IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR SUSSEX COUNTY

HARRY DAVID MCGINNES,	:	C.A. No. S12C-06-037
Plaintiff,	:	
v.	:	
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,	:	
	:	
Defendant.	:	

MEMORANDUM DECISION

UPON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT - GRANTED

DATE SUBMITTED: July 19, 2013

DATE DECIDED: September 24, 2013

Kelley M. Huff, Esquire, 1011 Centre Road, Suite 210, Wilmington, DE 19805

Jeffrey A. Young, Esquire, 300 South State Street, Dover, DE 19901

STOKES, J.

This is a contract claim which plaintiff Harry David McGinnes ("plaintiff") has brought against defendant State Farm Mutual Automobile Insurance Company ("defendant") seeking benefits pursuant to the underinsured motorist coverage ("UIM") provision of his automobile policy. Currently pending before the Court is defendant's motion for summary judgment seeking dismissal of the case on the ground that it is time-barred.

FACTS

On September 8, 2006, plaintiff was driving his motor vehicle, which defendant insured, when he collided with a vehicle operated by Marissa O'Donnell ("O'Donnell"). O'Donnell crossed the center line and struck plaintiff's vehicle head on. This accident occurred in Sussex County, Delaware.

Plaintiff settled the tort claims with O'Donnell. AAA Mid-Atlantic Insurance Company insured O'Donnell, and as a part of the settlement, paid plaintiff the $15,000.00 policy limits.

Plaintiff received that payment in July, 2010.

Plaintiff maintains that the $15,000.00 is insufficient to compensate him for his injuries. He made a demand on defendant on November 17, 2010, for UIM benefits. By letter dated December 13, 2010, defendant offered to pay plaintiff $5,000.00 under his UIM coverage.

Plaintiff alleges the offered amount is not reasonable compensation for his injuries. On June 29, 2012, plaintiff filed this suit seeking UIM benefits pursuant to his policy with defendant. He alleges defendant has breached its contract with him by failing to pay him reasonable compensation for the injuries O'Donnell caused in excess of $15,000.00 and up to $50,000.00.

The insurance policy in effect at the time of the accident was entered into in Florida. Defendant's address on the policy was a Florida one and plaintiff's address was a Florida one.

The State Farm agent listed on the policy was based in Florida. The accident report from the September 8, 2006, accident shows plaintiff's address as Florida and reflects that he has a Florida driver's license. The same report establishes that the vehicle was tagged and licensed in Florida. The December 13, 2010, letter denying plaintiff full coverage came from defendant's Claim Representative located in Winter Haven, Florida. Defendant contends that this evidence establishes the cause of action arose in Florida and plaintiff resided in Florida during the times pertinent to this litigation.

Plaintiff does not allege any facts regarding his residency in the complaint. In an affidavit, he asserts the following. At the time of the accident, his residence was Dagsboro, Delaware. He received payment from the tortfeasor's liability carrier in late July, 2010, and his residence at that time was Dagsboro, Delaware. He resided at Crestview, Florida, when defendant sent its December 13, 2010, letter. His affidavit asserting residency is conclusory; it does not present any evidence to support a general assertion that he was a resident at either location.

Besides the documentary evidence, the only other substantive evidence produced in this summary judgment motion regarding plaintiff's "residency" is contained in his deposition testimony taken on June 25, 2013.

Q And your current address?

A Is [ ] Overview Drive, ... Crestview, Florida, ...

Q For how long have you lived there?

A Since April of '93.

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Q Is the Crestview address the address you list as your primary residence –

A Yes, sir.

Q – on driver's license, tax returns, et cetera?

