STATE OF MICHIGAN

COURT OF APPEALS

SHIRLEY B. AKERS,

Plaintiff-Appellant,

v

BANKERS LIFE AND CASUALTY COMPANY and SHANNON NELSON,

Defendants-Appellees,

and

JOHN DOE,

Defendant.

UNPUBLISHED
June 23, 2009

No. 283771
Grand Traverse Circuit Court
LC No. 07-026056-CZ

Before: Zahra, P.J., and Whitbeck and M.J. Kelly, JJ.

PER CURIAM.

Plaintiff Shirley Akers appeals as of right from orders granting the motions for summary disposition of defendants Bankers Life and Casualty Company (Bankers Life) and Shannon Nelson. We affirm.

I. Basic Facts And Procedural History

In 1999, Margaret Zimmerman, who was employed by Bankers Life, sold Akers a long-term care insurance policy. Bankers Life terminated Zimmerman in April 2002 for unethical activities related to her job. A Bankers Life representative informed Akers by letter that Zimmerman "no longer represent[ed]" the company, but was not told that Zimmerman had been terminated or the reasons for her termination. Bankers Life reassigned Akers's policy to another insurance agent, "John Doe."

In May 2002, Zimmerman contacted Akers and advised her to buy a $50,000 annuity from Standard Life Insurance of Indiana. Akers did so. She also followed Zimmerman's advice to obtain a "reverse mortgage" on her home and to withdraw funds from an IRA account. Zimmerman then persuaded Akers to cash the annuity and invest its proceeds, as well as those from the mortgage and the IRA, in an "Internet kiosk" investment opportunity, which was later revealed as a Ponzi scheme. In January 2006, Zimmerman pleaded guilty to criminal fraud and

was sentenced to serve 57 to 120 months in prison, and to pay restitution totaling $867,504.49, with $224,967 to be paid to Akers. As of February 2008, Akers had received $77,834.24 in restitution but was apparently unable to collect the remainder.

Akers filed this action against Bankers Life, Nelson, and John Doe on August 1, 2007, alleging negligence, intentional misrepresentation and silent fraud, concert of action, civil conspiracy, and violation of the Michigan Consumer Protection Act (MCPA).[1]

II. Summary Disposition

A. Standard Of Review

Under MCR 2.116(C)(7), a party may move for summary disposition on the ground that a claim is barred by the statute of limitations. Neither party is required to file supportive material; any documentation that is provided to the court, however, must be admissible evidence.[2] The plaintiff's well-pleaded factual allegations must be accepted as true and construed in the plaintiff's favor, unless contradicted by documentation submitted by the movant.[3] Under MCR 2.116(C)(8), a party may move for summary disposition on the ground that the opposing party has failed to state a claim on which relief can be granted. Under this motion, the legal basis of the complaint is tested by the pleadings alone.[4] All factual allegations are taken as true, and any reasonable inferences or conclusions that can be drawn from the facts are construed in the light most favorable to the nonmoving party.[5] The motion should be denied unless the claim is so clearly unenforceable as a matter of law that no factual development can possibly justify a right to recover.[6] We review de novo a trial court's ruling on a motion for summary disposition, whether the cause of action is barred by a statute of limitations, and questions of statutory interpretation.[7]

B. Statute Of Limitations

Akers claims that the trial court wrongly decided that her negligence claims were time-barred, asserting that defendants fraudulently concealed Zimmerman's termination and the reasons for her termination so as to postpone the running of the statute of limitations.

---

[1] MCL 445.901 *et seq*.

[2] *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999).

[3] MCR 2.116(G)(5); *Maiden*, *supra* at 119; *Gortney v Norfolk & W R Co*, 216 Mich App 535, 538-539; 549 NW2d 612 (1996).

[4] *Maiden*, *supra* at 119.

[5] *Id*.

[6] *Id*.

[7] *Colbert v Conybeare Law Office*, 239 Mich App 608, 613-614; 609 NW2d 208 (2000).

We conclude that the trial court properly granted summary disposition on the tort claims pursuant to MCR 2.116(C)(7) based on the expiration of the three-year statute of limitations.[8] We reject Akers's claim that MCL 600.5855, which deals with fraudulent concealment, applied. MCL 600.5855 provides:

> If a person who is or may be liable for any claim fraudulently conceals the existence of the claim or the identity of any person who is liable for the claim from the knowledge of the person entitled to sue on the claim, the action may be commenced at any time within 2 years after the person who is entitled to bring the action discovers, or should have discovered, the existence of the claim or the identity of the person who is liable for the claim, although the action would otherwise be barred by the period of limitations.

Akers did not allege evidence sufficient to establish fraudulent concealment. In *Prentis Family Found, Inc v Barbara Ann Karmanos Cancer Inst*,[9] the Court stated:

> Generally, for fraudulent concealment to postpone the running of a limitations period, the fraud must be manifested by an affirmative act or misrepresentation. The plaintiff must show that the defendant engaged in some arrangement or contrivance of an affirmative character designed to prevent subsequent discovery. Mere silence is insufficient.

Here, Akers admittedly did not contact Bankers Life to inquire about the reasons for Zimmerman's termination; thus, Akers relies on mere silence. Because silence is not enough to show fraudulent concealment, Akers's tort claims were not exempted from the applicable statute of limitations.

