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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

CHARLES HARB,

Plaintiff and Appellant,

v.

DEREK SENE et al.,

Defendants and Respondents.

A142044

(San Francisco County
Super. Ct. No. CGC-12-523951)

Plaintiff Charles Harb appeals from the grant of summary judgment in favor of defendants Derek Sene and State Farm General Insurance Company in his suit for professional negligence. Plaintiff alleged his insurance broker (Sene) failed to carry out his request to secure a policy that would have covered damage caused by his general contractor during a 2007 major home remodel. The trial court granted summary judgment, finding the lawsuit was barred by the two-year statute of limitations of Code of Civil Procedure section 339, subdivision (1) (section 339(1)).¹ We conclude plaintiff both sustained damages and discovered, or should have discovered, Sene's negligence not later than January 2007, more than two years before he filed his complaint in September 2012. On appeal, plaintiff offers no legally cognizable theory to toll the

¹ “A cause of action for professional negligence is generally governed by the two-year statute of limitations under Code of Civil Procedure section 339, subdivision 1 for an ‘action upon a contract, obligation or liability not founded upon an instrument of writing.’ ” (*Thomson v. Canyon* (2011) 198 Cal.App.4th 594, 606.)

limitations period. We affirm the grant of summary judgment on the ground that the statute of limitations bars the action.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

In April 2005, plaintiff purchased residential property located in Tiburon (the Property). At the time he acquired the Property, it consisted of two side-by-side housing units. Plaintiff planned on renovating this duplex to convert the structure into a single family residence.

In June 2005, plaintiff purchased a State Farm homeowner's insurance policy (the Policy) for the Property. In a declaration filed in opposition to defendants' motion for summary judgment, plaintiff claims he told Sene's office the renovation would entail partial demolition of the duplex and that he wanted insurance for the risks associated with the demolition phase.²

In August 2006, plaintiff obtained a permit from the City of Tiburon to partially demolish the duplex (the Permit).

In December 2006, partial demolition commenced. At some point while plaintiff was away from the Bay Area, the scope of the Permit was exceeded by his contractors, resulting in the complete demolition of the structure.

After plaintiff returned to the Bay Area in January 2007, he called Sene's office in order to ascertain if his insurance coverage would apply to the loss, and to make a claim. He was told there was no coverage for demolition, and that the Policy provided coverage for fire and other limited disasters only. He was not advised to file an insurance claim.

In June 2009, plaintiff filed a lawsuit against his general contractor for negligent demolition of the duplex.

In August 2009, plaintiff's attorney sent a transmittal to Sene, presenting a claim on the Policy for the damage caused by the general contractor's negligence. At his

² Defendants did not dispute this statement for purposes of their summary judgment motion; however, State Farm objected on the grounds that plaintiff's declaration "impermissibly contradicts his own sworn deposition testimony." Our review of the record on appeal does not reflect that the trial court ruled on this objection.

November 2010 deposition, plaintiff confirmed he had not presented any claim to State Farm prior to retaining counsel in 2009.

In July 2011, State Farm denied plaintiff's claim.

On September 5, 2012, plaintiff filed a complaint against defendants. He asserted a single cause of action for negligence, alleging Sene's office was negligent for having failed to procure a policy with coverage for the risks associated with the partial demolition of the structure.

On October 10, 2013, defendants filed a motion for summary judgment. Plaintiff successfully moved for a continuance to obtain further discovery.

On December 18, 2013, plaintiff took Sene's deposition. Sene testified that he was not authorized to sell the kind of policy that would have covered the demolition activities on the Property.

On December 31, 2013, plaintiff filed his opposition to defendant's motion for summary judgment.

On January 13, 2014, plaintiff filed an ex parte application for an order shortening time to hear a motion for leave to file a first amended complaint (FAC). His attorney claimed it was not until he took Sene's deposition that he learned Sene could not have provided the type of insurance plaintiff needed.

On January 14, 2014, the trial court denied plaintiff's ex parte application for leave to file an FAC and held the hearing on defendants' motion for summary judgment.

On March 6, 2014, the trial court filed its order granting defendants' motion for summary judgment on the ground that the two-year statute of limitations for plaintiff's professional negligence claim had expired.

On April 10, 2014, judgment was entered in favor of defendants. This appeal followed.