A Yes, sir.[1]

He then explains that since 2005, he and his wife have stayed in a trailer on a lot in Dagsboro, Delaware, for a few months during the summers. They are purchasing the trailer in which they stay and they rent the lot. Their pattern is "[n]ormally it's just during the summer that we come up and spend some time."[2] He clarified:

> Q Once you decided to purchase the trailer in '05, has your history since then been to come up for a few months during the summer every year?
>
> A Yes.
>
> Q And then for the balance of the year, go back to your primary home in Florida?
>
> A Yes, sir. My primary purpose, we ended up coming up and started spending more and more time with because we ended up with people dying. So it seemed like from '05 all the way through '08, we lost at least one family member, and it seemed like it was summertime when they passed, so we would just come up and stay.[3]

He verified that the two vehicles he owned in 2006 and the three vehicles he owned as of June, 2013, all were registered in Florida. The only permanent document reflecting the Delaware address has been the electric bill, and that bill is forwarded to Florida when plaintiff and his wife are in Florida.

Defendant filed its motion for summary judgment pursuant to Superior Court Civil Rule

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[1]Deposition of Harry David McGinnes, Jr., taken June 25, 2013, at 16-17.

[2]*Id.* at 17.

[3]*Id.* at 18-19.

56, arguing the case must be dismissed because it is time-barred.

The standard for summary judgment is well-established in Delaware. Summary judgment may be granted only when no material issues of fact exist, and the moving party bears the burden of establishing the non-existence of material issues of fact.[4] Once the moving party meets its burden, then the burden shifts to the non-moving party to establish the existence of material issues of fact.[5] Where the moving party produces an affidavit or other evidence sufficient under Superior Court Civil Rule 56 in support of its motion and the burden shifts, then the non-moving party may not rest on its own pleadings, but must provide evidence showing a genuine issue of material fact for trial.[6] If, after discovery, the non-moving party cannot make a sufficient showing of the existence of an essential element of his or her case, then summary judgment must be granted.[7] If however, material issues of fact exist or if the Court determines that it does not have sufficient facts to enable it to apply the law to the facts before it, then summary judgment is inappropriate.[8]

Defendant supports its position by arguing as follows. The claim is one based in contract, and the contract was entered into in Florida. In contract cases, the determination of choice of law issues is based on the "most significant relationship" test.[9] Florida has the most significant

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[4]*Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979).

[5]*Id.* at 681.

[6]Super. Ct. Civ. R. 56(e); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).

[7]*Burkhart v. Davies*, 602 A.2d 56, 59 (Del. 1991), *cert. den.*, 112 S. Ct. 1946 (1992); *Celotex Corp. v. Catrett*, *supra.*

[8]*Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del. 1962).

[9]*Travelers Indemnity Co. v. Lake*, 594 A.2d 38 (Del. 1991).

relationship because the location of the contract and plaintiff's residence were based in Florida. Delaware's only contact was the accident's location. In Florida, the right to uninsured motorist benefits arises out of the breach of contract and thus, the applicable statute of limitations is five years from the date of the loss,[10] which is the date of the accident.[11] Thus, the statute of limitations would have run on September 8, 2011, nearly a year before the June 29, 2012, filing of the complaint.

Plaintiff's response is as follows. His cause of action against defendant accrued in July, 2010, when he received the tortfeasor's policy limits which did not fully compensate him for his injuries, and that was when he was residing in Delaware.[12] That event differs from when Delaware's three year statute of limitations commenced, which was upon notifying plaintiff of the denial of reasonable compensation on December 13, 2010.[13] Thus, the action was timely filed.

In response to defendant's contention that Florida law applies and consequently, the claim is time-barred, plaintiff argues that a choice of law analysis is **not** required because the question of which state's statute of limitations applies is a procedural question governed by the law of the

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[10]*Burnett v. Fireman's Fund Ins. Co.*, 408 So.2d 838 (Fla. Dist. Ct. App. 1982), *review den.*, 419 So.2d 1197 (Fla. 1982). This five year statute of limitations remains valid. *Fla. Stat.* § 95.11(2)(b) (1979).

[11]*State Farm Mut. Auto. Ins. Co. v. Kilbreath*, 419 So.2d 632, 633 (Fla. 1982).

[12]In support thereof, plaintiff cites to *Progressive Northern Ins. Co. v. Mohr*, 47 A.3d 492 (Del. 2012).

