State Court of Fulton County
E-FILED
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LeNora Ponzo, Clerk
Civil Division

IN THE STATE COURT OF FULTON COUNTY
STATE OF GEORGIA

PREMIER EYE CARE ASSOCIATES, P.C., Plaintiff, v. MAG MUTUAL INSURANCE COMPANY, Defendant.	CIVIL ACTION NO. 18EV005227

ORDER ON DEFENDANT'S MOTION TO DISMISS AND/OR MOTION FOR JUDGMENT ON THE PLEADINGS

This matter is before the Court on Defendant MagMutual Insurance Company's Motion to Dismiss and/or Motion for Judgment on the Pleadings and for Attorney's Fees. Having considered the record, briefs of counsel, and relevant law, Defendant's Motion is hereby **GRANTED** with regard to Defendant's Motion for Judgment on the Pleadings and **DENIED** with regard to Defendant's petition for attorney's fees pursuant to O.C.G.A. § 9-15-14 for the reasons that follow.

I. BACKGROUND

Plaintiff Premier Eye Care Associates, P.C., is a professional corporation owned and operated by Dr. Linda Szekeresh, an ophthalmologic surgeon who treats patients with sight disorders. Plaintiff was an insured of Defendant when a water pipe burst in a pizza restaurant ("Blue Jeans") located above and in the same building as Plaintiff. Water traveled down into Plaintiff's office below and caused damage to Plaintiff's property, including but not limited to medical equipment.

On May 8, 2013, Plaintiff purchased a Business Owners' Policy from Defendant, Policy Number BOP 0004109 08 ("the Policy"). Plaintiff notified Defendant of the incident at its place

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of business hours after the flooding occurred. Defendant began issuing payments to Plaintiff seven weeks after the date of the incident. Defendant paid Plaintiff $221,485.68 between November 15, 2013, and November 25, 2013, for the loss of personal property and reimbursement of computer expenses and lost business income. Twelve months later, Defendant issued to Plaintiff another payment of $118,949.70 for lost business. Plaintiff contended that it was entitled to additional business interruption payments and, in an effort to resolve that dispute, requested mediation with Defendant. The parties mediated Plaintiff's claims in January 2015 but did not reach an agreement. On February 10, 2017, Plaintiff filed a case in the Superior Court of Fulton County. Plaintiff dismissed that case without prejudice on or about July 27, 2018.

Plaintiff filed this case on October 30, 2018 pursuant to the renewal statute, O.C.G.A. § 9-2-61, seeking to recover additional monies under theories of breach of contract and bad faith pursuant to O.C.G.A. § 33-4-6. Additionally, Plaintiff seeks punitive damages and attorneys' fees pursuant to O.C.G.A. § 13-6-11. Defendant, however, contends that Plaintiff's claims against it are expressly time-barred by the limitation on actions set forth in the Policy at Section I(E)4 "Legal Action Against Us." Plaintiff counters that the current action is not barred as Defendant allegedly waived the two-year limitation period because its investigations and negotiations led Plaintiff to reasonably believe that strict compliance of the limitation provision would not be insisted upon. Plaintiff also posits that Defendant waived the time limitation provision in the insurance contract when Defendant implicitly admitted liability on the policy and when Defendant engaged in mediation with Plaintiff after expiration of the two-year limitation period. Finally, Plaintiff asserts that Defendant's alleged non-compliance with the Policy negates the limitation time bar.

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II. ANALYSIS

Under Georgia law, a motion to dismiss for failure to state a claim upon which relief may be granted should not be sustained unless:

> (1) the allegations of the complaint disclose with certainty that the claimant would not be entitled to relief under any state of provable facts asserted in support thereof; and
>
> (2) the movant establishes that the claimant could not possibly introduce evidence within the framework of the complaint sufficient to warrant a grant of the relief sought.

Anderson v. Flake, 267 Ga. 498, 501, (1997). "If, within the framework of the complaint, evidence may be introduced which will sustain a grant of the relief sought by the claimant, the complaint is sufficient and a motion to dismiss should be denied." Id. "In deciding a motion to dismiss, all pleadings are to be construed most favorably to the party who filed them, and all doubts regarding such pleadings must be resolved in the filing party's favor." Id.

