

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

FARM FAMILY CASUALTY)
COMPANY, As Subrogee of M.) C.A. No. K11C-07-006 JTV
Virginia Richardson and As Assignee)
of KNICELEY'S INC.,)
)
Plaintiff,)
)
v.)
)
CUMBERLAND INSURANCE)
COMPANY, INC., a foreign corp-)
oration, DOWNES INSURANCE)
ASSOCIATES, INC., a Delaware)
corporation, HARRINGTON INSUR-)
ANCE AGENCY, INC., Individually)
and as successor-in-interest to Downs)
Insurance Associates, Inc., and Marvel)
AGENCY, INC., a Delaware)
corporation,)
)
Defendants.)

Submitted: June 6, 2013
Decided: October 2, 2013

Michael R. Abbott, Esq., and David C. Malatesta, Esq., Kent & McBride,
Wilmington, Delaware. Attorneys for Plaintiffs.

Krista R. Samis, Esq., Eckert, Seamans, Cherin&Mellott, Wilmington, Delaware.
Attorney for Defendant Marvel Agency, Inc.

Kashif I. Chowdhry, Esq, Parkowski, Guerke& Swayze, Dover, Delaware.
Attorney for Defendant Downes Insurance Associates, Inc.,

Farm Family, et al., v. Cumberland Insurance, et al.

C.A. No. K11C-07-006 JTV

October 2, 2013

James S. Yoder, Esq., and Sean A. Meluney, Esq., White & Williams,
Wilmington, Delaware. Attorneys for Defendant Harrington Insurance Agency.

Stephen P. Casarino, Esq., and Rachel D. Allen, Esq., Casarino, Christman, Shalk,
Ransom & Doss, Wilmington, Delaware. Attorneys for Cumberland Insurance
Company.

*Upon Consideration of Defendant
Downes' Motion For Summary Judgment*

GRANTED

VAUGHN, President Judge

OPINION

Plaintiff Farm Family Casualty Insurance Co. ("Farm Family")¹ has asserted various claims against insurance brokers Downes Insurance Associates, Inc. ("Downes") and Harrington Insurance Agency, Inc. ("Harrington") (collectively, the "Broker Defendants"), for their failure to secure appropriate insurance coverage for Kniceley's, Inc.'s ("Kniceley") lead paint abatement business.² Now before the Court is Downes' motion for summary judgment against Farm Family.

FACTS

The Underlying Action

The precursor to this action was an underlying lawsuit where a child, Jose

¹ Farm Family brings its complaint as subrogee of M. Virginia Richardson and as assignee of Kniceley's, Inc.

² Farm Family sued another broker, Marvel Agency, Inc. ("Marvel") as well. Marvel has been dismissed from this action.

Farm Family, et al., v. Cumberland Insurance, et al.

C.A. No. K11C-07-006 JTV

October 2, 2013

LaTorre ("LaTorre"), suffered serious personal injuries and impairment caused by lead poisoning.³ The child's injuries resulted from exposure to lead paint located within a rental property owned by M. Virginia Richardson ("Richardson").

In November of 2004, it was discovered that LaTorre had an elevated blood-lead level. On December 13, 2004, after an inspection of the home indicated the presence of lead-based paint, the Delaware Division of Public Health ordered Richardson to reduce the levels of lead paint present on the property in order to bring them into compliance with state standards. Richardson hired Kniceley, a licensed lead abatement company, to handle the situation. Kniceley performed the abatement work in February and March of 2005. On March 11, 2005, subcontractor Batta Associates, Inc. ("Batta") informed Richardson that the work had been completed and that the premises had been cleared for lead dust. On August 30, 2005, LaTorre again tested positive for high blood-lead levels.⁴ The State's subsequent inspection confirmed that lead dust and paint were still present in the house.

A representative of LaTorre filed a lawsuit against Richardson on May 11, 2006. Richardson filed a third-party complaint against Kniceley and Batta on May 20, 2008 that sought contribution for their negligent failure to properly remove the lead-based paint from her home, resulting in injuries to LaTorre.

On July 8, 2008, Cumberland Insurance Company, Inc. ("Cumberland")

³ *LaTorre ex rel. Diaz v. Richardson*, C.A. No. 06C-05-020 (Del. Super.).

