UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 12-60735-CIV-COHN/SELTZER

WESTON APARTMENTS CORP., a Florida corporation as successor in interest to OLEN RESIDENTIAL REALTY CORP, a Florida corporation,

Plaintiff,

vs.

TRAVELERS INDEMNITY COMPANY OF AMERICA,

Defendant.
_____/

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS AND DISMISSING CASE WITH PREJUDICE

THIS CAUSE is before the Court upon Defendant Travelers Indemnity Company's Motion to Dismiss [DE 1-3] ("Motion"). The Court has considered the Motion, Defendant's Memorandum in Support thereof [DE 7] ("Mem."), Plaintiff's Response [DE 13] ("Response"), Defendant's Reply [DE 13] ("Reply"), and is otherwise fully advised in the premises.

I. BACKGROUND

Plaintiff Weston Apartment Corp., successor in interest to Olen Residential Realty Corp. ("Plaintiff"), commenced this action against Defendant Travelers Indemnity Company of America ("Defendant") in the 17th Judicial Circuit in and for Broward County on March 13, 2012. See Complaint [DE 1-2]. Defendant removed this action to this Court on April 25, 2012. See Notice of Removal [DE 1]. The Complaint is a declaratory action against Defendant to satisfy a judgment rendered against Dymle Construction

Company, Inc. ("Dymle"), Defendant's insured. Complaint ¶¶ 1, 7. Plaintiff filed suit against Dymle for breach of contract, violation of Fla. Stat. § 553.84, and negligence on August 11, 2003. Id. ¶ 13. The Complaint alleges that despite being provided with notice of the lawsuit, Defendant and Dymle both failed to respond to the Complaint. Id. ¶ 14. Subsequently, a final judgment was entered against Dymle on March 2, 2007. Id. ¶ 15. Plaintiff asserts that Defendant should not have denied coverage to Dymle. Id. ¶¶ 18-19. Plaintiff seeks judicial determination of whether Defendant is required to cover the $3,040,296.00 judgment entered against Dymle. Id. ¶ 20. Defendant has now moved to dismiss the Complaint with prejudice on the grounds that Plaintiff failed to file the Complaint within the applicable statute of limitations. Motion ¶ 4. Plaintiff disputes that the statute of limitations has expired and opposes the Motion.

II. DISCUSSION

A. Legal Standard.

Under Federal Rule of Civil Procedure 12(b)(6), a court shall grant a motion to dismiss where, based upon a dispositive issue of law, the factual allegations of the complaint cannot support the asserted cause of action. Glover v. Liggett Grp., Inc., 459 F.3d 1304, 1308 (11th Cir. 2006). Indeed, "[f]actual allegations must be enough to raise a right to relief above the speculative level." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007). Thus, a complaint must contain "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Twombly, 550 U.S. at 570).

Nonetheless, a complaint must be liberally construed, assuming the facts alleged therein as true and drawing all reasonable inferences from those facts in the plaintiff's

favor. Twombly, 550 U.S. at 555. A complaint should not be dismissed simply because the court is doubtful that the plaintiff will be able to prove all of the necessary factual allegations. Id. Accordingly, a well pleaded complaint will survive a motion to dismiss "'even if it appears that a recovery is very remote and unlikely.'" Id. at 556.

B. Whether the Statute of Limitations Expired Before Plaintiff Filed Its Complaint.

Generally, whether a claim is barred by the statute of limitations should be raised as an affirmative defense in the answer rather than in a motion to dismiss. Cabral v. City of Miami Beach, 76 So. 3d 324, 326 (Fla. Dist. Ct. App. 2011). However, if facts on the face of the pleadings show that the statute of limitations bars the action, the defense can be raised by motion to dismiss. Id.; see also Tello v. Dean Witter Reynolds, Inc., 410 F.3d 1275, 1288 (11th Cir. 2005) (noting that the granting of a motion to dismiss on statute of limitations grounds is appropriate if it is apparent from the face of the complaint that the claim is time-barred). Thus, the Court will address Defendant's statute of limitations argument to determine whether dismissal is appropriate based on the face of the Complaint.

Defendant contends that Plaintiff's claims against it accrued no later than March 2, 2007. Mem. at 2. Accordingly, because Plaintiff did not file the instant lawsuit until March 13, 2012, Defendant argues that the five year statute of limitations provided in Fla. Stat. § 95.11(2)(b) had already expired. Id. Plaintiff disputes that the statute of limitations has expired on its claim, because after the final default judgment was entered against Dymle, Plaintiff received two letters from Defendant where coverage was denied. Response at 2 ¶ 3. Plaintiff contends that each time it "submitted additional and/or supplemental information in support of coverage, a separate breach of contract occurred

and accrued each time that the Defendant, TRAVELERS, denied coverage." Id. Thus, according to Plaintiff, Defendant last breached its obligation on April 30, 2009, and the Complaint was timely filed within five years of this date. Id. at 3.

