IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

DELORES L. SALERNO	:	
	:	C.A. No. 02C-09-021 WLW
Plaintiff,	:	
	:	
v.	:	
	:	
SERVPRO OF HOCKESSIN/	:	
ELSMERE, INC. and	:	
STATE FARM FIRE AND	:	
CASUALTY COMPANY,	:	
	:	
Defendant.	:	

Submitted: April 4, 2003
Decided: May 19, 2003

OPINION AND ORDER

Upon Defendant State Farm's Motion for
Summary Judgment. Granted.

John C. Andrade, Esquire, Parkowski & Guerke, P.A., Dover, Delaware, attorneys for the Plaintiff.

Colin M. Shalk, Esquire, Casarino Christman & Shalk, P.A., Wilmington, Delaware, attorneys for Defendant Servpro of Hockessin/Elsmere, Inc.

Daniel V. Folt, Esquire, Duane Morris, LLP, Wilmington, Delaware, attorneys for Defendant State Farm Fire and Casualty Company.

WITHAM, J.

Facts and Background

This case arises out of damage to Plaintiff's home caused by flooding during Hurricane Floyd on or about September 16, 1999. Plaintiff was insured by State Farm for losses due to water damage and she filed a claim on September 17, 1999. At that time, State Farm recommended that Plaintiff call Servpro. She did so and Servpro was retained to clean Plaintiff's home, which it did on September 24, 1999. Servpro removed the rugs and put fans out to dry the water for a few days. When Servpro came to pick up the fans, Plaintiff asked about mold growth because of an odor in the home. Servpro sprayed the floor perimeter in the rooms on the ground floor, but allegedly did not spray the unfinished areas or the closets. State Farm and Servpro allegedly told Plaintiff that there was no further mold problem arising from the flooding. State Farm then sent Plaintiff a check for $1,488.37 for the actual cash value of repairs provided, which she did not cash at the time.

In August of 2001, Plaintiff came into contact with Servpro again for unrelated damage to her son's home. At that time, she asked Servpro to inspect her home. They did so and found mold in the heater room, the wallboards in the crawlspace and pointed out that the paneling was faded and stained from the water damage. Plaintiff then obtained a quote from Servpro and faxed it to State Farm on September 13, 2001. At that time, she also made a late claim for recovery of personal property damages. State Farm did not authorize Servpro to repair the mold problem but did send her a check for $2,008.37 for the adjusted cash value of the personal property lost or damaged. Plaintiff thereafter cashed both checks paid to her by State Farm

(the $1,488.37 for the actual cash value of repairs and the $2,008.37 for the adjusted cash value of the personal property).

Plaintiff made numerous claims against both Servpro and State Farm for the ongoing mold problem. Plaintiff has allegedly tested positive for allergies to mold and suffered medical problems related to the existence of mold. In the complaint, Plaintiff alleges that she has been out of work since the time the flood damage was allegedly improperly repaired due to her medical condition arising from continuous exposure to the mold. At the same time, she also alleges that she has been forced to move out of her home and has been out of the home since the time of the flood, returning only to keep the home maintained.

Defendant State Farm raises the issue that Plaintiff's insurance policy has a one-year suit limitations clause which should be honored to bar Plaintiff's claim filed three years after the original damage and claim. Defendant also notes that both Servpro and the structural engineering group Becker Morgan inspected the home and could not establish that the mold presently found was traceable to the flooding damage remediated by Servpro two years earlier.

Plaintiff now demands that State Farm pay her more than $10,000.00 for structural repairs additional to the work performed in 1999, more than $5,000.00 to replace personal property that was not reported as damaged until September of 2001, and to pay her personally for 13 hours of cleaning and 32 hours for researching her claims.

Applicable Rule and Law and Standard of Review

Superior Court Civil Rule 56. Summary judgment.

(b) *For defending party.* A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move, with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

The purpose of the Rule is to provide a method by which issues of law involved in proceedings may be speedily brought before the Court and disposed of without unnecessary delay.[1] Summary judgment may be granted only where, considering the facts in a light most favorable to the nonmoving party, there is no material issue of fact.[2] The moving party bears the initial burden of showing that no material issues of fact are present.[3]

Discussion and Conclusion

State Farm's motion relies on the suit limitations clause in Plaintiff's policy, which states as follows: "8. Suit Against Us. No action shall be brought unless there has been compliance with the policy provisions. The action must be started within one year after the date of loss or damage." In support of its motion, State Farm cites

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1 *State ex rel. Mitchell v. Wolcott*, 83 A.2d 759 (Del. 1951).

2 *Pullman, Inc. v. Phoenix Steel Corp.*, 304 A.2d 334 (Del. Super. Ct. 1973).

3 *Meth v. A.H. Bull & Co.*, 2000 WL 1211149 (Del. Super. Ct.).

the case of *Woodward v. Farm Family Casualty Insurance Co.*[4] as its only needed analysis. In that case, the Delaware Supreme Court ruled that an identically-worded suit limitations clause was unambiguous and fully enforceable. Salerno's lawsuit was not filed until three years after the loss occurred and, therefore, State Farm argues, is barred by the suit limitations clause consistent with controlling Supreme Court precedent.

