IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

AMERICAN CONTINENTAL PROPERTIES , INC., and CENTURY APARTMENTS ASSOCIATES,	:	February Term, 1994
Creditor,	:	No. 3478
v.	:	
MICHAEL LYNN and ASSOCIATES, P.C.,	:	Control Nos. 020394, 020326 020610 and 111320.
Debtor,	:	
v.	:	
NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA,	:	
Garnishee,	:	
- and -	:	
STV GROUP, INC. (formerly STV ENGINEERS, INC.), STV/WAI, INC., STV/MICHAEL LYNN ASSOCIATES, INC., and SEELYE, STEVENSON, VALUE & KNECHT,	:	
Intervenor-Garnishees.	:	

ORDER and MEMORANDUM

AND NOW, this 16th day of April 2003, upon consideration of the Motion for Summary Judgment of STV Group, Inc., et al. (the "STV Motion"), all responses in opposition thereto, the Motion for Summary Judgment of American Continental Properties, Inc. and Century Apartments Associates (the "ACP Motion"), all responses in opposition thereto, the Summary Judgment Motion of National Union Fire Insurance Company of Pittsburgh (the "National Motion"), all responses on

opposition thereto and all matters of record and in accord with the contemporaneous Opinion in support of this Order, it is hereby

ORDERED and **DECREED** that the STV Motion and the National Motion are **GRANTED**, and all claims asserted by American Continental Properties, Inc. and Century Apartments Associates are **DISMISSED**, it is further

ORDERED and **DECREED** that the ACP Motion is **DENIED** as moot.

BY THE COURT:

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GENE D. COHEN, J.

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MEMORANDUM OPINION

GENE D. COHEN, J.

Before the Court are the motions for summary judgment of (1) STVGroup, Inc. (formerly STV Engineers, Inc.), STV/WAI, Inc., STV/Michael Lynn Associates, Inc., and Seelye, Stevenson, Value & Knecht, (collectively "STV"); (2) American Continental Properties, Inc. and Century Apartments Associates and (3) National Union Fire Insurance Company of Pittsburgh, PA ("National"). For the reasons fully set forth below, the motions for summary judgment of STV and

National are **granted**. The motion for summary judgment of American Continental Properties and Century Apartments Associates is **denied** as moot.[1]

I. BACKGROUND[2]

A. The ACP Project

In the early 1980's, Century Apartments Associates ("Century") purchased a residential rental building consisting of 480 units located at 25 Central Park West in Manhattan, New York City (the "Property"). Century purchased the Property with the intent of converting the building from a rental property to a cooperative ownership. After encountering resistance from the Building's tenants and the Attorney General of New York, American Continental Properties, Inc. assumed the effort to convert the property as agent for Century (American Continental Properties, Inc. and Century shall be jointly referred to as "ACP" hereafter).

In May 1984, ACP hired the New York architectural firm Michael Lynn & Associates, P.C. ("MLA") to prepare tax lot drawings and square footage calculations for the individual units on the Property. Among other uses, the calculations were to be used as a part of an analysis by ACP to determine the selling price of the individual units. MLA's tax lot drawings and square footage

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[1] National filed its own motion for summary judgment joining and incorporating STV's arguments. ACP filed a joint response to the motions of STV and National and also filed its own motion for summary judgment to which STV and National responded. To the extent that ACP's response to the motions of STV and National incorporated by reference certain legal arguments in ACP's brief in support of its own motion, the Court considered those arguments as if set forth fully in ACP's response.

[2] Unless otherwise noted, the facts set forth in the Background are taken from the Joint Statement of Undisputed Facts submitted to the Court by the parties (the "Joint Statement"). The parties have agreed that the Joint Statement sets forth facts that are undisputed based upon the documentary and testimonial evidence produced in this case. The parties further agree that the exhibits referenced within the Joint Statement are true and correct copies of the referenced documents and are true and correct copies of deposition transcripts.

calculations were also to be included in ACP's Offering Plan to be submitted to the New York State Attorney General for approval.

ACP eventually submitted an Offering Plan that was declared effective by the New York State Attorney General in May of 1988. The Offering Plan contained MLA's square footage calculations and tax lot drawings. In late May and early June, the tax lot drawings and square footage calculations were being finalized for filing with the New York City Surveyor's Office. ACP then discovered that there were errors in MLA's square footage calculations. When the errors were disclosed, the New York State Attorney General revoked the declaration of effectiveness of the Offering Plan.

B. MLA, STV and the National Policy

National issued a professional liability policy (the "Policy") to STV Engineers, Inc., effective December 1, 1986 (STV Engineers, Inc. is now known as STV Group and will be referred to as STV Group hereafter). The Policy was issued in Pennsylvania. In consideration for National's issuing of the Policy, STV Group entered into an Indemnity Agreement dated December 1, 1986, wherein STV Group agreed to indemnify National against all liability that might incur as a result of having issued the Policy.[3] Through an endorsement to the Policy, MLA was added to the Policy as a named insured effective October 10, 1987.

In November 1987, prior to ACP's discovery of the errors in the square footage calculations, MLA entered into an assets purchase agreement with STV/WAI, an affiliate of STV Group. STV/WAI assigned its rights under the assets purchase agreement to a newly formed company

[3] STV Group also agreed by letter dating December 6, 1991, to indemnify National against any liability National might suffer from the New York Action or from claims made relating to the work MLA performed regarding the Property. Joint Statement, Exhibit 40.

