IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

John McCann, Plaintiff, v. Starbucks Corporation, Starbucks Coffee Company, Mauro & Marzola Real Estate Holdings, LLC, M&M Real Estate Holdings, LLC, and Bishop & Taylor Building, LLC, Defendants.	)	
Bishop & Taylor Building, LLC, an Illinois limited liability company, Third-Party Plaintiff, v. Wolf Point Financial Services, LLC, formerly known as Wolf Point Advisors, LLC, a dissolved Illinois limited liability company, and River Point Insurance Services, LLC d/b/a The Provant Group, an Illinois limited liability company, Third-Party Defendants.	)	No. 19 L 5227

MEMORANDUM OPINION AND ORDER

Actions against insurance producers for the sale or brokerage of insurance must be filed within two years after the date of accrual unless the policy contains contradictory provisions

or fails to define key terms. The renewal policy's declarations pages at issue in this case contained various contradictory provisions that a customer could not reasonably be expected to understand. For that reason, the third-party defendant's motion to dismiss the third-party complaint must be denied.

Facts

August Mauro and Theodore Mazola engage in real estate brokerage, development, and rentals through their company, Mauro & Mazola Real Estate Holdings (M&M). That entity exists solely as the owner of six subsidiaries, each of which, itself, owns and operates a single property. One of M&M's subsidiaries is Bishop & Taylor Building LLC (B&T) that owns the property located at 1430-34 West Taylor Street in Chicago.

In 2016, M&M moved their insurance business to a new broker, Wolf Point Advisors, LLC (Wolf Point). In late 2016, Mauro met with Tyler Weathered, a Wolf Point broker, to discuss the types of insurance M&M needed. Mauro explained to Weathered that M&M wanted to obtain on behalf of each subsidiary casualty and comprehensive general liability coverage for losses or claims arising out of the ownership and operation of each of the subsidiaries' insured properties. In December 2016, Wolf Point obtained the requested coverage through a policy issued by Westfield Insurance Company. The original policy ran from December 2, 2016 through December 2, 2017 and contained a one-year renewal period.

In April 2017, Provant acquired Wolf Point and Wolf Point dissolved soon thereafter. Provant was, therefore, responsible for the policy renewal at the end of 2017. The parties renewed the policy under the previous terms.

The original and renewal policies are each approximately 200 pages and provide property and liability coverage. The policies include eight pages of declarations. Multiple declarations pages identify M&M as the only "named insured." A separate

page containing the "schedule of named insured" identifies M&M and Mauro & Mazola Real Estate Holding. Another declarations page provides a "schedule of described premises," identifying each of the six M&M wholly owned subsidiaries by address. On the same page, the "property coverages" section identifies each property and indicates that the coverages include "business income and extra expense" and "building." The insurance limits for each property are unique. The declaration page containing the "other interests" section identifies each of the six properties as a location, a building, and an "Additional Insured," the latter of which covers five circumstances: (1) "Managers or Lessors of Premises;" (2) "Grantor of Franchise;" (3) "Mortgagee, Assignee or Receiver;" (4) "Owners or Other Interest From Whom Land has been Leased;" and (5) "State or Political Subdivisions – Permits Relating to Premises."

Section II of the renewal policy states that Provant has, "no duty to defend the insured against any 'suit' seeking damages or 'bodily injury', 'property damage' or 'personal and advertising injury' to which this insurance does not apply." Further, Section C of the policy defines an insured by stating:

> C. Who is Insured
>
> 1. If you are designated in the Declarations as:
>
> . . .
>
> c. A limited liability company, you are an insured. . . .

Section C does not mention M&M's subsidiaries as named insureds or additional insureds.

Wolf Point delivered the original policy and Provant delivered the renewal policy to Mauro for review. On each occasion, Mauro focused on the eight pages of declarations since they were the only part of the policy prepared specifically for M&M. Mauro understood that the policies designated M&M as the named insured because it purchased the policies and was solely responsible for paying the premiums.

On February 9, 2018, John McCann left the Starbucks store located in the B&T building at 1430 West Taylor Street. A fabric awning above the door allegedly permitted water to drip from the awning onto the area near the door where the water then froze, creating an unnatural accumulation of ice. McCann slipped on the ice, fell, and was injured.

