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Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-001253-MR

WAYNE ROMANS — APPELLANT

v.

APPEAL FROM BOYD CIRCUIT COURT
HONORABLE C. DAVID HAGERMAN, JUDGE
ACTION NO. 14-CI-00076

KENTUCKY FARM BUREAU
MUTUAL INSURANCE COMPANY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: JONES, D. LAMBERT, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Wayne Romans brings this appeal from an August 6, 2014, Order of the Boyd Circuit Court granting summary judgment in favor of Kentucky Farm Bureau Mutual Insurance Company (Farm Bureau) and dismissing Romans' complaint in its entirety. We affirm.

Wayne Romans, a resident of California, inherited his parents' house located at 4600 Tackett Drive, Ashland, Kentucky. After inheriting the house,

Romans contacted a Farm Bureau agent to secure insurance. On May 12, 2011, Farm Bureau issued a homeowner's policy of insurance (Policy No. A0204498) to Romans.[1] Then, on July 1, 2011, the house was vandalized and sustained damage near a fireplace. According to Romans' sworn affidavit, shortly after the loss was sustained in 2011, he "attempted . . . to begin the claims process" with Farm Bureau and on several occasions requested a copy of the homeowner's policy. The first notice that Romans gave Farm Bureau of a possible claim under the policy was August 8, 2013. Romans received a copy of the policy from Farm Bureau on September 9, 2013.

Subsequently, on February 3, 2014, Romans filed a complaint in the Boyd Circuit Court. Therein, Romans alleged Farm Bureau breached the terms of the homeowner's policy by failing to promptly pay for the damage to the house and further breached the implied covenant of good faith and fair dealing by not informing Romans the policy included coverage for damage caused by vandalism.

Farm Bureau answered and subsequently filed a motion for summary judgment arguing that Romans' complaint should be dismissed as being untimely filed. Kentucky Rules of Civil Procedure (CR) 56.02. Farm Bureau maintained that the homeowner's policy issued to Romans contained a one-year limitation period for initiating an action against it. Paragraph 11 of the homeowners' policy specifically provided that "[n]o action shall be brought unless there has been compliance with the policy provisions and the action is started within one year

[1] Wayne Romans' parents had previously insured the house with Kentucky Farm Bureau Mutual Insurance Company since approximately 1977.

after the loss." Farm Bureau Dwelling Policy at 6. Farm Bureau emphasized that the loss occurred on July 1, 2011, and Romans did not file the complaint until February 3, 2014, some two and one-half years later, thus requiring dismissal of the complaint since it was filed outside the one-year contractual limitation period.

By order entered August 6, 2014, the circuit court held that the one-year contractual limitation period was valid and barred Romans' claims under the homeowner's policy. Accordingly, the circuit court granted Farm Bureau's motion for summary judgment and dismissed Romans' complaint. This appeal follows.

Romans argues on appeal that the circuit court erred by rendering summary judgment dismissing his claims under the homeowner's policy, asserting that he was unaware of the one-year limitation provision in the homeowner's policy; thus, Farm Bureau's failure to "present" the exclusions to him renders the one-year limitation period invalid. The one-year limitation period being invalid, Romans maintains that the applicable controlling limitation period for asserting his claim under the policy is the fifteen-year statutory provision for breach of a written contract under Kentucky Revised Statutes (KRS) 413.090(2).[2]

[2] Kentucky Revised Statutes 413.090 provides, in relevant part:

> Except as provided in KRS 396.205, 413.110, 413.220, 413.230 and 413.240, the following actions shall be commenced within fifteen (15) years after the cause of action first accrued:
>
> . . . .
>
> (2) An action upon a recognizance, bond, or written contract, except that actions upon written contracts executed after July 15, 2014, shall be governed by KRS 413.160[.]

STANDARD OF REVIEW

Summary judgment is proper where there exists no material issue of fact and movant is entitled to judgment as a matter of law. *Steelvest, Inc. v. Scansteel Service Center, Inc.,* 807 S.W.2d 476 (Ky. 1991). All facts and inferences therefrom are to be viewed in a light most favorable to the nonmoving party. *Id.* Given that a summary judgment involves no fact finding, as in this case where the circuit court found there were no disputed material facts, our review of the circuit court's decision is *de novo*. *3D Enterprises v. Metro Sewer Dist.*, 174 S.W.3d 440 (Ky. 2005). Additionally, the interpretation of an insurance contract presents a question of law, which also requires that our review proceed *de novo*. *Kemper Nat'l Ins. Cos. v. Heaven Hill Distilleries, Inc.*, 82 S.W.3d 869 (Ky. 2002). Our review proceeds accordingly.