DISCUSSION

I. Standard of Review

We independently review the trial court's order granting summary judgment and determine if the undisputed facts establish that defendants are entitled to judgment as a

matter of law on their statute of limitations defense. (Code Civ. Proc., § 437c, subd. (c); *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 849, 860.)

II. Summary Judgment Was Properly Granted

The theory of plaintiff's complaint was that Sene's office negligently failed to procure an insurance policy providing coverage for damage occurring during the demolition phase of his home remodel. Specifically, the complaint alleged that Sene "held himself out as an expert in property insurance, and owed a duty to procure a policy with coverage for the risks associated with the partial demolition of the existing structure" The parties do not argue about which statute of limitations applies. Instead, the issue in this appeal is when the statutory limitations period on this claim began to run. Defendants assert the statute accrued in 2007, when plaintiff sustained damage and was told his loss was not covered by his insurance. Plaintiff contends the statute began to run in 2011, when his insurance claim was denied. Alternatively, he asserts his claim did not accrue until he learned at Sene's December 2013 deposition that Sene was incapable of selling plaintiff the type of insurance he needed. Both of plaintiff's arguments lack merit.

A. Commencement of the Statutory Limitations Period

A civil action can only be commenced after the cause of action has accrued. Generally a cause of action accrues on the date the cause of action is complete with all its elements, that is, when the wrongful act is done or the wrongful result occurs and the consequent liability arises. (*Hydro-Mill Co., Inc. v. Hayward, Tilton & Rolapp Ins. Associates, Inc.* (2004) 115 Cal.App.4th 1145, 1160 (*Hydro-Mill*)). " 'A cause of action for professional negligence does not accrue until the plaintiff (1) sustains damage and (2) discovers, or should discover, the negligence.' " (*Id.* at p. 1161.)

In *Hydro-Mill*, the court held that a claim against an insurance broker for the procurement of inadequate insurance accrued when the insurer made it clear to the insured that certain losses would not be covered. (*Hydro-Mill, supra*, 115 Cal.App.4th at p. 1162.) In other words, once the insurer denied the anticipated coverage, the statute began to run on the insured's cause of action. In that case, the plaintiff had asked its insurance broker to obtain comprehensive earthquake coverage for its three business

locations, two of which were leased. The broker procured coverage for only one of the three locations, the location that the plaintiff owned. (*Id.* at p. 1149.) Two days after all three facilities were damaged in the January 1994 Northridge earthquake, the plaintiff learned there was no insurance to cover damage at the two leased facilities. (*Id.* at p. 1150.) The appellate court concluded all of the elements of a cause of action against the broker were satisfied no later than December 9, 1994, the date on which the insurer offered the plaintiff a payment on its claim that excluded losses associated with the two leased locations. (*Id.* at p. 1164.) The plaintiff’s lawsuit against the broker was deemed barred because it was not filed until February 1997, three months beyond the two-year statute of limitations. (*Id.* at 1152.)

As applied to this case, *Hydro-Mill* establishes that plaintiff sustained damage no later than January 2007, when he learned the loss arising from the total demolition of the duplex would not be covered by his insurance. It was also at this point that he knew, or should have known, that Sene’s office had failed to give him the kind of coverage he had requested. That he may not have known the exact circumstances leading up to this failure does not alter our conclusion: “ ‘In a professional malpractice context, accrual of the cause of action does not await the plaintiff’s discovery that the facts constituting the wrongful act or omission constitute professional negligence, i.e., the plaintiff’s discovery that a particular legal theory is applicable based on the known facts. If one has suffered appreciable harm and knows or suspects that professional blundering is its cause, the fact that the professional has not yet advised the plaintiff [of the mistake] does not postpone commencement of the limitations period.’ ” (*Hydro-Mill, supra*, 115 Cal.App.4th at p. 1160.) As the statute of limitation began to run in January 2007, the latest plaintiff could have filed this lawsuit was January 2009. However, he did not file his complaint until September 2012. Accordingly, the action is untimely under section 339(1).³

³ Even assuming for purposes of argument that plaintiff had no reason to suspect wrongdoing in January 2007, he certainly evidenced such an awareness in 2009 when he retained counsel to sue the general contractor who demolished the duplex. Yet he did not file this complaint until three years later, well outside of the two-year period.