On May 14, 2019, McCann filed a complaint against various defendants. On February 4, 2020, McCann filed his four-count, second-amended complaint against the currently named defendants. In each count, McCann alleges that the Starbucks entities and the three M&M-related entities owned, operated, managed, maintained, and controlled the premises. McCann claims that the defendants' failures to act and other omissions proximately caused his injuries.

On February 14, 2020, B&T filed a two-count, third-party complaint against the third-party defendants. *See* 735 ILCS 5/2-406. The third-party complaint seeks indemnification from the third-party defendants for all sums B&T may be liable to McCann. B&T's claims Wolf Point and Provant were negligent in serving as B&T's insurance broker and failed to designate B&T as an additional insured in the renewal policy that B&T alleges was to provide it with coverage as the legal title holder and owner of 1430-34 West Taylor Street. (Starbucks leased the first floor of the building from B&T.)

The third-party complaint alleges that M&M relied on Wolf Point and Provant to ensure M&M obtained the coverage it expected. B&T further alleges that it and M&M reasonably believed the policy insured them and that the designation of M&M as the named insured included each M&M subsidiary as the actual owner of each property. B&T alleges it did not learn facts sufficient to disclose Wolf Point's and Provant's negligence until Westfield denied B&T coverage soon after McCann filed his complaint.

Westfield has assumed the defense of M&M in McCann's lawsuit. Westfield has, however, refused to defend B&T in the lawsuit or to indemnify B&T with respect to McCann's claims, arguing that B&T is not a named insured under the policy and is, therefore, not entitled to coverage. On October 7, 2019, Westfield filed a complaint for a declaratory judgment in the Chancery Division seeking an order that it owes no duty to defend or indemnify B&T as to McCann's claims. *See Westfield Ins. Co. v. Bishop & Taylor Bldg., LLC*, No. 19 CH 11569. On February 21, 2020, B&T filed a counterclaim for reformation.

On April 10, 2020, Provant filed a motion to dismiss count two of B&T's third-party complaint based on an expired statute of limitations. *See* 735 ILCS 5/2-619(a)(5). B&T filed a response brief that attached an affidavit by Mauro averring to various issues. Provant filed a reply. This court has reviewed all of the pleadings including the extensive exhibits.

Analysis

Provant's motion to dismiss is authorized by Code of Civil Procedure section 2-619. *See* 735 ILCS 5/2-619. A section 2-619 motion to dismiss authorizes the involuntary dismissal of a claim based on defects or defenses outside the pleadings. *See Illinois Graphics Co. v. Nickum*, 159 Ill. 2d 469, 485 (1994). A court considering a section 2-619 motion must construe the pleadings and supporting documents in a light most favorable to the nonmoving party. *See Czarobski v. Lata*, 227 Ill. 2d 364, 369 (2008). All well-pleaded facts contained in the complaint and all inferences reasonably drawn from them are to be considered true. *See Calloway v. Kinkelaar*, 168 Ill. 2d 312, 324 (1995). As has been stated: "The purpose of a section 2-619 motion is to dispose of issues of law and easily proved issues of fact early in the litigation." *Czarobski*, 227 Ill. 2d at 369.

One of the enumerated grounds for a section 2-619 motion to dismiss is that a claim is barred if "the action was not commenced within the time limited by law." 735 ILS 5/2-610(a)(5). B&T's

third-party complaint is founded on Provant's alleged failure to name each of M&M's subsidiaries as additional insureds under the Westfield policy. Such an omission by Provant, argues B&T, violates the statutory duty imposed by the Code of Civil Procedure requiring, "[a]n insurance producer, registered firm, and limited insurance representative [to] exercise ordinary care and skill in renewing, procuring, binding, or placing the coverage requested by the insured or proposed insured." 735 ILCS 5/2-2201(a). All entities licensed to sell, solicit, or negotiate insurance contracts, including agents and brokers, are "insurance producers" under the statute. *See Skaperdas v. Country Cas. Ins, Co.*, 2015 IL 117021, ¶¶ 19 & 23.

