STATE OF MICHIGAN

COURT OF APPEALS

VINOD SHARMA,

Plaintiff-Appellant,

v

METROPOLITAN LIFE INSURANCE COMPANY,

Defendant-Appellee.

UNPUBLISHED
December 14, 2004

No. 249314
Oakland Circuit Court
LC No. 02-045440-CZ

Before: Whitbeck, C.J., and Saad and Talbot, JJ.

PER CURIAM.

Plaintiff appeals the trial court's order that granted summary disposition in favor of defendant, and we affirm.

I

A

Plaintiff argues that the trial court erred when it granted defendant's motion for summary disposition based on expiration of the statute of limitations. A trial court's decision on a motion for summary disposition is reviewed de novo on appeal. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). To the extent the motion for summary disposition was granted based on the expiration of the statute of limitations, the dismissal is reviewed pursuant to MCR 2.116(C)(7). Also, the determination of whether a limitations period applies to preclude a lawsuit is a question of law that we review de novo. *City of Detroit v 19675 Hasse*, 258 Mich App 438, 444; 671 NW2d 150 (2003). Issues not addressed by the trial court are generally not preserved for appellate review. *Herald Co v Ann Arbor Pub Schools*, 224 Mich App 266, 278; 568 NW2d 411 (1997). Plaintiff's arguments related to the tolling of the statute of limitations based on disability and imposition of the discovery rule, are unpreserved and therefore are reviewed for plain error that affected substantial rights. *Kern v Blethen-Coluni*, 240 Mich App 333, 336; 612 NW2d 838 (2000); *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

B

To obtain relief from a judgment, based upon claims of misrepresentation or fraud, MCR 2.612(C)(2), requires that plaintiff bring his claim within a year from the entry of the order.[1] Because the order was entered on May 17, 1999, and because plaintiff filed this lawsuit on November 15, 2002, his claim is untimely.

C

Similarly, plaintiff's claims of negligence, breach of fiduciary duty and racial discrimination are time-barred by the applicable statute of limitations. MCL 600.5805(1).[2] Because plaintiff's injury occurred on May 17, 1999, with the issuance of an order releasing funds held by defendant, or at the very latest on May 27, 1999, when defendant actually released the funds from plaintiff's annuity account, plaintiff was required to initiate his lawsuit no later than May 27, 2002. It is undisputed that plaintiff filed his claim on November 15, 2002, and thus his claims are time-barred.

D

Plaintiff's breach of contract and fraud claims are similarly time-barred by the applicable statutes of limitation. A claim for breach of contract[3] and for fraud[4] must be brought within six years from the time the claim accrues. A claim accrues "at the time the wrong upon which the claim is based was done regardless of the time when damage results." MCL 600.5827. Plaintiff asserts he was fraudulently induced to purchase the annuity contract by defendant. The misrepresentations asserted by plaintiff occurred at the time of purchase of the contract in 1995. An action for breach of contract accrues on the date of the breach, not on the date the breach is discovered. *Michigan Millers Mut Ins Co v West Detroit Bldg Co, Inc*, 196 Mich App 367, 372 n 1; 494 NW2d 1 (1992). Similarly, accrual of a claim of fraud is not extended until plaintiff discovers or should have discovered the claim. *Boyle v General Motors Corp*, 468 Mich 226, 231; 661 NW2d 557 (2003). Plaintiff's claim for fraud in issuance of the annuity contract began to run in 1995, and is barred by the applicable statute of limitations.

E

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[1] The motion must be made within a reasonable time, and, for the grounds stated in subrules (C)(1)(a), (b), and (c), within one year after the judgment, order or proceeding was entered or taken.

[2] See also *Stephens v Dixon*, 449 Mich 531, 534; 536 NW2d 755 (1995) (negligence); *Bay Mills Indian Community v State*, 244 Mich App 739, 751; 626 NW2d 169 (2001) (breach of fiduciary duty); and *Collins v Comerica Bank*, 468 Mich 628, 630; 664 NW2d 713 (2003) (discrimination).

[3] MCL 600.5807(8).

[4] MCL 600.5813; *Kwasny v Driessen*, 42 Mich App 442, 445-446; 202 NW2d 443 (1972).

Plaintiff argues that his involvement in bankruptcy proceedings, with the resultant court-ordered stay, tolls the running of the statute of limitations. Plaintiff asserts 11 USC 108(c)(2) served to stay the applicable limitations period during his bankruptcy proceeding. Plaintiff incorrectly interprets the meaning and applicability of this provision. The historical and statutory notes that follow this section of the code indicate that the provision only "extends the statute of limitations for creditors." In addition, case law has indicated that, even if plaintiff received a stay under 11 USC 108(c)(2), he had only "thirty days from the termination of that stay to bring an action" as a grace period to file his claim, if the applicable limitations period, MCL 600.5805(10), had expired. *Ashby v Byrnes*, 251 Mich App 537, 542-543; 651 NW2d 922 (2002).[5] If permitted to use the thirty day savings provision, plaintiff would have been required to file his claim no later than October 24, 2002, or thirty days subsequent to the completion of the bankruptcy and lifting of the stay, which he failed to do.

