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DISTRICT II

February 21, 2024

To:

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Circuit Court Judge
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Clerk of Circuit Court
Kenosha County Courthouse
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You are hereby notified that the Court has entered the following opinion and order:

2022AP2158

Kenneth Bruce v. Wilson Mutual Insurance Co.
(L.C. #2021CV1047)

Before Gundrum, P.J., Grogan and Lazar, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Kenneth Bruce and Virginia Bruce appeal the circuit court's grant of summary judgment in favor of Wilson Mutual Insurance Co. The circuit court granted judgment in favor of Wilson determining the Bruces' breach-of-contract action was untimely under the applicable limitation periods. The Bruces argue summary judgment was inappropriate because Wilson revived its contractual obligations by making voluntary payments to the Bruces, Wilson waived its statute of limitation defense, and material factual disputes exist. Based upon our review of the briefs and

Record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2021-22).¹ We affirm.

On July 23, 2017, a neighbor's tree fell on the Bruces' home and lot. At the time, the Bruces' property was covered by an insurance policy issued by Wilson. Wilson agreed that the tree caused covered damages, but the parties disagreed as to the damage amount. On October 29, 2021, the Bruces commenced an action, alleging Wilson breached its contract with the Bruces by failing to compensate them for the full damage they suffered as a result of the tree's fall.

Wilson moved for judgment on the pleadings, arguing the case should be dismissed because the periods of limitation for the Bruces' breach-of-contract claim had expired. Wilson emphasized that WIS. STAT. § 631.83(1)(a) imposed a one-year statute of limitation on property insurance claims and the Bruces' policy also contained a one-year limitation. Wilson argued that both applicable periods of limitation had expired by October 29, 2021, which was when the Bruces commenced this action.

The Bruces responded and argued that Wilson, by making payments on the Bruces' claim after the limitation periods lapsed, had revived its contractual obligations and waived its limitation-periods defense.² In support, the Bruces introduced matters outside the pleadings, which converted Wilson's motion into one for summary judgment. *See* WIS. STAT. § 802.06(3).

¹ All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

² In the circuit court, the Bruces also argued Wilson was estopped from asserting a limitations defense. The Bruces do not raise estoppel on appeal and have therefore abandoned that argument. *A.O. Smith Corp. v. Allstate Ins. Cos.*, 222 Wis. 2d 475, 491, 588 N.W.2d 285 (Ct. App. 1998) (“[A]n issue raised in the trial court, but not raised on appeal, is deemed abandoned.”).

The Record reflects that the Bruces initially reported the loss to Wilson on June 23, 2017—the day the tree fell—but then contacted Wilson in August 2017 to advise Wilson they were going to pursue a negligence claim against their neighbors before moving forward with a claim under their insurance policy. The Bruces next contacted Wilson approximately two years later, in September 2019, to advise Wilson that their suit against their neighbors did not result in a damage award to them. Wilson then sent an adjuster to investigate the Bruces’ claim. In January 2020, Wilson made a payment to the Bruces for the June 2017 loss. Wilson made another payment in July 2020 and another in September 2020. In November 2020, Wilson denied the Bruces’ request for further payment. In September 2021, the Bruces made a final demand for payment, Wilson denied it, and the Bruces brought the underlying breach-of-contract action.

Wilson replied, arguing nothing established it revived its contractual obligations after the limitation periods had lapsed. Wilson explained that because the Bruces submitted a timely claim, Wilson owed the Bruces a duty of good faith and it continued to work with the Bruces on their claim after the one-year contractual limitation period lapsed because otherwise Wilson could face liability for a bad-faith-tort claim, which has a longer statute of limitation. *See Jones v. Secura Ins. Co.*, 2002 WI 11, ¶39, 249 Wis. 2d 623, 638 N.W.2d 575 (“We have concluded that even though the one-year statute of limitations on the [insureds]’ contract claim passed before this action was commenced, the [insureds] are not barred from pursuing and recovering damages on their bad faith claim, including damages otherwise recoverable in a breach of an insurance contract action.”). Wilson also argued that it never affirmatively waived its limitation-periods defense, emphasizing that in its correspondence with the Bruces it consistently reserved its right to contest coverage, applicability, and scope.

The circuit court granted judgment in favor of Wilson. It observed that it was undisputed that the Bruces commenced this action over four years after the tree damaged the Bruces' property, which was long past the one-year limitation periods. As for the Bruces' arguments against Wilson's limitation-periods defense, the circuit court first observed that the Bruces' argument conflated the concept of voluntary payment with the concept of duty of good faith. Wilson made payments to the Bruces after the contractual limitation periods lapsed because Wilson owed the Bruces a duty of good faith to investigate and make payment on a timely submitted and covered claim. *See id.* The court also rejected the Bruces' assertion that Wilson waived its limitation-periods defense, noting that in multiple exhibits submitted by the Bruces, Wilson unequivocally advised the Bruces that it was reserving its right to contest coverage, applicability, and scope.

On appeal, the Bruces argue the circuit court erred by granting judgment in favor of Wilson. They assert summary judgment was inappropriate because the Record established Wilson revived its contractual obligations and waived its statute of limitations defense, or, alternatively, genuine issues of material fact exist.

Our review of a circuit court's decision on summary judgment is de novo. ***Behrendt v. Gulf Underwriters Ins. Co.***, 2009 WI 71, ¶11, 318 Wis. 2d 622, 768 N.W.2d 568. Summary judgment is appropriate if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. ***Id.***

As a threshold matter, the Bruces' breach-of-contract action is time-barred unless one of the defenses they assert prevents application of the limitation periods. The Record establishes

the applicable limitation periods in this case were both one year, and the Bruces commenced their breach-of-contract action after these limitation periods expired.

As for the Bruces' defenses against application of the limitation periods to their breach-of-contract claims, in support of their argument that Wilson revived its contractual obligations by making payments, the Bruces cite *Hessman v. O'Brien*, 258 Wis. 243, 247, 45 N.W.2d 730 (1951). That case provides:

an unconditional, unqualified, and unequivocal part payment, voluntarily made by the debtor, or any person legally liable to pay it, of a debt already barred by the statute of limitations, is sufficient 'evidence of a new or continuing contract, whereby to take the cause out of the operation of the statute of limitations.'

Id. at 247 (citation omitted). However, assuming that Wilson owed a "debt" to the Bruces, the Record establishes the payments in this case were *not* "unconditional, unqualified, and unequivocal." *See id.* Wilson routinely advised the Bruces that it was reserving its right to contest coverage, applicability, and scope. We also agree with the circuit court that the Bruces have conflated the concept of a voluntary payment with Wilson's duty of good faith. We conclude Wilson did not revive its contractual obligations by making payments to the Bruces.

We also reject the Bruces' argument that Wilson waived its limitation periods defense for their breach-of-contract claim. As stated previously, Wilson routinely advised the Bruces that it was reserving its right to contest coverage, applicability, and scope. Wilson did not waive its limitation periods defense.

Based on the analyses above, we also disagree with the Bruces that there are genuine issues of material fact as to whether Wilson revived its contractual obligations or waived its limitation-periods defense. We conclude Wilson is entitled to summary judgment. *See*

Behrendt, 318 Wis. 2d 622, ¶19. The Bruces’ breach-of-contract action is time-barred because it was brought after the one-year statutory and the one-year policy breach-of-contract limitation periods expired, and the Bruces’ defenses to the period limitations do not apply.

Upon the foregoing,

IT IS ORDERED that the judgment of the circuit court is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Samuel A. Christensen
Clerk of Court of Appeals