[13]*Allstate Ins. Co. v. Spinelli*, 443 A.2d 1286, 1287 (Del. 1982).

forum state.[14] Alternatively, plaintiff cites to Delaware's borrowing statute, 10 *Del. C.* § 8121,[15] as authority for using Delaware's statute of limitations. He argues that if the action arises out of state and plaintiff was a resident of Delaware at the time the cause of action arose, then Delaware's law governs the limitation of the action.[16]

My conclusion as to the residency issue will frame the other issues I address in this decision. Thus, I address that issue first.

The *Cerullo* case offers general law regarding residency and the borrowing statute, adopting the rule that "whether one is considered a resident for purposes of its borrowing statute 'turns on whether [the individual] has a significant connection with some locality in the state as a result of living there from some length of time during the course of a year.' [Citations omitted]"[17] The case of *Williamson v. Standard Fire Ins. Co.*,[18] fleshes out the residency standard in Delaware:

> In Delaware, the term "resident" is often equated with the legal term of "domicile." For example, under the State tax law, a resident individual of the state is defined as an individual:
>
> (1) Who is domiciled in this State to the extent of the period of

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[14]Plaintiff cites to *Central Mortg. Co. v. Morgan Stanley Mortg. Capital Holdings, LLC,* 2012 WL 3201139 (Del. Ch. Aug. 7, 2012), *rearg. den.*, 2012 WL 4503731 (Del. Ch. Oct. 1, 2012), in support of this contention.

[15]The text of this statute appears at page 8, *infra*.

[16]Plaintiff cites as authority the cases of *Cerullo v. Harper Collins Publishers, Inc.*, 2002 WL 243387 (Del. Super. Feb. 19, 2002) ("*Cerullo*") and *Pack v. Beech Aircraft Corp.*, 132 A.2d 54 (Del. 1957).

[17]*Cerullo, supra*, at * 3.

[18]2005 WL 6318348 (Del. Super. Aug. 19, 2005).

such domicile; ... or such domicile; ... or

(2) Who maintains a place of abode in this State and spends in the aggregate more than 183 days of the taxable year in this State.

30 *Del. C.* § 1103.

Domicile is said to require bodily presence plus the intent to make the place one's home. *See* Black's Law Dict. 1310 (7th ed. 1999). *See also Fritz v. Fritz*, 187 A.2d 348, 349 (Del. 1962). ("[A] domicile is defined as a dwelling place with the intention to make that place the resident's permanent home. It requires a concurrence of the fact of living at a particular place with the necessary intention of making that the permanent home."). ...

... Webster's Third New International Dictionary at 1931 (1993) defines a "residence" as "the act or fact of abiding or dwelling in a place for some time; an act of making one's home in a place." It also defines one as a "temporary or permanent dwelling place, abode or habitation to which one intends to return as distinguished from a place of temporary sojourn or transient visit." Similarly, a note to the definition of "reside" states, "reside, despite the fact that it is somewhat formal, may be the preferred term for expressing the idea that a person keeps or returns to a particular dwelling place as his fixed, settled or legal abode." *Id.*[19]

The mere fact plaintiff stayed in Delaware a few months a year does not render him a "resident" for legal purposes. To the extent *Cerullo* might be deemed authority for concluding otherwise, I decline to follow that decision. Plaintiff's undisputed deposition testimony clearly establishes that the Delaware location was not his residence. He did not stay in Delaware for significant periods of time nor did he consider it his fixed, settled, or legal abode. His residence was the Florida address. Should this Court conclude otherwise, then plaintiff would run afoul of his insurance policy, which requires that he notify defendant of any change in the location where

[19] *Id.* at *5.

the car is principally garaged,[20] as well as numerous Delaware laws.[21] A person's residence is of great significance both to an insurer as well as to each state. Plaintiff was not a Delaware resident at any time pertinent to this litigation but instead, was a resident of Florida.

I now turn to the timeliness aspect of the case.