In response, Plaintiff argues that the Delaware Supreme Court, in *Bendix Corp. v. Stagg*[5], held that the discovery rule announced in *Layton v. Allen*[6] was applicable to a product liability action involving latent diseases. Therefore, the statute of limitations begins to run when the harmful effect first manifested itself and became physically ascertainable.[7] Plaintiff argues that she was not aware as of September 16, 2000[8] that mold had existed at her residence due to the alleged failure to properly remediate the initial damage and that she had health consequences due to the existence of the mold in her residence. Postponement of the commencement of the limitations period is warranted until the victim discovers or should have discovered

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4 796 A.2d 638 (Del. 2002).

5 486 A.2d 1150 (Del. 1984).

6 246 A.2d 794, 798 (Del. 1968).

7 *Bendix Corp.* at 1152-1153.

8 One year after the date of loss.

the wrong where the negligent conduct is inherently unknowable.[9] Following this reasoning, Plaintiff argues that the suit limitations period in her policy should be postponed until she knew or reasonably should have discovered that her property damages and health problems were a result of the alleged failure of Defendants to properly remediate the initial damage to her home.

Salerno claims that she did not know until August of 2001 that her damages and health problems were a result of alleged negligence of Defendants. However, in the same complaint, she alleges as follows:

> "19. Plaintiff has been out of work *since the time the flood damage was improperly repaired* due to her medical condition arising from the presence of mold in her home.
>
> 20. Plaintiff has been forced to move out of her home and incurred additional living expenses and has been without her home *since the time of the flood* returning only to keep the home maintained."[10]

These allegations are inconsistent. Plaintiff alleges that the presence of mold has caused her health problems that prevent her from working while, at the same time alleging that she has been out of her home and, therefore, not exposed to the mold. Either scenario, on its own, would show damages to the Plaintiff. However, taken together, these allegations are inconsistent.

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[9] *Consol. Am. Ins. Co. v. Chiriboga*, 514 A.2d 1136, 1138 (Del. 1986); *Cavalier Group v. Stresscon Industries, Inc.*, 782 F. Supp. 946, 951 (D. Del. 1992).

[10] *emphasis added.*

Despite the inconsistency of these allegations, if either one is taken as true, or both, then facts are presented by the Plaintiff that show that she knew, or reasonably should have known, of the presence of mold and its effects upon her and her property some time within the first year after the alleged negligent work of Defendants. Therefore, Plaintiff's argument must fail.

As such, in accordance with the Delaware Supreme Court's holding in *Woodward*, the suit limitations provision of Plaintiff's insurance policy with Defendant State Farm is unambiguous and fully enforceable and, therefore, Plaintiff must have brought suit within one year after the date of damage. She did not file suit until three years later.

Subsequent to the hearing on this motion, Plaintiff argued three issues in a memo to the Court in support of her opposition to Defendant State Farm's motion: (1) State Farm has waived the one-year limitation by compensating Plaintiff after the one-year period expired when it paid Plaintiff for her late report of damage to personal property; (2) The loss did not occur until the mold developed and was "discovered" by Plaintiff more than one year after the initial flood damage; and (3) fact-dependent arguments exist as to "waiver by State Farm, request by Plaintiff for a copy of the policy on September 9, 2002, when the extent of the loss was discovered, etc."[11] Issue #2 is simply an extension of Plaintiff's argument addressed above. Accordingly, this Court finds that Plaintiff discovered, or reasonably should have discovered, the damages alleged in the Complaint. Issues #1 and #3 should have

[11] Plaintiff's memo (April 24, 2003) at *1.

been raised either in response to Defendant State Farm's Motion for Summary Judgment or at the hearing on the motion. Therefore, Plaintiff has failed to properly bring these issues before this Court. Despite Plaintiff's delay in raising these issues, Defendant State Farm has responded to those issues and this Court will address them here.

Issue #3 relates to fact-dependent arguments as to waiver by State Farm, request by Plaintiff for a copy of the policy, discovery of extent of damage, and other unnamed, hypothetical fact-dependent arguments. This Court is not convinced by Plaintiff's argument on this issue. The "fact-dependent" arguments raised by Plaintiff have been brought to this Court's attention already and were considered in deciding this motion. As to discovery of the alleged damage and related facts, this issue is discussed above. Alleged waiver by State Farm on the suit limitations clause will be discussed below.

Plaintiff's new Issue #1 alleges that State Farm has waived the one-year suit limitation clause by compensating Plaintiff after the one-year period when it paid Plaintiff for her late report of damage to personal property and, therefore, State Farm should be estopped from enforcing the one-year suit limitations clause. This argument fails as a matter of law because all "acts or conduct giving rise to waiver or estoppel must have occurred within the time limitation contained in the policy, rather than after such limitations have run."[12] The payment by State Farm for Plaintiff's alleged personal property damages was made well past the one-year

[12] *Friendly Farms v. Reliance Ins. Co.*, 79 F.3d 541, 545 (6th Cir. 1996).

limitations period. There are no actions by State Farm alleged to have occurred within the one-year suit limitations period that would constitute waiver. Therefore, there was no waiver on the part of State Farm as to the one-year suit limitations clause.

NOW, THEREFORE, IT IS ORDERED that Defendant State Farm's Motion for Summary Judgment is **GRANTED**.

s/s William L. Witham, Jr.
Judge

dmh
oc: Prothonotary
xc: Order distribution
File