STV/Michael Lynn Associates ("STV/MLA"), which is a third tier subsidiary of STV Group.

C. The MLA Arbitration Judgment

ACP contended that as a result of MLA's errors in the square footage calculations that: (i) conversion of the building was delayed for approximately seven months and (ii) it suffered damages. On November 6, 1989, ACP filed a demand for arbitration against MLA seeking to recover damages caused by the errors in the square footage calculations. On February, 28, 1990, ACP served its demand for arbitration on MLA; however, before serving MLA with the arbitration demand, ACP commenced a special proceeding in the New York Supreme Court against MLA and STV/MLA in order to conduct pre-arbitration discovery.

Although the documents produced in the special proceeding included the Asset Purchase Agreement and a side letter agreement regarding insurance, a copy of the Policy was not included.[4] During the special proceeding, counsel for MLA advised ACP that MLA had never obtained a copy of any professional liability policy from STV/MLA and was not aware if any such policy existed. Counsel for STV/MLA also advised ACP that he was unaware of any policy held by STV/MLA that included MLA.

On or about October 24, 1990, counsel for ACP filed a "Freedom of Information Law" request with the New York State Department of General Services requesting copies of any insurance certificates filed by MLA and/or STV/MLA. On December 14, 1990, in response to the request,

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[4] The Side Letter Agreement, dated September 22, 1987, provided that STV/WAI would add MLA as an additional insured under the Policy. It further provided that the maximum liability covered under the Policy would be $1,000,000. STV asserts that although the Policy has a limit of $5,000,000, the Side Letter Agreement limits any recovery under the Policy to $1,000,000. The Court need not address this issue because the Policy's limitations clause bars ACP's claim.

counsel for ACP received an insurance certificate indicating that MLA was a named insured under the Policy.

Arbitration hearings were held on November 15 and 20, 1990. After receiving the insurance certificate, ACP sent a letter, dated December 20, 1990, inviting National to participate in any remaining arbitration hearings. The letter was sent to an office in Lake Success, New York, which was the office for an AIG Company named American International Adjustment Company.[5] Copies of the letter were also sent to MLA, STV/MLA and their respective counsel. On January 15, 1991, the third and last arbitration hearing was held. Neither National nor STV/MLA attended any of the arbitration hearings and, on the day of the last arbitration hearing, MLA withdrew from the proceedings.

On March 4, 1991, an arbitration award was entered in favor of ACP and against MLA. On May 13, 1991, the award was confirmed by the New York Supreme Court and judgment was entered in the amount of $3,595,702.85 (the "MLA Judgment"). No appeal was taken of the MLA Judgment and no amount was ever paid to ACP. On June 10, 1991, counsel for ACP wrote to National demanding that it satisfy the MLA Judgment. The letter was sent to the same address as the previous letter inviting National to participate in the arbitration hearings. National did not respond to the demand for satisfaction.

D. <u>The New York Action</u>

In July 1991, ACP commenced an action directly against National pursuant to New York

[5] National asserts that the address was incorrect. Again, the Court need not address this argument because ACP's claim is barred by the Policy's limitations clause.

Insurance Law § 3420, seeking to satisfy the MLA Judgment (the "New York Action").[6] After the commencement of the New York Action, in a letter dated September 20, 1991, AIG Risk Management, Inc., an affiliate of National, formally advised STV Group that is disclaimed coverage of the MLA Judgment under the Policy. It was not until December of 1991 that ACP received a copy of the Policy.

ACP subsequently filed a motion for summary that was granted by the New York Supreme Court on July 20, 1992. On September 4, 1992, National filed a motion to renew and reargue on the grounds that: (i) New York's direct action statute did not apply because the Policy was not issued or delivered in New York and (ii) coverage was precluded because MLA knew about its errors and omissions on the ACP work prior to the time it was added as an insured under the Policy. It was at this time that National produced a "countersignature endorsement" to the Policy (the "Signature Page") that evidenced the Policy was actually issued in Pennsylvania.

On May 5, 1993, the New York Supreme Court denied National's renewal and re-argument motion. National appealed the trial court's decision and in January, 1994, the Appellate Division of the New York Supreme Court reversed ACP's award of summary judgment. The matter was remanded to the trial court to determine whether the Policy was issued or delivered in New York and if MLA knew of its errors and omissions prior to being added to the Policy.[7] ACP and National

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[6] New York Law on Insurance permits direct actions against insurance companies to recover judgments; however, an important caveat is that the direct action statute only applies to policies that are issued or delivered in New York. See N.Y. Ins. Law § 3420 (McKinney 2003). Pennsylvania has no comparable statute.

[7] The Appellate Division held that the trial court erred in not considering the Signature Page in National's motion to reargue and renew and that there were conflicting factual contentions regarding MLA's knowledge of its errors that precluded summary judgment. Joint Statement, Exhibit 45.

eventually executed a Stipulation Discontinuing Action on October 17, 1995. ACP conceded that the Policy was not issued or delivered in New York and that the New York Action be discontinued with prejudice. The stipulation also provided that the discontinuance was to be without prejudice to any other proceeding or action between the parties. On March 3, 1994, prior to the discontinuance of the New York Action, ACP commenced the present garnishment proceeding (the "Garnishment Action").

