

**IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO**

WILLIAM BOWEN)	CASE NO: CV 09 688770
)	
Plaintiff,)	JUDGE JOHN P. O'DONNELL
)	
vs)	
)	
FARMERS INS. CO., et al.)	<u>JOURNAL ENTRY</u>
)	
Defendant.)	

John P. O'Donnell, J.:

STATEMENT OF THE CASE

The plaintiff filed a second amended complaint on January 8, 2010. The defendant¹ filed a motion to dismiss that complaint on February 26. Opposition and reply briefs were subsequently filed and an oral argument was held on April 26. This entry follows.

STATEMENT OF THE FACTS

Plaintiff William Bowen was a party to a contract of automobile insurance issued or renewed by defendant Farmers between October 5, 1994 and September 2, 1997. The insurance policy included uninsured motorist (UM) coverage. The policy covered more than one vehicle and included a separate UM premium for each vehicle.

Bowen's policy also had a coverage exclusion for "other owned vehicles." This contract provision purports to exclude UM coverage where it is sought for bodily injury sustained by a named insured while occupying a motor vehicle owned by the policyholder or a resident relative but not listed as an insured vehicle.

¹ References in this entry to the defendant are to Farmers Insurance of Columbus, Inc. only. There is no such entity known as Farmers Insurance Company.

The other owned vehicle exclusion in the context of UM coverage was declared unenforceable by The Ohio Supreme Court on October 5, 1994, in its decision in *Martin v. Midwestern Group Ins.*, 70 Ohio St.3d, 478. The court held, at syllabus 3:

An automobile liability insurance policy provision which eliminates uninsured motorist coverage for persons insured thereunder who are injured while occupying a motor vehicle owned by an insured, but not specifically listed in the policy, violates R.C. 3937.18 and is therefore invalid.

To reach this holding, the court reasoned that the purpose of the UM statute is “to protect persons, not vehicles” so that language excluding a covered person because of an injury sustained in a vehicle that wasn’t covered contravenes the intent of the legislature in enacting the UM law.

The practical effect of this ruling was to allow a named insured or his resident relative to access UM coverage for an occurrence in any owned vehicle if a UM premium was paid on just one of several owned vehicles. After the *Martin* decision, some insurers – including Farmers, according to Bowen’s second amended complaint here – continued to charge and collect separate UM premiums on each owned vehicle despite the fact that a named insured was eligible for UM coverage as to all vehicles if a premium was paid for only one. This practice – which Bowen alleges Farmers continued until September 3, 1997, when R.C. 3937.18 was amended to permit the other owned vehicle exclusion – generated a number of lawsuits against insurance carriers, including this one.

Bowen asserts two causes of action: breach of contract and fraud.

LAW AND ANALYSIS

To most courts and practitioners, the standard of review for a motion to dismiss has become axiomatic, but reproducing it here may provide the parties some reassurance that it is the standard applied by this court.

Pursuant to Civ.R. 12(B)(6), a motion to dismiss for failure to state a claim upon which relief can be granted is procedural and tests the sufficiency of the complaint. (*Citation omitted.*)

Such motions should be granted only where the allegations in the complaint show the court to a certainty that the plaintiff can prove no set of facts upon which he might recover. (*Citation omitted.*) In ruling on a motion to dismiss for failure to state a claim on which relief can be granted, the trial court must construe the allegations in the complaint in a light most favorable to the plaintiff and must presume the truth of any factual allegation as contained in the complaint. (*Citation omitted.*) In order to dismiss a case for failure to state a claim upon which relief can be granted, it must appear beyond doubt that the plaintiff can prove no set of facts warranting relief, after all factual allegations of the complaint are presumed true and all reasonable inferences are made in the plaintiff's favor.²

I. The Breach of Contract Claim.

Farmers argues that the second amended complaint fails to state a claim for breach of contract because the plaintiff paid for and received UM coverage. The plaintiff counters that all the UM coverage he contracted for was supplied in return for the first premium on the first vehicle. He claims that Farmers breached by promising him one thing – UM coverage – in return for a separate premium on all subsequent vehicles, but delivering something else – guest coverage.

To illustrate his position, Bowen notes that the UM section of the policy's declarations page lists a specific vehicle, a specific premium for that vehicle, and a promise to provide UM coverage on that vehicle in exchange for the listed premium. Bowen claims that by not providing him and his resident relatives with UM coverage for the premiums on each vehicle

² *Wells Fargo Bank v. Fusco Properties*, 2010-Ohio-1417, Cuyahoga App. Nos. 92681 & 93164, ¶¶24-25.

after the first, Farmers has substituted another coverage for these premiums that Bowen didn't want and wouldn't have bought if Farmers had told him what it was.

