NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2013 CA 1682

MAXUM OFFSHORE SERVICES, L.L.C.

VERSUS

LARIS INSURANCE AGENCY, L.L.C., AND ABC INSURANCE COMPANY

Judgment Rendered: SEP 17 2014

* * * * * * *

APPEALED FROM THE SEVENTEENTH JUDICIAL DISTRICT COURT
IN AND FOR THE PARISH OF LAFOURCHE
STATE OF LOUISIANA
DOCKET NUMBER 118631, DIVISION "B"

HONORABLE JEROME J. BARBERA, III, JUDGE

* * * * * * *

Charles M. Rush
Lafayette, Louisiana

Attorney for Plaintiff/Appellant
Maxum Offshore Services, L.L.C.

James H. Gibson
D. Paul Gardner, Jr.
Lafayette, Louisiana

Attorneys for Defendants/Appellees
Laris Insurance Agency, L.L.C. and
Westport Insurance Corporation

and

David M. Flotte
Joseph E. Lee
New Orleans, Louisiana

BEFORE: PETTIGREW, McDONALD, AND McCLENDON, JJ.

Pettigrew, J. Concurs

McClendon, J. dissents and assigns reasons.

McDONALD, J.

A company supplying labor to offshore oil companies appeals a judgment finding that the suit filed against its insurance agent was perempted. For the following reasons, we affirm.

FACTS

In 2006, Maxum Industries, L.L.C., was formed to provide labor to oilfield industries onshore. Also in 2006, Maxum Offshore Services, L.L.C., (Maxum), appellant in this case, was formed to supply labor to the offshore oil industry. Broc Segura was the managing member and owned a majority interest. He had been actively involved in the formation and running of several "Maxum" companies since the time he graduated from high school in 1995. All of the insurance needs for the companies had been handled by Travis Segura, Broc's father, until he left the Maxum companies in either December 2009 or January 2010. Thereafter, insurance for Maxum was handled by Broc.

After the Deepwater Horizon, an offshore drilling platform, exploded on April 20, 2010, Maxum recognized an opportunity to provide vessels and labor to participate in the massive oil spill cleanup. It was determined a Maritime Employer's Liability Insurance Policy (MEL) was needed, and Broc contacted Rudy B. Laris, an account executive with Laris Insurance Agency (Laris), the agency that had been handling the insurance needs of the Maxum companies, and Craig Romero, an agent with Laris. Broc, Rudy, and Craig met and determined that the estimated annual payroll for Maxum would be $6,000,000.00. At the time, insurers calculated premiums for MEL coverage by applying rates to the insured's projected annual payroll. Laris obtained several quotes from brokers and presented Broc with a proposal on May 28, 2010, from Chesterfield Insurance Group of London, England. The proposal was based on a payroll of $6,000,000.00 at a rate of 15 percent for a total policy cost of $945,000.00. Policy J100226 was issued by

Chesterfield on June 3, 2010, and a Cover Note was delivered to Broc on July 13, 2010.[1] It indicated the policy's cost was $945,000.00 and also indicated it had a Minimum & Deposit (M&D) premium requirement. M&D premiums are used by insurers to guarantee a certain level of premium from a policy. The insurer calculates the premium by applying the rate to the insured's projected annual payroll. At the end of the year, the premium can be adjusted and increased if the actual payroll exceeds the insured's projected payroll, and the insured will owe an additional premium. If the actual payroll is less than the projected payroll, the premium does not adjust, and the insured still owes, at "a minimum," the entire premium based on the payroll projection.

After receiving the proposal and having an opportunity to review it, Broc agreed to it and proceeded to finance the premium with First Insurance Funding Corporation (FIF). Broc's business was not as successful as he had envisioned, and his payroll was substantially less than the $6,000,000.00 that he had projected. On October 28, 2010, the MEL policy was cancelled by FIF because Maxum had failed to timely make the payments when they became due. Because the policy was cancelled before the full term, a proportion of the $945,000.00 premium was returned to Maxum. The amount returned to Maxum was $453,600.00, but this was inadequate to cover the balance Maxum owed to FIF for finance charges, late payment penalties, insufficient funds charges, cancellation charges, and interest.

A petition for damages was filed by Maxum against Laris alleging that Laris had misrepresented terms of the insurance policy and had failed to disclose explanations of various aspects of the policy to "induce" Maxum to obtain the insurance. Suit was filed in Iberia Parish and Laris filed an exception raising the objection of improper venue. Maxum agreed to a consent judgment that venue was

[1] A Cover Note is a document used to provide evidence of insurance if the policy documents are not available.

improper and, on September 12, 2011, the suit was ordered transferred to Lafourche Parish, and docketed by the clerk of court on October 3, 2011. Laris answered the petition, and included a reconventional demand against Maxum.