F

Plaintiff erroneously claims that the statute of limitations should be tolled based on either his disability or that of his daughter and/or the discovery rule. In order to determine whether to impose the discovery rule or strictly enforce a limitations period, a court "must carefully balance when the plaintiff learned of her injuries, whether she was given a fair opportunity to bring [her] suit, and whether defendant's equitable interests would be unfairly prejudiced by tolling the statute of limitations." *Brennan v Edward D Jones & Co*, 245 Mich App 156, 159; 626 NW2d 917 (2001), citing *Stephens*, *supra* at 531, 536. Pursuant to the discovery rule, "the period of limitations does not begin to run 'until the plaintiff discovers, or through the exercise of reasonable diligence should have discovered, that he had a possible cause of action.'" *Brennan*, *supra* at 159, quoting *Brown v Drake-Willock Int'l, Ltd*, 209 Mich App 136, 142; 530 NW2d 510 (1995). Plaintiff acknowledged receipt of defendant's motion for release of the annuity funds, receipt of the order requiring defendant to release the monies and the actual payment of the monies pursuant to the May 17, 1999, court order. Plaintiff is unable to demonstrate, and fails to indicate any evidence that would imply, he was unable to discover the alleged injury on the date of the lower court order of May 17, 1999. Simply based on plaintiff's claim of ordinary negligence, the discovery rule is not available. *Stephens*, *supra* at 537.

Plaintiff also argues that the statute of limitations should be tolled pursuant to MCL 600.5851(1) for "disability" due to his daughter's illness and the psychological and emotional stress he incurred as a result of the ongoing court proceedings and subsequent financial distress. Plaintiff cannot succeed in tolling the statute of limitations pursuant to this statute. Plaintiff acknowledged in his deposition receiving the court notices and garnishment order and comprehending their meaning. Plaintiff has failed to demonstrate that he was unable to attend to personal or business affairs to the extent it became necessary to explain matters that an ordinary person would comprehend. *Lemmerman v Fealk*, 449 Mich 56, 71-73; 534 NW2d 695 (1995).

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[5] See also *Bowers v Bowers*, 216 Mich App 491, 498; 549 NW2d 592 (1996), indicating in reference to 11 USC 108(c)(2) that "the savings provision acts as an extension to the Michigan period of limitation, not as an independent limitation period."

As plaintiff provides no evidence other than his own contention of disability, he cannot sustain his burden of demonstrating insanity for purposes of tolling the statute. *Warren Consolidated Schools v WR Grace & Co*, 205 Mich App 580, 583; 518 NW2d 508 (1994). MCL 600.5851(1) deals exclusively with an individual's disability and not the disability or infancy of a dependent. Moreover, plaintiff's unsupported assertion that his daughter's medical condition should toll the limitations period is not properly pled or supported by plaintiff. "It is not sufficient for a party to simply announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject the position." *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998), citing *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959).

II

Plaintiff maintains that the trial court erred when it dismissed his breach of contract claim. Plaintiff has failed to identify the actual language of the annuity contract that defendant breached. The annuity contract does not contain a duty to defend provision. Nothing in the annuity contract supports plaintiff's position that defendant was obligated to defend the garnishment action on plaintiff's behalf. Contrary to plaintiff's contention, there is no ambiguity in the language of the contract. Plaintiff does not argue that the wording of the contract is subject to differing interpretations. Rather, plaintiff asserts the release of funds from the annuity by defendant is contrary to plaintiff's understanding, and assurance by defendant, that the funds were protected from creditors. Plaintiff asserts that the basis of his agreement for entering into the annuity contract was the assurance by defendant that the contract was inviolate with regard to creditor actions. The problem with this argument is that plaintiff has failed to demonstrate that the annuity contract was fraudulently induced and did not conform with plaintiff's requirements. The contract is clear, on its face, that it is an "annuity contract." Further, the contract "is an Individual Retirement Annuity under Section 408(b) of the Internal Revenue Code" and may also qualify as a "Simplified Employee Pension Plan" pursuant to "Section 408(k) of the Internal Revenue Code." Plaintiff has failed to demonstrate that the contract funds were subject to MCL 600.6023(1). The structure of the annuity contract, in conformance with MCL 600.6023(1)(k) contradicts plaintiff's assertion that defendant fraudulently or negligently provided a contract that was not subject to invasion by creditors. Because plaintiff failed to timely contest the propriety of the garnishment of these funds by creditors, he cannot now assert the contract did not conform to his expectations and understanding with defendant. Similarly, because plaintiff has failed to demonstrate fraud or mistake in relation to the contract, there exists no basis to reform the contract as requested by plaintiff.

Plaintiff's assertion that defendant wrongfully released the annuity funds following the issuance of a court order, thereby breaching the annuity contract, is without a legal basis:

> A party must obey an order entered by a court with proper jurisdiction, even if the order is clearly incorrect, or the party must face the risk of being held in contempt and possibly being ordered to comply with the order at a later date. [*Kirby v Michigan High School Athletic Ass'n*, 459 Mich 23, 40; 585 NW2d 290 (1998).]

