IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR SUSSEX COUNTY

JOSEPH JADCZAK and CATHERINE JADCZAK	)	
Plaintiff,	)	
v.	)	C.A. No. 08C-05-028 RFS
ASSURANT, INC., t/d/b/a/ Assurant Solutions and Assurant Specialty Property, a Delaware Corporation; AMERICAN SECURITY INSURANCE COMPANY, a Delaware Corporation; and AIG MARKETING, INC. a Delaware Corporation,	)	
Defendant.	)	

MEMORANDUM OPINION

Upon AIG Marketing Inc.'s Motion to Dismiss. Granted in part. Denied in Part.

Submitted:January 7, 2009
Decided:April 30, 2009

Michael L. Sensor, Esq., Perry & Sensor, Wilmington, DE, Attorneys for Plaintiffs, Joseph and Catherine Jadczak.

Candice T. Aaron, Esq., and Kara H. Goodchild, Esq., Saul Ewing LLP, Wilmington, DE, Attorney for Defendant, AIG Marketing, Inc.

Michael R. Smith, Esq., Griffin & Hackett, P.A., Georgetown, DE, Attorney for Defendant, Assurant, Inc.

STOKES, Judge

This is my decision regarding AIG Marketing's ("AIGM") Motion to Dismiss. For the reasons set forth herein, the motion is granted in part. The remainder of the motion will be decided at the conclusion of a four-month discovery period on a summary judgment basis upon request by AIGM.

STATEMENT OF FACTS

On May 29, 2006, a fire occurred on the property of Joseph and Catherine Jadczak ("Plaintiffs"). This property was located at the Eagles Crest residential airpark in Milton, DE. The fire completely destroyed a hangar that was on the property. The hangar was built before their residence. Plaintiffs' had an insurance policy through Homesite Insurance Company ("Homesite") which was in effect from August 16, 2005 to August 16, 2006. Plaintiffs had initially obtained their insurance through the American International Insurance Company ("AIG"). When AIG exited the market, Plaintiffs' policy was transferred to Homesite. The initial policy with AIG had been placed for Plaintiffs by SLM Financial ("SLM") when they obtained the mortgage on their property.

A dispute arose between Plaintiffs and Homesite over how much compensation Plaintiffs were entitled to receive for the property damage. Plaintiffs argued that the hangar was insured under Coverage Part A, which allowed them to receive $622,000. Homesite argued that the hangar was insured under Coverage Part B, which allowed them to receive no more than $62,200. The essential difference between the coverages was whether the hangar could be considered a part of the dwelling or was a separate

structure subject to a 10 limitation of the dwelling amount. Plaintiffs filed suit in *Jadczak v. Homesite Insurance Company* ("*Jadczak I*") in the Superior Court as the hangar loss exceeded $62,200. After the case was removed to the federal district court, *Jadczak I* was settled on May 15, 2008 between Plaintiffs and Homesite.

During the course of discovery, it was found that Assurant, Inc. ("Assurant") may have placed the insurance policy. On May 22, 2008, Plaintiffs filed suit against Assurant and SLM for negligence in placing an insurance policy that Plaintiffs claim did not provide adequate coverage. SLM produced documents which indicated that the policy had been placed by AIGM and not SLM. On September 2, 2008 Plaintiffs were permitted to amend their complaint to add AIGM and American Security Insurance Company as defendants. SLM was dropped from the suit. Plaintiffs also added a breach of contract claim to the complaint under a third-party beneficiary theory to contracts which may have been signed between Homesite and the various defendants.

STANDARD OF REVIEW

The Court must assume all well-pleaded facts or allegations in the complaint as true when evaluating a motion to dismiss under Rule 12(b)(6). *RSS Acquisition, Inc. v. Dart Group Corp.*, 1999 WL 1442009 (Del. Super. 1999) at *2. The Court will not dismiss a claim unless the plaintiff would not be entitled to recover under any circumstances that are susceptible to proof. *Id.* The complaint must be without merit as a matter of fact or law to be dismissed. *Id.* The plaintiff will have every reasonable

factual inference drawn in his favor. *Ramunno v. Cawley*, 705 A.2d 1029, 1036 (Del. 1998).

"Dismissal is warranted where the plaintiff has failed to plead facts supporting an element of the claim, or that under no reasonable interpretation of the facts alleged could the complaint state a claim for which relief might be granted." *Hedenberg v. Raber*, 2004 WL 2191164 (Del. Super. 2004) at *1. "Where allegations are merely conclusory, however (*i.e.*, without specific allegations of fact to support them) they may be deemed insufficient to withstand a motion to dismiss." *Lord v. Souder*, 748 A.2d 393, 398 (Del. 2000).

DISCUSSION

AIGM has moved to dismiss this case on the grounds that Plaintiffs did not file a claim within the applicable statute of limitations. Section 8106(a) of the Delaware Code states:

> ... no action based on a detailed statement of the mutual demands in the nature of debit and credit between parties arising out of contractual or fiduciary relations, no action based on a promise, no action based on a statute, and no action to recover damages caused by an injury unaccompanied with force or resulting indirectly from the act of the defendant shall be brought after the expiration of 3 years from the accruing of the cause of such action...