II. SUMMARY JUDGMENT

In accordance with Rule 1035.2 of the Pennsylvania Rules of Civil Procedure, this Court may grant Summary Judgment where the evidentiary record shows either that the material facts are undisputed, or the facts are insufficient to make out a prima facie cause of action or defense. McCarthy v. Dan Lepore & Sons Co., Inc., 724 A.2d 938, 940 (Pa. Super. Ct. 1998). To succeed, a defendant moving for summary judgment must make a showing that the plaintiff is unable to satisfy an element in his cause of action. Basile v. H&R Block, 777 A.2d 95, 100 (Pa. Super. Ct. 2001). To avoid summary judgment, the plaintiff, as the non-moving party, must adduce sufficient evidence on the issues essential to its case and on which it bears the burden of proof such that a reasonable jury could find in favor of the Plaintiff. McCarthy, 724 A.2d at 940. In addressing the issue, this Court is bound to review the facts in a light most favorable to the non-moving party, and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party. Manzetti v. Mercy Hospital of Pittsburgh, 565 Pa. 471, 776 A.2d 938, 945 (2001). The plaintiff, must be given the benefit of all reasonable inferences. Samarin v. GAF Corp., 391 Pa. Super. 340, 350, 571 A.2d 398, 403 (1989).

III. DISCUSSION

STV seeks the dismissal of ACP's claim on two grounds. First, STV alleges that ACP failed to bring the Garnishment Action within the one year limitations period set forth in the Policy (the "Limitations Clause"). Second, STV argues that MLA's prior knowledge of its own malpractice precludes coverage under the Policy. The Court holds that the Garnishment Action is barred by the Limitations Clause and, therefore, the Court need not rule on the merits of STV's second argument. Before addressing ACP's arguments against the application of the Limitations Clause, the Court will address ACP's legal status in this proceeding and the validity of the Limitations Clause.

A. Status Accorded ACP Judgment Creditor and Garnishor

Since Pennsylvania does not permit direct actions against insurers by judgment creditors, the vehicle through which ACP must seek satisfaction of the MLA Judgment is a garnishment action. "[G]arnishment is a well-settled, viable remedy available to a judgment creditor to collect on a judgment from the judgment debtor's insurer." Butterfield v. Giuntoli, 448 Pa.Super. 1, 18, 670 A.2d 646, 651 (1995). The insurance policy creates a debt in the amount of the judgment and the liability of the insurer is founded upon the insurer's breach of the insurance agreement with the insured. Id. The property held by the insurer that is subject to garnishment is the applicable limits of coverage provided by the insurance policy. Brown v. Candelora, 708 A.2d 104, 107 (Pa.Super.Ct. 1998). In order to recover, the judgment creditor must prove that there was a judgment and that there is an insurance policy that covers the debt. Butterfield, 448 Pa.Super. at 18, 670 A.2d at 651.

The rights of the judgment creditor, as garnishor, are not unlimited. The judgment creditor's rights are derived wholly from the judgment debtor, as such, the judgment creditor's rights cannot exceed that of the judgment debtor. Jefferson Bank v. J. Roy Morris and Scanforms, Inc., 432

Pa.Super. 546, 553, 639 A.2d 474, 477 (1994). The judgment creditor can be said to step into the shoes of the judgment debtor and, as a result, the insurer can assert any rights and defenses against the judgment creditor that it would have been able to assert against the insured. See Butterfield, 448 Pa.Super. at 18, 670 A.2d at 651; See also Ryan v.Furey, 437 Pa. 96, 104, 262 A.2d 305, 309 (1969). Moreover, the judgment creditor does not generally succeed to the rights of the judgment debtor that are in the form of unliquidated claims against the garnishee. See Brown, 708 A.2d at 107; Robert Pierson, Inc. v. London Grove Contractors, Inc., 44 B.R. 556 (E.D.Pa. 1984).

Therefore, in accordance with long standing Pennsylvania law and within certain limits, ACP may seek the satisfaction of the MLA Judgment from National through a garnishment action as if ACP were MLA. In pursuing satisfaction from National, ACP becomes subject to all of the defenses National could assert against MLA.

B. The Policy And The Limitations Clause.

STV and National assert that the Limitations Clause bars ACP's claim because ACP did not bring the Garnishment Action within the one year period after the action accrued. The Limitations Clause provides the following:

> Action Against the Company: No action shall be maintained against the Company by the Insured to recover for any loss under this Policy unless as a condition precedent thereto, the Insured shall have fully complied with all the terms and conditions of this Policy (sic) not until the amount of such loss shall have been fixed or rendered certain either by final judgment against the insured after trial of the issues and the time to appeal therefrom shall have expired without appeal having been taken, or if an appeal shall have been taken, then until after the appeal has been determined, or by agreement between parties with written consent of the Company. *In no event shall any action be maintained against the Company by the insured or any other persons unless brought within twelve (12) months after the right of action accrued hereon.* (emphasis added)

(Joint Statement, Exhibit 21, Conditions, ¶(a)(d))