The essential elements of a cause of action for breach of contract are: the existence of a contract; performance by the plaintiff; breach by the defendant; and resulting damage to the plaintiff.³ The second amended complaint does not allege the terms of the proposed contract in detail. Despite that, it appears that the basic agreement was that Farmers would provide UM coverage in exchange for Bowen's payment of a premium. A breach of contract is defined as the failure, without legal excuse, to perform any promise that forms a whole or part of the contract.⁴ There is no allegation in the second amended complaint that Farmers failed in its obligation to provide UM coverage. In fact, Bowen does not allege *any* promise in the contract that Farmers failed to perform.

Whatever Farmers may have done wrong, it was not a breach of contract as that term is commonly understood.

The plaintiff alleges that Farmers breached the contract by "providing guest coverage, and not UM/UIM coverage" for the extra premiums.⁵ In other words, Farmers sold him something he didn't ask for. That may be fraud, but because Farmers also sold him what he did ask for it is not a breach of contract.

The plaintiff as much as admits that his first cause of action is not one for breach of contract by alleging, at paragraph 22 of the second amended complaint, that Farmers had a duty

³ *Benesch, Friedlander v. W. Res. Orofacial & Cosmetic Surg., Inc.*, 2008-Ohio-5269, Cuyahoga App. No. 91047, ¶8.

⁴ *National City Bk. of Cleveland v. Erskine & Sons* (1953), 158 Ohio St. 450, paragraph one of syllabus.

⁵ Second amended complaint, ¶8. He describes the claimed breach similarly in ¶21: Farmers "breached the contract by contracting to provide UM/UIM coverage" for the additional vehicle premiums, "but instead providing guest coverage."

“not to conceal information” and to “truthfully disclose the nature of the coverage provided” for the extra premium payments. That describes conduct suggestive of fraud, not breach of contract.

The allegation that Farmers breached “the contractual duty of good faith and fair dealing” is also insufficient to state a contract cause of action. An insurer’s duty of good faith towards its insured arises out of the contract and is implied at law.⁶ The duty of good faith is breached only by an intentional failure by the insurer to perform under its contract with the insured.⁷ Again, Bowen has not alleged the failure by Farmers to perform under the contract. Indeed, he alleges that Farmers engaged in misconduct – by failing “to truthfully disclose the nature of the coverage” that it was selling – before the contract was agreed to, thus before a duty of good faith arose.

For all of these reasons, the defendant’s motion to dismiss count one of the second amended complaint is granted.

II. The Fraud Claim.

The claim of fraud at count two of the second amended complaint is supported not only by the factual allegations on the breach of contract claim,⁸ but by additional factual assertions at paragraphs 31 through 33 as follows:

Farmers . . . represented to Plaintiff, . . . in the contract documents including the policy and dec sheets, that the amount [he was] paying for vehicles after the first was for UM coverage for the named insured and resident relatives, when that was untrue. The untruth included but was not limited to the fact that the coverage was not UM for the named insured and resident relatives, but was for guest coverage. Additionally or alternately, Defendants represented to the Plaintiff . . . that [he] would not have UM coverage on any vehicle after the first vehicle unless [he] paid an additional premium on those vehicles, which was untrue. Additionally or alternately, Defendants represented to the Plaintiff . . . in

⁶ *Pizzino v. Lightning Rod Mut. Ins. Co.* (1994), 93 Ohio App.3d 246, 253.

⁷ *Id.*

⁸ Second amended complaint, ¶29.

the dec sheet portion of the contract that [he was] to pay an additional premium on vehicles after the first to have UM coverage for [himself] and [his] family members while in those vehicles, which was untrue.

Defendant made these representations, or any of them, with the intent that the Plaintiff . . . would rely on them by paying the additional premiums.

Plaintiff . . . did reasonably rely on them by paying the additional charged premiums, to [his] detriment.

As to this portion of the second amended complaint, the defendant first moves for dismissal on the basis that it is not pled with the particularity required by Rule 9(B) of the Ohio Rules of Civil Procedure.

The elements of fraud are (a) a representation, or where there is a duty to disclose, concealment of a fact, (b) which is material to the transaction at hand, (c) made falsely, with knowledge of its falsity, or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred, (d) with the intent of misleading another into relying upon it, (e) justifiable reliance upon the representation or concealment, and (f) a resulting injury proximately caused by the reliance.⁹

In pleading a cause of action for fraud, Civil Rule 9(B) requires that “the circumstances constituting fraud or mistake shall be stated with particularity.” The Cuyahoga County Court of Appeals has summarized the purposes of the rule:

There are usually three reasons cited for the requirement of particularity. First, particularity is required to protect defendants from the potential harm to their reputations which may attend general accusations of acts involving moral turpitude. Second, particularity ensures that the obligations are concrete and specific so as to provide defendants notice of what conduct is being challenged. Finally, the particularity requirement inhibits the filing of complaints as a pretext for discovery of unknown wrongs.¹⁰

⁹ *Burr v. Stark Cty. Bd. of Commrs.* (1986), 23 Ohio St.3d 69, at syllabus 2.

