STATE OF MICHIGAN

COURT OF APPEALS

AMERICAN ERECTORS, INC.,

Plaintiff/Counter-Defendant-Appellant,

v

MCNISH GROUP, INC.,

Defendant-Appellee,

and

ADMIRAL INSURANCE COMPANY and TRIBLER, ORPETT & MEYER,

Defendants,

and

SECURA INSURANCE COMPANIES/SECURA INSURANCE,

Defendant/Counter-Plaintiff/Cross-Plaintiff,

and

JANET KOMACKO,

Defendant/Cross-Defendant.

UNPUBLISHED
September 15, 2015

No. 322799
Oakland Circuit Court
LC No. 2013-133581-CK

Before: MURRAY, P.J., and METER and OWENS, JJ.

PER CURIAM.

Plaintiff American Erectors, Inc., appeals as of right an order granting summary disposition to defendant, McNish Group, Inc. ("McNish"). We affirm.

I. FACTS

A. BACKGROUND

This appeal arises out of a dispute involving inadequate insurance coverage. Plaintiff is a business involved in the erection of steel. For approximately 10 years, McNish provided plaintiff with advice and guidance on many insurance and business matters. Throughout their relationship, McNish was plaintiff's agent in insurance transactions and plaintiff did not directly deal with insurance providers. Every year, McNish counseled plaintiff regarding the type of coverage that plaintiff should obtain and McNish would suggest which policy plaintiff should ultimately obtain.

In 2005, Plaintiff, upon advice from McNish, formed a subsidiary company, Great Lakes Steel ("Great Lakes"). The purpose of forming Great Lakes was to provide the labor for plaintiff's construction projects while at the same time reducing the high costs and risks of providing labor for plaintiff. After the formation of Great Lakes, plaintiff informed McNish that it needed insurance to protect against claims for injuries to workers, whether employed by plaintiff or Great Lakes.

During a meeting where plaintiff and McNish discussed plaintiff's insurance for the year of 2008, McNish recommended that plaintiff obtain "umbrella coverage" from Admiral Insurance Company ("Admiral") for both plaintiff and Great Lakes. McNish recommended that plaintiff and Great Lakes be named insureds on the Admiral policy. When plaintiff questioned the possible gap in coverage by having plaintiff and Great Lakes named as insureds, McNish advised plaintiff that listing both plaintiff and Great Lakes as insureds would be a less expensive method to obtain the same coverage for both plaintiff and Great Lakes.

Based on the recommendation from McNish, plaintiff agreed to purchase an insurance policy from Admiral and obtained umbrella insurance for both plaintiff and Great Lakes under a single policy. The Admiral insurance policy was an excess liability policy that provided a limit of five million dollars per loss event and became effective on February 19, 2008.

On April 1, 2008, Gary Komacko, an employee of Great Lakes, was killed while working on a construction project in Portage, Indiana. Shortly thereafter, plaintiff notified McNish of the accident.

On September 5, 2008, Janet Komacko, the administratix of the Estate of Gary Komacko, filed a wrongful death action against plaintiff and Great Lakes in Indiana state court. Plaintiff's primary insurer, Secura Insurance ("Secura"), hired Tribler, Orpett & Meyer to defend the Komacko lawsuit.

On August 25, 2009, Admiral sent a letter to plaintiff advising plaintiff that there was no coverage for plaintiff's claim under the policy issued by Admiral. Admiral indicated that coverage was precluded as a result of a named insured versus named insured exclusion in plaintiff's policy. Admiral stated that the named insured versus named insured exclusion applied because Janet Komacko sued plaintiff, who is a named insured under the policy, but Gary Komacko was employed by Great Lakes, who was also a named insured under the policy.