Pennsylvania law by statute expressly permits the shortening of limitations periods by written agreement, so long as the agreed period is not manifestly unreasonable. See 42 Pa.C.S.A. §5501(a). Case law also clearly supports the validity of written agreements that shorten limitations periods. "It is well established in Pennsylvania that a contractual modification of the ordinary statute of limitations is valid and enforceable." Caln Village Assocs., L.P. v. The Home Indemnity Co., 75 F.Supp.2d 404, 409 (E.D.Pa. 1999)(citing Lyons v. Nationwide Ins. Co., 390 Pa.Super. 25, 567 A.2d 1100 (1989). "The validity of the special agreement as to the time of bringing any action on the policy is conceded." Howard Ins. Co. v. Hocking, 130 Pa.170, 179, 18 A. 614 (1889)(citing Insurance Co. v. Barr, 31 Pa. St. 345; Insurance Co.v. Oil., 31 Pa. St. 448; Insurance Co. v. Conover, 98 Pa. St. 384; Insurance Co. v. Weiss, 106 Pa. St. 20).

If the contractual limitations period is otherwise valid, an insurer does not need to show prejudice in order to assert the limitations clause in defense of a suit. See Hospital Support Services, LTD. v. Kemper Group, Inc., 889 F.2d 1311 (3d Cir. 1989).[8] Yet, regardless of the validity of a limitations provision, an insurer may be barred from asserting the provision as a defense if the insurer can be shown to have waived the provision or acted in a manner that misled the insured, thereby causing the insurer to not bring the action in a timely manner. O'Conner v. Allemania Fire Ins. Co. of Pittsburgh, 128 Pa.Super. 336, 194 A. 217 (1937).

ACP does not challenge the validity of the Limitations Clause on its face by arguing that the limitations period in the Policy is manifestly unreasonable. Instead, ACP asserts that the Limitations

[8] The Court adopts the well reasoned analysis of the United States Court of Appeals for the Third Circuit that is set forth in Hospital Support Services, LTD v. Kemper Group, Inc., 889 F.2d 1311 (1989). While ACP does not directly argue that National and STV must show prejudice, ACP's brief does allude to such an argument.

Clause is not enforceable and/or not applicable as against ACP. Specifically, ACP argues the following:

(i) ACP is not bound by the Limitations Clause;

(ii) ACP timely brought its action against National;

(iii) National and STV are estopped from asserting the Limitations Clause; and,

(iv) National breached the insurance agreement and, therefore, National and STV are precluded from asserting the Limitations Clause.

The Court will address each of ACP's arguments in turn.

1. National And STV May Assert The Limitations Clause against ACP

The Court finds no merit in ACP's claim that it is not bound by the Limitations Clause. As already established, ACP has no more or no less rights than MLA would have had if MLA brought this proceeding. Generally, "in an execution attachment proceeding, plaintiff is placed in the position and acquires the right of his debtor, as regards the garnishee; and, after an answer filed and issue joined, the same presumptions of law arise on trial from any particular evidence as if there had been no attachment, and the suit had been by the debtor against the garnishee." Tremont Township School Dist. v. Western Anthracite Coal Co., 381 Pa. 276, 281, 113 A.2d 234, 237 (1955)(quoting Fessler v. Ellis, 40 Pa. 248, 1861 WL 6051). ACP is bound by the terms of the Policy just as MLA.

The Court finds Ferguson v. Manufacturers' Cas. Ins. Co. of Phila. particularly instructive. 129 Pa.Super. 276, 195 A. 661 (1937) . In Ferguson, a judgment creditor brought a direct action against an insurer

based upon its judgment against the insured.[9] The policy in question contained the following

[9] The Ferguson court found no authority for the judgment creditor to bring a direct action against the insured but, nevertheless, continued its analysis of whether the suit was time barred

provision:

> No action shall lie against Company to recover upon any claim or for any loss under this Policy unless brought after the amount of such claim or loss shall have been fixed and rendered certain, either by final judgment . . . In no event shall any such action lie unless brought within (90) days after the right of action accrues as herein provided.

Id. at 277. The court held that the limitations provision in the policy was sufficiently broad so as to apply not only to actions by the insured, but any action, including actions by third parties. Id. If a policy's limitations clause is limited to just the insured, then third parties would not be bound. Id. (Citing Grahm v. U.S. Fid. & Guar. Co., 308 Pa. 534, 162 A. 902 (1932) The judgment creditor, although not a party to the policy, was therefore barred from recovery based upon of the policy's limitations clause.

The Court is not persuaded that the analysis of the court in Insurance Company of North America v. Carnahan, cited by ACP, relieves ACP of its obligations under the Limitations Clause. 446 Pa. 48, 284 A.2d 728. In fact, the Court notes that the rational contained in Carnahan tends to support the position of STV and National.

Carnahan involved a subrogation claim instituted by Insurance Company of North America ("INA"). INA's insured, Alexander Greenhill, entered into an automobile policy with INA that provided coverage to Greenhill for any damages caused by an uninsured motorist. Id. at 49, 284 A.2d at 729. On May 22, 1967, Greenhill did indeed suffer damages caused by an uninsured motorist. INA contested the amount of damages and on February 28, 1968, an arbitor awarded Greenhill judgment. INA paid and then waited fifteen months after it paid the claim to commence

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by the policy's limitations provision. Ferguson, 129 Pa.Super. at 280, 195 A. at 166. "Assuming, but not conceding, the right of the plaintiff to maintain the present suit, she is confronted with the 90-day limitation of action clause contained in the policy, upon which the action is founded." Id.

a subrogation action against the uninsured motorist. Two years had passed since the accident. The court held:

> [A]s subrogee INA possesses no greater rights than its insured. . . . The insured's right of action accrued on the date he sustained the injury to his person, not the later date when the arbitor found the appellant [INA] liable to the insured under the policy. It is the insured's right of action which appellant [INA] was pursuing when it cause the trespass to be filed.