⁴ In fact, Richardson alleged that LaTorre's blood-lead levels actually increased after the abatement.

Farm Family, et al., v. Cumberland Insurance, et al.

C.A. No. K11C-07-006 JTV

October 2, 2013

informed Kniceley that it was denying coverage for the negligence claim brought by Richardson pursuant to a Total Pollution Exclusion Endorsement (the "total pollution exclusion") contained in the Policy. In its letter to Kniceley, Cumberland explained that "there [was] no coverage for [the] claim as presented" because the law suit was "based on [the] allegation of the release of 'pollutants' as a result of the work performed."⁵

On March 30, 2011, Richardson obtained a \$350,000 (plus costs and interest) consent judgment against Kniceley after the parties agreed to a settlement.

The Procurement of the Policy and the Brokers

In the Fall of 2002, Donald Kniceley ("Mr. Kniceley") contacted Downes, an insurance broker, to help him obtain a commercial general liability policy (the "Policy") for his painting and paint removal business. After completing the preliminary application and risk investigation processes, Downes submitted an insurance application to Cumberland on November 11, 2002. Cumberland reviewed the application and issued the Policy to Kniceley. With Downes' assistance, Kniceley renewed the Policy annually through November 2005. The Policy was in effect from November 11, 2004 to November 11, 2005, during which the aforementioned lead-paint abatement of Richardson's home occurred. It is undisputed that each iteration of the Policy contained the total pollution exclusion.

On March 13, 2006, Downes and Harrington executed an "Agreement for the

⁵ Pl.'s Resp. to Cumberland's Mot. Summ. J., Ex. C, at 3.

Farm Family, et al., v. Cumberland Insurance, et al.

C.A. No. K11C-07-006 JTV

October 2, 2013

Purchase of Assets" (the "Purchase Agreement") wherein Downes sold its property and casualty insurance businesses to Harrington. Downes remained the broker of record for Kniceley until September 18, 2006, when the broker was formally changed to Harrington. Kniceley decided to end its relationship with Harrington before the annual renewal of the Policy's coverage was slated to occur on November 11, 2006. It appears that Harrington was made aware of the change in broker by November 9, 2006 at the latest. Kniceley appointed Marvel Agency, Inc. ("Marvel") to replace Harrington as its insurance broker.

Procedural Facts

On July 7, 2011, Farm Family filed the complaint in this action against Cumberland and the Broker Defendants. Farm Family alleged that the Policy actually covered the claim filed by Richardson, and contended, alternatively, that if it did not, Cumberland, along with the Broker Defendants, made erroneous representations that the Policy would provide coverage for Kniceley's lead-based paint activities. Farm Family asserted three counts against Cumberland: (1) breach of contract, (2) breach of the duty of fair dealing, and (3) consumer fraud. The plaintiff asserted five counts against the Broker Defendants: (4) negligence, (5) breach of contract, (6) consumer fraud, (7) negligent misrepresentation and (8) equitable fraud. Also, Harrington moved to amend its answer and assert two cross-claims against Downes relating to an indemnification provision found in the Purchase Agreement: (1) for breach of contract and (2) for a declaratory judgment.

No scheduling order has been entered in this case, as the parties believe that summary judgment will resolve most, if not all, of the issues. Every defendant moved

Farm Family, et al., v. Cumberland Insurance, et al.

C.A. No. K11C-07-006 JTV

October 2, 2013

for summary judgment. Oral argument on the motions was heard on October 12, 2012. At the October 12 hearing, the Court granted Marvel's motion for summary judgment, and permitted the remaining parties to submit additional briefing and/or to request additional argument time. The parties all made supplemental submissions and another hearing occurred before the Court on June 6, 2013.

STANDARD OF REVIEW

Summary judgment should be granted when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.⁶ "[T]he moving party bears the burden of establishing the non-existence of material issues of fact."⁷ If a motion is properly supported, the burden shifts to the non-moving party to establish the existence of material issues of fact.⁸ In considering the motion, the facts must be viewed in the light most favorable to the non-moving party.⁹ Thus, the court must accept all undisputed factual assertions and accept the non-movant's version of any disputed facts.¹⁰ Summary judgment is inappropriate "when the record reasonably indicates that a material fact is in dispute or if it seems desirable to inquire more thoroughly into the facts in order to clarify the application of law to

⁶ Super. Ct. Civ. R. 56(c).