After discovery and the taking of numerous depositions, a motion for summary judgment was filed by Laris on March 28, 2013. Following the hearing on May 31, 2013, the trial court granted the motion finding that Maxum's claim against Laris was perempted under La. R. S. 9:5606 and, additionally, the trial court found that Louisiana law does not recognize a duty that would support a cause of action for such claims against an insurance agent.[2] A judgment was signed on June 26, 2013, dismissing all of Maxum's claims against Laris. The devolutive appeal is now before us.

Maxum appeals alleging that the trial court erred in finding that its claims were perempted under La. R.S. 9:5606, because Maxum had constructive knowledge when the policy was delivered to Broc, and it became aware of the amount of the premium.[3] Maxum argues that the July date chosen by the trial court, the date the policy was received by Broc, should not be considered the date of constructive notice sufficient to cause inquiry to be made.

DISCUSSION

In determining whether summary judgment is appropriate, appellate courts review evidence *de novo* under the same criteria that govern the trial court's determination of whether summary judgment is appropriate. An appellate court thus asks the same questions as does the trial court in determining whether

---

[2] In addition to these two claims, the motion for summary judgment also included a claim that Maxum could not prove any liability against Laris because Maxum could not prove any alleged damages. This issue was not discussed by the trial court.

[3] Maxum appealed alleging two assignments of error. In addition to the peremption issue, Maxum argues that it was error for the trial court to find that Louisiana law does not recognize a duty that supports a cause of action against an insurance agent for failing to advise it of the financial risks of a minimum and deposit provision and the implications of estimating payroll with such a policy. Because the first assignment of error is dispositive of the case, we do not address the other.

summary judgment is appropriate: whether there is any genuine issue of material fact, and whether the mover-appellant is entitled to judgment as a matter of law. **Janney v. Pearce**, 09-2103 (La. App. 1 Cir. 5/7/10), 40 So.3d 285, 289, writ denied, 10-1356 (La. 9/24/10), 45 So.3d 1078.

Louisiana Revised Statute 9:5606 provides in relevant part:

§ 5606. Actions for professional insurance agent liability

> A. No action for damages against any insurance agent, broker, solicitor, or other similar licensee under this state, whether based upon tort, or breach of contract, or otherwise, arising out of an engagement to provide insurance services shall be brought unless filed in a court of competent jurisdiction and proper venue within one year from the date of the alleged act, omission, or neglect, or within one year from the date that the alleged act, omission, or neglect is discovered or **should have been discovered**. However, even as to actions filed within one year from the date of such discovery, in all events such actions shall be filed at the latest within three years from the date of the alleged act, omission, or neglect.
>
> . . . .
>
> D. The one-year and three-year periods of limitation provided in Subsection A of this Section are peremptive periods within the meaning of Civil Code Article 3458 and, in accordance with Civil Code Article 3461, may not be renounced, interrupted, or suspended. [Emphasis supplied.]

There are numerous cases that support the date of receipt of a policy as a valid date of "discovery" of the contents of the policy. However, generally these are based on an insurance policy that is not complex and the issue is usually a question of coverage and exclusions. **Naquin v. Fortson**, 99-2984 (La. App. 1 Cir. 12/22/00), 774 So.2d 1277. The purpose of the statute requiring delivery of an insurance policy to an insured within a reasonable period of time after its issuance is to ensure that an insured is informed of the policy's contents. **MaClaff, Inc. v. Arch Ins. Co.**, 07-1182 (La. App. 3 Cir. 2/27/08), 978 So.2d 482, 488, writ granted, cause remanded on other grds, 08-1095 (La. 11/14/08), 996 So.2d 1080. An insured has a duty to read its insurance policy when it is received and is deemed to know the policy's contents. **Seruntine v. State Farm Fire and Cas. Co.**, 10-1108 (La. 9/3/10), 42 So.3d 968.

In this case, the policy was complex and there were terms, i.e. minimum and deposit, that might have needed explaining. The peremptive period commences when a plaintiff obtains actual or constructive knowledge of facts indicating to a reasonable person that he is the victim of a tort. Constructive knowledge is whatever notice is enough to excite attention and put the injured party on guard and call for inquiry. Such notice is tantamount to knowledge or notice of everything to which a reasonable inquiry may lead. Such information or knowledge as ought to reasonably put the alleged victim on inquiry is sufficient to start running of the peremptive period. **Green Trails, LLC v. Stewart Title of Louisiana, Inc.**, 12-0133 (La. App. 1 Cir. 9/21/12), 111 So.3d 14, 17-18, writ denied, 12-2295 (La. 12/14/12), 104 So.3d 443.

