IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

ANNA M. HARRIS, and ANNA M. HARRIS as Next of Friend of CARLIE HARRIS	)	
Plaintiffs,	)	C.A. No. 06C-02-245(MJB)
v.	)	
COCHRAN OIL COMPANY, A Delaware Corporation	)	
Defendant.	)	

Submitted: November 10, 2006

Decided: December 21, 2006

Upon Defendant's Motion for Judgment on the Pleadings, treated by the Court as a Motion for Summary Judgment, **DENIED**.

OPINION AND ORDER

Gary W. Aber, Esquire, Aber, Goldlust, Baker & Over, Attorney for Plaintiffs.

Monica E. O'Neill, Esquire, and David C. Malatesta, Esquire, Kent & McBride, P.C., Attorneys for Defendant.

BRADY, J.

INTRODUCTION

This action was filed by Plaintiffs, Anna and Carlie Harris for personal injuries and property damages that allegedly occurred as a result of Defendant, Cochran Oil Company's ("Cochran") negligence. Defendant filed the instant Motion for Judgment on the Pleadings, arguing that the claims should be dismissed because Plaintiffs have failed to assert their claims within the applicable statute of limitations. In response, Plaintiffs contend that pursuant to 18 *Del. C.* §3914, Defendant is estopped from raising the statute of limitations defense because it failed to provide timely notice of the statute of limitations to Plaintiffs. A hearing was held on the motion, and supplemental briefings were submitted on November 10, 2006.

On the face of the pleadings, it is clear that the statute of limitations had expired at the time the action was filed. The contention, however, is that an exceptional circumstance exempts this case from the statute. The parties' contentions and the Court's inquiry, therefore, cannot end at the pleadings. Consideration must be given to the facts that bear on the exception. The parties have attached to their briefs documents, outside of their pleadings, which address matters for the Court's consideration in deciding the issue. The Court will, therefore, treat this Motion as a Motion for Summary

Judgment. For the reasons that follow, the Motion is DENIED.

FACTS

In September of 2003, Plaintiffs hired Cochran to deliver fuel oil to their home for use in a residential heating system. Plaintiffs allege, during the delivery of the oil, on September 2, 2003, Cochran negligently caused oil to overflow from the delivery pipe with the result that oil contaminated the exterior soil and migrated in the residence. Following the spill, Cochran attempted to remove the oil, but in so doing, Plaintiffs allege, Cochran negligently set the temperature for the heating boiler excessively high, causing it to be damaged. Plaintiffs allege as a result of the damage to the heating boiler, it cracked, causing water spillage in the basement, resulting in damage to the property.

After the alleged contamination, on September 10, 2003, Plaintiffs forwarded a letter to Defendant inquiring as to whether Defendant had filed, with its insurance company, the Plaintiffs' claims from September 3, 2003. On November 21, 2003, Plaintiffs' attorney wrote a second letter to the Defendant requesting that the Defendant notify its insurance company of the claim. Thereafter, on December 5, 2003, L&W insurance ("L&W") responded to Plaintiffs in a letter stating that "any oil that leaked out was

cleaned up by Cochran Oil Company," and that the Plaintiffs should call a repair firm for the boiler leak as it was unrelated to Cochran's actions. The letter further stated that based upon information provided by its "insured," Cochran Oil, L&W was closing its file. Thereafter, on February 23, 2006, Plaintiffs filed the instant action asserting personal injury and property damage claims.