B. Accrual of Plaintiff's Claim Was Not Delayed or Tolled

“To align the actual application of the limitations defense more closely with the policy goals animating it, the courts and the Legislature have over time developed a handful of equitable exceptions to and modifications of the usual rules governing limitations periods. These doctrines may alter the rules governing either the initial accrual of a claim, the subsequent running of the limitations period, or both. The ‘ “most important’ ” of these doctrines, the discovery rule, where applicable, ‘postpones accrual of a cause of action until the plaintiff discovers, or has reason to discover, the cause of action.’ [Citations.] Equitable tolling, in turn, may suspend or extend the statute of limitations when a plaintiff has reasonably and in good faith chosen to pursue one among several remedies and the statute of limitations’ notice function has been served. [Citation.] The doctrine of fraudulent concealment tolls the statute of limitations where a defendant, through deceptive conduct, has caused a claim to grow stale. [Citation.] The continuing violation doctrine aggregates a series of wrongs or injuries for purposes of the statute of limitations, treating the limitations period as accruing for all of them upon commission or sufferance of the last of them. [Citations.] Finally, under the theory of continuous accrual, a series of wrongs or injuries may be viewed as each triggering its own limitations period, such that a suit for relief may be partially time-barred as to older events but timely as to those within the applicable limitations period.” (*Aryeh v. Canon Business Solutions, Inc.* (2013) 55 Cal.4th 1185, 1192.)

On appeal, plaintiff first suggests his claim was tolled until July 2011, when the insurance claim filed by his attorney in August 2009 was denied by State Farm.⁴ Because plaintiff maintained his insurance policy during the intervening time, he asserts “it would be unjust to deprive [him] of a cause of action against Sene and State Farm when [they] continued, even after [plaintiff] informed them of the claim to provide the same insurance that was previously provided.” He further argues that because Sene and plaintiff had a long-term relationship, there is a triable issue as to whether Sene had a duty to advise him

⁴ We note the insurance claim was filed beyond the two-year limitations period.

to file a claim. The cases he relies on are inapposite in that they concern whether an insurance agent can assume a special duty toward his or her insureds by misrepresenting a policy's terms. They do not address the statute of limitations, nor do they discuss whether there is a duty to proactively advise insureds to file claims.⁵

For example, in *Paper Savers, Inc. v. Nacsa* (1996) 51 Cal.App.4th 1090 (*Paper Savers*), the plaintiff had sued his insurance company and his insurance agent for negligence, alleging the defendants had assumed a special duty towards him by misrepresenting that a replacement-cost coverage endorsement was adequate to replace all lost or destroyed personal property in the event of a loss, regardless of policy limits. In reversing summary judgment for the defendants, the appellate court concluded there were genuine issues of triable fact as to whether the agent made this representation and, if so, whether it was sufficient to impose a special duty on the insurer. (*Id.* at pp. 1092–1093.) No issue was raised in the case concerning the applicable statute of limitations. Rather, the case stands for the proposition that an insured's failure to read his insurance policy does not render the insured's reliance on the agent's advice unjustifiable as a matter of law.

Similarly, in *Eddy v. Sharp* (1988) 199 Cal.App.3d 858, the appellate court reversed summary judgment as to claims for negligent misrepresentation and breach of contract, finding material factual issues existed as to whether the defendant agent had negligently misrepresented the terms of a prospective insurance policy and breached a

⁵ Plaintiff does cite to two cases addressing the statute of limitations, *Thomson v. Canyon* (2011) 198 Cal.App.4th 594 and *Williams v. Hilb, Rogal & Hobbs Ins. Services of California* (2009) 177 Cal.App.4th 624. Both of these are distinguishable from the present case because they concern how to determine when an actual harm occurs such as to trigger accrual of the statute. In *Thomson*, a case arising out of a breach of an alleged oral promise to reconvey real property to a plaintiff whose home had been in foreclosure, the appellate court held the plaintiff's damage occurred when her post-sale request for reconveyance was refused, and not at the prior close of escrow on that sale. (*Thomson*, at p. 605.) In *Williams*, the appellate court held that a cause of action for negligent failure to procure workers' compensation insurance did not accrue until judgment was entered against the employer in the injured worker's lawsuit, as opposed to when the employer first became aware of his exposure and potential liability. (*Williams*, at pp. 641–642.)

contract to insure. (*Id.* at pp. 866–867.) In that case, an insurance agent had prepared a cover letter for a landlord specifically enumerating a policy’s exclusions. The letter neglected to mention any exclusion for damage caused by water backing up through sewers or drains. In fact, the policy did contain such an exclusion. The plaintiff sued after he was denied coverage for damage to rental units caused by a clogged sewer system. (*Id.* at pp. 862–863.) As in *Paper Savers, supra*, 51 Cal.App.4th 1090, no issue was presented regarding the accrual of the statute of limitations.