⁷ *Gray v. Allstate Ins. Co.*, 2007 WL 1334563, at *1 (Del. Super. May 2, 2007).

⁸ *Id.*

⁹ *Pierce v. Int'l Ins. Co. of Ill.*, 671 A.2d 1361, 1363 (Del. 1996).

¹⁰ *Merrill v. Crothall-American, Inc.*, 606 A.2d 96, 99-100 (Del. 1992).

Farm Family, et al., v. Cumberland Insurance, et al.
C.A. No. K11C-07-006 JTV
October 2, 2013

the circumstances."¹¹

PARTIES' CONTENTIONS

Downes contends that the Superior Court lacks subject matter jurisdiction to hear the negligent misrepresentation and equitable fraud claims; that the equitable claims should be dismissed rather than transferred; that the plaintiff's claims are barred by the applicable Statute of Limitations; that any purported liability resulting from Farm Family's claims actually lies with Cumberland, Downes' "disclosed principal;" and that because the plaintiff has offered nothing more than conclusory allegations without evidentiary support in furtherance of its claims, summary judgment must be granted.

Farm Family contends that the Superior Court has jurisdiction over its negligent misrepresentation and equitable fraud claims because they are pled within the context of the Consumer Fraud Act; that its consumer fraud claim alleges sufficient facts to state a claim upon which relief may be granted; that all of its claims fall within the applicable Statutes of Limitation pursuant to the "time of discovery" exception; that there is a genuine question of material fact regarding whether Cumberland was a disclosed principal of Downes; and that the allegations in the complaint are sufficient to sustain the causes of action against Downes.

DISCUSSION

Negligent Misrepresentation (Count VII) and Equitable Fraud (Count VIII)

¹¹ *Mumford & Miller Concrete, Inc. v. New Castle Cnty.*, 2007 WL 404771, at *1 (Del. Super. Jan. 31, 2007).

Farm Family, et al., v. Cumberland Insurance, et al.

C.A. No. K11C-07-006 JTV

October 2, 2013

"Whenever a question of subject matter jurisdiction is brought to the attention of the trial court, the issue must be decided before any further action is taken, and the issue of jurisdiction must be disposed of regardless of the form of motion."¹² In adherence to this doctrine, I first address Downes' contention that this Court lacks subject matter jurisdiction over Farm Family's allegations of negligent misrepresentation and equitable fraud.

Although Farm Family pled them as separate counts in its complaint, equitable fraud and negligent misrepresentation are essentially the same cause of action.¹³ It is well-established that the Court of Chancery retains exclusive jurisdiction over claims for negligent misrepresentation¹⁴ and equitable fraud.¹⁵ An exception to this jurisdictional doctrine applies when such claims are "raised in the context of the Consumer Fraud Act."¹⁶

Farm Family alleged its statutory fraud claim separately from its claims for

¹² *Texcel v. Commercial Fiberglass*, 1987 WL 19717, at *2 (Del. Super. Nov. 3, 1987).

¹³ *See Radius Servs., LLC v. Jack Corrozi Constr., Inc.*, 2009 WL 3273509, at *2 (Del. Super. Sept. 30, 2009) ("Equitable fraud is also known as negligent or innocent misrepresentation.").

¹⁴ *Van Lake v. Sorin CRM USA, Inc.*, 2013 WL 1087583, at *11 (Del. Super. Feb. 15, 2013).

¹⁵ *Pepsi-Cola Bot. Co. of Salisbury, Md. v. Handy*, 2000 WL 364199, at *6 (Del. Ch. Mar. 15, 2000).

¹⁶ *Iacono v. Barici*, 2006 WL 3844208, at *5 (Del. Super. Dec. 29, 2006).

Farm Family, et al., v. Cumberland Insurance, et al.