The general rule requires the law of the forum state to apply with regard to the statute of limitations.[22] However, the Delaware legislature has modified that general rule by enacting the borrowing statute, 10 *Del. C.* § 8121.[23] This statute provides:

> Where a cause of action arises outside of this State, an action cannot be brought in a court of this State to enforce such cause of action after the expiration of whichever is shorter, the time limited by the law of this State, or the time limited by the law of the state or country where the cause of action arose, for bringing an action upon such cause of action. Where the cause of action originally accrued in favor of a person who at the time of such accrual was a resident of this State, the time limited by the law of this State shall apply.

The question, at this point, is whether the borrowing statute applies. I have concluded that

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[20]Insurance Policy, at 30-31.

[21]21 *Del. C.* § 2102 (new residents must register their vehicles within 60 days after taking up residence in Delaware); 21 *Del. C.* § 2704 (new residents must obtain a proper license in Delaware within 60 days of taking up residence); 21 *Del. C.* § 2118 (various insurance requirements must be met if a vehicle is required to be registered in Delaware).

[22]*HealthTrio, Inc. v. Margules*, 2007 WL 544156, *7 (Del Super. Jan. 16, 2007); *Delargy v. Hartford Accident and Indem. Co.,* 1986 WL 11562, * 2 (Del. Super. Oct. 8, 1986); *VLIW Technology, LLC v. Hewlett-Packard Co.*, 2005 WL 1089027, *12 (Del. Ch. May 4, 2005); *Juran v. Bron*, 2000 WL 1521478, *10 (Del. Ch. Oct. 6, 2000), *rearg. den.*, 2000 WL 33173171 (Del. Ch. Oct. 20, 2000); *Grynberg v. Total Compagnie Francaise des Petroles*, 891 F. Supp.2d 663, 678-79 (D.Del. 2012); *In re Winstar Communications, Inc,* 435 B.R. 33, 44 (Bkrtcy. D.Del. 2010).

[23]*Delargy v. Hartford Accident and Indem. Co., supra; Juran v. Bron*, *supra* at *11; *Grynberg v. Total Compagnie Francaise des Petroles*, *supra*; *In re Winstar Communications, Inc., supra.*

plaintiff was a Florida resident during all times pertinent to this litigation. The next question is whether the cause of action arose outside of this State. That involves a conflict of laws analysis.

The conflict of laws involved in this UIM case is contract, not tort: "[C]ontract law governs only those aspects of the underinsured motorist claim that are not controlled by the resolution of the facts arising from the accident."[24] If the contract itself does not have a choice of law provision, which this contract does not, then the general choice of law rules of Delaware, the forum state, apply.[25]

The test for choice of law issues in a contract case is the "most significant relationship" test set forth in the Restatement 2nd of Conflict of Laws § 188 (1971):

> (2) In the absence of an effective choice of law by the parties, the contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:
> (a) the place of contracting,
> (b) the place of negotiation of the contract,
> (c) the place of performance,
> (d) the location of the subject matter of the contract, and
> (e) the domicile, residence, nationality, place of incorporation and place of business of the parties.
> These contacts are to be evaluated according to their relative importance with respect to the particular issue.

Section 6 of the Restatement 2nd of Conflict of Laws provides:

> (2) ... [T]he factors relevant to the choice of the applicable rule of law include:
> (a) the needs of the interstate and international systems;
> (b) the relevant policies of the forum,
> (c) the relevant policies of the other interested states and the relative interests of those states in the determination of the particular issue,
> (d) the protection of justified expectations,

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[24] *Rapposelli v. State Farm Mut. Auto. Ins. Co.*, 988 A.2d 425, 428-29 (Del. 2010).

[25] *Shook & Fletcher Asbestos Settlement Trust v. Safety Nat. Cas. Corp.*, 2005 WL 2436193, *2 (Del. Super. Sept. 29, 2005), *aff'd*, 909 A.2d 125 (Del. 2006).

(e) the basic policies underlying the particular field of law,
(f) certainty, predictability and uniformity of result, and
(g) ease in the determination and application of the law to be applied.