¹⁰ *Korodi v. Minot* (1987), 40 Ohio App.3d 1, 4.

The first and third reasons have little relevance to this case. An insurance company is inevitably a defendant in numerous lawsuits. Even if this suit is eventually determined in favor of Farmers there is no reason to believe the defendant's reputation will have been damaged. Moreover, if the allegations here are true, Farmers was only one of many insurance companies to continue to charge premiums as if the other owned vehicle exclusion to UM coverage was valid, so its reputation would suffer no more or less than that of most of its peers. And because the plaintiff's claim is clearly premised on continuing to charge the separate per vehicle premiums after the *Martin* decision it cannot be said that the lawsuit is a pretext to discover unknown wrongs.

As for notice to the defendant sufficient to allow the preparation of a defense, the second amended complaint includes allegations that: Farmers represented to Bowen and other policyholders that the separate UM premiums on vehicles after the first would provide UM coverage; the representation was false because Farmers knew, after the *Martin* decision, that the extra premiums were not for UM coverage, but guest coverage; Farmers intended for Bowen to rely on the false representation by paying for the coverage; Bowen relied on the false representation by paying extra premiums; and he was damaged as a result.

Bowen describes the misrepresentations as being contained in "the policy and dec sheets."¹¹

Considering the passage of time, the likelihood that Farmers's archives contain some or all of the policies and declaration pages at issue, and the general inability of a plaintiff, in the absence of discovery, to recite in minute detail the exact means a defendant used to defraud him – since frauds are usually concealed – the second amended complaint satisfies Civil Rule 9(B) and will not be dismissed for lack of particularity.

¹¹ Second amended complaint, ¶31.

The defendant's other reason for dismissal of the fraud claim is the expiration of the statute of limitations.

Ohio Revised Code section 2305.09 provides a four-year statute of limitations for fraud. However, under § 2305.09(E), the cause of action does not accrue until the fraud is discovered. The statutory discovery rule has been judicially interpreted to mean actual discovery or when, through the exercise of reasonable diligence, a plaintiff should have discovered the complained of injury.¹² When determining whether, through the exercise of reasonable diligence, a party should have discovered a case of fraud, the relevant inquiry is whether the facts known would lead a fair and prudent man, using ordinary care and thoughtfulness, to make further inquiry.¹³

The second amended complaint alleges that the fraud was committed between October 5, 1994 and September 2, 1997.¹⁴ The plaintiff claims he did not discover the fraud until less than four years before the lawsuit was filed.¹⁵ The defendant argues that these allegations are not enough to defeat a motion to dismiss because the plaintiff did not plead the circumstances of his actual discovery in any detail and because he doesn't defeat the possibility that he could have discovered his claim earlier through reasonable diligence.

A statute of limitation is an affirmative defense.¹⁶ A Civil Rule 12(B)(6) motion to dismiss based upon a statute of limitations should be granted only where the complaint conclusively shows on its face that the action is barred.¹⁷ Moreover, especially where a question about the exercise of reasonable diligence is raised, the defense will usually require reference to materials outside the complaint.¹⁸ While this court is open to the consideration of evidence that

¹² *Marks v. KeyBank N.A.*, 2005-Ohio-769, Cuyahoga App. No. 84691, ¶24.

¹³ *Id.*

¹⁴ Second amended complaint, ¶2.

¹⁵ *Id.*, ¶8.

¹⁶ Ohio Rule of Civil Procedure 8(C).

¹⁷ *Doe v. Catholic Diocese of Cleveland*, 158 Ohio App.3d 49, 2004-Ohio-3470, ¶23.

¹⁸ *Ryan v. Ambrosio*, 2008-Ohio-6646, Cuyahoga App. No. 91036, ¶20.

before March, 2005,¹⁹ the plaintiff knew about, or should have discovered, the possibility that Farmers defrauded him between 1994 and 1997, the court is not prepared to conclude, without evidence, that as a matter of law the plaintiff should have known of his potential cause of action, and the motion to dismiss will not be granted on the basis that the lawsuit was filed more than four years after the cause of action asserted in count two arose.

CONCLUSION

Because the second amended complaint fails to state a claim for breach of contract, the defendant's motion to dismiss the breach of contract cause of action labeled as count one is granted. Because the second amended complaint states a cause of action for fraud that is not obviously time-barred by the statute of limitations, the defendant's motion to dismiss that cause of action, labeled as count two, is denied.

IT IS SO ORDERED:

Judge John P. O'Donnell

Date: _____

¹⁹ The first complaint was filed March 31, 2009.

SERVICE

A copy of this Journal Entry was sent by e- mail, this _____ day of May, 2010, to the following:

Patrick J. Perotti, Esq.
pperotti@dworkenlaw.com

Attorney for Plaintiff

Donald S. Scherzer, Esq.
dscherzer@ralaw.com

Michael C. O'Neil, Esq.
michael.oneil@dlapiper.com

Attorneys for Defendant

Judge John P. O'Donnell