The trial court addressed two issues at the motion for summary judgment, peremption and liability. Regarding the peremption issue, the trial court stated that he thought a May date was more appropriate (when Broc received the initial proposal), but he chose the July date, when the policy was received by Broc.

After a *de novo* review of this summary judgment, we agree with the trial court that the earlier date of May 2010 could have been chosen as the date of constructive knowledge. The trial court stated the following when choosing the date of constructive knowledge:

> And if anybody was excited and on guard and needed to make inquiry, it was Broc Segura. He obviously was an astute businessman and he had a company that he was running. So I think the date probably could be put before July, but because we know that there was [sic] documents delivered to him on July 10, because he admits that he got documents, he says it in his petition, but if Mr. Rush says don't put that on him, put that on me, even if you say that, he admits on page 104 of his - - or was it 105 - - 105 of his deposition that he received a copy of the policy. We know that it had the premium. And he's got - - you know, the old saying a little of bit of knowledge is a dangerous thing? Well, he thought that he understood how it worked because he remembered what his daddy did, that they would do audits and that - - you know, that probably applies to worker's [sic] comp policies and some other ones where you go on the back end and see what happened. But did he know

that it applied to this or not, I don't think he did. Did he know anything about it, he says he didn't.

So the beginning date I believe of constructive knowledge, whatever notice is enough to excite attention and put the injured party on guard and call for inquiry, can't be any later than July of 2010. I don't believe a trial in this case would produce anything different than that. Good argument could be made that it was probably before that. Good argument could be made when the first time somebody told him the premium is going to be 900,000 plus tax, after he got up off the floor from hearing that, you could probably start it from there which would probably be back in May when discussions and the application was filed and when Mr. Laris first told him how much the premium was.

On the May date, Broc received the insurance proposal from Laris. Not only did it contain the premium amount of $900,000.00 plus $45,000.00 in surplus tax, resulting in the total policy cost of $945,000.00 (arrived at by a computation made by Rudy Laris with figures provided by Broc), but also the premium type was a choice between "Flat" or "Minimum and Deposit." The option Minimum and Deposit was marked with an "x" indicating Minimum and Deposit was chosen. Admittedly, Broc had little knowledge of insurance matters. In fact, the trial court judge compared his lack of knowledge of insurance to one of his law professor's lack of knowledge of criminal law.[4] The trial court judge stated:

Mr. Segura says that he doesn't know anything about insurance. And, in fact, when his deposition was taken in 2012 in November, he still didn't know anything about insurance.

It's kind of like Frank Marais [sic]. Frank Marais - - everybody knows who Frank Marais is? Whenever somebody asks him a question about criminal law and Frank - - Mr. Marais, Professor Marais's always been involved in teaching civil law - - Frank Marais's response was always "I yield to no man in my ignorance of criminal law." So that was kind of Mr. Segura's position, that he yielded to no man in his ignorance of insurance and he proclaimed it to the mountains, to the hills in his deposition.

[4] Professor Frank L. Maraist was the Nolan J. Edwards and Holt B. Harrison Professor of Law at the LSU Law Center from 1974 until he retired in 2011. He taught *Evidence, Torts, Admiralty,* and *Civil Procedure*. He also authored numerous books on Torts, Louisiana Civil Procedure, the Louisiana Law of Lawyering, Louisiana Evidence & Proof, Louisiana Civil Procedure-Special Proceedings, and Maritime Law. He did not teach any courses on criminal law subjects.

However, upon learning that a $945,000.00 yearly premium was being charged on an M&D policy, we believe that was sufficient information to constitute constructive knowledge, as it should have caused Broc to conduct further inquiry about the policy. Broc was the person charged with handling this aspect of his company's business, and we believe he should have inquired further.

Maxum maintains that a date of January 6, 2011, or January 22, 2011, should be considered as the date for commencement of the running of peremption. In January, Maxum, through Broc, learned that the premium was not based on actual payroll, and the estimated payroll of six million dollars was still being used to determine the premium owed. According to Broc, he remembers insurance accounts being audited, and he assumed the actual amount of payroll would be determined by an audit before arriving at a final premium amount. Further, he explained that this policy was the first insurance matter that he handled. Laris responds that "audit" is not referred to in any of the insurance documents.

Actually, the record indicates that Laris originally had difficulty locating a company to write the insurance needed by Maxum. Chesterfield Insurance Group of London, a subsidiary of Lloyd's of London, agreed to underwrite the MEL policy, and the policy was delivered to Broc in July 2010. By August 2010, Broc realized that his payroll estimate, which had been speculative, was overestimated. Laris requested, and Chesterfield agreed, to base the premium on a lower payroll estimate. However, upon realizing that claims had already been made, Chesterfield took the position that because the policy was an M&D policy, there was no obligation to reduce the amount of payroll that formed the basis for the premium, and declined to do so.