It is undisputed that only after the issuance of a court order did defendant release the funds. Also, plaintiff was apprised by defendant, at each step in the process, of the action or position

taken by defendant. By failing to take action to dispute the release of funds, subsequent to the issuance of the court order, plaintiff violated the basic tenet, that:

> A person may not disregard a court order simply on the basis of his subjective view that the order is wrong or will be declared invalid on appeal. [*Johnson v White*, 261 Mich App 332, 346; 682 NW2d 505 (2004), quoting *In re Contempt of Dudzinski*, 257 Mich App 96, 111; 667 NW2d 68 (2003).]

It was incumbent upon plaintiff to defend against the garnishment or contest the order that required defendant to relinquish the funds. Any error is solely attributable to plaintiff and fault cannot be assigned to defendant for simply complying with a valid court order.

III

Plaintiff asserts that the trial court erred when it dismissed his claims of negligence and breach of fiduciary duty against defendant. Plaintiff claims that defendant violated the Michigan Consumer Protection Act, and that plaintiff should be permitted to proceed based upon the expanded limitations period provided by MCL 445.911. The provision is not applicable as it refers to the use of class actions to preclude deceptive trade, practice or commerce declared by a court of law to be unlawful. Plaintiff asserts that defendant was more knowledgeable regarding individual retirement accounts and annuity contracts, and thus, should be held to the level of a fiduciary in the underlying transaction. However, plaintiff's status as a consumer does not transform this commercial transaction into a situation that gives rise to a fiduciary relationship.

Plaintiff's broader assertion of an action sounding in negligence is unsustainable. It is well recognized in Michigan, that:

> It has often been stated that the sometimes hazy distinction between contract and tort actions is made by applying the following rule: if a relation exists that would give rise to a legal duty without enforcing the contract promise itself, the tort action will lie, otherwise it will not. [*Sherman v Sea Ray Boats, Inc*, 251 Mich App 41, 49; 649 NW2d 783 (2002), citing *Hart v Ludwig*, 347 Mich 559, 565; 79 NW2d 895 (1956).]

While plaintiff's claims imply negligent performance by defendant, as they center on a failure to warn and instruct plaintiff, they are, in essence, a claim of nonfeasance "for which there is no duty alleged that is separate and distinct from a claim of breach of contract." *Sherman*, *supra* at 53. As such, the trial court was correct in dismissing the negligence action.

Plaintiff argues defendant breached its fiduciary duty by misleading plaintiff regarding the inviolate nature of the annuity contract by creditors. However, the relationship between an insurer and its insured is contractual, not fiduciary, in nature. "While this Court has recognized a relationship of trust and confidence between insurer and insured which permits an action for fraud predicated upon a claim of misrepresentation," *Crossley v Allstate Ins Co*, 155 Mich App 694, 697; 400 NW2d 625 (1986), citing *Drouillard v Metropolitan Life Ins Co*, 107 Mich App 608, 621; 310 NW2d 15 (1981), plaintiff's assertion of misrepresentation and negligence is simply unfounded under these facts.

IV

Plaintiff contends the trial court and defendant discriminated against him based on race, ethnicity and his status as an in propria persona plaintiff. A motion for summary disposition pursuant to MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone and may not be supported with documentary evidence. *Beaudrie v Henderson*, 465 Mich 124, 129; 631 NW2d 308 (2001).

Plaintiff merely asserted a suspicion that defendant had discriminated against him. "It is not sufficient for a party to simply announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject the position." *Wilson, supra* at 243. It is a well established rule of pleading that "[c]onclusory statements, unsupported by factual allegations, are insufficient to state a cause of action." *Churella v Pioneer State Mut Ins Co*, 258 Mich App 260, 272; 671 NW2d 125 (2003). Therefore, the trial court's dismissal of plaintiff's claim of discrimination was appropriate pursuant to MCR 2.116(C)(8).[6]

Affirmed.

/s/ William C. Whitbeck
/s/ Henry William Saad
/s/ Michael J. Talbot

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[6] Also, plaintiff implies that the trial court discriminated against him as a pro se litigant based upon the failure of the court to hold plaintiff's pleadings to a lower standard to survive summary disposition. While case law suggests that the pleadings of pro se litigants are held to "less stringent standards" than those drafted by attorneys, *Haines v Kerner*, 404 US 519, 520; 92 S Ct 594; 30 L Ed 2d 652 (1972), the technical leniency permitted does not suggest that pro se litigants are not required to follow the court rules or that their claims should survive despite an absence of factual support. A plaintiff may not leave it to a court to find or discern the factual basis to support their position. *Great Lakes Div of Nat'l Steel Corp v Ecorse*, 227 Mich App 379, 424; 576 NW2d 667 (1998). As such, the trial court properly granted summary disposition in favor of defendant on plaintiff's discrimination claim pursuant to MCR 2.116(C)(8).

Plaintiff also says that the trial court erred when it granted summary disposition prior to the conduct of discovery. Because plaintiff failed to raise this issue before the trial court, he has waived his right to appeal. In any event, discovery could and would not have changed the outcome because his claims were simply time-barred.