STANDARD OF REVIEW

The standard for granting summary judgment is high.[1] Summary judgment may be granted where the record shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.[2] "In determining whether there is a genuine issue of material fact, the evidence must be viewed in a light most favorable to the non-moving party."[3] "When taking all of the facts in a light most favorable to the non-moving party, if there remains a genuine issue of material fact requiring trial, summary judgment may not be granted."[4]

CONTENTIONS OF THE PARTIES AND APPLICABLE LAW

Defendant alleges that Plaintiffs' claims are time barred because the

[1] *Mumford & Miller Concrete, Inc. v. Burns*, 682 A.2d 627 (Del. 1996).
[2] Super.Ct.Civ.R. 56(c).
[3] *Muggleworth v. Fierro*, 877 A.2d 81, 83-84 (Del. Super. Ct. 2005).
[4] *Gutridge v. Iffland*, 889 A.2d 283 (Del. 2005).

applicable statute of limitations has run. Plaintiffs contend that Defendant is precluded from raising the statute of limitations defense because no notice of the applicable statute of limitations was provided to Plaintiffs by the insurer as required by 18 *Del. C.* §3914.

Count I and II of the Complaint allege property damage and personal injuries, respectively. Under 10 *Del. C.* §8107, the statute of limitations for both personal and property damage actions is two years. The alleged negligence in this case took place on September 3, 2003. The instant action was filed on February 23, 2006, over five months past the expiration of the statutory period.

Plaintiffs argue that pursuant to 18 *Del. C.* §3914, Defendant is estopped from raising the statute of limitations as a defense. 18 *Del. C.* §3914 provides:

> An insurer shall be required during the pendency of any claim received pursuant to a casualty insurance policy to give prompt and timely written notice to claimant informing claimant of the applicable state statute of limitations regarding action for his/her damages.

Plaintiffs contend that Defendant was made aware of the potential claims by letter and later forwarded the letter to L&W. Subsequently, L&W wrote a letter to Plaintiffs' attorney, denying all liability and all claims, but

did not notify Plaintiffs of the applicable statute of limitations in the letter or in any subsequent correspondence. Plaintiffs contend, therefore, Defendant is precluded from pleading statute of limitations as a defense.

ANALYSIS

In order to decide the applicability of 18 *Del. C.* §3914 in this case, the Court must determine whether Plaintiff has pled sufficient fact to meet all of the required conditions; 1) there must be notice of claims to the "insurer;" 2) the claims must be pursuant to a "casualty insurance policy;" 3) there must be the pendency of claims; and 4) the insurer must have failed to give notice of applicable statute of limitations.[5]

Did the "insurer" receive notice of the claims?

The undisputed facts indicate that Plaintiffs notified the Defendant of their claims and Defendant subsequently forwarded the letter of claims to L&W.[6] Thereafter, L&W responded to Plaintiffs by letter stating that Cochran had cleaned up the oil spill and that L&W would be closing their files because Plaintiffs' claim regarding the boiler leak was unrelated to any actions by Cochran.[7] The correspondence between Plaintiffs, Cochran and L&W demonstrates that L&W had notice of Plaintiffs' claims. The

[5] *See* 18 *Del. C.* §3914.
[6] *See* Defendant's Supplemental Brief, Exhibits A-C.
[7] *See* Defendant's Supplemental Brief, Exhibit D.

remaining issue is, therefore, whether notice to L&W constitutes notice to the "insurer."

Plaintiffs contend that L&W is an agent of Defendant's insurance carrier, Utica National Insurance Group ("Utica"). Relying on agency principles, Plaintiffs argue that notice to the agent of the insurer constitutes notice to the insurer as required by statute. Defendant does not oppose Plaintiffs' contention that L&W is an agent of Utica; in fact, Defendant has submitted a copy of the "agency agreement" between L&W and Utica.[8] Defendant asserts "it is key to the application of §3914 for the Court to determine whether or not the entity Plaintiff notified of the claim was the insurer or an agent of the insurer-as opposed to a broker."[9]

The distinction between "insurer," "agent of insurer," and "broker" is significant. If a claimant reports a claim to a broker, as opposed to the insurer or the insurer's agent, the statutory notice requirement may not be met.[10] Generally, "absent any indicia of authority except possibly to forward the policy to the insured and to accept premiums from him, the broker is the agent of the insured, and, timely notice to the broker is not notice to the

