FILED
APR 12 2019
AVIS BISHOP-THOMPSON, J.S.C.

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WAEL QATTOUS and Q PREPAID LLC d/b/a CLIFTON TELECARD ALLIANCE, Plaintiff, v. STATE FARM FIRE AND CASUALTY COMPANY, Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION-BERGEN COUNTY DOCKET NO.: BER-L-8286-18 Civil Action **ORDER**

THIS MATTER having been brought before the court on Motion by John Robertelli, Esq. of Rivkin Radler, LLP, attorneys for Defendant, State Farm Fire and Casualty Company, for an Order granting State Farm's Motion for Summary Judgment pursuant to R. 4:46-1 et. seq.; and the Court having considered the moving papers and for a good cause having been shown;

IT IS on this 12th day of ~~February~~ April, 2019;

FURTHER ORDERED that State Farm's Motion for Summary Judgment pursuant to R. 4:46-1 et. seq. is granted dismissing Plaintiffs' Complaint with prejudice as a matter of law; and it is

FURTHER ORDERED that a copy of this Order shall be served upon all parties within seven (7) days of receipt of same by the moving party.

Honorable Avis Bishop-Thompson, J.S.C.

X Opposed
OPPOSED
Unopposed

RIDER ATTACHED

WAEL QATTOUS and Q PREPAID LLC d/b/a CLIFTON TELECARD ALLIANCE v. STATE FARM FIRE AND CASUALTY COMPANY

BER-L-8286-18

RIDER TO THE ORDER DATED APRIL 12, 2019

I. Introduction and Factual Background

This matter arises from the alleged theft of property that occurred on November 18, 2012, resulting in loss ("Incident") to Q Prepaid LLC d/b/a Clifton Telecard Alliance ("Q Prepaid") operated by Wael Qattous ("Qattous" collectively "Plaintiffs"). On that date, approximately $75,000 worth of phone cards belonging to Plaintiffs were stolen from the back area of a cargo van. At the time of the Incident, Plaintiffs retained business insurance through State Farm Fire and Casualty Company ("State Farm") bearing the policy No. 90BJN5657 ("Policy"). Plaintiffs immediately reported the theft to the Clifton Police Department and State Farm. State Farm assigned the claim number 30-1W64-399 ("Claim"). On or about January 21, 2016, State Farm denied Plaintiffs Claim, pursuant to Section I – Conditions, 1(d)(2) of the Policy ("Limitation Clause"). The Limitation Clause states:

> d. Legal Action Against Us
> No one may bring a legal action against us under this insurance unless:
> (1) There has been full compliance with all of the terms of this insurance; and
> (2) The action is brought within 2 years after the date on which the accidental direct physical loss occurred.

On or about November 16, 2018, Plaintiffs initiated the instant action by filing a Summons and a Complaint alleging two (2) counts seeking judgment that the Policy covers Plaintiffs claim. State Farm did not answer the Complaint but now moves for summary judgment dismissing

Plaintiffs' Complaint on the basis that the Complaint was filed "beyond any applicable statute of limitations and is therefore time barred by operation of law." Specifically, the Complaint was filed nearly six (6) years after the Incident, and two (2) years and ten (10) months after State Farm denied the Claim.

Plaintiffs oppose the instant motion on the basis that State Farm has produced an unsigned insurance policy that purports to have the two (2) year limitation, which Plaintiffs argue was not in the insurance contract it executed and therefore did not have notice of the limitation. Additionally, Plaintiffs allege State Farm is moving in bad faith for failure to notify Plaintiffs that the Policy State Farm is relying upon to govern the Claim also bars the Claim pursuant to the Limitation Clause. Plaintiffs additionally oppose on the basis that State Farm continuing to investigate the Claim after the two (2) limitation is evidence that the Limitation Clause does not govern the Incident and, therefore, equity should toll the statute of limitations.

State Farm replies that Plaintiffs' equitable tolling argument is belied by the fact that Plaintiffs did not take any action for thirty-four (34) months between the denial on January 21, 2016 and filing of the Complaint on November 16, 2018. Additionally, the Limitation Clause is included in Plaintiffs copy of the Policy attached to the opposition brief. Finally, Plaintiffs cannot bring a breach of contract action for breach of the Policy while simultaneously arguing that the express terms as contained in the Limitation Clause do not apply.

Oral argument was held on April 12, 2019.

II. Legal Analysis: Summary Judgment Standard

New Jersey's standard for summary judgment as set forth in Brill v. Guardian Life Ins. Co. Am., 142 N.J. 520, 540 (1995) entitles a movant to summary judgment if the adverse party, having all facts and inferences viewed most favorably towards it, has not demonstrated the existence of a

dispute whose resolution in its favor will entitle him to judgment. A motion for summary judgment must be granted if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact challenged. R. 4:46-2(c); Brill, 142 N.J. at 528-29. Bare conclusions in the pleadings without factual support in affidavits will not defeat a motion for summary judgment. Brae Asset Fund, L.P. v. Newman, 327 N.J. Super. 129, 134 (App. Div. 1999).