Id. at 50, 284 A.2D at 729. Therefore, INA was barred by the two year statute of limitations.

Just because INA's right of subrogation under the contract did not accrue until it paid Greenhill's claim did not mean that INA could be accorded additional rights its insured did not have. "Thus the appellee [the uninsured motorist] in the present case may not be prejudiced by the circumstance that appellant's [INA] subrogation right, a consequence of its contractual arrangement with the insured, did not accrue under the policy until sometime later than the insured's personal injury right." Id. INA was barred by the statute of limitations because INA, suing in the shoes of its insured, could not be granted additional rights its insured did not possess. If the insured was barred by the statute of limitations, INA was also barred. ACP stands in the shoes of MLA in the same manner that INA stood in the shoes of its insured.[10]

2. The Garnishment Action Was Not Timely Brought By ACP.

Now that the Court has determined that ACP is bound by the Limitations Clause, the Court must determine when ACP's action accrued under the Policy and the time by which ACP must have brought suit. As a matter of law, this Court may determine the construction of a contract. Osial v.

[10] The Court sees no basis upon which Insurance Company of North America v. Greenhill could be held to have overruled Ferguson v. Manufacturers' Casualty Inc. Co. of Philadelphia, even *sub silentio*, as ACP asserts.

Cook, 803 A.2d 209, 214 (Pa. Super. Ct. 2002). It is a well settled tenet of contract law that "the intent of the parties to a written contract is contained in the writing itself." Tuthill v. Tuthill, 763 A.2d 417, 420 (Pa. Super. Ct. 2000) As a threshold inquiry, the Court must determine whether the language of the contract is ambiguous. Hutchison v. Sunbeam Coal Corp., 513 Pa. 192, 200-01, 519 A.2d 385, 390 (1986). A contract is ambiguous when the contract language is indefinite and reasonably susceptible to more than one meaning. Commonwealth of Pa. v. Brozzetti, 684 A.2d 658, 663 (Commonwealth Ct. 1996).

However, the "ambiguity" must appear on the face of the contract itself, and not be "created" by evidence offered by the parties. Id. A contract is not "ambiguous" simply because the parties present different interpretations of the language. Riccio v. American Republic Ins. Co., 453 Pa. Super. 364, 377, 683 A.2d 1226 (1996). Where the contract language is clear, the Court is limited to review of the expressed terms and many not consider extrinsic or parol evidence. Steuart v. McChesney, 498 Pa. 45, 49, 444 A.2d 659, 661 (1982). Following the "plain meaning" rule, the Court is bound to interpret the terms as manifestly expressed in the contract, rather than as silently intended by a party. Id. at 49.

Lastly, "where the facts are not in dispute, the question of whether the statute of limitations on a claim has run is a question of law for the court. Boyle v. State Farm Mutual Automobile Ins. Company, 310 Pa.Super. 10, 15, 456 A.2d 156, 158 (1983)(citing Smith v. Bell Telephone Co. of Pennsylvania, 397 Pa. 134, 153 A.2d 477 (1959). Therefore, as a matter of law this Court may interpret the Policy's limitations provision and determine when the limitations period had run.

(a) ACP's Action Against National Accrued On June 13, 1991

The Limitations Clause provides two temporal criteria for bringing an action against

National. First, no action can be brought against National "until the amount of such loss shall have been fixed or rendered certain either by final judgment against the insured after trial of the issues and the time to appeal therefrom shall have expired without appeal having been taken, or if an appeal shall have been taken, then until after the appeal has been determined . . . ." Joint Statement, Exhibit 21, p.2-3/B-2. Although a judgment may be entered against the insured, tp be able to bring an action against National, a party must wait until the judgment becomes final and without an appeal having been taken or after any appeals taken have been determined ("Final Judgment"). The MLA Judgment was entered on May 13, 1991. Under New York law, an appeal of the MLA Judgment must be taken within 30 days from the date of entry of the judgment. N.Y.C.P.L.R. 5513(a) (McKinney 2003). Therefore, because no appeal was taken, June 13, 1991, was the earliest date that ACP could have brought an action against National under the Policy.