Once plaintiff was denied coverage, McNish advised plaintiff on how to handle the Admiral denial and attempted to reinstate coverage for the Komacko accident. McNish told plaintiff that it would handle all negotiations regarding the denial of coverage and "promised to resolve the issue." From 2009 to 2012, McNish assured plaintiff that it was handling the matter and that plaintiff should not interfere with the negotiations between McNish and Admiral regarding the Komacko loss. At one point, McNish told plaintiff that it "had insurance for these types of gaps in coverage." While the Komacko trial was ongoing, McNish told plaintiff to "delay any activity pending the outcome of trial" because if "the trial could be successful, and there would be [no] need to act if the Komacko estate lost at trial." On June 29, 2012, Janet Komacko obtained a judgment against plaintiff in the amount of $7,359,140.33.

B. PROCEDURAL HISTORY

On April 22, 2013, plaintiff filed a complaint against McNish; Secura; Admiral; Tribler, Orpett & Meyer; and Janet Komacko.[1] Relevant to this appeal, plaintiff alleged that (1) McNish breached its contract with plaintiff by failing to procure adequate insurance coverage (2) McNish fraudulently represented the terms and scope of coverage of the Admiral insurance policy and (3) McNish did not exercise the standard of care when procuring insurance coverage for plaintiff.

On November 8, 2013, McNish filed a motion for summary disposition pursuant to MCR 2.116(C)(10). McNish argued (1) that there was no genuine issue of material fact regarding whether a contract existed between McNish and plaintiff (2) that there was no genuine issue of material fact regarding whether McNish breached its duty to provide plaintiff with adequate insurance and (3) that plaintiff failed to specifically state a cause of action for fraud.

On December 11, 2013, plaintiff filed a response to McNish's first motion for summary disposition. Plaintiff argued (1) that a contract existed between McNish and plaintiff, and that McNish breached the contract; (2) that McNish owed a duty to plaintiff and a genuine issue of material fact existed regarding whether McNish breached its duty and (3) that plaintiff sufficiently stated a cause of action for fraud.

After hearing arguments on McNish's motion for summary disposition on January 8, 2014, the trial court dismissed plaintiff's fraud claim because plaintiff did not plead with specificity the elements of fraud. The trial court concluded that McNish owed a duty to plaintiff and that a genuine issue of fact exists regarding whether McNish breached its duty to plaintiff. The trial court took McNish's request for summary disposition with regard to plaintiff's breach of contract claim under advisement. The trial court subsequently entered an order granting McNish's motion for summary disposition with regard to plaintiff's fraud claim, and denied its motion with regard to plaintiff's negligence claim.

McNish subsequently filed a second motion for summary disposition pursuant to MCR 2.116(C)(7) and argued that plaintiff's negligence claim was barred by the professional

[1] Secura; Admiral; Tribler, Orpett & Meyer; and Janet Komacko were subsequently dismissed from the lawsuit.

malpractice statute of limitations set forth in MCL 600.5808(6) and MCL 600.5838. McNish asserted that plaintiff did not file its complaint within two years of the accrual of plaintiff's claim and that plaintiff's complaint was not filed within six months of discovering the alleged claim. Specifically, McNish contended that the accrual of plaintiff's claim began on April 1, 2008, the date of the construction accident, and that the limitation period lapsed on April 1, 2010, which resulted in plaintiff's complaint that was filed on April 22, 2013, to be untimely.

In its response, plaintiff asserted that its negligence claim was properly characterized as a professional malpractice claim and that it was required to bring the claim within two years after the relationship between the parties terminated. Plaintiff argued that the professional relationship did not end until 2013 as McNish continued to provide insurance services to plaintiff until that time. Plaintiff contended that because the complaint was filed on April 22, 2013, the action was brought well within two year statute of the limitation. Plaintiff also claimed that the statute of limitations was tolled as a result of fraudulent concealment, and that McNish should be equitably estopped from asserting the statute of limitations defense. Lastly, plaintiff asserted that it properly pleaded a claim of fraud.