[8] *See* Defendant's Supplemental Brief, Exhibit E, The Agency Agreement.
[9] Defendant's Supplemental Brief, at 9.
[10] *Bradford, Inc. v. Travelers Indemnity Company, et al.,* 301 A.2d 519, 524 (Del. 1972) *overruled on other grounds by, State Farm Mut. Auto. Ins. Co. v. Johnson,* 320 A.2d 345 (Del. 1974).

insurer."[11]

18 *Del. C*. §102(3) defines "insurer" as "every person engaged as a principal and as indemnitor, surety or contactor in the business of entering into contracts of insurance…" Furthermore, "Agent of insurer" is defined by 18 *Del. C.* §1702 as "a licensed producer of the Department appointed by an insurer to sell, solicit or negotiate applications for policies of insurance on its behalf and, if authorized to do so by the insurer, to issue conditional receipts." Conversely, "Broker of insured" is "a licensed producer of the department who for compensation negotiates on behalf of others contracts for insurance from companies to whom he or she is not appointed."

In the instant case, Utica, the insurance carrier entered into an "agency agreement" with L&W.[12] Pursuant to the agreement, Utica granted L&W settlement authority as an agent for Utica claims.[13] Furthermore, L&W's "Agents Procedure Guide," provided by Utica, requires that the agents report claims in full detail on an accident report to the local claim office.[14] The obligations of L&W indicate that its authority extends beyond accepting premium payments and issuing policies; L&W is authorized, and indeed

[11] *Id.*
[12] *See* Defendant's Supplemental Brief, Exhibit E, The Agency Agreement.
[13] *See* Defendant's Supplemental Brief, Exhibit F, The Agent's Procedure Guide, at 18.
[14] *Id.*

obligated, to report filed claims to the insurer.[15] Because L&W is given broad authority that extends beyond negotiating insurance contracts, the Court finds that Utica and L&W have an agency relationship.

Having found that L & W is an agent of the insurer, the Court must determine whether notice to L & W constitutes notice to Utica. In *Stop & Shop v. Gonzales,*[16] the claimant had notified the owner of the premises where claimant had fallen and requested that the notice be forwarded to the insurance company. A Response was later sent by an individual who designated himself as the "Corporate Insurance Representative." Rejecting the insurer's argument that it never received actual notice of the plaintiff's claim, the Supreme Court held that since Stop and Shop "undertook to engage in the role of an insurer," it was obligated under the statute to provide the appropriate notice of the statute of limitations.[17]

Similarly, in *Old Guard Insurance co. v. Jimmy's Grill, Inc*.,[18] the insurance company attempted to avoid payment because it had not received notice of a claim before a default judgment was entered. The Complaint was delivered by the defendant to the insurer's agent, but was never forwarded

[15] *Id.*
[16] 619 A.2d 896 (Del. 1993).
[17] *Id.*
[18] 860 A.2d 811 (Del. 2004).

by the agent to the insurer. The Court held that notice to the agent would operate as sufficient notice of the claim to the insurer[19]. In so holding, the Court reasoned that prior course of dealing between the insured and the agent gave the insured reason to believe that giving prompt notice of the claim to the agent would satisfy the policy requirement that the insured give notice to the insurance carrier.

Here, as Plaintiffs correctly assert, L&W has undertaken the role of the insurer by responding to Plaintiffs in a letter and referring to Defendant as "my insured." Therefore, even if L&W failed to forward the claims to Utica, as it is required to do by the agency guidelines, Plaintiffs should not suffer for L&W's negligent conduct when Plaintiffs reasonably believed that notifying L&W of their claims satisfied the policy requirements. The Court therefore, finds that L&W received adequate notice of Plaintiffs' claims and that such notice constitutes notice to the insurer as required by the statute.

Are the claims made pursuant to a casualty insurance policy?