Akers argues that, nonetheless, her intentional misrepresentation and silent fraud claims should have survived summary disposition. However, there was no representation and thus, no misrepresentation. Moreover, for silent fraud "mere nondisclosure of facts is insufficient."[10] Similarly, "a legal duty to make a disclosure will arise most commonly in a situation where inquiries are made by the plaintiff, to which the defendant makes incomplete replies that are truthful in themselves but omit material information."[11] But here, Akers made no inquiry at all.

Akers nevertheless argues that a duty arose by virtue of a "special relationship." In an analogous context, the Michigan Supreme Court held that such a duty arises when:

---

[8] See MCL 600.5805(10).

[9] *Prentis Family Found., Inc v Barbara Ann Karmanos Cancer Inst*, 266 Mich App 39, 48; 698 NW2d 900 (2005) (internal quotations and citations omitted).

[10] *Amco Builders & Developers, Inc v Team Ace Joint Venture*, 469 Mich 90, 101; 666 NW2d 623 (2003).

[11] *Hord v Environmental Research Institute of Mich* (*After Remand*), 463 Mich 399, 412-413; 617 NW2d 543 (2000).

> (1) [an insurance] agent misrepresents the nature or extent of the coverage offered or provided (2) an ambiguous request is made that requires clarification, (3) an inquiry is made that may require advice and the agent, though he need not, gives advice that is inaccurate, or (4) the agent assumes an additional duty by either express agreement with or promise to the insured.[12]

Here, there was no representation regarding the fact of termination or the reasons therefore and, accordingly, no misrepresentation. There was no request for information, ambiguous or otherwise, and no inquiry that led to inaccurate information. Moreover, there was no assumption of duty. Thus, there was no basis for the finding of a special relationship. Accordingly, we conclude that summary disposition on the intentional misrepresentation and fraud claims was proper.

C. Michigan Consumer Protection Act

Akers argues that the trial court wrongly concluded that defendants were exempt from liability under the MCPA. Akers alleges that because Bankers Life was "engaged in trade or commerce in the State of Michigan," it was liable under the MCPA for engaging in "[u]nfair, unconscionable, or deceptive methods, acts or practices in the conduct of trade or commerce" by failing to inform Akers of the reasons for Zimmerman's termination. Because the MCPA exempts any "transaction or conduct specifically authorized under laws administered by a regulatory board or officer acting under statutory authority of this state or the United States,"[13] and the Insurance Code regulates the insurance industry, the trial court found that Bankers Life and Nelson were exempt from the MCPA.

Akers claims that certain portions of the Insurance Code[14] were intended to limit the exemption in the MCPA. Specifically, she claims that the Legislature intended to limit the exemption for regulated industries in MCL 445.904 with respect to the insurance industry based on Chapter 20 of the Insurance Code. Neither statute supports this argument. As previously stated, the MCPA prohibits "[u]nfair, unconscionable, or deceptive methods, acts, or practices in the conduct of trade or commerce."[15] However, § 4 of the act states clearly that the it does not apply to "[a] transaction or conduct specifically authorized under laws administered by a regulatory board or officer acting under statutory authority of this state or the United States."[16] Akers acknowledges that Chapter 20 of the Insurance Code identifies a variety of prohibited business practices. In addition, MCL 500.2002 provides that the purpose of the Act is to regulate the insurance industry by defining "all such practices in this state which constitute unfair methods of competition or unfair or deceptive acts or practices, and by prohibiting the trade practices so defined." Therefore, the Insurance Code's statement of its purpose shows that it

---

[12] *Harts v Farmers Ins Exch*, 461 Mich 1, 10-11; 597 NW2d 47 (1999).

[13] MCL 445.904(1)(a).

[14] MCL 500.2001 *et seq*.

[15] MCL 445.903(1).

[16] MCL 445.904(1)(a).

governs the conduct within the insurance industry that the MCPA seeks to govern within non-regulated industries.

Akers argues that her claims against defendants do not stem from any transaction or conduct regulated by the Insurance Code, and because the conduct is not regulated by the statute, "it follows that the company may not be exempt from claims regarding that conduct." However, the Michigan Supreme Court has stated that in cases analyzing the MCPA exemption, "the relevant inquiry is whether the general transaction is specifically authorized by law, regardless of whether the specific misconduct alleged is prohibited."[17] Applying this test here, the specific transaction at issue—defendants' letter to Akers notifying her that Zimmerman no longer worked for the company—was a part of Bankers Life's business as Akers's insurance provider. Because defendants' conduct was "specifically authorized" by the Insurance Code, Akers's claim that defendants were not exempt under the MCPA lacks merit.

D. Failure To Address Identity Of John Doe

Akers argues that the trial court improperly closed the case before the identity of John Doe could be determined. More specifically, Akers argues that the trial court's failure to address Akers's claims with respect to John Doe must have been a "factual error" that should be remedied on remand.

In its decision on Nelson's motion for summary disposition, the trial court stated that it would not discuss counts I and II of Akers's amended complaint because they were "directed against Defendants Bankers Life and John Doe . . . ." The trial court failed to expressly mention "John Doe" in its decision on Bankers Life's motion for summary disposition. Akers argues that this was an oversight. However, Doe was in essentially in the same position to Akers as Nelson. Moreover, as an agent of Bankers Life, any claim against "John Doe" was derivative of claims against Bankers Life. As previously discussed, the limitations period had run on those claims.

Affirmed.

/s/ Brian K. Zahra
/s/ William C. Whitbeck
/s/ Michael J. Kelly

[17] *Liss v Lewiston-Richards, Inc*, 478 Mich 203, 210; 732 NW2d 514 (2007) (internal quotations omitted).