With regard to the time frame within which Plaintiff may bring a legal action against Defendant, the Policy states in pertinent part:

> No one may bring a legal action against us [MagMutual] under this insurance unless:
>
> a. There has been full compliance with all of the terms of this insurance; and
>
> b. The action is brought within 2 years after the date on which the direct physical loss or damage occurred.

Policy, p. 17 (Section I(E)4).

Limitation provisions like the one contained in the Policy are valid and enforceable in Georgia. See Gen. Ins. Co. of Am. v. Lee Chocolate Co., 97 Ga. App. 588, 590 (1958) (enforcing similar one-year limitation provision); Parks v. State Farm Gen. Ins. Co., 238 Ga. App. 814, 816 (1999) ("Parks admitted in response to State Farm's request for admission that he did not file this action within one year of the date of damage. The one-year limitation period is

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valid and enforceable, and the trial court correctly granted summary judgment on this basis."). However, a limitation period may be obviated where the conduct of the insurer would "lull the claimant into a false sense of security so as constitute a waiver of the limitation defense." Ga. Farm Bureau Mut. Ins. Co. v. Pawlowski, Ga. App. 183, 184 (1997) (punctuation and footnote omitted); accord Morrill v. Cotton States Mutual Ins. Co., 293 Ga. App. 259, 263 (2008). A waiver may be inferred from an insurer's actions, conduct, or course of dealings when all of the relevant facts, when considered together, amount to an intentional relinquishment of a known right. Forsyth County v. Waterscape Servs., LLC, 303 Ga. App. 623, 630 (2010).

In the present suit, Plaintiff asserts that Defendant's actions, conduct, and course of dealings amounts to a waiver of the limitation provision. Plaintiff points to the fact that Defendant never denied liability as evidenced by making payments under the policy in question and by orally agreeing to consolidate its subrogation case against Blue Jeans with the then current suit that Plaintiff had against Blue Jeans. At the very least, argues Plaintiff, Defendant's actions rise to the level of being an issue of fact for a jury to determine. The Court disagrees. Plaintiff presents no support for the assertion that an insurer's act of making payments to a claimant, in this case payments that Plaintiff describes as "slow" and "inadequate," stands as an implicit admission of liability. Additionally, negotiation for settlement, unsuccessfully accomplished, is not that type of conduct designed to lull the claimant into a false sense of security so as to constitute a waiver of the limitation defense. Morrill, supra, at 263 (2008).

The record shows that in January of 2015, mediation between the parties took place resulting in no agreement. Importantly, the record is devoid of evidence showing that Plaintiff and Defendant engaged in any type of negotiations after the breakdown of that mediation session until approximately two years later (January 2017). Nor is there any evidence that Defendant

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continued making payments after the failed mediation session. Plaintiff had until September 19, 2015 to file an action against Defendant. It failed to do so and did not initially file suit in the Superior Court of Fulton County against Defendant until February of 2017. Thus, the totality of the record mandates a finding that Plaintiff's claims are time-barred.

Defendant has also moved the Court for an award of litigation expenses and attorney fees pursuant to O.C.G.A. § 9-15-14. Under O.C.G.A. § 9-15-14(a), the movant must prove and the Court must find that a party "has asserted a claim, defense, or other position with respect to which there existed such a complete absence of any justiciable issue of law or fact that it could not be reasonably believed that a court would accept the asserted claim, defense, or other position." Under O.C.G.A. § 9-15-14(b), the movant must demonstrate "that an attorney or party brought or defended an action, or any part thereof, that lacked substantial justification or that the action, or any part thereof, was interposed for delay or harassment, or ... that an attorney or party unnecessarily expanded the proceeding by other improper conduct, including, but not limited to, abuses of discovery procedures...." The Court finds, on the record before it, that Defendant has failed to demonstrate sanctionable conduct on Plaintiff's part under either subsection (a) or (b) of O.C.G.A. § 9-15-14. Consequently, the Court declines to grant Defendant's petition for O.C.G.A. § 9-15-14 attorney's fees.

III. <u>CONCLUSION</u>

For the foregoing reasons, Defendant's Motion to Dismiss and Motion for Judgment on the Pleadings, and for Attorneys' Fees is hereby **GRANTED IN PART AND DENIED IN PART**. The Motion is **GRANTED** with respect to Defendant's assertion that Plaintiff's claims are time-barred. The Motion is **DENIED** with respect to Defendant's petition for attorneys' fees pursuant to O.C.G.A. § 9-15-14.

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