As stated above, 18 *Del. C.* §3914 applies only to casualty insurance policies, and is inapplicable to property insurance. "Casualty insurance" is defined by 18 *Del. C.* §906 as including:

[19] *Id.*

> Liability insurance: insurance against legal liability for the death, injury or disability of any human being, *or for damage to property*, and provision of medical, hospital, surgical, disability benefits to injured persons and funeral and death benefits to dependants, beneficiaries or personal representatives of persons killed, irrespective of legal liability of the insured, *when issued as an incidental coverage with or supplemental to liability insurance.* (Emphasis added)

Property insurance is defined as:

> [i]nsurance on real or personal property of every kind and of every interest therein against loss or damage from any and all hazard or cause, and against loss consequential upon such loss or damage, other than non-contractual legal liability for any such loss or damage.

In *Woodward v. Farm Family Casualty Co*.,[20] the Supreme Court found that claims under property insurance differ from those under casualty insurance policies and held the provisions of 18 *Del. C.* §3914 are not applicable to claims under property insurance policies. In *Woodward*, a homeowner submitted a claim under his own homeowner's insurance carrier for property damages to their residence. The Court held that the homeowner's claims for property damages were under a property insurance policy and thus found the statute inapplicable.[21]

[20] 796 A.2d 638 (Del. 2002).
[21] *Id*. at 648.

In this case, Plaintiffs raise both personal injury and property damages claims. However, the property damages claims here are distinguishable for those in *Woodward.* Here, Plaintiffs' claims are raised under Defendant's liability insurance policy, which, by definition, constitutes a casualty insurance polic, and is subject to the provisions of 18 *Del. C.* §3914. The Court, therefore, finds that Plaintiffs' claims are pursuant to a casualty insurance policy.

Was there pendency of a claim?

Before 18 *Del. C.* §3914 is found applicable, the Court must find that a claim was pending, which triggered the notice requirement. This Court has found "pendency of a claim" where the claimant filed a report and corresponded with the insurer regarding the claim and the claim was later denied by the insurer.[22]

In the instant case, Plaintiffs notified Defendant of their claims, and Defendant forwarded the claims to L&W. L&W then corresponded with Plaintiffs and denied further liability for Plaintiffs' damages. Therefore, the Court finds that pursuant to 18 *Del. C.* §3914, a claim was pending, which triggered the statutory requirement to provide notice of the statute of

[22] *Fleming v. Perdue Farms, Inc.,* 2002 WL 31667335 (Del. Super.).

limitation.

Did the insurer fail to provide notice of the statute of limitations?

Finally, it is undisputed that L & W insurance and Utica failed to provide notice of the statute of limitations to Plaintiffs. The purpose of the notice requirement is to ensure that a claimant "has adequate notice of her statutory rights."[23] Moreover, the insurer is required to provide notice of the statute of limitation even if the claimant is represented by an attorney.[24] Notice given to a claimant's attorney satisfies the statutory requirements.[25] However, where the insurer has not provided notice to the claimant or the claimant's attorney, the insurer cannot raise the statute of limitations defense.[26] In this case, L&W sent correspondence to Plaintiff denying liability, but failed to provide notice of the statute of limitations.

CONCLUSION

Having found that L&W is the agent of the insurer, that the insurer was notified of a claim under a casualty insurance policy, and that the insurer subsequently failed to provide notice to claimant of the applicable statute of limitations, the Court finds the Defendant is estopped from raising

[23] *Brown v. State*, 900 A.2d 628 (Del. 2006).
[24] *Vance v. Irwin*, 619 A.2d 1163 (Del. 1993).
[25] *Id*.
[26] 18 *Del. C.* §3914.

the statute of limitations as a defense. Accordingly, the Motion for Judgment on the Pleadings, treated by the Court as a Motion for Summary Judgment, is **DENIED**.

IT IS SO ORDERED.

/s/
M. Jane Brady
Superior Court Judge