Florida law provides a five year statute of limitations for any "legal or equitable action on a contract, obligation, or liability founded on a written instrument." Fla Stat. § 95.11(2)(b).[1] In Florida, a cause of action accrues "when the last element constituting the cause of action occurs." Fla. Stat. § 95.031(1). Generally, in breach of insurance contract cases, the statute of limitations "begins to run from the date of the alleged breach." Saenz v. State Farm Fire & Cas. Co., 861 So. 2d 64, 68 (Fla. Dist. Ct. App. 2003). Here, Defendant first denied coverage to its insured Dymle on August 31, 2006. Complaint ¶ 15 & Composite Exhibit C. However, Florida statute provides that "[i]t shall be a condition precedent to the accrual or maintenance of a cause of action against a liability insurer by a person not an insured under the terms of the liability insurance contract that such person shall first obtain a settlement or verdict against a person who is an insured under the terms of such policy for a cause of action which is covered by such policy." Fla. Stat. § 627.4136 (1). Thus, Plaintiff's claim against Defendant did not accrue until after Plaintiff had obtained a final default judgment against Dymle on March 2, 2007. See id; see also Complaint ¶ 15.

Defendant contends that Plaintiff was required to bring its lawsuit within five years of the March 2, 2007 final judgment. Mem. at 5. Plaintiff, on the other hand, argues that the breach of contract did not occur until 2009, the last time Defendant denied coverage,

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[1] The parties do not dispute that this is the proper statute of limitations.

and that to the extent there are facts in dispute, Defendant's Motion must be denied. Response at 3. For the reasons discussed below, the Court agrees with Defendant that Plaintiff's cause of action accrued on March 2, 2007 and Plaintiff Complaint, filed on March 13, 2012, is time-barred.

The heart of Plaintiff's opposition is that Defendant breached its insurance contract in September 2007 and April 2009, when it sent letters to Plaintiff denying coverage. Response at 2 ¶ 3. Defendant disputes that these letters constituted independent breaches of contract because "[t]he fact that Travelers reiterated its August 2006 coverage denial in September 2007 and April 2009 has no relevance in the third party insurance context." Reply at 1-2. The Court agrees. It is apparent from the face of the Complaint and the exhibits thereto[2] that Defendant first denied coverage on August 31, 2006. Complaint ¶ 15 & Composite Exhibit C. Although Plaintiff attaches letters between it and Defendant dated September 6, 2007 and April 30, 2009 to the Complaint, these letters do not alter the date that coverage was originally denied, August 31, 2006, or the date that a final default judgment was entered against Dymle, March 2, 2007. Moreover, a close review of the letters indicates that Defendant merely repeated its original August 31, 2006 decision to deny coverage. Composite Exhibit C. Thus, these letters cannot constitute an independent breach of the insurance contract.[3]

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[2] It is axiomatic that when there is a dispute between a complaint and attached exhibits, the exhibits control. See Friedman v. Mkt. St. Mortg. Corp., 520 F.3d 1289, 1295 n.6 (11th Cir. 2008).

[3] As Defendant points out in its Reply, "an insured cannot extend the limitations period by repeatedly resubmitting the same claim." Reply at 6 (quoting Roth v. State Farm Mut. Auto. Ins. Co., 581 So. 2d 981, 983 (Fla. Dist. Ct. App. 1991)).

Furthermore, as Defendant points out, because this suit is brought against a liability carrier by a judgment holder, not an insured, the pertinent date for statute of limitations purposes is the date a judgment was obtained. Fla. Stat. § 627.4136(1); see also Dollar Sys., Inc. v. Elvia, 967 So. 2d 447, 449 (Fla. Dist. Ct. App. 2007) (noting that "[a]n injured person has no beneficial interest in the wrongdoer's liability policy until a judgment is entered against the insured."). Thus, whether the September 2007 and April 2009 letters constitute breaches of the insurance contract is not a proper inquiry in this case.

Finally, to the extent Plaintiff argues that the Complaint should not be dismissed because there are disputed issues of fact, the Court disagrees. It is apparent from the face of the Complaint and the exhibits thereto that Plaintiff's claim is time barred. Accordingly, dismissal of the Complaint on statute of limitations grounds is proper. See Cabral, 76 So. 3d at 326; Tello, 410 F.3d at 1288. Additionally, the Court finds that dismissal with prejudice is warranted because any amendment would be futile. Coresello v. Lincare, Inc., 428 F.3d 1008, 1014 (11th Cir. 2005) (noting that leave to amend need not be granted "(1) where there has been undue delay, bad faith, dilatory motive, or repeated failure to cure deficiencies by amendments previously allowed; (2) where allowing amendment would cause undue prejudice to the opposing party; or (3) where amendment would be futile").

III. CONCLUSION

In light of the foregoing, it is **ORDERED AND ADJUDGED** as follows:

1. Defendant Travelers Indemnity Company's Motion to Dismiss [DE 1-3] is **GRANTED**;

2. This action is **DISMISSED WITH PREJUDICE**; and

3. The Clerk shall **CLOSE** this case and **DENY** all pending motions as **MOOT**.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 12th day of July, 2012.

JAMES I. COHN
United States District Judge

Copies provided to counsel of record via CM/ECF.