IN THE COURT OF APPEALS OF IOWA

No. 9-346 / 88-1605

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CLERK SUPREME COURT

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C. ROE POUSH,

Appellant,

vs.

NATIONAL AG UNDERWRITERS, INC. and EMPIRE FIRE AND MARINE INSURANCE CO., INC.,

Appellees.

Appeal from the Iowa District Court for Decatur County, Dale B. Hagen, Judge.

Plaintiff appeals the district court's granting of appellee's motion for summary judgment. **AFFIRMED.**

Scot M. Halverson of Halverson Law Office, Leon, for plaintiff-appellant.

Richard N. Winders and Richard A. Steffen of Herrick, Langdon & Langdon, Des Moines, for defendant-appellee Empire.

Dale A. Knoshaug and T. Scott Bannister of Hanson, Bjork & Russell, Des Moines, for defendant-appellee National Ag Underwriters.

Considered by Oxberger, C.J., and Sackett and Habhab, JJ.

HABHAB, J. 231

Appellant, C. Roe Poush, appeals the district court's granting of appellee's motion for summary judgment. We affirm.

In 1985, appellant, a farmer, purchased crop insurance through a local agent for his 1985 crop. Appellant apparently believed that the insurance company issuing the policy was National Ag Underwriters, Inc. (NAU). It subsequently developed that the actual issuing insurance company was Empire Fire & Marine Insurance Company (Empire); NAU claimed to act only as a "general agent" for Empire. The insurance policy in question contained the following limitation: "If you do enter suit against us you must do so within 12 months of the occurrence causing loss or damage."

Appellant proceeded to plant his corn crop on May 21, 22, and 23, 1985. Sometime in the fall of 1985, appellant submitted a claim for alleged crop losses due to "adverse" weather conditions. On November 5, 1985, two NAU claims representatives inspected appellant's corn crop. One of these representatives, Wayne Pitkin, met with appellant on April 25, 1986, in order to discuss appellant's claim. Pitkin and appellant both prepared estimates of appellant's claimed loss. Pitkin's estimate showed appellant's claimed loss to be equal to his unpaid insurance premium for the 1985 crop insurance coverage. Appellant's estimate listed the "date of damage" as being "all summer." On May 5,

1986, Nelson Maurice, an officer of NAU, sent appellant a letter denying his claim under the crop insurance policy. Appellant stated at his deposition that he received the May 5th letter and understood it to mean that NAU was denying his claim. Appellant had no further contact with NAU. He subsequently retained counsel and brought this action on September 24, 1987.

Our review is on assigned errors. Iowa R. App. P. 4. In determining whether summary judgment is appropriate, we apply the following standards:

> Summary judgment is proper when there is no genuine issue of fact and the moving party is entitled to the judgment as a matter of law. The burden of showing the nonexistence of a material fact is upon the moving party. While an adverse party generally cannot rest upon his pleadings when the moving party has supported his motion, summary judgment is still not proper if reasonable minds could draw different inferences and conclusions from the undisputed facts. In this respect, summary judgment is functionally akin to a directed verdict; every legitimate inference that reasonably can be deduced from the evidence should be afforded the nonmoving party, and a fact question is generated if reasonable minds can differ on how the issue should be resolved.

Martinke v. H-N-W Associates, 393 N.W.2d 320, 321 (Iowa 1986) (quoting Knapp v. Simmons, 345 N.W.2d 118, 121 (Iowa 1984)).

Iowa law does not restrict or prohibit private agreements which alter general statutes of limitations.[1] See Thomas v. United Fire & Caus. Co., 426 N.W.2d 396, 397

1. Iowa Code section 614.1(5) provides that actions based upon written contracts are subject to a ten-year statute of limitations.

(Iowa 1988). The insurance contract involved here required appellant to initiate a lawsuit "within 12 months of the occurrence causing loss or damage." The trial court found that the date of appellant's loss was in the fall of 1985. The record does not reflect a precise date of "the occurrence causing loss or damage" because of the ongoing nature of the cause of appellant's alleged loss. Nonetheless, even by appellant's own estimate, the date of the loss would be during the summer of 1985. As a result, by his own estimate, appellant had until sometime during the summer of 1986 to initiate his lawsuit. Appellant, however, failed to bring this action until September 24, 1987; well outside of the contract's twelve-month limitation period.

Appellant claims that the trial court erred in granting summary judgment because a material fact issue was generated concerning whether appellees waived the contractual limitation provision or were estopped from asserting it. As the Iowa Supreme Court noted in Scheetz v. IMT Ins. Co., 324 N.W.2d 302, 304 (Iowa 1982): "The issue of waiver is generally one of fact for the jury, in particular where acts and conduct are relied upon as a basis for the waiver . . . . When the evidence is undisputed, however, the issue is one of law for the court." See Continental Casualty Co. v. G. R. Kinney Co., Iowa, 258 Iowa 658, 661, 140 N.W.2d 129, 130 (1960). We find no acts or conduct on the part of the appellees which

could conceivably form the basis for either an estoppel or waiver claim. The letter informing appellant that his claim was denied was neither equivocal nor ambiguous. Furthermore, appellant understood the letter to mean that NAU was denying his claim.

Appellant further asserts that he received the letter at "the zero hour," thereby leaving him insufficient time in which to commence his action within the twelve-month period. We find this assertion to be meritless. As noted above, even by appellant's own estimate, the occurrence date of his losses was the summer of 1985. Since he received the letter notifying him of the denial of his claim in May of 1986, appellant had ample time to commence his suit before the twelve-month limitation had run. Therefore, the decision of the district court is affirmed.

AFFIRMED.

Sackett, J., concurs; Oxberger, C.J., dissents.

OXBERGER, C.J. (dissenting)

I respectfully dissent. Appellant alleges that the appellee Empire Fire & Marine Insurance Co., Inc. hid its principal status from the appellant. Appellant alleges that he was advised his insurance carrier was National Ag Underwriters, Inc. (NAU). I would toll the contractual notice until the appellant became aware of Empire's principal status.