

STATE OF MICHIGAN
COURT OF APPEALS

CONTINENTAL RENTAL, INC.,
Plaintiff-Appellant,

UNPUBLISHED
April 19, 2012

v

MOULTHROP-CLIFT, INC.,
Defendant-Appellee.

No. 303138
Bay Circuit Court
LC No. 10-003186-CK

Before: HOEKSTRA, P.J., and SAWYER and SAAD, JJ.

PER CURIAM.

Plaintiff appeals as of right the grant of defendant's motion for summary disposition under MCR 2.116(C)(10) and (C)(7). We affirm.

James Patterson is the owner of plaintiff corporation, which rents furniture to the public. Patterson testified that although he does not remember precisely when plaintiff began to purchase corporate insurance policies through defendant, an insurance broker, he believed it was sometime around 1985. Patterson testified that at that time defendant agreed to provide insurance policies to plaintiff for whatever was needed to protect the company from lawsuits from employees and the general public. The type of insurance at issue here is known as employment practices liability insurance (EPLI). The parties agree that, once a year, new insurance policies would be discussed and signed.

In March 2004, Steven Pasanski, a former employee of plaintiff, sued it under the Civil Rights Act, MCL 37.2101 *et seq.* Pasanski was awarded damages as well as attorney fees. In 2006, Mrs. Pasanski sued plaintiff as well for Mr. Pasanski's wrongful termination. Mrs. Pasanski was never employed by plaintiff. Patterson maintains that he was first introduced to the existence of EPLI in a conversation with Guy Moulthrop, defendant's agent who dealt with Patterson, after Patterson became aware of Mr. Pasanski's lawsuit. However, during discovery, defendant produced a letter, which it maintained was mailed to plaintiff in December 1999, in which an offer was extended to sell plaintiff EPLI.

On March 12, 2010, plaintiff brought suit against defendant, claiming a breach of an oral contract established at the beginning of their business relationship. At the motion hearing for summary disposition, the trial judge determined that plaintiff's claim sounded in tort as professional negligence and so the two-year statute of limitations barred the action. Plaintiff now argues that the court erred. We review a grant of summary disposition *de novo*, *West v Gen*

Motors Corp, 469 Mich 177, 183; 665 NW2d 468 (2003), viewing all the record evidence in a “light most favorable to the nonmoving party.” *Quality Products and Concepts Co v Nafle Precision, Inc*, 469 Mich 362, 369; 666 NW2d 251 (2003).

In order to avoid the two and three-year statutes of limitations for malpractice and ordinary negligence, respectively, MCL 600.5805(6), (10), plaintiff’s claim must sound in contract. The elements of a valid contract in Michigan are as follows: (1) the parties are competent to form a contract; (2) the contract involves a proper subject matter; (3) the existence of legal consideration; (4) mutuality of agreement; and (5) mutuality of obligation. *Thomas v Leja*, 187 Mich App 418, 412; 468 NW2d 58 (1991). The mutuality of agreement is disputed by defendant. “[A] contract requires mutual assent or a meeting of the minds on all the essential terms.” *Kloian v Domino’s Pizza LLC*, 273 Mich App 449, 453; 733 NW2d 766 (2006).

Absent a special relationship such as one created by an express contract, the general rule in Michigan is that an insurance agent has no duty to advise the insured concerning the correct policies for his needs. *Harts v Farmers Ins Exch*, 461 Mich 1, 10; 497 NW2d 47 (1999). Plaintiff alleges that an oral express contract existed with defendant whereby defendant would purchase necessary insurance for plaintiff. In support, plaintiff notes that Patterson testified about the initial agreement that occurred around 1985 between plaintiff and defendant:

Plaintiff’s counsel: Earlier you said to counsel to the effect of when you got the lawsuit you assumed you had the insurance you needed because that was your deal; do you remember saying that?

Witness: Yes.

Plaintiff’s counsel: What deal were you referring to?

Witness: Well, when I switched insurance companies from Rummel Insurance Agency . . . to MCI, when I spoke with Tim Moulthrop I brought copies of my insurance that I had and I asked him to cover me for whatever I needed.

Plaintiff’s counsel: Did he agree to do that, to provide you policies protecting you from exposure to lawsuits from employees and the general public?

Witness: Yes.

The court reasoned that a prior admission by Patterson that he had not heard of EPLI until 2004 was proof of the impossibility of a meeting of the minds in 1985 for a contract to purchase EPLI. However, plaintiff argues that the contract was for a sort of ongoing service to purchase needed insurance policies. According to plaintiff, EPLI may well not have even existed at the time plaintiff claims the contract was initially formed. But if the agreement was as plaintiff describes, defendant would nonetheless be contractually obligated to purchase it for plaintiff once it was available.

Viewed in a manner most favorable to plaintiff, *Martin v Ledingham*, 282 Mich 158, 160; 774 NW2d 328 (2009), the record supports the conclusion that defendant did agree to provide

plaintiff with insurance to protect it from employee lawsuits once it became available. Thus, an express oral contract to that effect was created.

“Although the complaint may state that it is an action in tort, . . . such an allegation is not controlling, and the Court will determine from the complaint whether the action is one in tort or one in contract.” *Nat’l Discount Corp v O’Mell*, 194 F2d 452, 455 (CA 6, 1952), citing *Dallas v Garras* 306 Mich 313, 316; 10 NW2d 897 (1943). Thus, it is the type of interest allegedly harmed that is the focal point in determining what limitations period controls. *Seebacher v Fitzgerald, Hodgeman, Cawthorne & King, PC*, 181 Mich App 642, 646; 449 NW2d 673 (1989) (concluding that the two-year malpractice statute of limitations applied to a breach of contract claim, because the interest harmed was one stemming from poor legal representation). Citing *MacDonald v Barbarotto*, 161 Mich App 542; 411 NW2d 747 (1987), defendant argues that in a circumstance where two possible legal theories of liability are based on the same cause of action, caselaw has determined that the main thrust or gravamen of the claim controls the statute of limitations for both claims. For example, in *MacDonald*, the plaintiff brought suit against his chiropractor for ordinary negligence and for malpractice. *Id.* at 545. The Court concluded that the nature of the claim was one of malpractice, and thus the two-year limitations period for malpractice barred the negligence claim as well. *Id.*

In the instant case, plaintiff’s injury came from the absence of an insurance policy that, it is claimed, defendant was supposed to know was needed because defendant is an insurance agent. At its heart, this is an assertion that defendant deviated from the professional standard of conduct for insurance agents, and thus professional malpractice. The contract that is alleged was not one where defendant explicitly promised to buy EPLI for plaintiff, but rather one where defendant promised to use defendant’s knowledge and skill to identify and procure insurance for whatever plaintiff needed.

In response, plaintiff points to *Khalaf v Bankers & Shippers Ins Co*, 404 Mich 134, 142-145; 273 NW2d 811 (1978), where an insurance agent breached his contract with the insured and this breach of contract was allowed to be brought by the third-party plaintiff as a negligence action. However, *Khalaf* is distinguishable because neither action was barred by a statute of limitations, and the contract in question was specifically for the type of insurance that was not procured. *Id.* at 143.

Thus, while a contract may have existed in the case at hand, the gravamen of plaintiff’s claim is professional malpractice. Accordingly, the two-year statute of limitations under MCL 600.5805(6) bars the action.

Affirmed.

/s/ Joel P. Hoekstra
/s/ David H. Sawyer
/s/ Henry William Saad