the scope of the definition. If the Statute needs to be broader to achieve its goals, then it is a legislative remedy that must be pursued and not a rewrite by the judiciary.

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[23] *Id.* at *2.

[24] *Id.* at *3 (citing *Farm Family Ins. Co. v. Connectiv Power Delivery*, 2008 WL 2174411, at *4 (Del. Super. Ct. May 21, 2008)).

This, however, does not end this dispute. It appears undisputed that Defendant's insurance carrier, Harleysville, became aware of the claim within a month or so of the accident and never provided the notice required under 18 *Del. C.* § 3914. Since litigation is filed only against the tortfeasor of an accident and not their insurance carrier, if the Court was to dismiss Defendant from this litigation, it would in essence be providing an unjustified windfall to the insurance carrier that has failed to meet its statutory obligations. This would clearly frustrate the legislative intent of Section 3914 and would be unfair to Plaintiff. The remedy here is to find that, to the extent the Defendant is found liable for the slip and fall incident, recovery is limited to Defendant's insurance coverage provided by Harleysville minus Defendant's deductible. The Plaintiff can receive no direct recovery from Defendant, but Defendant will not be dismissed from the case.

CONCLUSION

For the reasons discussed above, Defendant's Motion to Dismiss is **GRANTED IN PART AND DENIED IN PART** consistent with this Opinion.

IT IS SO ORDERED.

Judge William C. Carpenter, Jr.