On May 30, 2014, the trial court entered an order granting summary disposition to McNish with regard to plaintiff's breach of contract claim as no evidence was presented that a contract existed between the parties. Then, on June 4, 2014, the trial court entered an order granting McNish's motion for summary disposition. The trial court determined that plaintiff's negligence claim was barred because a reasonable person should have discovered the possible cause of action by August 25, 2009, or by the latest, June 15, 2012. The trial court further stated that because plaintiff did not file the instant action until April 22, 2013, the six month discovery rule set forth in MCL 600.5838(2) applied and plaintiff's claim was barred by the statute of limitations.

II. ANALYSIS

A. STATUTE OF LIMITATIONS

Plaintiff contends that the trial court erred in granting McNish's second motion for summary disposition because the statute of limitations did not bar plaintiff's claim.

This Court reviews a grant of summary disposition de novo. *Kincaid v Cardwell*, 300 Mich App 513, 522; 834 NW2d 122 (2013). A party moving for summary disposition under MCR 2.116(C)(7) may support the motion with affidavits, depositions, admissions, or other admissible documentary evidence, which the reviewing court must consider. *Id*. Summary disposition under MCR 2.116(C)(7) is appropriate when the undisputed facts establish that the plaintiff's claim is barred under the applicable statute of limitations. *Id*. If there is no factual dispute, whether a plaintiff's claim is barred under the applicable statute of limitations is a matter of law for this Court to determine. *Id*. at 523.

The statute of limitations for various tort actions is set forth in MCL 600.5805. The statute provides, in relevant part:

> (1) A person shall not bring or maintain an action to recover damages for injuries to persons or property unless, after the claim first accrued to the plaintiff or to

someone through whom the plaintiff claims, the action is commenced within the periods of time prescribed by this section.

* * *

(6) Except as otherwise provided in this chapter, the period of limitations is 2 years for an action charging malpractice.

* * *

(10) Except as otherwise provided in this section, the period of limitations is 3 years after the time of the death or injury for all actions to recover damages for the death of a person, or for injury to a person or property. [MCL 600.5805.]

The resolution of this case hinges on the proper characterization of plaintiff's claim; whether plaintiff's claim is one of ordinary negligence or professional malpractice. It is well established in Michigan that a court is not bound by the label a party assigns to its claims. *Stephens v Worden Ins. Agency, LLC*, 307 Mich App 220, 228-229; 859 NW2d 723 (2014). Rather, a court must consider the suit based on a reading of the complaint as a whole. *Id*. at 229. As such, a party is prevented from avoiding an applicable statute of limitations through "artful drafting." *Id*.

In plaintiff's complaint, plaintiff alleges that McNish breached its duty to plaintiff by failing to "procure" suitable coverage for plaintiff and for failing to advise plaintiff of the extent or scope of insurance coverage. In *Stephens*, this Court held that claims for negligent procurement of insurance and negligent advice with regard to insurance are claims that sound in ordinary negligence, not malpractice. *Id*. at 222. Therefore, plaintiff's claim sounds in ordinary negligence and the three year statute of limitations applies to plaintiff's negligence claim. *Id*.

The *Stephens* Court also held that negligent procurement of insurance and negligent advice with regard to insurance claims accrue when the insurer denies the insured's claim because "any speculative injury becomes certain, and the elements of the negligence action are complete." *Id*. at 236-237. The record indicates that Admiral denied plaintiff's claim on August 25, 2009, when Admiral sent a letter to plaintiff advising plaintiff that "there is no coverage for this claim under the policy issued by Admiral." Thus, plaintiff's negligence claim began to accrue on August 25, 2009, and was required to file its claim by August 25, 2012.

Although plaintiff asserts that the statute of limitations did not begin to accrue until June 15, 2012, when Admiral sent a second letter to plaintiff denying coverage, the negligence claim began to accrue upon Admiral's first denial of coverage on August 25, 2009, because that is when the elements of the negligence action were complete. *Id*. Because plaintiff's suit was not filed until April 22, 2013, more than three years after the claim began to accrue, plaintiff's negligence claim was untimely.