C.A. No. K11C-07-006 JTV

October 2, 2013

negligent misrepresentation and equitable fraud.¹⁷ Additionally, the equitable claims are devoid of any citation to a statutory provision of the Consumer Fraud Act. These were conscious decisions made by the plaintiff from which only one conclusion can be drawn. It is clear from reading the Complaint that Farm Family's claims for negligent misrepresentation and equitable fraud were pled outside the confines of the Consumer Fraud Act. Consequently, this Court lacks jurisdiction over those claims. Therefore, Counts VII and VIII of the Complaint are ***dismissed without prejudice*** to Farm Family's right to transfer the action to the Court of Chancery within 60 days.¹⁸

The Statute of Limitations and the Time of Discovery Exception

Three claims against Downes remain in the case: negligent procurement (Count IV), breach of contract (Count V) and consumer fraud (Count VI). These claims are all governed by the three year statute of limitations set forth in 10 Del. C. § 8106.¹⁹

¹⁷ Compl. ¶¶ 39, 43, 48. Consumer fraud is asserted as Count VI. Negligent misrepresentation and equitable fraud are asserted as Counts VII and VIII.

¹⁸ 10 Del. C. § 1902. In anticipation of the Court's finding that it lacked subject matter jurisdiction over the equitable claims, the parties argued whether transfer or dismissal was appropriate. Despite Downes' argument to the contrary, I do not read *Northpointe Holdings, Inc. v. Nationwide Emerging Managers, LLC.*, as requiring dismissal under these circumstances. 2010 WL 3707677 (Del. Super. Sept. 14, 2010). Indeed, the court in *Northpointe* decided to dismiss the plaintiff's equitable fraud claim "subject to [the plaintiff] pleading a claim for such"—*i.e.*, without prejudice—after it determined that the claim suffered from pleading deficiencies. *Id.* at *9. Having already determined that there is no subject matter jurisdiction over the equitable claims in this case, I see no reason to delve into the merits of those claims. The parties may renew their substantive arguments in the Court of Chancery if the plaintiff elects to transfer its case.

¹⁹ 10 Del. C. § 8106 (“[N]o action to recover damages caused by an injury unaccompanied with force ... shall be brought after the expiration of 3 years from the accruing of

Farm Family, et al., v. Cumberland Insurance, et al.

C.A. No. K11C-07-006 JTV

October 2, 2013

Thus, the critical issue for the Court to determine is when exactly the causes of action accrued and triggered the commencement of the three year statutory period.

Downes contends that the statute began to run when the Policy was first delivered to Kniceley, on November 11, 2002. If the three year period began on that day, then it expired well before Farm Family filed the instant lawsuit on July 7, 2011. Farm Family maintains that, pursuant to the "time of discovery" exception, the statutory period did not commence until July 8, 2008, when Cumberland informed Kniceley that it was denying coverage for Richardson's lawsuit. If that is correct, then the plaintiff asserted its claims within the three year statute of limitations.

"The general rule in [Delaware] is that the statute of limitations . . . begins to run at the time of the wrongful act, and, ignorance of a cause of action, absent concealment or fraud, does not stop it."²⁰ However, Delaware courts have recognized a "time of discovery" exception to the traditional rule that may sometimes act to toll the statute of limitations.²¹ In, *Kaufman v. C.L. McCabe & Sons, Inc.*, the Delaware Supreme Court held that the time of discovery exception "is narrowly confined in Delaware to injuries which are both: (a) 'inherently unknowable'; and (b) sustained by a 'blamelessly ignorant' plaintiff."²²

The Kaufman decision is directly applicable here. In Kaufman, the plaintiffs

the cause of action . . .").

²⁰ *Isaacson, Stolper & Co. v. Artisans's Sav. Bank*, 330 A.2d 130, 132 (Del. 1974).

²¹ *Kaufman v. C.L. McCabe & Sons, Inc.*, 603 A.2d 831, 835 (Del. 1992).

²² *Id.*

Farm Family, et al., v. Cumberland Insurance, et al.