Second, the Limitations Clause sets an outer limit by providing that "in no event shall any action be maintained against the Company by the insured or any other persons unless brought within twelve (12) months after the right of action accrued hereon." Id. A claim under the Policy is not legally cognizable until it is a Final Judgment. Since a party is not able to sue until it is a Final Judgment, the one year limitations period begins to run on that date. Under the plain language of the Limitations Clause, ACP's claim against National accrued on June 13, 1991. Unless ACP can prove National waived the Limitations Clause or acted in a manner that caused ACP to file untimely, the last date by which ACP should have commenced its action against National was June 13, 1992.[11]

[11] STV and National contend the last day ACP could bring an action against National was June 13, 1992 because the MLA judgment was entered on May 13, 1991. The Court finds their assertion contrary to the plain language of the Policy. ACP's action could not have accrued until it was permitted by the Policy to bring suit and that was not until the MLA Judgment became final, thirty days after entry of the judgment without appeal. Therefore, ACP's action

ACP asserts that, while the earliest it could have brought suit against National was on June 13, 1991, that its claim did not really accrue until it transferred the MLA Judgment to Pennsylvania in 1994.[12] ACP believes that because the Limitations Clause *could* have been written in a more precise manner that the use of the word "accrue" becomes ambiguous. Such reasoning ACP asserts, would permit the Court to hold that ACP's claim did not really accrue until it transferred the MLA Judgment to Pennsylvania.

The Court will not read ambiguity where there is none. A contract provision or term does not become ambiguous simply because a party asserts it could have been drafted in a more precise manner. Such a theory would render any contract provision or term ambiguous so long as a party can imagine a better way to draft it. The Court holds that the claim of ACP against National accrued on June 13, 1991 and the period in which ACP could bring an action against National expired on June 13, 1992. The time ACP's claim accrued against National is not altered just because the present action is a garnishment proceeding based upon a New York judgment.

(b) <u>The New York Action Is Nullity.</u>

In the alternative, ACP asserts that the it timely commenced its action against National by virtue of the New York Action. While it is undisputed that ACP commenced the New York Action within one year from the date its claim accrued, as a matter of law, ACP's voluntary dismissal of the action had the effect of making the New York Action a nullity. Pursuant to the stipulation executed by ACP and National, ACP voluntarily discontinued the New York Action with prejudice as to bringing another action in New York and without prejudice to any parties rights in any other

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accrued on June 13, 1991 and the twelve month period ran from that date.

[12] In effect, giving ACP a limitations period of over 20 years.

actions.[13] The effect of the voluntary discontinuance was to eliminate the New York Action from the Court's consideration when deciding whether the Garnishment Action is timely.

Under New York law, a party asserting a claim has a statutory right to voluntarily discontinue an action. N.Y.C.P.L.R. 3217(a)(1)(McKinney 2003) The effect of a voluntary discontinuance is to make the discontinued action a nullity. "When an action is discontinued by consent, it is as though the action never existed. Smith v. Snide, 404 N.Y.S.2d 927, 928 (N.Y.App.Div.1978); See also Newman v. Newman, 665 N.Y.S.2d 423 (N.Y.App.Div. 1997); American Progessive Health Ins. Co. of N.Y. v. Chartier, 180 N.Y.S.2d 181 (N.Y.App.Div. 1958). Because the New York Action is treated as if it never had existed, the proceeding does not operate to toll or satisfy the Limitations Clause and, therefore, cannot be considered when examining whether ACP timely brought its suit against National.

While this result seems harsh, it is consistent with Pennsylvania law as set forth in Williams Studio Div. of Photography by Tallas, Inc. v. Nationwide Mutual Fire Ins. Co., 380 Pa.Super. 1, 550 A2d 1333 (1988). In Williams, the insured suffered damages as a result of a fire on December 31, 1979. The insured's policy with Nationwide Mutual Fire Insurance Co. ("Nationwide") had a one year limitations period. On June 26, 1980, the insured initiated suit against Nationwide when it denied his claim. Over three years later, during the course of the trial, the plaintiff elected to take a voluntary nonsuit.[14] Plaintiff subsequently attempted to commence a new action on the same

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[13] Joint Statement, Exhibit 47.

[14] Although the insured in Williams took a voluntary nonsuit, the result would had been the same if the insured voluntarily discontinued the action prior to trial. The significant difference between a voluntary nonsuit and a voluntary discontinuance is the time when the suit is discontinued. A discontinuance is the exclusive manner a plaintiff may voluntary terminate an action prior to trial. Pa.R.C.P. 229. A voluntary nonsuit is the method of termination by a

grounds against Nationwide on November 22, 1983, almost four years after the fire.

The Williams court began its analysis by examining federal law. "It is well settled, and numerous Federal cases hold that 'dismissal without prejudice operates to leave the parties as if no action had been brought at all.'" Id. at 5, 550 A.2d at 1335 (quoting Moore v. St Louis Music Supply Co., Inc., 539 F.2d 1191, 1194 (8th Cir. 1976). The court went on to note:

> While not expressly stating that a voluntary nonsuit or discontinuance operates to leave the parties as if no action had been filed, Pennsylvania case law reflects a similar result.
>
> . . .
>
> Based upon the forgoing discussion, we conclude that, when a plaintiff takes a voluntary nonsuit, it is as if the original suit was never initiated. Logically, since the original complaint is treated as if it never existed, the "statute of limitations is not tolled by the filing of a complaint subsequently dismissed without prejudice."

Williams, 380 Pa.Super. at 6, 550 A.2d at 1335 (quoting Cardio-Medical Associates, Ltd. v. Crozer-Chester Medical Center, 721 F.2d 68, 77 (8th Cir. 1983).

