

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 4, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

No. 97-3287

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT II

BRENT K. MCFARLAND,

PLAINTIFF-APPELLANT,

v.

**THE NORTHWESTERN MUTUAL LIFE INSURANCE
COMPANY,**

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Winnebago County:
BRUCE SCHMIDT, Judge. *Affirmed.*

Before Snyder, P.J., Nettesheim and Anderson, JJ.

NETTESHEIM, J. Brent K. McFarland appeals from a trial court order dismissing his claims against The Northwestern Mutual Life Insurance Company (NML). NML was both McFarland's employer and insurer under a long-term disability insurance policy covering NML employees. McFarland's

complaint alleged breach of contract and bad faith against NML for its handling of his claims for disability benefits. The trial court determined that McFarland's claims were barred by the applicable statutes of limitations, §§ 631.83(1)(b) and 893.57, STATS. McFarland challenges the trial court's ruling on appeal. We reject his arguments and affirm.

BACKGROUND

McFarland was employed by NML as a field director from April 1, 1988, through October 1, 1993. As such, he was covered by an NML group policy which provided long-term disability benefits for partial and total disabilities. In February 1992, McFarland made a claim under this policy for total disability due to alcoholism. NML approved McFarland's claim on May 20, 1992, and paid total disability benefits for the time period commencing December 4, 1991, and ending January 9, 1992.

On March 1, 1993, McFarland submitted a claim for partial disability benefits. According to the terms of the policy, partial disability benefits are available when the insured's earnings drop below eighty percent of the Indexed Predisability Earnings. McFarland claimed that he was entitled to benefits from January 1992 through an undetermined date.¹ On June 4, 1993, NML denied McFarland's request for partial disability benefits based on its conclusion that there was insufficient documentation to support a finding that "[his] reduction in earnings in any way was caused or contributed to by a disabling

¹ We note that NML's brief states that McFarland was seeking partial disability benefits from January 1992 through March 1993. However, we do not see anything in McFarland's request or in his supporting materials which placed a termination date on the benefits he was seeking. In fact, NML's June 4, 1993 letter rejecting McFarland's request stated that McFarland was seeking partial disability benefits "beginning January 10, 1992; through an undetermined date."

condition.” NML informed McFarland that he could request a review of this denial within sixty days from the date the denial was received.

Following this denial, McFarland continued to work for NML despite his belief that he was unable to perform effectively. McFarland sought care from Dr. Kenneth Erdmann of the Erdmann Clinic of Psychiatry and Medicine. On September 16, 1993, McFarland provided NML with a report from Erdmann. This report, summarized by Dr. Lila Ireland, stated that McFarland first sought treatment for an unknown condition in August 1993; the symptoms relating to the condition dated back to August 1991. McFarland’s psychiatric evaluation determined that “[McFarland’s] bipolar condition is such that [he] has been disabled from performing the duties of his occupation since August 1991.”

On October 25, 1993, NML acknowledged receipt of the Erdmann report and informed McFarland that his request for further benefits was in the process of being reviewed. On November 2, 1993, McFarland’s attorney contacted NML requesting a response to McFarland’s benefit requests in light of Erdmann’s report and indicating his belief that a denial would not be appropriate given the additional information.

NML responded to McFarland’s attorney on December 10, 1993, indicating the claim would remain closed but would be referred to the “Quality Assurance Department” for an independent review. McFarland subsequently sought an explanation from NML stating the specific reasons for its decision to confirm its denial. On February 11, 1994, NML sent a letter to McFarland’s attorney stating that the “Quality Assurance Department” had confirmed the decision to deny McFarland’s claim and stating in detail the basis for the decision.

No further correspondence occurred between NML and McFarland until October 7, 1994, when McFarland's new attorney sent a request to NML again raising McFarland's claim for partial disability benefits. NML sent McFarland a letter on October 18, 1994, indicating that "[t]he denial of Mr. McFarland's claim represents our final decision regarding any benefits payable." McFarland responded to NML's letter on January 13, 1995, stating that NML's reasoning underlying its denial was flawed and that in the absence of any resolution McFarland would pursue claims of breach of contract and bad faith.

On January 20, 1995, NML sent a further explanation of its denial to McFarland. McFarland's response, dated May 8, 1996, outlined the history of McFarland's illness and benefit claims and again raised the threat of litigation. On December 30, 1996, McFarland's attorney sent NML's attorney a letter in support of the claim from Dr. Allen Hauer, the physician who had provided treatment to McFarland following his diagnosis by Erdmann. After receiving no response from NML regarding Hauer's letter, McFarland's attorney notified NML on January 17, 1997, that he would be filing suit after seven days. McFarland's complaint was filed on May 15, 1997, alleging breach of contract and bad faith based on NML's "denial and continued denial of [McFarland's] claim for disability benefits."