C.A. No. K11C-07-006 JTV

October 2, 2013

brought a claim of negligent procurement against their insurance broker when their insurer denied their claim for loss of use coverage following a fire that damaged a property that they co-owned.²³ Apparently, unbeknownst to the plaintiffs, they had been excluded from the loss of use coverage when they were changed from named insureds to additional insureds under their policy.²⁴ The Kaufman plaintiffs presented the court with the same argument that is now raised by Farm Family in this case, "that the exclusion of the loss of use coverage in the insurance policy procured for them . . . was inherently unknowable to them as laymen and that they were blamelessly ignorant because they relied upon the expertise of a professional."²⁵ The Kaufman court noted that the plaintiff's "argument assume[d] too much and ha[d] been previously rejected as unsound."²⁶ The court found that:

The absence of loss of use coverage for the Kaufmans in their insurance policy was not inherently unknowable; rather, it was available to be ascertained by anyone who cared to read the policy. That is the reason for placing the terms of coverage in writing and delivering the policy representing the contractual undertaking of the issuer to the insured. The Kaufmans cannot reasonably claim to be blamelessly ignorant of the terms of a policy of which they

²³ *Id.* At 833.

²⁴ *Id.*

²⁵ *Id.* At 835.

²⁶ *Id.*

Farm Family, et al., v. Cumberland Insurance, et al.
C.A. No. K11C-07-006 JTV
October 2, 2013

had notice and constructively accepted.²⁷

Ultimately, the court in Kaufman held that the time of discovery rule did not apply and that "the cause of action accrued on the date on which the Kaufmans entered into an insurance contract whose coverage was not that which they desired for the period in question."²⁸

Farm Family contends that this case is distinguishable from Kaufman because, in Kaufman, the exclusion of coverage was "apparent on the face of the policy,"²⁹ whereas here, in a case involving lead paint, there is disagreement in the legal community as to whether the total pollution exclusion should apply. The plaintiff contends that, under these circumstances, the exclusion of coverage was not ascertainable by a layperson. Farm Family is correct that courts are split as to whether total pollution exclusions preclude coverage for injuries caused by lead paint.³⁰ However, in a separate opinion granting a motion for summary judgment filed by Cumberland, I have concluded that the total pollution exclusion in Kniceley's Policy is unambiguous and that Cumberland correctly denied coverage.³¹ I do not find the plaintiff's argument persuasive. The rule established by the court in Kaufman

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id. At 834.*

³⁰ *See Farm Family Cas. Ins. Co. v. Cumberland Ins. Co., Inc.*, C.A. No. K11C-07-006, at *12 nn.25-26 (Del. Super. Oct. 2, 2013) (listing courts on either side of the argument).

³¹ *Id.*

Farm Family, et al., v. Cumberland Insurance, et al.

C.A. No. K11C-07-006 JTV

October 2, 2013

is purposely broad. I conclude that Farm Family's negligent procurement claim falls within the scope of Kaufman because the injury in this case—the procurement of the "wrong" coverage—was not "inherently unknowable."

Upon the delivery of the initial Policy containing the total pollution exclusion on November 11, 2002, Kniceley was apprised of the existence "of facts sufficient to put a person of ordinary intelligence on inquiry which, if pursued, would lead to discovery."³² As in Kaufman, those facts could be discovered by reading the Policy. When Kniceley received the initial Policy, it had reason to know that its desired coverage may not have been obtained. Therefore, I conclude that the negligent procurement cause of action accrued on November 11, 2002.

Further, I conclude that Farm Family's breach of contract claim is also barred by the three year statute of limitations. If Downes did breach its contract with Kniceley, the breach occurred, and thus the cause of action accrued,³³ at the same time that the negligent procurement claim accrued: when Kniceley received its initial Policy from Cumberland on November 11, 2002.³⁴ The time of discovery rule does

³² *Abdi v. NVR, Inc.*, 2007 WL 2363675, at *3 (Del. Super. Aug. 17, 2007), *aff'd*, 945 A.2d 1167 (Del. 2008) (TABLE).

³³ *VLIW Tech., LLC v. Hewlett-Packard Co.*, 2005 WL 1089027, at *13 (Del. Ch. May 4, 2005) ("An action for breach of contract accrues at the time of the alleged breach of the contract.").

³⁴ *See Jadczyk v. Assurant, Inc.*, 2009 WL 1277965, at *4 (Del. Super. Apr. 30, 2009) ("The time of discovery rule does not apply to breach of contract claims.").