10 *Del. C.* § 8106(a). The parties agree that this section applies to Plaintiffs' claims. The dispute is over which date started the three year period. The fire occurred on May 29, 2006; however, the claim relates to AIGM's alleged failure to secure adequate insurance

for the hangar. That insurance policy began on August 16, 2005. If the three year period began on that day, then it expired before Plaintiffs filed suit against AIGM on September 2, 2008.

The issue of when an injury occurs in a claim for negligent procurement of insurance was faced in *Kaufman v. C.L. McCabe & Sons, Inc.*, 603 A.2d 831, 834 (Del. 1992). The question there was whether the injury occurred at the time of the uncovered loss or at the time the plaintiffs entered into the contract. The Court found that since the plaintiffs could have asserted their claim prior to the loss for the difference in value between a policy which included the requested coverage (here $622,000) and the value of the policy as issued (here $62,200), the statute of limitations runs from the time of delivery of the policy. *Id.* Under the *Kaufman* precedent, Plaintiffs' injury occurred on August 16, 2005. Consequently, the statute of limitations expired before the claim against AIGM was filed.

Plaintiffs have argued that the time of discovery rule should toll the statute of limitations in this case and allow them to bring this action. The plaintiffs in *Kaufman* made the same argument. The time of discovery rule applies to injuries which are "inherently unknowable" and "sustained by a 'blamelessly ignorant' plaintiff". *Kaufman* at 835. The receipt of the insurance policy made the extent of the coverage knowable to "anyone who cared to read the policy." *Id.* Here, the fact that the plaintiffs did not know their policy was underinsured is irrelevant; they could have known from the time the policy began that the hangar was likely not part of the Schedule A coverage. Therefore, a

claim relating to negligent procurement of insurance is not tolled under the time of discovery rule.

Plaintiffs have argued that even if the injury was knowable, AIGM's involvement in it was not. Plaintiffs sued Assurant and SLM within the statutory period in the belief that those were the parties responsible. Later SLM made Plaintiffs aware of AIGM. Plaintiffs again mistakenly focus on what they actually knew as opposed to what was knowable. SLM had to have been aware of AIGM's involvement from the beginning, and Plaintiffs were aware of SLM's involvement, since SLM had produced their mortgage. There has been no allegation that SLM and/or AIGM deliberately concealed AIGM's identity from Plaintiffs. There has been no allegation that Plaintiffs even asked SLM until SLM's counsel informed Plaintiffs in a letter on August 13, 2008. Without asking, Plaintiffs cannot plausibly claim that AIGM's identity was inherently unknowable.

As a matter of record, Plaintiffs' complaint was amended after the three year period expired. The question naturally arises whether the claim should relate back to the original complaint which was filed at the proper time. Superior Court Civil Rule 15(c) states:

> An amendment of a pleading relates back to the date of the original pleading when
> (1) relation back is permitted by the law that provides the statute of limitations applicable to the action, or
> (2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, or
> (3) the amendment changes the party or the naming of the party against whom a claim is asserted if the foregoing provision (2) is satisfied and,

> within the period provided by statute or these Rules for service of the summons and complaint, the party to be brought in by amendment (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) *knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.*

Id. (emphasis added).

Rule 15(c)(3) governs any case in which an attempt is made to add a party to a suit after the statute of limitations has run. *Mullen v. Alarmguard of Delmarva, Inc.*, 625 A.2d 258, 266 (Del. 1993). It is not enough for provision (2) to be satisfied; there must have been a reason for AIGM to have known both that there was a mistake concerning its identity and that it would have been sued if not for Plaintiffs' mistake. *Id.*

In *Moorehead v. City of Wilmington*, 2003 WL 23274848 (Del. Super. 2003) at *1, the plaintiff sued the City of Wilmington after he fell due to inadequate snow and ice removal. While taking a deposition, the plaintiff that a company called Asset Management Alliance had a contract with the city for snow and ice removal. The Court did not allow that company to be added to the complaint after the statute of limitations had expired because there was no evidence that the company should have known that plaintiffs made a mistake about their identity or that if not for such a mistake, the company would have been sued. *Id.* Under the standard set forth in *Mullen*, the motion to dismiss was granted.

Here, there is not enough of a factual record for this Court to say for sure whether or not there was such a reason. Therefore, a four-month discovery period is

hereby ordered for the purpose of determining whether AIGM had reason to know of Plaintiffs' mistake and had reason to know that they would have otherwise been sued.

Plaintiffs have also brought a breach of contract claim under a third-party beneficiary theory. This claim must fail, however. Under Delaware law, a breach of contract claim must be brought within three years of the actual breach, regardless of whether the plaintiff is aware of the injury. *VLIW Technology v. Hewlett-Packard Co.*, 2005 WL 1089027 at *13 (Del. Ch. 2005). If AIGM did breach a contract with somebody when it placed Plaintiffs' insurance policy, that breach could not have occurred later than the date that policy began. The time of discovery rule does not apply to breach of contract claims; Plaintiffs' lack of knowledge does not toll the statute of limitations. *Id.* The breach of contract claim must be dismissed as a matter of law.

CONCLUSION

Considering the foregoing, AIGM's Motion to Dismiss is GRANTED concerning the third party beneficiary claim. It is denied as to the negligence claims pending a four-month discovery period to confirm that the policy was delivered on or before August 16, 2005 and, if so, see whether or not the claim can relate back under Rule 15(c) and be timely.

IT IS SO ORDERED.