The Code of Civil Procedure contains a statute of limitations applicable to insurance-related claims. As provided:

> All causes of action brought by any person or entity under any statute or any legal or equitable theory against an insurance producer, registered firm, or limited insurance representative concerning the sale, placement, procurement, renewal, cancellation of, or failure to procure any policy of insurance shall be brought within 2 years of the date the cause of action accrues.

735 ILCS 5/13-214.4. The statue does not define what constitutes a cause of action's accrual date. The Supreme Court has, nonetheless, explained that: "[f]or contract actions and torts arising out of contractual relationships . . . , the cause of action ordinarily accrues at the time of the breach of contract, not when a party sustains damages. The reason for this distinction is the concern that plaintiffs will delay bringing suit after a contract is breached in order to increase damages." *American Family Mut. Ins. Co. v. Krop*, 2018 IL 122556, ¶ 17 (quoting *Hermitage Corp. v. Contractors Adjustment Co.*, 166 Ill. 2d 72, 77 (1995) (citations omitted)). In other words, negligent procurement claims against an insurer or broker accrue and the two-year statute of limitations

begins to run when the insurer issues a policy that does not conform to the customer's request. *See id.*

Given the statute's two-year limitations period and *American Family*'s general rule as to when a claim accrues, it is plain that B&T's third-party complaint is untimely. Westfield issued the renewal policy in December 2017, but B&T did not file its third-party complaint until February 14, 2020, well after the statute of limitations had expired. B&T argues, however, that its claim is timely given an exception to the statute recognized in *American Family*. As the court explained:

> Although customers should read their policy and discover any defects, we recognize that there will be a narrow set of cases in which the policyholder reasonably could not be expected to learn the extent of coverage simply by reading the policy. In some cases the insurance policies may contain contradictory provisions or fail to define key terms. In others the circumstances that give rise to the liability may be so unexpected that the typical customer should not be expected to anticipate how the policy applies.

2018 IL 122556, ¶ 36.

B&T argues that the declarations pages contain contradictory terms that Mauro could not reasonably be expected to understand. Provant argues, in turn, that the terms of the declarations pages are unambiguous in identifying M&M exclusively as the named insured. That designation, alone, should have put Mauro on notice that the renewal policy did not cover B&T. To Provant, Mauro's explanation is nothing more than an excuse attempting to circumvent *American Family*'s explicit requirement that an insured has a duty to read and understand a policy's terms. *Id.* at ¶ 29. According to Provant, Mauro's admission that he focused on the declarations pages only and not the policy compounds his breach. As explained by *American Family*, "[e]xpecting customers to read their policies and

understand the terms incentivizes them to act in good faith to purchase the policy they actually want, rather than to delay raising an issue until after the insurer has already denied coverage." *Id.* That goal is reflected in prior Supreme Court opinions that declarations pages and the underlying policy must be read together. As provided:

> The declarations page of an insurance policy is but one piece of the insuring agreement. *See* 1 Holmes's Appleman on Insurance 2d § 4.4 (1996). Although it contains important information specific to the policyholder, the declarations page cannot address every conceivable coverage issue. Thus, some uncertainty could arise if the declarations page is read in isolation from the rest of the agreement. This is precisely why an insurance policy must be interpreted from an examination of the complete document.

Hobbs v. Hartford Ins. Co., 214 Ill. 2d 11, 23 (2005), (citing *Zurich Ins. Co. v. Raymark Indus., Inc.*, 118 Ill. 2d 23, 50 (1987)).

Provant's arguments seeking to trigger the statute of limitations must fail for at least three reasons. First and foremost, it remains unexplained why Provant brokered an insurance policy to M&M at all. If Provant is correct that M&M is the only named insured under the policy and that it does not cover any of M&M's wholly owned subsidiaries, then Provant should not have brokered property and commercial general liability insurance to an entity that is nothing more than a shell corporation owning no property. To that extent, it could be argued Provant brokered insurance under false pretenses – allowing Westfield to collect substantial premiums for insurance Provant knew Westfield would not, indeed, could not, pay if one of M&M's subsidiaries filed a claim.