ANALYSIS

We begin our analysis by noting that the insurance policy in question is a written contract binding on both parties, and the lack of knowledge of its contents by the insured does not create a legal basis for reforming or voiding its provisions. *Midwest Mutual Ins. Co. v. Wireman*, 545 S.W.3d 177 (Ky. App. 2001); *Grisby v. Mountain Valley Ins. Agency, Inc.*, 795 S.W.2d 372 (Ky. 1990). Upon review of the provisions in Paragraph 11 of the policy, containing the one-year limitation, the language is clear, concise, and unambiguous. In Kentucky, courts cannot create an ambiguity in the insurance contract in an effort to extend

coverage to the insured. *Bitiminous Cas. Corp. v. Kenway Contracting, Inc.*, 240 S.W.3d 633 (Ky. 2007).

There being no ambiguity in the terms of the insurance contract, we now turn to the limitation argument. KRS 413.090(2) clearly provides a fifteen-year limitation period upon an action pursuant to a written contract.[3] However, the common law in Kentucky has historically permitted the shortening of a statutory limitation period by contractual agreement. It is well-established that a one-year limitation period set forth in a policy of insurance is generally enforceable and valid. *Webb v. Kentucky Farm Bureau Ins. Co.,* 577 S.W.2d 17 (Ky. 1978). In *Webb*, the Kentucky Supreme Court upheld the validity of an insurance policy that included a one-year limitation period for claims thereunder. *Id.* The Court specifically noted that the purpose of a statute of limitation is to encourage prompt assertion of any legal claims. *Id.* And, "since there is nothing in their language nor inherent in their purpose which prevents parties from agreeing to a shorter period of limitation," a provision in a contract containing such a limitation is valid. *Id.* at 18.

In the case *sub judice*, the undisputed facts reflect that on July 1, 2011, Romans' house was vandalized and sustained damaged. Romans subsequently filed a complaint in the Boyd Circuit Court against Farm Bureau on February 3, 2014, some two and one-half years after the date of the loss. Pursuant to the authority of *Webb*, we believe the one-year limitation period contained in the

[3] For written contracts executed after July 15, 2014, the ten-year limitation period set out in KRS 413.160 is controlling.

homeowner's policy is valid and enforceable. *See id.* Furthermore, Romans has cited no authority for his assertion that a lack of knowledge of a shorter contractual limitation period renders such provision invalid. Thus, we do not believe that the circuit court erred by applying the one-year limitation period contained in the homeowner's insurance policy issued to Romans.

Romans next asserts the circuit court erred by failing to hold that the one-year contractual limitation period was tolled pursuant to KRS 413.190(2) by virtue of Farm Bureau's alleged interference with the timely prosecution of this action.

KRS 413.190(2) provides:

> When a cause of action mentioned in KRS 413.090 to 413.160 accrues against a resident of this state, and he by absconding or concealing himself or by any other indirect means obstructs the prosecution of the action, the time of the continuance of the absence from the state or obstruction shall not be computed as any part of the period within which the action shall be commenced. But this saving shall not prevent the limitation from operating in favor of any other person not so acting, whether he is a necessary party to the action or not. (Emphasis added.)

Romans specifically claims that by failing to provide him a copy of the homeowner's policy, Farm Bureau engaged in "indirect means" that obstructed the prosecution of the action. The term "indirect means" as set forth in KRS 413.190(2) was discussed by the Kentucky Supreme Court in the case of *Emberton v. GMRI, Inc.*, 299 S.W.3d 565 (Ky. 2009):

> [I]n order to toll the limitations period, the concealment envisioned by KRS 413.190(2) must represent an

> "affirmative act" and "cannot be assumed" – i.e., it must be active, not passive. *Id.; accord Munday,* 831 S.W.2d at 915. For this reason, we have held that the statute's reference to "other indirect means" of obstruction of an action still requires an act or conduct that remains "affirmatively fraudulent": "The 'other indirect means' of obstruction . . . must consist of some act or conduct which in point of fact misleads or deceives plaintiff and obstructs or prevents him from instituting his suit while he may do so." *Adams,* 249 S.W.2d at 792 (*citing Reuff – Griffin Decorating Co. v. Wilkes,* 173 Ky. 566, 191 S.W. 443, 444 (Ky. 1917)); *accord Gailor v. Alsabi,* 990 S.W.2d 597, 603 (Ky. 1999). As a result, "mere silence ... is insufficient" and cannot support its application. *Gailor,* 990 S.W.2d at 603; *see also* L.S. Tellier, Annotation, *What constitutes concealment which will prevent running of statute of limitations,* 173 A.L.R. 576 5th § 12 (2009) ("The rule is quite generally accepted, particularly in modern cases, that ... an affirmative act on the part of the defendant tending toward concealment is necessary, and that passivity, such as silence on his part, is not sufficient, in order to constitute such a concealment as to toll the statute of limitations.").