We conclude the statute of limitations was not tolled by any purportedly “heightened duty” on the part of Sene. Even if Sene owed plaintiff such a duty, the existence of a special relationship does not delay accrual of the limitations period in an action for professional negligence when a plaintiff has reason to suspect wrongdoing. As the *Hydro-Mill* court observed that “it is unclear whether a fiduciary relationship exists between an insurance broker and an insured.” (*Hydro-Mill, supra*, 115 Cal.App.4th at p. 1156.) “ ‘[T]he relationship between an insurance broker and its client is not the kind which would logically give rise to such a duty. The duty of a broker, by and large, is to use reasonable care, diligence, and judgment in procuring the insurance requested by its client. . . .’ ” (*Id.* at p. 1157.) The court therefore concluded that the “causes of action, regardless of appellation, amount to a claim of professional negligence.” (*Id.* at p. 1159.)

We also reject plaintiff’s alternative argument that the discovery rule should delay the commencement of the statutory period until December 2013, when he discovered that Sene’s office did not offer the type of insurance policies that would have covered risks associated with the partial demolition of his duplex. It is undisputed that plaintiff knew in 2007 that Sene had not procured a State Farm policy covering demolition damages. While he claims “it is [at] best a question of fact as to whether the statement in 2007 that the demolition was not covered is the same as a finding that Sene could not have sold the insurance [plaintiff] requested even if he wanted to,” this is a distinction without a difference for purposes of the statute of limitations. Whether the loss was uncovered because Sene’s office failed to secure the proper policy, or because it was not authorized

to issue such policies in the first place, the fact remains plaintiff knew in 2007 that his loss was not covered.

Plaintiff appears to suggest that Sene's conduct amounted to a fraudulent concealment such as would toll the statute of limitation. We disagree. Whether plaintiff knew all the facts that could have supported an alternative legal theory is irrelevant. Once a plaintiff is aware of a cause of action, it is expected that further facts will ordinarily be revealed by investigation. (See *Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th 797, 807.)

III. Denial of Continuance

Finally, plaintiff asserts the trial court abused its discretion in denying his ex parte application for leave to file a motion to amend his complaint. We disagree.

In the first place, the relevant statute authorizing requests for continuances applies to allowances for opposing parties to obtain additional discovery to use in opposing summary judgment, not to requests for time to file an amended complaint. Code of Civil Procedure section 437c, subdivision (h) provides: "If it appears from the affidavits submitted in opposition to a motion for summary judgment or summary adjudication or both that facts essential to justify opposition may exist but cannot, for reasons stated, then be presented, the court shall deny the motion, order a continuance to permit affidavits to be obtained or discovery to be had, or make any other order as may be just. The application to continue the motion to obtain necessary discovery may also be made by ex parte motion at any time on or before the date the opposition response to the motion is due."

In any event, it appears any amendment would be futile because the statute of limitations would still bar the action. As we have already indicated, "[a] plaintiff need not be aware of the specific 'facts' necessary to establish the claim; that is a process contemplated by pretrial discovery. Once the plaintiff has a suspicion of wrongdoing, and therefore an incentive to sue, she must decide to file suit or sit on her rights. So long as a suspicion exists, it is clear that the plaintiff must go find the facts; she cannot wait for the facts to find her." (*Jolly v. Eli Lilly & Co.* (1988) 44 Cal.3d 1103, 1111.)

Plaintiff's brief indicates his FAC would have asserted Sene knew he did not have the ability to procure a policy that would have provided first party coverage for the demolition. As we have already discussed above, regardless of whether Sene failed to inform plaintiff that his office could not have provided the appropriate policy, plaintiff knew by January 2007 that his loss was not covered. Plaintiff cannot plead around the statute of limitations using his belated discovery theory. We need not address the parties' remaining arguments.

DISPOSITION

The judgment is affirmed.

DONDERO, J.

We concur:

HUMES, P. J.

MARGULIES, J.

A142044