The court further found direct support for its position in Royal-Globe Ins. Co. v. Hauck Mfg. Co. The Pennsylvania Superior Court in Royal-Globe held that the commencement of a federal action does not toll the running of the statute of limitations against the action in state court, the commencement of a state court action does not toll the running of the statute of limitations against a subsequent action in federal court and an action in one state does not toll the statute of limitations against an action in another state. Williams 380 Pa.Super at 8, 550 A.2d at 1336 (citing Royal-Globe, 233 Pa.Super. 248, 335 A.2d. 460 (1975)). "Therein, we adopted the general rule in respect of

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plaintiff during trial. Pa.R.C.P. 230. Pennsylvania law treats the effect of a voluntary nonsuit and a discontinuance the same. See Pa.R.C.P. 231.

limitations set forth by the United States Supreme Court in Willard v.Wood, 164 U.S. 502, 523, 17 S.Ct. 176, 181, 41 L.Ed 532 (1896)". Id. In Willard, the United States Supreme Court held:

> The general rule in respect of statute of limitations must also be borne in mind, that if plaintiff mistakes his remedy, in the absence of any statutory provision saving his right, or where, from any cause, a plaintiff becomes a nonsuit, or the action abates or is dismissed, and during the pendency of the action, the limitation runs, the remedy is barred. (emphasis added)

Willard, 164 U.S. at 523, 17 S.Ct. at 181.[15] Based upon the forgoing, the Court concludes that because the New York Action was voluntarily discontinued by ACP, the New York Action cannot be used to save ACP from the Limitations Clause in the Policy.

3. ACP's Estoppel Argument Does Not Save The Garnishment Action

Assuming that the Garnishment Action is untimely under the plain language of the Limitations Clause, as the Court holds, ACP asserts that the conduct of National and STV excuses what would otherwise be an untimely action. Specifically, ACP argues that the production of the Signature Page by National, over a year after ACP's claim accrued, prevents National and STV from raising the Limitations Clause as a defense. It was not until the production of the Signature Page that ACP could have known that the Policy was not issued or delivered in New York. ACP also argues that whether the withholding of the Signature Page was intentional or inadvertent, the result is the same, STV and National should be barred from asserting the Limitations Clause as a defense.

The Court need not address whether the delayed production of the Signature Page was intentional or inadvertent. Assuming *arguendo,* that STV and National's conduct in the production of the Signature Page warrants judicial intervention in the application of the Limitations Clause, STV

[15] Pennsylvania does have a statutory savings clause, but it is not applicable to actions that are terminated by voluntary nonsuit or discontinuance. 42 Pa.C.S.A. §5535.

and National are not permanently barred from asserting it as a defense. Rather, the limitations period commenced again once ACP had knowledge of the Signature Page. The Garnishment Action is still untimely because ACP still waited over a year from when the Signature Page was produced to commence this proceeding. Therefore, the Garnishment Action is barred, even assuming that National and STV's conduct tolled the Policy's limitations period.

ACP takes great lengths to convince the Court that the conduct of National and STV warrants a complete bar to the application Limitations Clause. In essence, ACP argues that the provision is waived by National and STV. Pennsylvania law does recognize that an insurance policy's contractual limitations provision may be waived or suspended by the actions of the insurer. O'Conner v. Allemannia Fire Ins. Co. of Pittsburgh, 128 Pa.Super. 336, 194 A. 217 (1937). Yet, there is a distinction under Pennsylvania law between a waiver of a limitations provision by an insurer and the tolling of the limitations provision when the insurer acts in a manner that misleads the insured. The court in O'Conner addressed this distinction:

> Undoubtedly there may be an express waiver of the limitation of suit clause in the policy, and, when there is such a definite waiver, it is no longer in force and thereafter the statutory limitation as to contracts applies, but our Supreme Court has ruled that, when the insured seeks to excuse his failure to bring suit within the period of time fixed in the policy by conduct of the insurer which misled the insured to his injury –*the limitation has not been fully and completely waived, in the strictest sense of the word, but has only been suspended or extended, and begins to run when the insurer's conduct no longer excuses the insured's failure to bring suit.* (emphasis added)

Id. at 339, 194 A.2d at 218.

There are no allegations that National or STV expressly waived the Limitations Clause. Instead, ACP asserts that the late production of the Signature Page prevented ACP from timely commencing the Garnishment Action. Because ACP could not discover that the Policy was not

issued or delivered in New York until it was produced, ACP could not have known that its action in New York was improper.

The question is, assuming STV and National's conduct misled ACP into not filing its action in a timely manner, what effect, if any, was there on the Limitations Clause when ACP received the Signature Page in September of 1992. Applying the precedent set by O'Conner, it is clear that the limitations period began to run once the conduct of National and STV could no longer excuse ACP's failure to bring the suit in a timely manner. ACP states in its Motion for Summary Judgment:

> Specifically, it was not until September 1992, two months after the New York State Supreme Court had awarded ACP summary judgment against National Union, that National Union first came forward with an allegedly "newly discovered" countersignature endorsement to the Policy, which indicated that the Policy was "issued" in Pennsylvania rather than in New York. *Prior to that time, ACP had no way of knowing that it had a Pennsylvania garnishment remedy, and no way of knowing that its New York Action against National Union could not be maintained because, technically, the Policy was not "issued" in New York.* (emphasis added)[16]

ACP became aware in September, 1992, that the Policy was not issued in New York and could no longer claim ignorance. ACP makes no allegations that once the Signature Page was produced that National or STV misled it into not bringing suit in Pennsylvania or into believing that the contractual limitations period would not be enforced. Therefore, ACP had one year, until September of 1993, to bring the Garnishment Action. APC and failed to do so.