Id. at 573-74.

Romans' reliance upon KRS 413.190 is misplaced. Even if Farm Bureau failed to supply Romans with a copy of the policy, this did not obstruct or prevent him from prosecuting the action within the meaning of KRS 413.190. Romans paid premiums to insure his property in Kentucky under a homeowner's policy that he acquired from Farm Bureau.[4] Romans also knew that his property had sustained damage by vandalism in 2011 as set out in his sworn affidavit. And, there is nothing in the record that establishes that Farm Bureau engaged in any conduct that deceived him or prevented him from filing a lawsuit against Farm

[4] Presumably, Romans utilized the services of a Farm Bureau agent in acquiring the policy, but that issue has not been addressed or raised in this appeal.

Bureau for his claim. *See Emberton*, 299 S.W.3d 565. The fact that Romans resides out of state does not preclude him from timely complying with the terms of an insurance policy that he purchased in Kentucky. Consequently, we conclude that the contractual one-year limitation period was not tolled by KRS 413.190(2).

Romans further claims that the circuit court erred by rendering summary judgment in favor of Farm Bureau because he was not notified of the time limitation pursuant to 806 Kentucky Administrative Regulations (KAR) 12:095 § 6(4) (2016). Romans states that Farm Bureau had an obligation pursuant to 806 KAR 12:095 § 6(4) to notify him that the one-year limitation period under the homeowner's policy was near expiration. For the following reasons, we disagree.

806 KAR 12:095 is entitled Unfair Claims Settlement Practices for Property and Casualty Insurance and provides, in relevant part:

> Insurers shall not continue negotiations for settlement of a claim directly with a first party claimant who is not legally represented if the first party claimant's rights may be affected by a statute of limitations . . . unless the insurer has given the first party claimant written notice of the limitation. The notice shall be given to the first party claimant at least thirty (30) calendar days before the date on which the time limit expires.

806 KAR 12:095 § 6(4). While 806 KAR 12:095 § 6(4) clearly states that an unrepresented claimant is entitled to notice, Romans' reliance upon this regulation is misguided. 806 KAR12:095 § 2(3) provides:

> This administrative regulation establishes standards for the executive director in investigations, examinations,

> and administrative adjudication and appeals therefrom. A violation of this administrative regulation shall be found only by the executive director. **This administrative regulation shall not create or imply a private cause of action for violation of this administrative regulation.** (Emphasis added.)

806 KAR12:095 § 2(3) explicitly states that the regulation is only applicable to the executive director, and it is not intended to be utilized by an individual to create a private cause of action. Therefore, we conclude Romans' contention that Farm Bureau had an obligation to notify him pursuant to 806 KAR 12:095 is in error. *See Davidson v. Am. Freightways, Inc.*, 25 S.W.3d 94 (Ky. 2000).

Finally, Romans asserts that the circuit court erred by denying him the opportunity to conduct discovery relevant to the statute of limitations issue. Romans contends he should have been permitted to engage in discovery on the issue of when Farm Bureau provided him with a copy of the insurance policy. Romans argues that such discovery would have assisted the circuit court in determining "what proof [Farm Bureau] had to verify that it sent the policy" to him. Romans' Brief at 8.

This contention is wholly without merit. The opportunity to conduct discovery relevant to the limitation period would not have changed the facts necessary for resolution of the issue. It is undisputed that Romans' property sustained a loss on July 1, 2011, and Romans did not file the complaint until February 3, 2014. The uncontroverted facts support the circuit court's conclusion that Romans filed the complaint outside the one-year contractual limitation period

as provided in the homeowner's policy. As such, we hold that the circuit court properly granted summary judgment in favor of Farm Bureau and dismissed Romans' claims.

We view any remaining contentions of error to be moot or without merit.

For the foregoing reasons, the Order of the Boyd Circuit Court is affirmed.

ALL CONCUR.

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