Farm Family, et al., v. Cumberland Insurance, et al.
C.A. No. K11C-07-006 JTV
October 2, 2013

not apply to the plaintiff's breach of contract claim.³⁵

Accordingly, the bar of the statute of limitations applies as a matter of law and Downes' motion for summary judgment on the plaintiff's claims for negligent procurement (Count IV) and breach of contract (Count V) is **granted**.

Although it seems likely that the statute has also run on the plaintiff's consumer fraud claim, the parties offer little in the way of evidence or argument regarding when the alleged wrongful acts or injuries occurred. Because the timing cannot be ascertained on the present record, that claim is best addressed in the context of the other contentions raised by the parties.

Consumer Fraud (Count VI)

Downes contends that the plaintiff has failed to sufficiently support its Delaware Consumer Fraud Act³⁶ claim. Downes contends that the plaintiff's entire claim rests upon the broad sweeping generalizations and conclusory statements alleged in its complaint and that the plaintiff has failed to offer further facts, circumstances or details to support its claims despite the opportunity to do so. Farm Family defends the sufficiency of all of its claims, generally, but it does not directly address its statutory fraud claim in its summary judgment briefing. It appears that Farm Family is content to rely upon the consumer fraud allegations asserted in its complaint.

The plaintiff's complaint avers that "[Downes] engaged in deception, fraud,

³⁵ *Id.*

³⁶ 6 *Del. C.* § 2511 *et seq.*

Farm Family, et al., v. Cumberland Insurance, et al.

C.A. No. K11C-07-006 JTV

October 2, 2013

false pretense, false promise, misrepresentation, concealment, suppression or omission of material facts with its insured, with the intent that its insured rely on such conduct in connection with the sale or advertisement of its insurance products," resulting in injuries to the plaintiff.³⁷ This assertion tracks the statutory language of 6 Del. C. § 2513 very closely.³⁸ However, Farm Family offers no further evidence to substantiate or develop the allegations in its complaint.

At this stage in the litigation, the plaintiff has had ample opportunity to acquire such evidence. The case is now over two years old and the parties have exchanged discovery directed towards fleshing out the substance of each claim. All of the plaintiff's claims-including the consumer fraud claim, specifically-have been challenged by both Downes' and Harrington's motions for summary judgment as lacking sufficient supporting evidence, but the plaintiff still has made no effort to craft a response or produce evidence aimed at establishing the consumer fraud claim's validity. Farm Family's failure to provide the Court with any evidence regarding the essential elements of its statutory fraud claim³⁹ is fatal.⁴⁰ I find that Farm Family has

³⁷ Complaint ¶¶ 41-42.

³⁸ See 6 Del. C. § 2513(a).

³⁹ See *Stephenson v. Capano Dev., Inc.*, 462 A.2d 1069, 1074 (Del. 1983) (reciting the elements of a common law or equitable fraud action and discussing the major differences between those actions and the requirements of an action brought pursuant to the Consumer Fraud Act).

⁴⁰ See *Wilmington Trust Co. v. Jestice*, 2012 WL 1414282, at *2 (Del. Super. Jan. 11, 2012) (quoting *Burkhart v. Davies*, 602 A.2d 56, 59 (Del. 1991) ("A complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts

Farm Family, et al., v. Cumberland Insurance, et al.

C.A. No. K11C-07-006 JTV

October 2, 2013

failed to state a prima facie Consumer Fraud action under 6 Del. C. § 2513. Therefore, Downes' motion for summary judgment is **granted** with regards to Count VI, consumer fraud.

CONCLUSION

For the foregoing reasons, Count VII, negligent misrepresentation, and Count VIII, equitable fraud, are **dismissed without prejudice** to Farm Family's right to transfer the action to the Court of Chancery within 60 days. Downes' motion for summary judgment is **granted** as to Count IV, negligent procurement, Count V, breach of contract, and Count VI, consumer fraud.

IT IS SO ORDERED.

 /s/ James. T. Vaughn, Jr.

cc: Prothonotary
Order Distribution
File

immaterial.”)).