ACP attempts to defend its delay by asserting that once ACP was granted summary judgment in New York, the doctrine of *res judicata* barred ACP from commencing a garnishment action in Pennsylvania. The real issue presented by ACP's argument is whether or not the New York Supreme

[16] ACP Motion for Summary Judgment, ¶86.

Court's grant of summary judgment tolled the limitations period in Pennsylvania. Pennsylvania law is clear that actions or proceedings in foreign courts and jurisdictions do not toll the running of a limitations period in Pennsylvania. See Royal-Globe, 233 Pa.Super. 248, 335 A.2d. 460 (1975); Ravitch v. Pricewaterhouse, 793 A.2d 939 (2002). The Court does not believe that the fact that summary judgment was granted in the New York alters the result.

ACP's argument that *res judicata* barred them from filing any action in Pennsylvania is form over substance. Res judicata is a judicial creation that prevents the relitigation of issues that have already been fully adjudicated. See Consolidated Coal Co. v. District 5, United Mine Workers of America, 336 Pa.Super. 354, 485 A.2d 1118 (1984). However, *res judicata* is an affirmative defense to be raised by a defendant as new matter. Pa.R.C.P. 1030. ACP cites no authority supporting its position that it was procedurally barred from commencing a Pennsylvania action for the sole purpose of preventing the limitations period from running. It is clear from National's motion to renew and reargue that one of the bases for its request to reverse was that New York Law did not permit ACP's direct action because the Policy was not issued or delivered in New York. If granted, ACP would be left without a remedy in New York, as it was.

Under the circumstances of this case, ACP should have taken *some* action to protect its claim in Pennsylvania in order to prevent the limitations period from running. This Court will not hold that ACP is excused from its inaction when case law is clear that a another state's proceeding does not toll the running of a limitations period. The Court further does not believe that the purpose of *res judicata* is to bar a party from protecting its rights in light of the running of a limitations period. Any such action would not be for the purpose of litigating to two judgments, but to protect ACP's right to proceed in the event the New York courts ruled adversely. Therefore, the Court finds no

basis to hold the Limitations Clause is not enforceable because of the New York trial court's grant of summary judgment.

4. National's Alleged Breach Of The Policy Does Not Prevent The Application Of The Limitations Clause.

ACP's allegation that National's failure to defend MLA at the arbitration proceeding does not prevent the enforcement of the Limitations Clause. As already discussed, it is clear that Pennsylvania law holds contractual limitations clauses are valid unless the time period within the clause is manifestly unreasonable. It is also clear that an insurer can waive the limitations clause or act in a manner that tolls a limitations clause. The is no basis in Pennsylvania law to hold that an allegation that the insurer breached the policy leads to a waiver of a policy's limitations clause.

Generally, the only reason to commence an action against an insurer would be for its alleged breach of some duty or obligation under the policy.[17] If ACP's argument were extended to its logical conclusion, any breach of an insurance contract containing a limitations clause would automatically render the limitations clause unenforceable. The sole purpose of including a limitations clause would be defeated.

In McElhiney v. Allstate Ins. Co., the plaintiffs alleged that their insurer breached the policy by failing to provide coverage and acting in bad faith. 33 F.Supp.2d 405 (1999). The plaintiffs did not bring their suit within the policy's limitations period and the insurer asserted the policy's limitations clause as a defense. Id. The court refused to sanction the plaintiffs inactivity and stated that "if plaintiffs' argument were correct, no time limitations provision in an policy or in any contract, for that matter, would ever be enforceable." Id. at 408. This Court agrees.

[17] Indeed, this garnishment action is based upon National's alleged breach of the Policy by failing to satisfy the MLA Judgment.

Finding no Pennsylvania precedent for its argument, ACP cited two cases from other states to support its position, Gildenhorne v. Colombia Real Estate Title Ins. Co., 317 A.2d 836 (Md.Ct.App. 1974) and Leonardi v. Standard Acc. Ins. Co. of Detroit, Mich, 212 F.2d 887 (2d.Cir. 1954). The Court finds these case factually and legally distinct from the present case. The issue presented Gildenhorne and Leonardi was whether the limitations provisions in question barred an action for the insurers breach of the duty to defend when the suit was brought outside the time provided for by the policy. The courts examined the language of the limitations clauses and held that the language of the clauses limited the provisions to actions to recover claims "under" the policies. Gildenhorne, 317 A.2d at 841; Leonardi, 212 F.2d at 890. It was held that actions for breach of the duty to defend were not actions "under" the policies and, therefore, were not time barred. Id. The issue of whether a limitations clause is unenforceable solely because there was an alleged breach of the policy is never raised or addressed. Therefore, the Court holds that the Limitations Clause is enforceable against ACP, regardless of the National's alleged breach of the duty to defend.

V. CONCLUSION

Therefore, the Motions for Summary Judgment of STV and National are **granted**. Furthermore, because the Court holds that ACP's claim is time barred, the motion for summary judgment of ACP is **denied** as moot.

BY THE COURT:

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GENE D. COHEN, J.

Dated: April 16, 2003