In this case, the contract was entered into in Florida and negotiated in Florida. Plaintiff was a Florida resident during all pertinent times. The vehicle was registered in Florida. The principal location of the insured risk was Florida.[26] Defendant's place of business was Florida.[27] The denial of the underinsured benefits came from the agent in Florida. The only contacts with Delaware were that plaintiff obtained Delaware counsel, the accident occurred in Delaware, and plaintiff treated with Delaware doctors a few times. Delaware does not have a public policy reason to intervene in an insurance contract purchased in Florida and entered into between a Florida resident and a Florida company. Thus, I conclude that Florida has the most significant contacts[28] and the cause of action arose in Florida.

The borrowing statute requires the Court to apply Florida's statute of limitations as well as Florida's rules governing when the cause of action accrued.[29] In Florida, the cause of action for seeking UM/UIM benefits based upon a policy such as the one at issue accrues at the time of the

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[26]The policy required plaintiff to notify defendant if he housed the insured vehicle elsewhere; such a change modifies the principal location of the insured risk.

[27]The fact defendant sells insurance elsewhere carries little weight in this analysis.

[28]*Tiller v. Nationwide Mut. Ins. Co.*, 2007 WL 2199649 (Del. Super. 2007); *Country Preferred Ins. Co. v. Chastian*, 2012 WL 7006583 (Ill. App. 3 Dist. Aug. 13, 2012).

[29]*Delargy v. Hartford Accident and Indem. Co.*, *supra,* 1986 WL 11562 at *2.

accident,[30] and that date was September 8, 2006. Since plaintiff was not a Delaware resident at the time the cause of action arose and since the cause of action arose out of state, the borrowing statute applies.[31]

Delaware's statute of limitations for a breach of contract is three years[32] while Florida's is five years.[33] The borrowing statute requires that the Court apply the shorter statute of limitations to the time when the cause of action arose, and that would be Delaware's three year statute of limitations.[34] Plaintiff's cause of action is barred if the conduct giving rise to it occurred three years prior to the date of the filing of the complaint.[35] That would have been September 8, 2009.[36]

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[30]*State Farm Mut. Auto. Ins. Co. v. Bishop,* 750 So.2d 101 (Fla. Dist. Ct. App. 2000); *State Farm Mut. Auto. Ins. Co. v. Kilbreath, supra. Cf. Woodall v. Travelers Indemnity Co.*, 699 So.2d 1361 (Fla. Supr. 1997) (exhaustion provisions in policy tolled the statute of limitations). This differs from Delaware, where the cause of action for seeking UM/UIM benefits accrues when the insurance company notifies the insured that it will not grant those benefits. *Parisi v. State Farm Mut. Auto. Ins. Co.*, 2012 WL 2161597, *2 (Del. Super. June 13, 2012). However, since the Court has concluded that Delaware law does not apply to determining when the cause of action accrued, this law is irrelevant for calculating the running of the statute of limitations.

[31]*K&K Screw Products, L.L.C. v. Emerick Capital Investments, Inc.*, 2011 WL 3505354, *14 (Del. Ch. Aug. 9, 2011).

[32]10 *Del. C.* § 8106; *Parisi v. State Farm Mut. Auto. Ins. Co.*, *supra.*

[33]*Fla. Stat.* § 95.11(2)(b) (1979); *Woodall v. Travelers Indemnity Co.*, 699 So.2d at 1362 n. 2 ; *Burnett v. Fireman's Fund Ins. Co.*, 408 So.2d at 838.

[34]*K&K Screw Products, L.L.C. v. Emerick Capital Investments, Inc.*, *supra*; *Norman v. Elkin*, 2007 WL 2822798, *4 (D.Del. Sept. 26, 2007), *reconsideration den.*, 2008 WL 2662997 (D.Del. July 2, 2008); *In re Winstar Communications, Inc.,* 435 B.R. at 44.

[35]*Grynberg v. Total Compagnie Francaise des Petroles*, 891 F.Supp.2d at 680.

[36]The statute of limitations has passed even if Florida's longer statute of limitations applied.

Plaintiff failed to timely file his suit. Thus, the action is dismissed with prejudice.

IT IS SO ORDERED.