Second, Mauro's failure to review the entire policy, not just the declarations pages, is irrelevant under these circumstances. Even if the policy makes plain that B&T was not an insured or

additional insured, the presumptively unambiguous policy terms conflict with the declarations pages, as explained below. Under *American Family*, such conflicting terms tolls the two-year running of the statute of limitations under section 13-214.4.

Third, the declarations pages are internally inconsistent for a host of reasons. First, it makes no sense that Provant considers M&M to be the only named insured based on the declarations pages. If that were true, there would have been no reason to list M&M's subsidiaries' properties in either the "described premises" schedule or the "property coverages" section. It is impossible to conclude that those properties are individually identified with unique insurance limits applicable to each for no reason; rather, their inclusion must have some meaning. Second, six declarations pages are devoted to listing liability and medical payment coverages and various endorsements. The latter includes employee dishonesty, equipment breakdown, fire department service charges, debris removal, utility services, windstorm and hail losses, signage, and fine arts coverage. Those endorsements cannot apply to M&M – a non-property owning entity; rather, they can only apply to an entity owning real property. Third, if M&M were the only named insured, there would have been no reason for Provant to provide a "schedule of described premises" including B&T and the other five M&M wholly owned subsidiaries' properties. Fourth, the "other interests" section in the declarations pages explicitly identifies each of the six properties as a "location," a "building," and, most importantly, an "Additional Insured." The "Additional Insured" status covers five circumstances: (1) "Managers or Lessors of Premises;" (2) "Grantor of Franchise;" (3) "Mortgagee, Assignee or Receiver;" (4) "Owners or Other Interest From Whom Land has been Leased;" and (5) "State or Political Subdivisions – Permits Relating to Premises." Provant has failed to explain how B&T cannot be an additional insured when the declarations pages explicitly identify it as one.

The patent inconsistencies in the declarations pages should, by themselves, doom Provant's motion. After all, declarations pages must be construed strictly against the drafter. *See*

Traveler's Ins. Co. v. Eljer Mfg., 197 Ill. 2d 278, 293 (2001) ("if the language of the policy is susceptible to more than one meaning, it is considered ambiguous and will be construed strictly against the insurer who drafted the policy and in favor of the insured"); *Central Ill. Light Co. v. Home Ins. Co.*, 213 Ill. 2d 141, 153 (2004) (same); *Gillen v. State Farm Mut. Auto. Ins. Co.*, 215 Ill. 2d 381, 393 (2005) (same). *American Family* indicates, however, that an objective reading of the contract is, alone, insufficient. Rather, there is a subjective component based on what a customer should reasonably be expected to understand. 2018 IL 122556, ¶¶ 36-37.

On one hand, it should have been evident to Mauro that the declarations pages, by themselves, were inconsistent in identifying the policy's insureds. That should have prompted Mauro to contact Weathered. On the other hand, Mauro explains that the declarations pages made sense by identifying M&M as the named insured because M&M alone purchased the policy and paid the premiums. Either possibility raises a question of Mauro's credibility given that he is not a typical insured homeowner, but a sophisticated owner of multiple interlocking companies that conduct a variety of real estate operations. Whether either possibility is true is based to a considerable extent on Mauro's credibility, a question of fact lying within a jury's province. *See Dowler v. New York, Chicago & St. Louis R.R. Co.*, 5 Ill. 2d 125, 130 (1955).

The inexorable conclusion is that, at this point, this is an exceptional case identified by *American Family* that tolls the running of the statute of limitations under section 13-214.4. Even without referring to the rest of the insurance contract, the eight declarations pages are internally contradictory by identifying B&T as an additional insured for certain coverages, but not identifying B&T as a named insured. The meaning of the declarations pages and the policy is obviously a complex question of mixed fact and law inappropriate for a section 2-619 motion to dismiss.

Conclusion

For the reasons presented above, it is ordered that:

1. Provant's motion to dismiss the third-party complaint is denied; and
2. The parties are to submit an agreed Rule 218 category one case management order no later than September 9, 2020.

John H. Ehrlich, Circuit Court Judge

Judge John H. Ehrlich

AUG 25 2020

Circuit Court 2075