The issue here is whether Laris had a duty to disclose the meaning of the term "Minimum and Deposit." Craig Romero was the Laris agent handling Maxum's insurance needs. In depositions, it was disclosed that Craig was a close

personal friend of Travis Segura. More importantly, Craig did not know what an M&D insurance policy was. Craig had assured Broc that he considered him like family, and Broc professed complete trust in Craig.

Similarly, Rudy Laris had assured Broc that "we got your back." However, Rudy had experience with M&D policies and could have explained any questions concerning an M&D policy to Broc. With regard to the effects of an M&D insurance policy, Rudy testified in his deposition that he did not discuss M&D policies unless there was a belief that the policy would be cancelled. Regardless of the reason, the effect of an M&D policy was not discussed.

While Broc did not know what "Minimum and Deposit" was, he was the person in his organization responsible for handling insurance, and we agree with the trial court judge that he should have inquired at least by July when he received the policy. We know he was upset by the amount of the premium and complained about it on several occasions. While he had few options in meeting his insurance needs, he still had the obligation to understand what he was purchasing. If he did not understand something about the policy, he should have requested an explanation from Laris or inquired elsewhere prior to agreeing to the proposal in May 2010.

CONCLUSION

Accordingly, the judgment of the trial court is affirmed. Costs are assessed to Maxum Offshore Services, L.L.C.

AFFIRMED.

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2013 CA 1682

MAXUM OFFSHORE SERVICES, L.L.C.

VERSUS

LARIS INSURANCE AGENCY, L.L.C. AND ABC INSURANCE COMPANY

****

McCLENDON, J., dissenting.

I disagree with the majority's conclusion that this matter was perempted under LSA-R.S. 9:5606. The one year peremptive period does not begin to run until the agent's "alleged act, omission, or neglect is discovered or should have been discovered." LSA-R.S. 9:5606A. While the majority concludes that the alleged act, omission, or neglect should have been discovered when Maxum entered into the insurance contract and/or received the insurance policy, I cannot conclude under the facts of this case that a reasonable person would have been placed on notice at that time.

As noted by the majority, most reported cases that deem the date of receipt of an insurance policy as the date of "discovery" for purposes of peremption, involve insurance issues that are not complex and generally concern the extent of coverage or exclusions. The majority concedes, however, the complexity of the policy herein and the ambiguity of the term "minimum and deposit."[1] The majority further concedes that the term "minimum and deposit" might require explanation to an insured who is not knowledgeable in the "field of insurance."

In this case, Broc Segura contacted Laris Insurance Agency to determine what coverage would be required in connection with its operation relative to the Deepwater Horizon cleanup. Mr. Segura testified that at the time of initial

[1] Because the effect of a "minimum and deposit" policy is not within the knowledge generally held by a lay person, "an agent's specific knowledge of the insured's individual situation" may trigger a duty to disclose. See **Isidore Newman School v. J. Everett Eaves, Inc.**, 09-2161 (La. 7/6/10), 42 So.3d 352, 358.

contact, Craig Romero told him that Laris would "take care of you" and that Mr. Segura "was like family to me." Thereafter, Mr. Segura, Mr. Romero, and Rudy Laris attended a meeting in May 2010 to discuss Maxum's insurance needs. After Mr. Segura informed Mr. Laris that he had never handled insurance, Mr. Laris told Mr. Segura "don't worry ... we got your back. We're on your team. We're going to take care of you. Don't worry. That's what we're here for. ... we're just like family."

Mr. Laris informed Mr. Segura that his company would need a maritime employer's liability policy. Subsequently, Mr. Laris, based on figures obtained from Mr. Segura, calculated Maxum's projected annual payroll. Mr. Laris, although he recognized that Mr. Segura had little knowledge of insurance and was relying on Laris for coverage, never explained the effect of a "minimum and deposit" policy and did not advise that the minimum premium would be locked in based on the projected payroll figures.[2] Mr. Laris admitted that he never mentioned what would occur regarding the premium if the actual payroll was less than the projected payroll. Nor did he advise Mr. Segura of not overestimating Maxum's projected payroll.

Considering the foregoing, I dissent from the majority's conclusion that Maxum's claim is perempted. Rather, a reasonable person, under these circumstances, would not have been placed on notice until it was informed that the policy premium could not be reduced based on the actual annual payroll. Accordingly, I respectfully dissent.

[2] I note that while the actual payroll could be used to determine premium increases, it could not serve a basis for a premium reduction.