On June 19, 1997, NML filed a motion to dismiss McFarland's complaint based on the three-year statute of limitations for breach of contract claims pursuant to § 631.83(1)(b), STATS., and the two-year statute of limitations for bad faith claims pursuant to § 893.57, STATS. Additionally, NML argued that McFarland's claim was barred by the doctrine of laches.

At the hearing on the motion, the trial court found that the onset of McFarland's disability was in August or September of 1991 and that, therefore,

the statute of limitations for his breach of contract claim had run. As for McFarland's bad faith claim, the court found that the statute of limitations had expired at the earliest in 1995, two years after the denial of McFarland's application for disability benefits, or at the latest in 1997, two years after NML's January 20, 1995 letter to McFarland which confirmed NML's denial of benefits. Accordingly, the trial court dismissed McFarland's complaint. McFarland appeals.

DISCUSSION

“Whether the statute of limitations applies to a claim for relief and whether a complaint states a claim upon which relief can be granted are questions of law, which we review de novo.” *Barry v. Maple Bluff Country Club*, No. 97-0736, slip op. at 4 (Wis. Ct. App. Sep. 3, 1998, ordered published Oct. 28, 1998).

To determine whether a complaint states a claim upon which relief can be granted pursuant to a motion under § 802.06(2)(f), STATS., the facts pled are taken as admitted and inferences are drawn in favor of the party against whom the motion is brought. The pleadings are to be liberally construed and a claim will only be dismissed if the plaintiff cannot recover under any circumstances. In this analysis, we are limited to the examination of the facts as stated in the complaint.

Heinritz v. Lawrence Univ., 194 Wis.2d 606, 610-11, 535 N.W.2d 81, 83 (Ct. App. 1995) (citations omitted).

Breach of Contract

McFarland contends that the trial court erroneously dismissed his breach of contract claim based on § 631.83(1)(b), STATS., which provides that “[a]n action on disability insurance coverage must be commenced within 3 years from the time written proof of loss is required to be furnished.” It is important to first note that this statute departs from the general statute of limitations rule in

breach of contract actions. Generally, the statute of limitations for a breach of contract action accrues at the time of the breach. *See CLL Assocs. Ltd. Partnership v. Arrowhead Pacific Corp.*, 174 Wis.2d 604, 607, 497 N.W.2d 115, 116 (1993). Here, however, the statute commenced to run from the time McFarland was required to present his claim or, in the words of the statute, his proof of loss. To determine that moment, we look to the NML policy.

Pursuant to NML's group policy, an employee "must claim [Long-term Disability] Benefits within 120 days after your Beginning Date or as soon thereafter as reasonably possible. In any case, you must make such claim within one year after the end of that 120 day period. Claims not filed within these time limits will be denied and no [Long-term Disability] Benefit will be paid." The policy fixes the "Beginning Date" at "the 91st day of each period of continuous Disability." Thus, the NML policy provides a grace period of up to one year and one hundred twenty days from the Beginning Date before the statute of limitations commences to run. Functionally then, the claimant is given four years and one hundred twenty days from the Beginning Date to file the action.

Following his initial period of total disability due to alcoholism, NML paid McFarland total disability benefits for the period of December 4, 1991, through January 9, 1992. On March 1, 1993, McFarland sought partial disability benefits based on his alcoholism and other conditions from January 10, 1992, through an undetermined future date. Thus, McFarland's "Beginning Date" was April 11, 1992—ninety-one days after January 10—the date of the onset of McFarland's new further disability. Therefore, the statute of limitations began running on August 9, 1993, one year and one hundred twenty days from April 11, 1992. The statute expired three years later on August 9, 1996. However,

McFarland's action was not commenced until May 15, 1997.² As such, the action was barred by § 631.83(1)(b), STATS.

McFarland argues that each of his claims for benefits was separate and distinct and, when viewed as such, his repeated claims for benefits in his successive letters served to salvage this action. We disagree. All of McFarland's requests stemmed from his March 1, 1993 letter seeking new and additional benefits for a new and additional period of partial disability measured from January 10, 1992, to an undetermined future date. NML unequivocally rejected this request in its June 4, 1993 letter. Although NML acknowledged receipt of McFarland's repeated requests thereafter to reconsider, it never stated that it had withdrawn its denial of the claim. McFarland's unwillingness to accept "no" for an answer did not serve to postpone the running of the statute of limitations.

Moreover, as we have noted, the statute of limitations question in this case is not governed by NML's stance on McFarland's further requests, but rather by the ticking clock following McFarland's "Beginning Date."