Plaintiff next contends that its negligence claim was timely filed because the statute of limitations was tolled as a result of fraudulent concealment. MCL 600.5855 provides:

> If a person who is or may be liable for any claim fraudulently conceals the existence of the claim or the identity of any person who is liable for the claim from the knowledge of the person entitled to sue on the claim, the action may be commenced at any time within 2 years after the person who is entitled to bring the action discovers, or should have discovered, the existence of the claim or the identity of the person who is liable for the claim, although the action would otherwise be barred by the period of limitations.

However, "[i]f there is a known cause of action there can be no fraudulent concealment which will interfere with the operation of the statute, and in this behalf a party will be held to know what he ought to know . . . ." *Doe v Roman Catholic Archbishop of Archdiocese of Detroit,* 264 Mich App 632, 643; 692 NW2d 398 (2004), quoting *Weast v Duffie*, 272 Mich 534, 539; 262 NW 401 (1935). Given that plaintiff was aware of Admiral's denial of coverage from Admiral's August 25, 2009 letter denying coverage, there was a known cause of action against McNish for failing to procure adequate insurance and for failing to properly advise plaintiff. As such, tolling did not occur because the fraudulent concealment statute was not available to plaintiff.

McNish is also not estopped from raising the statute of limitations as a defense. The doctrine of equitable estoppel can foreclose a statute of limitations defense. *Cincinnati Ins Co v Citizens Ins Co*, 454 Mich 263, 270; 562 NW2d 648 (1997). In order to invoke equitable estoppel, a party must establish that there has been (1) a false representation or concealment of a material fact, (2) an expectation that the other party will rely on the misconduct, and (3) knowledge of the actual facts on the part of the representing or concealing party. *Id*. The Michigan Supreme Court "has been reluctant to recognize an estoppel absent intentional or negligent conduct designed to induce a plaintiff to refrain from bringing a timely action." *Id*. "[T]he usual sort of conduct which may work an estoppel in the statute of limitations context" includes "an offer to compromise or settle plaintiff's claim, a representation that the limitations period was of much greater duration than it actually was, or part payment of plaintiff's claim." *Lothian v City of Detroit*, 414 Mich 160, 178; 324 NW2d 9 (1982).

Plaintiff has failed to establish a genuine issue of material fact that McNish made a false representation or concealed a material fact, had an expectation that plaintiff would rely on the misconduct, and had knowledge of the actual facts. There is no evidence of a false representation or concealment of a material fact by McNish. Indeed, plaintiff was aware of Admiral's decision to deny plaintiff's claim when it was made, and Admiral never informed McNish (or anyone else) that the decision had been changed. Thus, there was no material fact to conceal from plaintiff, and no actual facts otherwise known by McNish. And, in the absence of any false representation or concealment of a material fact, there can be no misconduct. Additionally, McNish's representation that it would obtain affirmative relief was merely a promise of future conduct, not a false representation of a current fact. *Foreman v Foreman*, 266 Mich App 132, 143; 701 NW2d 167 (2005).

Moreover, plaintiff has failed to establish that any of McNish's conduct was designed to induce plaintiff to refrain from bringing a timely action. In fact, none of McNish's statements constitute an offer to compromise or settle plaintiff's claim or a representation that the limitations period was of greater duration than it actually was, nor did any of its conduct amount to a partial payment of plaintiff's claim. *Lothian*, 414 Mich at 178. First, McNish's statement that Admiral

was going to "step in" and cover the loss to Great Lakes does not constitute an offer to compromise or settle plaintiff's claim, as the statement dealt with Great Lakes. Second, McNish's statement that it had insurance for these types of gaps in coverage is also not an offer to settle plaintiff's claim as McNish only represented that it had such a policy. The mere fact that McNish took the lead in negotiations with Admiral and assured plaintiff that the issue would be resolved favorably does not permit plaintiff to invoke the doctrine of equitable estoppel as plaintiff, like most other litigants, had a primary obligation to secure prompt resolution of its claim in the courts. *Id*. at 179. Accordingly, plaintiff has failed to establish that McNish engaged in intentional or negligent conduct designed to induce plaintiff to refrain from bringing a timely action.