Only when the party opposing the motion has come forward with specific facts that create a genuine issue for trial should a court deny a summary judgment motion; the opposing party may not rest upon the mere allegations or denial of its pleadings. See Brill, 142 N.J. at 529; Brae, 327 N.J. Super. at 134. At this stage, the Court's function is not to weigh the evidence and determine the truth of the matter, but rather to determine whether there is a "genuine issue as to any material fact challenged." Brill, 142 N.J. at 529. In doing so, the Court must construe the facts and inferences in the light most favorable to the non-moving party. Id. at 540.

Additionally, the Appellate Division has held that summary judgment is inappropriate prior to the completion of discovery. Wellington v. Estate of Wellington, 359 N.J. Super. 484, 496 (App. Div. 2003), cert. denied, 177 N.J. 493 (2003); see also Crippen v. Cent. Jersey Concrete Pipe Co., 176 N.J. 397, 409-10 (2003); Laidlow v. Hariton Mach. Co., 170 N.J. 602, 619-20 (2002); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986) (summary judgment is appropriate after adequate time for discovery, upon motion, against a party who fails to establish an element essential to the party's case which they bear the burden of proof). But, a party opposing summary judgment based on incomplete discovery must nonetheless establish, "'with some degree of particularity the likelihood that further discovery will supply the missing elements of the cause of action or defense.'" Wellington, 359 N.J. Super. at 496 (quoting Auster v. Kinoian, 153 N.J.

Super. 52, 56 (App. Div. 1977)). Furthermore, the party "must specify what further discovery is required, rather than simply asserting a generic contention that discovery is incomplete." Trinity Church, 394 N.J. Super. at 166.

In the instant matter, Plaintiffs are seeking judgment that the Policy covers the loss from the Incident. In support, Plaintiffs attached a version of the Policy it avers governs the dispute. However, Plaintiffs' Policy has the same Limitation Clause as stated in the certified Policy that State Farm has produced and avers governs the loss. Therefore, in the absence of a contradictory Policy, there is not a material question of fact as to whether the Limitation Clause applies since both parties have produced a Policy with the same identical provision.

Additionally, Plaintiffs argument that the Policy does not govern because it is not signed is not convincing. Whether the Policy is signed is not dispositive of the dispute, since typically, as State Farm argues, only an application for an insurance policy is signed by the applicant, rather than the insurance policy itself.

Finally, the six year limitation period prescribed by statute is not applicable to the Policy which contains a shorter, two (2) years limitations period. When an insured knows or should have known of the terms of an insurance policy, a limitations provision is enforceable "though he received notice of the limitation by means other than the policy itself." Matos v. Farmers Mut. Fire Ins. Co. of Salem Cty., 399 N.J. Super. 219, 220 (App. Div. 2008). Here, as early as May 7, 2013, five (5) months after the Incident, Plaintiffs received correspondence from State Farm regarding investigation of the claim. Therefore, Plaintiffs had ample opportunity prior to the expiration of the two (2) year period on November 18, 2014, in which to inquire into the details of the Policy to bring this suit, if same was not made known by the prior correspondence. "The law will not make a better contract for parties than they themselves have seen fit to enter into, or alter

it for the benefit of one party and to the detriment of the other. The judicial function of a court of law is to enforce the contract as it is written." James v. Fed. Ins. Co., 5 N.J. 21, 24 (1950) (quoting Kupfersmith v. Del. Ins. Co., 84 N.J.L. 271, 275 (1913)). Finally, even providing all inferences in favor of Plaintiffs, as the non-moving party, and assuming equitable tolling applies until the denial letter on January 21, 2016, the Complaint filed on November 16, 2018 was still outside the two (2) year limitation window.

Considering that the Limitation Clause, even after affording Plaintiffs the benefit that equitable tolling applies, prescribes actions against State Farm must be "brought within 2 years after the date on which the accidental direct physical loss occurred," and that Plaintiffs have not refuted that the Limitation Clause applies, but merely questions the authenticity of State Farm's certified Policy that contains the same provision, while Plaintiffs produce a Policy with the identical Limitation Clause, and in the absence of the possibility that discovery will supply the missing element for Plaintiffs to sustain its cause of action, coupled with the legal doctrine that trial courts do not make new law, this Court concludes that the time for Plaintiffs to enforce the Policy has expired.

III. Conclusion

For the aforementioned reasons, Defendant's Motion for Summary Judgment is GRANTED.