McFarland further contends that the calculated time period for his October 1994 claim for total disability should be measured from the "'onset' of his bi-polar diagnosis in August, 1993." We are unpersuaded. McFarland's bipolar depression diagnosis provided an explanation for his symptoms which dated back to 1991. Specifically, McFarland's medical report, which he submitted to NML in September 1993, indicated that "[h]is bipolar condition is such that Mr. McFarland

² NML argues that McFarland's "Beginning Date" actually commenced in November 1991, ninety-one days after the July 1991 date that McFarland represented as the last date that he worked at full capacity. We need not address this alternative argument because our analysis uses a later "Beginning Date." Even under this more favorable analysis, McFarland's action was untimely.

has been disabled from performing the duties of his occupation since August 1991.” The record in this case establishes that McFarland’s March 1993 and October 1994 claims for disability benefits were premised upon a disability which had an “onset” date of September 1991.

McFarland also challenges the trial court’s ruling that “the statute of limitations began to run from the time he was partially disabled (1991), *regardless of whether he knew the cause or origin of his disability.*” Here, McFarland is essentially arguing for the application of a “discovery rule” in this statute of limitations case. However, § 631.83(1)(b), STATS., does not speak of when a breach occurs or when a breach is discovered. Rather, the statute measures the statute of limitations from the date the proof of loss is required to be furnished. McFarland’s argument would abrogate the statute.

Moreover, the application of the discovery rule to breach of contract claims was rejected by our supreme court in *CLL Assocs.*, 174 Wis.2d at 617, 497 N.W.2d at 120 (1993). Although McFarland’s claim has undertones which sound in tort, the fact remains that McFarland’s suit alleges breach of contract. We therefore reject McFarland’s claim that the statute of limitations did not begin to run until after he was diagnosed with bipolar depression. Based on the time calculations made in accordance with the policy language and § 631.83(1)(b), STATS., McFarland’s breach of contract claim is untimely.

Bad Faith

Next, McFarland contends that the trial court erroneously dismissed his bad faith claim on the basis of the statute of limitations set forth under § 893.57, STATS. That statute provides that “[a]n action to recover damages for ... [an] intentional tort to the person shall be commenced within 2 years after the

cause of action accrues or be barred.” McFarland contends that a genuine issue of material fact exists as to when his bad faith claim accrued. Because NML was still “handling” his claim at the time he filed this action, McFarland contends that his bad faith claim “continues to date.” We are unpersuaded. We conclude that McFarland’s bad faith claim is barred by the statute of limitations.

NML first denied McFarland’s claim for partial disability coverage in June 1993. McFarland contends, however, that a material factual dispute exists as to when the bad faith claim arose. *See Davis v. American Family Mut. Ins. Co.*, 212 Wis.2d 382, 392, 569 N.W.2d 64, 68 (Ct. App. 1997). However, such a dispute arises only when it is unclear as to when the plaintiff knew or should have discovered his or her injury for statute of limitations purposes. *See id.*

In this case, the record clearly establishes that McFarland was aware of his injury and a potential bad faith claim more than two years prior to the filing of this action. In a letter dated January 13, 1995, McFarland’s attorney informed NML that its treatment of McFarland “provides the basis for a claim not only for breach of contract, but for bad faith as well.” Nevertheless, more than two years passed before this action was filed. Even if we were to accept that the statute of limitations began to run on January 20, 1995—the date of NML’s final detailed explanation of its denial—McFarland’s claim, filed May 15, 1997, would still be untimely.

McFarland contends that NML’s continuing denial of his claims is “akin to a continuing tort” such that the statute of limitations did not run prior to

the filing of this action.³ We are unpersuaded. McFarland's injury occurred when NML denied his claim. It is clear from the correspondence of record that NML issued one denial to McFarland and thereafter merely confirmed that original denial. Therefore, McFarland's claim arose when he knew or should have known of his injury. We conclude that, at the earliest, he should have known of his injury following NML's 1993 denial. In any event, the record demonstrates that McFarland was well aware of his injury and bad faith claim by January 1995. Nevertheless, he did not file a bad faith claim until May 15, 1997, after the statute of limitations had expired. We therefore affirm the trial court's dismissal of his claim.

CONCLUSION

The statute of limitations on McFarland's breach of contract claim commenced running, at the latest, in April 1993, when the period for McFarland to file a claim expired. Because more than three years passed since that occurrence, McFarland's breach of contract action is barred by § 631.83(1)(b), STATS. Furthermore, the record demonstrates that McFarland was aware of his bad faith claim at the latest in January 1995. Because his bad faith action was also not filed until May 1997, it is barred by § 893.57, STATS. We conclude that the trial court properly dismissed McFarland's breach of contract and bad faith claims on the basis of §§ 631.83(1)(b) and 893.57.

³ This argument is akin to McFarland's contention in his breach of contract claim that his repeated requests for benefits constitute separate and discrete claims which deferred the running of the statute.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

