

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-000027-MR

ACUITY

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE DENISE CLAYTON, JUDGE
ACTION NO. 03-CI-001450

GREAT WEST CASUALTY COMPANY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: BARBER, MINTON, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Acuity brings this appeal from a December 3, 2004, summary judgment of the Jefferson Circuit Court dismissing its claim as barred by the statute of limitations. We affirm.

Acuity filed a complaint against Great West Casualty Company (Great West) to recover \$10,000.00 in Basic Reparation Benefits (BRB) it paid to its insured as a result of an automobile accident which occurred on March 21, 2000, in Jefferson County. The driver of the other vehicle involved in the accident was insured by Great West. It appears that a

representative of Acuity, Jay Machcinski, and a representative of Great West, Alan Druckemiller, corresponded concerning Great West reimbursing Acuity the \$10,000.00 paid in BRB. However, Great West never paid Acuity, and Acuity instituted the instant action to recover same on February 19, 2003.

Great West moved for summary judgment based upon the statute of limitations set out in Kentucky Revised Statutes (KRS) 304.39-230. Great West pointed out that Acuity made the last payment of BRB on July 21, 2000, and Acuity commenced the instant action on February 19, 2003. Pursuant to KRS 304.39-230(6), Great West argued that an action to recover BRB should have been instituted by Acuity within two years from the last payment of BRB. Thus, Great West contended that Acuity's action was time-barred.

Great West responded that Acuity should be estopped from relying upon the statute of limitations defense because of its misrepresentations. Moreover, Acuity argued that there existed an implied contract between it and Great West. Specifically, Acuity contended that Great West representative, Druckemiller promised its representative Machcinski, that payment of the \$10,000.00 in BRB would be forthcoming. Acuity believes that this promise created an "implied contract" which was breached when Great West failed to pay the BRB.

On December 3, 2004, the circuit court granted Great West's motion for summary judgment and dismissed the action. This appeal follows.

Acuity contends the circuit court committed error by entering summary judgment dismissing its action against Great West. Summary judgment is proper where there exists no material issue of fact and movant is entitled to judgment as a matter of law. Ky. R. Civ. P. 56.03. Movant must demonstrate that the opposing party could not prevail under any circumstance. Pearson ex rel. Trent v. Nat'l Feeding Sys., Inc., 90 S.W.3d 46 (Ky. 2002).

Acuity specifically asserts there existed material issues of fact upon whether Great West was equitably estopped from relying upon the statute of limitations defense. Again, Acuity's claim centers around the allegation that a false representation was made by Druckemiller promising to pay the \$10,000.00 in BRB and that Acuity relied upon such misrepresentation to its detriment by failing to timely file a claim within the statutory deadline.

To create a material issue of fact, Acuity relies upon what it calls the "Acuity Claim Diary" (Diary). The Diary was found in the appendix to Acuity's response to Great West's motion for summary judgment. We observe that the record is devoid of an affidavit concerning the validity or veracity of

the Diary's contents. Nevertheless, the entries in the Diary are terse. The Diary indicates that on May 10, 2002, Machcinski presumably contacted Druckemiller and was told by Druckemiller that Acuity would receive a check by May 13, 2002. On May 24, 2002, and June 3, 2002, the Diary reflects that Machcinski attempted to call Druckemiller to determine why a check was never received by Acuity. Another entry on June 18, 2002, reflects that Machcinski sent a letter to Great West advising it to either reimburse Acuity or legal action would be pursued.

To prevail upon a claim of equitable estoppel, a party must demonstrate:

- (1) [L]ack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) reliance, in good faith, upon the conduct or statements of the party to be estopped; and (3) action or inaction based thereon of such a character as to change the position or status of the party claiming the estoppel, to his injury, detriment, or prejudice.

Rivermont Inn, Inc. v. Bass Hotels Resorts, Inc., 113 S.W.3d 636, 643 (Ky.App. 2003). It is well-established that the reliance necessary to establish a claim of equitable estoppel must be reasonable. Gailor v. Alsabi, 990 S.W.2d 597 (Ky. 1999).

In the case at hand, the Diary indicates that Acuity's representative Machcinski was aware by June 18, 2002, that legal action was probable as Druckemiller failed to forward the

reimbursement check by May 13, 2002. The last payment of BRB was on July 21, 2000; thus, the statute of limitations had yet to expire. From these facts, we cannot say that Acuity's failure to file the complaint within the two-year statute of limitation was due to a reasonable reliance upon the misrepresentation of Great West representative Druckemiller. As such, we are of the opinion the circuit court properly entered summary judgment upon the claim of equitable estoppel.

Acuity also argues the circuit court committed error by entering summary judgment upon its claim of breach of an implied contract between the parties. To create a material issue of fact, Acuity once again relies upon the Diary. In particular, it calls this Court's attention to the entry on May 10, 2002, which states as follows:

CALLED ALAN AT GREAT WEST CAS, HE SAID HE
HAD TO REOPEN THE FILE AND FORGOT TO TO
[Sic] IT. HE WILL GET THE CHECK OUT BY 5-
13. REDIARY.

We, however, believe that the Diary's entry without more is insufficient to support Acuity's claim of breach of an implied contract.

To create an implied-in-fact contract, the evidence must demonstrate:

[A]n actual agreement or meeting of the
minds although not expressed and such is
implied or presumed from the acts or
circumstances which according to the

ordinary course of dealing and the common understanding of men shows a mutual intent to contract.

Rider v. Combs, 256 S.W.2d 749, 749 (Ky. 1953). The Diary entry does not establish evidence of a "mutual intent" to enter into a contract. Rather, the entry merely shows that a check was to be issued by May 13. Thus, we are of the opinion that Acuity failed to demonstrate sufficient facts to create a material issue of fact upon whether an implied-in-fact contract existed.

For the foregoing reasons, the summary judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Wayne J. Carroll
Keri E. Hieneman
MacKENZIE & PEDEN, P.S.C.
Louisville, Kentucky

BRIEF FOR APPELLEE:

Stockard R. Hickey, III
David M. Schuler, Jr.
FROST BROWN TODD, LLC
Louisville, Kentucky

ORAL ARGUMENT FOR APPELLANT:

Wayne J. Carroll
MacKENZIE & PEDEN, P.S.C.
Louisville, Kentucky

ORAL ARGUMENT FOR APPELLEE:

David M. Schuler, Jr.
FROST BROWN TODD, LLC
Louisville, Kentucky