B. FAILURE TO STATE A CLAIM AND RIGHT TO AMEND COMPLAINT

Plaintiff contends that the trial court erred in concluding that plaintiff failed to state a claim and that it was not entitled to amend the complaint.

This Court reviews de novo the trial court's decision to grant a motion for summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Under MCR 2.118(C)(8), the legal sufficiency of the complaint is tested by the pleadings alone. *Id*. at 119. All well-pleaded factual allegations in support of the claim are accepted as true and are construed in the light most favorable to the nonmoving party. *Johnson v Pastoriza*, 491 Mich 417, 435; 818 NW2d 279 (2012). The motion should be granted only when the claim is "clearly unenforceable as a matter of law and no factual development could justify recovery." *Id*., quoting *Wade v Dep't of Corrections*, 439 Mich 158, 162-163; 483 NW2d 26 (1992).

Fraud claims must be pleaded with particularity, addressing each element of the tort. *Cooper v Auto Club Ins Ass'n*, 481 Mich 399, 414; 751 NW2d 443 (2008). General allegations or mere speculation are insufficient to properly plead a claim for fraud. *LaMothe v Auto Club Ins Ass'n*, 214 Mich App 577, 586; 543 NW2d 42 (1995). To properly plead a fraud claim, the plaintiff must allege that:

> (1) the defendant made a representation that was material, (2) the representation was false, (3) the defendant knew the representation was false, or the defendant's representation was made recklessly without any knowledge of the potential truth, (4) the defendant made the representation with the intention that the plaintiff would act on it, (5) the plaintiff actually acted in reliance, and (6) the plaintiff suffered an injury as a result. [*Stephens*, 307 Mich App at 230.]

Plaintiff failed to address each element of fraud with particularity. Plaintiff did allege that McNish made a material representation that ultimately proved false: that the liability coverage secured for plaintiff would cover injuries to both employees of plaintiff and Great Lakes. However, plaintiff failed to specify who at McNish made such a representation. Moreover, plaintiff merely alleged that "the representations were made intentionally or recklessly, with disregard for their truth or falsity." Plaintiff did not allege any particulars regarding how defendant knew the statement was false or how it was made recklessly without any knowledge of the potential truth. Plaintiff also failed to allege facts regarding how or why McNish intended to have plaintiff rely on the false representation. Plaintiff merely asserted

general allegations of fraud. Because general allegations are insufficient to properly plead a claim for fraud, plaintiff failed to state a claim of fraud and no factual development could possibly justify recovery. Under the circumstances, the trial court did not err when it ordered dismissal of plaintiff's fraud claim pursuant to MCR 2.116(C)(8).

Plaintiff asserts that the trial court abused its discretion in refusing to allow plaintiff to amend its complaint. However, the issue is not properly before this Court because no written order or judgment was entered by the trial court on plaintiff's oral request to amend its complaint. See *Lown v JJ Eaton Place*, 235 Mich App 721, 725-726; 598 NW2d 633 (1999) (holding that the jurisdiction of this Court is confined to judgments and orders and that because no written order or judgment was entered by the trial court on plaintiff's request to amend its complaint, this Court did not have jurisdiction). Plaintiff never filed a motion to amend, so the trial court never had an opportunity to exercise its discretion.

III. CONCLUSION

For the reasons stated herein, we affirm the trial court's order granting McNish's motion for summary disposition. As the prevailing party, McNish may tax costs pursuant to MCR 7.219(A).

/s/ Christopher M. Murray
/s/ Patrick M. Meter
/s/ Donald S. Owens